

2003

Austin's Ghost and DSU Reform

Raj Bhala

Lucienne Attard

Recommended Citation

Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, 37 INT'L L. 651 (2003)
<https://scholar.smu.edu/til/vol37/iss3/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Austin's Ghost and DSU Reform

RAJ BHALA AND LUCIENNE ATTARD*

Abstract

Members of the World Trade Organization face numerous issues relating to the reform of the dispute settlement mechanism. At bottom, all of the issues present a challenge: Are the Members serious about advancing the rule of law in international trade? That is, what kind of "legal" system do they want to govern cross-border trade? This challenge presumes a definition of what "law" is. Among many scholars through the ages, the nineteenth century English legal philosopher, John Austin, considered the definition. His three-part test defined "law" as (1) the issuance of a command by a central authority, (2) the reinforcement of that command by threat of punishment, and (3) the habitual obedience to commands of the authority, and is useful in classifying the WTO dispute settlement reform issues. Rather than merely listing a complex array, the issues can be put into one of three categories inspired by Austin's famed Command Theory of Law. That exercise underscores the enormity of the challenge now facing the WTO.

I. Austin's Ghost

In the recorded history of civilization, legal practitioners and scholars have regarded relatively few international dispute resolution mechanisms as effective. Consciously or not,

*Raj Bhala, Rice Distinguished Professor, The University of Kansas School of Law, Lawrence, Kansas. Professor Bhala is the author of *Trade, Development, and Social Justice* (Carolina Academic Press, 2003), *International Trade Law: Theory and Practice* (Lexis 2001), *International Trade Law Handbook* (Lexis 2d ed. 2001), and *World Agricultural Trade in Purgatory*, 79 North Dakota Law Review issue 4 (February 2004). Professor Bhala can be reached by e-mail at: bhala@ku.edu. Lucienne Attard, currently an S.J.D. candidate at The George Washington University, holds an LL.M. degree from GW and Master's and Bachelor's degrees in Law from the University of Malta. E-mail: Lattard@law.gwu.edu.

All WTO decisions referred to herein are available on the WTO Web site, <http://www.wto.org>.

Adopted Appellate Body reports from 2000 and 2001 are treated in detail in the *WTO Case Review* series published in the *Arizona Journal of International and Comparative Law*. Provisions of Uruguay Round texts referred to are in the *International Trade Law Handbook*, *supra*.

An earlier, shorter version of this article appeared as Raj Bhala, *WTO Dispute Settlement and Austin's Positivism: A Primer on the Intersection*, 9 INTERNATIONAL TRADE LAW & REGULATION issue 1 (2003). Professor Bhala and Ms. Attard are grateful to Warren Murayama, Esq., Hogan & Hartson, for his support, and to the participants at the American Bar Association Section of International Law and Practice Conference in September 2002 for their comments on the earlier draft.

many lawyers and academics have been, and still are, influenced by the legal positivism of John Austin. In his 1832 English legal classic, *The Province of Jurisprudence Determined*, he identified the core elements of "law" and the attendant separation of "law" from morality.¹ For him "law," as distinct from opinions or mores, is the command of a sovereign that is enforceable through a sanction administered by that sovereign.² The command is habitually obeyed, because of the threat of punishment and (implicitly at least) the sovereign's sense of legitimacy. In his famous Lecture V, Austin pronounced that international "law" did not satisfy this "Command Theory," and was nothing more than general opinion.³

Likewise, Austin would teach that the rulings produced by international dispute resolution mechanisms generally fail to meet these strict criteria. There is no single sovereign in the international order. Countries concerned with maintenance of individual sovereign rights traditionally dominate that order. Their domination is neither seriously challenged by a central authority, nor by increasingly powerful and vociferous non-governmental organizations (NGOs). Obeying a command issued by the dispute resolution mechanism—if it is proper to call it a "command"—is not habitual. There are instances of non-compliance with decisions by the losing party, and even more instances of half-hearted and delayed compliance. There are persistent objections to rules with one state forewarning others it does not feel bound by the rule. Most glaringly, history has not recorded many, if any, instances of a credible method for enforcing international decisions, short of the use of force.

It is no small wonder then that Austin condemned international "law" as not "law" at all, but rather as a body of customs akin to social fashion. As another renowned legal positivist H.L.A. Hart would write in *The Concept of Law*, "the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings . . . in the breasts of legal theorists."⁴ Therefore, it is also no small wonder why the distinction between "hard" and "soft" law animates many discussions of international trade disputes, and why scholars in various disciplines use tools like game theory to explain compliance by sovereign states with international "law." What Hart called "misgivings" might be called, metaphorically, Austin's ghost. That ghost still haunts international law, as contemporary events reveal. The International Criminal Court and the Kyoto Protocol are examples of the difficulty of establishing cross-border institutional mechanisms to issue rules in the criminal and environmental areas that Austin would accept as "law."

Austin's ghost also haunts international trade lawyers and policy makers. Apparently, untempered by a good faith reading of relevant WTO rules, these lawyers and policy makers read of staunchly pro-nationalist statements of Member governments of the World Trade Organization (WTO) about protecting this or that sector (e.g., steel and agriculture). They look worriedly at instances of non-compliance with major WTO Appellate Body decisions (e.g., *Beef Hormones*⁵ and *Foreign Sales Corporation*⁶) and wonder if the cherished mechanism

1. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 118 (Wilfred E. Rumble ed., 1995).

2. *Id.*

3. *Id.*

4. H.L.A. HART, *THE CONCEPT OF LAW* 209 (1961).

5. See Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS/48/AB/R (Jan. 16, 1998).

6. See Report of the Appellate Body, *United States—Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/R (Feb. 24, 2000).

for settling disputes might collapse, or atrophy into insignificance. The WTO Director-General, Dr. Supachai Panitchpakdi, who took office in September 2002, has set the reform of WTO dispute settlement procedures as a principal focus of his three-year term.⁷ But, why are international trade experts haunted by Austin's ghost? Former Chairman of the United States Senate Finance Committee, Max S. Baucus (D-Mont.), used a metaphor from the animal kingdom rather than the realm of spirits, accusing the WTO of increasingly resembling a "kangaroo court."⁸

Surely, there is irony here. Should international trade lawyers and policy makers not be quite pleased with what they have? After all, it is difficult, if not impossible, to find in recorded history a more promising mechanism for settling spats among nations peacefully than the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Have trade lawyers forgotten the enthusiasm surrounding the birth of the DSU on January 1, 1995? That was the date on which the years of diplomacy under the veil of article XXIII of the *General Agreement on Tariffs and Trade* (GATT),⁹ which had led to interminable delays, blocked decisions, and produced ambiguous outcomes, supposedly ended. Trade negotiators, having toiled since the 1986 Uruguay Round, gave birth to a new adjudicatory mechanism that was as close to creating and enforcing real "law" as the world had ever seen. That was the date on which trade lawyers apparently told Austin's ghost to haunt other areas of the international realm.

II. Three "Austinian" Categories

Why then is there still so much fuss among international trade lawyers about the DSU? Why, only a decade after its birth, are WTO Members considering reforms to the DSU as part of the discussions in the Doha Round? Were there latent birth defects in the DSU? Is the DSU malfunctioning? Are the Members who use the DSU misbehaving? In brief, has the DSU failed to meet the rigorous demands for real "law" made by Austin's positivism—the command of a sovereign, an enforcement sanction to ensure compliance, and habitual compliance with the command?

There is no single "right" answer to these questions. Neither the fuss among trade lawyers, nor the negotiations among WTO Members is about a single issue. The positions adopted vary from lawyer to lawyer and Member to Member. In other words, there is a cacophony of voices as to what is wrong and what ought to be done. The discordant sounds are not from an irrational fear of Austin's ghost. Rather, they bespeak genuine problems regarding the design, operation, and use of the DSU, which the individual trade lawyers and WTO Members have a right to be concerned about. To link contemporary issues a bit more directly to the elements of "law" in Austin's Command Theory, there are three broad categories of alleged defects: (1) central authority issues; (2) enforcement sanction issues; and (3) habitual obedience issues.

7. See Frances Williams, *Early Trade Talks are Top Priority, Says New WTO Chief*, FIN. TIMES, Sept. 3, 2002, at 8 (stating Dr. Supachai "hoped to focus . . . on four main topics—improvements in the dispute settlement process, institutional changes including decision-making procedures, technical assistance to help poor countries to negotiate and implement WTO agreements, and closer working relations with other organizations.").

8. Gary G. Yerkey, *Sen. Baucus Calls WTO 'Kangaroo Court' with Strong 'Bias' Against the United States*, 19 Int'l Trade Rep. (BNA) 1679 (2002).

9. The General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIII, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

This three-part organization of the contemporary issues about the DSU should not connote a rigid link between them and Austin's definition of "law." The classification scheme also should not suggest mutual exclusivity or exhaustiveness. There may be certain issues that do not fit neatly into just one category, but rather straddle the boundaries of more than one category. There also could be issues, now or in the future, that do not fit well into any category. The point of the categories is to put pressing DSU issues in a larger context than international trade lawyers and WTO Members usually see them.¹⁰

Typically in these debates, the fundamental question of "what is law?" or, to put it differently, "what, do we, as the international trading community, want law to be?" is not raised. Yet, with sufficient reflection, this kind of basic inquiry lies at the heart of many sophisticated DSU issues. Linking many, if not all, of the issues is the concern about whether the WTO system is a meaningful one, producing "real" law. In brief, the categories are to help examine the issues in light of the three indispensable elements of a legal system, as specified by a uniquely rigorous school of jurisprudence—Austinian positivism. Without a central authority issuing commands, sanctions to enforce those commands, or habitual obedience to those commands, there is no "law" or "legal system" according to Austin's positivism. In his Lecture V, Austin expounds the idea that, "every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of a political superior . . . to a person or persons in a state of subjection to its author. And being a command (and therefore flowing from a determinate source), every positive law is a law proper, or a law properly so called."¹¹

If the WTO Members are serious about creating an international "legal" order, then they will think about these requisites as they pursue DSU reforms. To be sure, they might also look to elements of "law" identified by Professor Hart or other legal philosophers. However, as a starting point, Austin's school is worthy of attention if for no other reason than its strict positivist definition of what counts as "law" and his rejection of international "law" as real law. According to Austin:

the so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called. But one supreme government may doubtless *command* another to forbear from a kind of conduct which the law of nations condemns. And, though it is fashioned on law which is law improperly so called, this command is a law in the proper signification of the term.¹²

If the WTO Members can begin to satisfy Austin's criteria, then they ought to be lauded for being serious about the rule of law in international trade. That is because these rigorous criteria can help define whether outcomes from a dispute resolution mechanism like the DSU are "law" to be followed or mere guidance to be considered.

Central authority issues concern the nature of the decision-maker responsible for publishing commands for adjudicating cases. In Austin's paradigm, the authority should be a single, centralized one. By implication, that authority should also be stable (i.e., durable) and final (i.e., the "last word"). Part III discusses central authority issues.

10. We should disclaim any implication of discussing all DSU reform issues. For example, we have not discussed the interaction between the DSU and other mechanisms for settling trade disputes.

11. AUSTIN, *supra* note 1.

12. *Id.* at 124.

A second Austin-inspired category, enforcement sanctions, pertains to the existence of credible threats of punishment to compel obedience with commands. Is there a "stick" to ensure losing parties pay attention to decisions of the central authority and implement them faithfully? Part IV deals with these issues.

Habitual obedience issues relate to respect for the commands of the centralized authority. Obedience may be based on fear of sanction. It also could follow from a sense of legitimacy vested in the authority. In most instances, the imposition of a punishment becomes unnecessary because there is respect for the commands (i.e., for the adjudicatory decisions). Part V examines these issues. Finally, Part VI provides a summary of the intersection between DSU reform issues and Austin's Command Theory of Law.

III. Central Authority Issues

The DSU established a "central adjudicatory authority" or "authorities" operating in tandem. There is the Appellate Body, the dispute settlement panels, the arbitration panels, and—of course—the Dispute Settlement Body (DSB), which adopts Appellate Body and panel reports via the negative consensus rule. The reports contain "commands," styled as "recommendations." With regard to these authorities, even international trade lawyers and scholars supportive of the DSU as it currently works, admit to at least four issues in need of examination.

A. DEFERENCE

What is the relationship between the WTO adjudicatory authorities and sovereign governments? Specifically, how much deference ought these authorities give to decisions made by WTO Members? American trade lawyers see this issue most glaringly in the context of decisions rendered by the Department of Commerce (DOC) and the International Trade Commission (ITC) in anti-dumping (AD) and countervailing duty (CVD) cases, and by the ITC in safeguards cases.¹³ In some politically prominent circles, it is said that the WTO Appellate Body and dispute settlement panels, in particular, have ignored their obligation to give deference to administrative decisions in trade remedy cases.¹⁴ Consider the aggressive remarks of Senator Baucus:

They [the WTO panels and Appellate Body] are exceeding their powers to add to the obligations and diminish the rights of the United States. . . . They are making up rules out of

13. That American trade lawyers highlight this problem is somewhat ironic. During the Uruguay Round negotiations, it appears the American delegation sought to ensure the presence of a provision concerning deference to national authorities in all relevant draft texts. This "across-the-board" proposal on deference appears to have been offered in approximately August 1993. That is, the American team wanted the Appellate Body and dispute settlement panels to defer to national authorities in all trade-related subject areas. That would have meant inclusion of a provision on deference in the TRIPs Agreement. It seems that representatives of the intellectual property industry in the United States did not favor that position. They were concerned about the WTO authorities giving deference to certain IP protection systems, such as the patent laws of India. Apparently, in response to this opposition, at least in part, the American delegation abandoned an "across-the-board" approach to deference. The result was a specific standard of review provision found only in the Antidumping Agreement (namely, article 17:6).

14. For example, during the recent debate about Trade Promotion Authority, the Senate Finance Committee produced a report saying these authorities have ignored this obligation.

whole cloth—substituting their judgment for the negotiated agreement. They are making up rules that the United States never negotiated, that Congress never approved, and, I suspect, that Congress would not approve. . . . If this trend is not addressed . . . this will be the next major trade issue. *And it absolutely threatens the legitimacy of the WTO.*¹⁵

In brief, from the American perspective, at least there is concern that the DSU process is being used to legislate, notwithstanding applicable deferential standards of review.

A corollary issue is whether advocacy for deference in all areas covered by a package of trade accords is more appropriate for a dispute resolution mechanism associated with a regional trade agreement (RTA). In many, but by no means all, RTAs, the constituent customs territories share a similar racial or ethnic lineage, historical experience, religious tradition, legal culture, and/or language.¹⁶ Consequently, each Member feels more comfortable with an RTA panel deferring to the national authorities. There is a sense of “like-mindedness” about deference, not to mention approaches to adjudication. On the other hand, some regionalists may argue the whole rationale behind regional arrangements is the sense that a regional adjudicating authority’s decisions are more likely to be well-received and accepted than the decisions of some central “global” authority sitting in New York or Geneva, which has no connection or proximity to the hotbed of the dispute. In this sense, the need for deference to national authorities would be much less of an issue since countries willingly submit to a regional authority’s ruling.

How might the issue of deference be viewed in the paradigm of Austin’s legal positivism? Quite possibly, the issue evinces an ambiguity in the DSU. Perhaps Senator Baucus has it backwards; the legitimacy of the WTO is threatened not by too little deference given by adjudicatory authorities but by too much deference. Put differently, the problem may be exactly how “central” is the WTO’s adjudicatory authority?

The Appellate Body and dispute settlement panels now operate in a tense relationship with ministries and regulatory agencies of the WTO Members. Critics like Senator Baucus would like to see the central adjudicatory authorities at the WTO held liable for “trespass” against or worse yet “breaking and entering” on, the “property” of a ministry or agency that rendered a decision about a trade remedy. Senator Baucus has resurrected the “Dole Commission” idea of a group of American judges monitoring and reviewing reports issued by the WTO panels and Appellate Body, particularly those decisions that go against the United States.¹⁷ But, the Austin-inspired argument might be that the authoritative nature of any pronouncement by the Appellate Body or a panel would be diminished by decentralizing decision-making through insistence on ever-greater deference to ministries and regulatory agencies. After all, in Austin’s positivism, “by every command, the party to whom it is directed is obliged to do or to forbear.”¹⁸

B. PERMANENCE

In addition to the centrality of the WTO adjudicatory authorities *vis-à-vis* WTO Members, the stability—or lack thereof—of the authorities needs consideration. Should dispute

15. Yerkey, *supra* note 8, at 1679–80 (emphasis added).

16. One exception to the view that RTAs share a common tradition in law, religion, language, and history is the customs union existing between Turkey and the EU. The same can be said of the Association Agreements between the EU and a number of Arab countries, including Morocco, Tunisia, and Jordan.

17. See Yerkey, *supra* note 8, at 1680.

18. See AUSTIN, *supra* note 1, at 25.

settlement panels be permanent (i.e., comprised of individuals with long-term appointments of fixed duration)? Austin's brand of legal positivism presumes the central authority issuing commands is the same authority today and tomorrow. Yes, in the long run, the mantle is passed from ruler to ruler. But, in the short and medium term, there must be certainty in knowing who issues commands. Other variables aside, the authoritative quality of the command, and the respect for it, are enhanced when the commanding authority is consistent for a set period. In the WTO, the troublesome point is whether dispute settlement and arbitration panels ought to be consistent in their membership. Should there be a standing body for a fixed term, like the Appellate Body? Or, should they be assembled on an *ad hoc*, case-by-case basis as has been the case since the first panel was organized in 1996?

The proposal of the European Communities and its Member States to have a permanent panel is based on the fact there is an increased demand for panelists, yet few *ad hoc* panelists are available.¹⁹ The European Union (EU) claims that since the WTO was created, there are clearly many more panels than there were under GATT. The EU also claims that these panels are of much longer duration due to the complexity of the subject matter and the procedures before arbitrators and compliance panels. Another argument is that having a permanent panel would likely lessen the potential for conflicts of interest and would safeguard the independence of panelists.²⁰ The EU proposes that, in line with article 17:3 of the DSU, panelists should not participate in the consideration of any dispute that would create a direct or indirect conflict of interest. It is interesting that the EU should insist on this point considering that a totally different approach has been adopted by the Europeans under the Council of Europe (not European Union) at the European Court of Human Rights (ECHR). In this setting, a permanent judge of a country having a dispute before that Court is specifically made part of the panel hearing that case. The Council of Europe's reasoning for establishing this rule was that no one could better serve the Court than a legal expert from the country having the dispute in terms of explaining the domestic system, laws, and procedures of that country to the other judges. Permanent panels would be consistent with the paradigm of Austinian positivism. But, that outcome would beget more questions. Most importantly, who would the panelists be? This matter is larger than the career interests of would-be panelists. There is a paradigm of suspicion about the WTO in which not only anti-globalization protestors in the streets and activists in NGOs operate, but also many Third World countries and their advocates. Put impudently, suppose the average profile of a permanent panelist is a white male, aged fifties or sixties, from Western Europe or the United States. Suppose this quintessential panelist has more than a dozen years of experience in the Secretariat of the WTO or its predecessor, the GATT, plus a dozen or so years of experience with the trade office of his home country, along with a significant stint in private practice. Indubitably, many who operate in this paradigm will cross the line from suspicion to cynicism, and probably the next line too, from cynicism to outright hostility. They will see panelists as "members of the same club," incapable of

19. World Trade Organization, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Doc. TN/DS/W/1, available at www.wto.org (last visited June 8, 2003) (stating the EU's proposal) [hereinafter *Contribution of the European Communities*].

20. See also Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in *INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS* 219-40 (Laurence Boisson de Chazournes et al. eds., 2002) (examining the independence of the Dispute Settlement Body, the Appellate Body, and panels).

empathy with their needs and interests. Even if WTO Members were to obtain a consensus on panelists, it would be important that the agreement not be a Pyrrhic victory. The acrimonious, politicized battle to choose the second WTO Director-General, resulting in the bi-section of the standard term, could be re-visited when choosing new panelists to fill vacancies upon the expiration of set terms.

Finally, might the Austinian inclination to a standing central adjudicatory authority neglect a personal point? Serving on an *ad hoc* panel can strain the family life of a panelist, as he sacrifices months of time and energy to complainants and respondents. *A fortiori*, might the strain be yet more as a permanent panelist. And to what end? The marginal costs would rise—even accounting for scale economies (e.g., “being up to speed” on relevant trade principles)—if the term of appointment were counted in years. Conversely, the marginal benefits, such as experience and prestige, would decline after involvement in one or two cases.

The response to these concerns may lie in the circumstances in which permanent panelists live. If they, with their families, relocate to Geneva, they would face no problem of separation. If the conditions of employment allowed them to teach and publish, then they could continue to grow intellectually. In brief, to attract top-flight candidates to a permanent panel, it would be necessary to offer them a top-flight experience. In this regard, it may be worth exploring the experience of the ECHR, which converted in 1998, from an *ad hoc* to a more permanent body.²¹ Among the reasons for reforming the system is the fact that the number of applications filed before the Court increased from 404 in 1981 to 4,750 in 1997. The huge volume of cases before the European judges, as well the need for simplifying the procedures, prompted Member States to ratify Protocol 11, which entered into force on November 1, 1998.

Would permanent dispute settlement and arbitration panels produce better quality decisions than *ad hoc* panels? That is difficult to say *a priori*. How severe is the risk of experimentation? That depends on how dreadful the performance of *ad hoc* panels is thought to be. Perhaps, Austin would say permanent panelists would benefit from their reservoir of experience gained through years of accumulated service. It might be urged in reply that *ad hoc* panelists with trade experience and a sound understanding of the WTO texts have the requisite experience to hear cases and write opinions. Here again, the experience of the ECHR may be instructive. It appears that since becoming a standing body, the Court has been able to function for a longer period each year and to handle a larger volume of cases. A reasonable argument might be made that the quality of the decisions has also improved, although, it is somewhat premature to reach a final conclusion on this matter.

Perhaps Austin would also identify the likelihood of greater consistency in decisional outcomes, and, therefore, in their predictability, as a virtue of permanent panels. However, for that virtue to manifest itself, two implicit assumptions would have to hold true. First, *ad hoc* panels would have to eschew viewing prior holdings as precedent. The argument has been made that the Appellate Body does, in effect, take this “*stare decisis*” approach, and that the WTO Members could, if they were so inclined, require panels to do so as

21. The European Court of Human Rights was established under the auspices of the Council of Europe and started to operate in 1959, although the Convention was opened for signature in 1950 and entered into force in 1953. The European Court system has developed into one of the most successful regional arrangements for the protection of human rights. Membership of the Council of Europe includes the fifteen member nations of the European Union as well as most Eastern European states, Baltic States, Cyprus, Malta, and Turkey. See Council of Europe Portal (2003), available at <http://www.coe.int> (last visited June 21, 2003).

well.²² The point is that for there to be increased consistency in results, permanent panels would have to take prior decisional law seriously as a source of law, more seriously than occurs even now.

The second assumption needing verification for the virtue of consistency to be realized concerns the panelists themselves. Individuals serving as permanent panelists would have to be neither parochial nor intransigent. Suppose they were unable to think "outside of a Geneva-centered box." Simply stated, how could they then apply, in a creative and effective manner, past decisions to present controversies? How could they apply otherwise relevant concepts to new cases? In other words, the "we have never done it this way" kind of reasoning would impede healthy development in WTO "common law." The conceptual problem that may arise in this context is that "civil law" Member States may, after all, not be keen on embracing this "common law" approach. Yet, the contrast between the receptivity of Appellate Body to the application of principles of public international law, and the hesitancy to resort to those principles by some panels, reveals precisely that kind of occlusion.²³

Might there be a compromise between insistence on standing panels and retention of the present ordering? Possibly, panels could be "mixed." They could still have three Members, but two—or even one—would be permanent. The remaining Members could be chosen from a roster, as is done now. The compromise might give rise to another issue, namely, the implication for the WTO Director-General. That position carries with it the power, under certain circumstances, to name panelists. Would that role continue?²⁴ There is also an immediate need for WTO Members to refrain from opposing the nomination of panelists unless there are compelling reasons to do so. The practice of opposing panelists simply because hope of early settlement have withered, and then, resorting to the intervention of the Director-General, is a sheer waste of time and a delay in the whole process.²⁵

C. REMAND

The DSU does not give the Appellate Body the power to remand a case to the panel that heard it and wrote the underlying report. The choices are to affirm, modify, or overrule. Should the Appellate Body have the power of remand? If so, to what body—the same panel or a different one—should a remand be directed?

To extrapolate from Austin's legal positivism, it would seem that enhancing the command-issuing possibilities of the WTO adjudicatory authority would help its decisions

22. See Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 1-151 (Fall 1999); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999).

23. The contrast is evident, for example, in the importation of the principle of good faith by the Appellate Body in the Japan *Hot-Rolled Steel* and Korea *Beef Safeguards* cases. See Report of the Appellate Body, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) (outlining the Japanese dispute); see Report of the Panel, *Republic of Korea—Restrictions on Imports of Beef—Complaint by the United States*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 324 (1990) (outlining the Korean dispute).

24. Interestingly, the Secretariat for the NAFTA cannot do so. This is a key difference between the WTO and the NAFTA dispute settlement mechanisms, which contributes to significant delays in assembling a NAFTA panel.

25. See Robert Maclean, *The Urgent Need to Reform the WTO's Dispute Settlement Process*, INT'L TRADE L. & REG. 137-38 (2002).

look more like “law.” After all, a command might be more likely to be perceived as “real” law if issued by a body with a range of potential commands from which to choose, each of which is a meaningful option. Weighed against the remand option is the fact that creating it has not yet become a major demand among advocates for DSU reform.²⁶ Apparently, there has been “self-healing” (i.e., the utility of a remand order, were it possible, has been dealt with on a case-by-case basis in a manner acceptable to the parties). Also weighed against the remand option is the likely effect on panels. Surely, the implications for burdens on panels—namely, whether they would be crushed under the weight of cases plus remands—would have to be considered.

D. CONSENSUS

In Austin’s world, a single, central sovereign has the power to issue commands. Reaching a consensus among parties that would or might be affected by those commands is not unimportant but not critical either. The consensus-building process might enhance the legitimacy of the commands, the authority, or both and thus contribute to habitual obedience. But, as long as there is a punishment to compel compliance, the essential ingredients exist for the “orders-backed-by-threats” formula of what qualifies as “law.” Austin considers that:

every law or rule (taken with the largest signification which can be given to the term properly) is a command. . . . if you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command.²⁷

What is the relationship between Austin’s statement and the negative consensus rule? As is widely understood, the introduction of the negative consensus rule for panel creation, and for adoption of a panel or Appellate Body report, was a significant innovation of the Uruguay Round. The negative consensus rule can be simply described as the rule that a panel will be formed, a report adopted, and retaliation will be authorized unless there is a consensus against doing so.²⁸ Following the Uruguay Round, the rule was touted as the remedy to the blockage of panels and their reports in the GATT era. In the paradigm of Austin’s legal positivism, negative consensus would be hailed as an effort to affirm the rule of “law” in the international realm. It is a device to ensure issuance of commands in the first place. Yet, within a decade of the negative consensus rule’s implementation, it has come under attack.

Ought the WTO to return to the pre-Uruguay Round era of a positive consensus, whereby no panel is formed and no report is adopted, unless there is agreement among all the Members to do so? No one looks at the past with such innocence. But, ideas for a partial counter-reformation (i.e., a dilution of the automatic character of the negative consensus

26. The question arose, for example, in the *EC LAN* and *Canada Dairy* cases. See Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (June 5, 1998); Report of the Appellate Body, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (Oct. 13, 1999); see also Report of the Panel, *Canada—Import Restrictions on Ice Cream and Yoghurt*, Sept. 27, 1989, GATT B.I.S.D. (36th Supp.) at 68 (1990).

27. AUSTIN, *supra* note 1, at 21.

28. See RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 213–19 (2001).

rule) exist.²⁹ They are attractive, if the aims of the counter-reformation were to protect the sovereignty of individual WTO Members (especially the losing parties in cases) and to prevent poor decisions from entering into force.

However, might this attraction actually be a seduction? To date, are there so many instances of monstrous infringements on sovereignty to merit a counter-reformation? Even if so, are the infringements the product of misbehavior by the Appellate Body and panels, or are they the nearly inevitable result of the obligations set forth in the WTO texts disputed in cases? Further, informed by the jurisprudence of Austin, would rethinking the negative consensus rule help the WTO satisfy the criteria for a "legal" system? Might it do little more than shift power from one part of the central adjudicatory authority (the Appellate Body and panels) to another part (a majority or super-majority of the DSB)?

IV. Enforcement Sanction Issues

Austin claimed a rule is not "law" unless it is backed by a credible threat of punishment. Four contemporary issues surrounding the DSU cast doubt on whether the "orders" (phrased as "recommendations") of the Appellate Body and panels, upon their adoption by the DSB, are buttressed by that threat. These issues suggest enforcing compliance with decisions is not as direct and automatic as Austin would like, if decisions about WTO rules are "law." He considers that "the greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation. . . . or, the greater is the chance that the command will be obeyed, and that the duty will not be broken."³⁰

A. THE THREE YEAR PASS

In practice, nearly every WTO Member believes it can "pass" on—that is, "get away with"—virtually any trade measure for three or sometimes four years before it has to worry about complying with a decision of the Appellate Body or panel.³¹ To be sure, no Member would admit publicly to this sense of impunity. But, in private circles, it is apparent that the Members feel they have a few years to avoid compliance without incurring even the threat of punishment. That feeling is incongruous with Austin's Command Theory, according to which obedience to an order ought to follow with celerity, because punishment is certain if there is an inappropriate delay in compliance.

The problem of non-compliance for a significant period is evident in DSU cases such as *Bananas*³² and *High Fructose Corn Syrup*.³³ It also may exist in the *EC—Bed Linen* case, in

29. See, e.g., CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 125–29 (2001) (calling for a limited blocking capability based on disapproval by at least one-third of the members of the DSB accounting for at least one-quarter of total trade among WTO Members); William A. Lovett, *The WTO: A Train Wreck in Progress?* 24 *FORDHAM INT'L L.J.* 411 (2000) (stating "the WTO's decision-making and voting regime is a contradictory mess").

30. AUSTIN, *supra* note 1, at 23.

31. We are indebted to Gary Horlick, Esq., O'Melveny & Myers, Washington, D.C., for both the insight and terminology on this issue.

32. See Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

33. See Report of the Panel, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Feb. 25, 2000).

which the Appellate Body held that the EU cannot use the so-called “zeroing” methodology in calculating dumping margins.³⁴ It appears no other Members, such as the United States and Japan, are altering their calculation methodologies to respect the holding.³⁵ In other words, national authorities continue to engage in trade practices they know are not compliant with an adopted report from a case in which they were not involved. Fake compliance is a related problem in which the losing party in a DSU case claims in bad faith that it is complying, when, in reality, it is not. It could well be that if the first seven years of the operation of the DSU are used as a basis for projecting compliance over the next half-century, then in fifty years’ time it will be obvious compliance has been no greater under the DSU than it was under the pre-Uruguay Round GATT mechanism.³⁶

If that forecast were true, then it would mean international trade “law” fits neatly into the paradigm of Austin’s positivism, namely, that it is general opinion, without the backing of punishment. It would also mean the Uruguay Round “revolution” in dispute settlement was hardly that at all. Austin has viewed the law of nations, or international law, as “laws which regard the conduct of sovereigns or supreme governments in their various relations to one another . . . and laws or rules of this species . . . are imposed upon nations or sovereigns by opinions current amongst nations.”³⁷ Austin further elaborates that a law set or imposed by general opinion is a law improperly so called, because it consists of opinions or sentiments current among nations generally. He goes on to explain:

as no supreme government is in a state of subjection to another, the government commanding does not command in its character of political superior. If the government receiving the command were in a state of subjection to the other, then the command, though fashioned on the law of nations, would amount to a positive law.³⁸

The *de facto* reality of the Three Year Pass is a problem for everyday importers and exporters. Sovereign state actors negotiate and agree to the rules of the GATT and WTO.

34. Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. (2002) (discussing the *EC-Bed Linen* dispute in detail).

35. Of course, the United States has suffered defeats in AD cases brought directly against it. One hypothesis is that such defeats should not have been unexpected. Under that hypothesis, the losses suffered by the United States in DSU cases on AD claims concern issues on which the Clinton administration tried—unsuccessfully—to negotiate during the Uruguay Round. Arguably, because of its lack of success in writing those positions into the text of the WTO Antidumping Agreement, the Clinton administration went to Congress and legislated its negotiating agenda—even though it had been rejected in the Round (i.e., even though it was not accepted into the final text of the Agreement). If that is true, then there may be an argument that the defeats suffered in DSU cases are the costs of a unilateralist approach to AD rules.

There is, of course, a question about DSU article 21:3, under which a WTO Member is entitled to an additional reasonable period of time (RPT) for compliance with panel or Appellate Body recommendations adopted by the DSB. Under article 21:3(c), the customary RPT is fifteen months. Is that truly “reasonable” in all instances? There are instances in which a losing Member cannot comply for political reasons, notwithstanding the sincere efforts of some leaders of its government to comply. The *Foreign Sales Corporation* case appears to be an instance.

36. The scholarship of Professor Robert Hudec argues compliance with the GATT mechanism was better than what the conventional wisdom suggests, i.e., he argues there is a problem of perception of non-compliance with the GATT. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* chs. 11–12 (1993) (containing a statistical profile of GATT cases from 1948–1989, and an analysis of past practice and future trends).

37. AUSTIN, *supra* note 1.

38. *Id.*

These rules are about more than how those governments treat each other. They are about a third constituency—businesses—because they address how governments must treat businesses engaged in cross-border trade. That makes GATT-WTO accords different from a treaty on sovereign immunity, or on the treatment of official foreign property. Those treaties cover only the behavior of one foreign government toward another. Not surprisingly, most businesses are delighted to learn the DSU process is designed to last roughly twelve to eighteen months. They regard that duration as reasonably quick for obtaining a final decision, particularly in comparison with the time to final judgment in the courts of their home country, or some of the countries to which they export. However, businesses are chagrined to learn the DSU does not offer retrospective relief. They are distraught to learn about the Three Year Pass, and—as Austin would—rightly query how “hard” WTO law is.

B. COMPENSATION

For a WTO Member losing a DSU case to pay the winning Member compensation is a “punishment” of sorts. Does it rise to the level of rigor of Austin’s legal positivism? Probably not, because the loser does not comply with the judgment issued against it. Rather, the loser persists in its violation, despite the “command” of the central authority, and just “pays off” the winner.

Suppose loser and winner likewise view compensation as an alternative to retaliation by the winner. The supposition is appealing, because “compensation” sounds kinder and gentler than “retaliation.” It also is appealing for an entirely different reason—many WTO Members seem to prefer not to pay compensation, and their opposition suggests that remedy might be effective.³⁹ However, would that view be more in keeping with Austinian-style “punishment”? Again, probably not, because the loser still does not comply with the judgment entered against it. Indeed, with compensation, the loser does not suffer damage directed at specific targets identified by the winner. Instead, the loser “writes a check,” without worrying about which domestic constituencies otherwise would be targeted in a retaliatory strike.

The point is that if the panel and Appellate Body reports adopted by the DSB are to contain “orders backed by threats,” then the threat ought to be of a painful and inescapable punishment. Otherwise, the adopted reports would look more like what Austin would consign to the category of opinion than to the category of “law.” Yet, in the debate about DSU reform, the possibility of fostering compensation as a means of compliance, and by implication discouraging retaliation, is widely discussed.

Despite the incongruity between compensation and Austin’s Command Theory, the discussion about fostering this “alternative punishment” proceeds in spite of serious practical problems associated with compensation. First, how can the DSU promote a greater degree of compensation, as an outcome, rather than retaliation? What precise incentives can the WTO use? Second, is there a level of compensation (and, to be sure, retaliation) that is so large as to be meaningless?

If the amount in question is \$1 million, or even \$10 million, then perhaps there is no problem. For example, compensation was feasible in the Section 1105 case, because of the

39. Compensation would be obvious to consumers in the importing country, like steel users in the United States. They would continue to suffer under an offending trade measure, while their government pays compensation to keep the measure in place.

low level needed from the United States to compensate European performing artists. But what if the amount is \$100 million, or \$1 billion? The latter figure is still smaller than that connected to the *Foreign Sales Corporation* dispute, and suggests a threshold above which a successful complainant cannot expect one cent. The reason is straight forward, to retaliate in such a large amount would be akin to detonating a nuclear device in front of oneself. The cost of importing products from the losing WTO Member would rise dramatically, and inflict damage on the consumers of those products residing and doing business in the jurisdiction of the winning Member—notably, manufacturers using those items as inputs into production. Thus, retaliation in such a large amount is self-defeating.

Compensation is not an alternative because it is almost certain the loser will decline to “write a check” for hundreds of millions, or billions, of dollars. The EU has tabled a trading system proposal before the WTO in which it claims the authorization to suspend concessions runs against an essential principle of the WTO, namely, predictability of the trading system. In this sense they view it as logical that trade compensation should always be preferred to suspension of concessions or other obligations. In fact, article 3:7 of the DSU gives preference to temporary trade-enhancing compensation over trade-restricting suspension of concessions or other obligations. The EU maintains, however, that with the current system Members clearly are not being encouraged to prefer trade compensation. It is claimed that the structure of the DSU is such that Members are induced to request suspension of concessions first. In fact, the main element for the negotiation of compensation can only be obtained in requesting the authorization to apply sanctions. Article 22:6 of the DSU would have to be triggered for the parties to know the level of nullification and impairment, and therefore, to be able to negotiate reasonable compensation.⁴⁰

The option of compensation appears to be even more remote, however, if the loser is a developing or least-developed country (LDC). How could a Third World WTO Member afford to pay a fine (because that is what compensation essentially is) in the hundreds of millions, or billions, of dollars? Even if that Member could pay the fine, then would it be socially just to compel payment, given the impoverished millions within the Member desperately needing help? To be sure, these queries assume that the disputed trade with a Third World country is commercially significant enough to warrant a large judgment against it. In many instances, the actual value of total trade with a poor country is likely to be quite small. But the value of the judgment in relation to what a losing Third World Member reasonably can be expected to afford would be an important factor.⁴¹

40. See generally *Contribution of the European Communities*, *supra* note 19.

It is worth observing that Australia raised an important objection to compensation, namely, bilateral compensatory arrangements that exclude injured third parties. When the United States and the EU settled their copyright dispute about the American Fairness in Music Licensing Act, following DSU adjudication, they did so through a bilateral arrangement in which the United States offered payment to EU artists. But, the United States did not acknowledge the right of any third-country artists, like Australian performers, to similar payments. The recourse for such artists would be to initiate a WTO action through their governments. Australia argues that such actions are unnecessary and wasteful essentially because of a decision holding a Member (the United States) in breach of its WTO obligations. Therefore, Australia argues for the general extension of compensation offers, wherever feasible, to all injured WTO Members. See Daniel Pruzin, *Australia, South Korea Outline Proposals for Revamping of WTO Dispute Settlement*, 19 Int'l Trade Rep. (BNA) 1296, 1296-97 (July 25, 2002) [hereinafter *Australia, South Korea Outline Proposals*]. We might add that were such an amendment to the DSU made, it would be one more step in the direction of recognizing the legal culture of *de facto stare decisis* that now exists in WTO adjudication.

41. Apparently, one of the largest fines (if not the largest) ever paid in the annals of international trade law was by the United States to Canada on softwood lumber—approximately \$600 million. That amount came

Indeed, the marginal cost to the United States, the EU, or other major trading power of bringing a case ("marginal" in the sense of one more case) is small. They are armed with large staffs of trade lawyers conversant with the GATT and WTO agreements that can draw on considerable institutional resources (at least relative to minor trading nations) to file yet one more complaint in the WTO. Conversely, the marginal costs to most Third World Members of bringing or defending a case are high. Few developing countries, aside from the likes of Brazil, India, Malaysia, Mexico, South Africa, and Thailand, are major litigants (or third party participants) in WTO actions.⁴² For the likes of Bangladesh, Burma, Honduras, Nigeria, and the Philippines, all of the costs associated with bringing or defending a case are marginal costs—and, the point is, steep.

This point might fall on deaf ears in some developed countries, but it is one to which careful attention should be paid. If developed countries are serious about the rule of law in international trade, then the likely impact of alternative enforcement regimes on Third World countries ought to matter. These countries account for 80 percent of the WTO's membership, so there may well be a few instances of opportunity for a dispute that is "high-stakes" relative to their commercial size. Moreover, during the pre-DSU era (1947–1995), many poor countries that were GATT contracting parties came to the conclusion—rightly or wrongly—that the dispute settlement system was unjust. One basis for this conclusion was their practical inability, and effective lack of a legal right, to retaliate against a rich country, if the rich country transgressed against trade laws vis-à-vis the poor country.

Now, with the DSU, poor countries in the WTO tend to believe a rich country Member can raise their (the Third World's) costs substantially, if the rich country suspects a poor country of a transgression. For example, suppose the DSB adopts an Appellate Body or panel report finding a trade measure in a poor country violates the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement). Then, under the DSU, the rich country that brought the case has a right to retaliate (or obtain compensation), in the event of non-compliance by the poor country. Thus, there could be two costs to the LDC: the ineluctable marginal cost of litigating the case, plus the possible cost of retaliation inflicted.

In brief, many Third World WTO Members accuse First World Members of "having it both ways." The First World GATT contracting parties essentially were immune from retaliation before the DSU, and under the DSU, they can retaliate against an unsuccessful respondent from the Third World. To be sure, that possibility exists for successful Third World complainants, but that leads back to the problem of effective participation. In both the pre- and post-Uruguay Round era, most poor countries have lacked the resources (including, especially, human capital in trade law) to bring cases, and argue them well, to the adjudicatory authorities in Geneva.⁴³ The result is skepticism about the GATT-WTO

from a settlement fund, i.e., a special account of the Department of the Treasury for settling international claims, not out of the budget of the United States Trade Representative (USTR). It appears the final settlement amount increased because of hesitancy, or stalling, on the part of the USTR. The consequence was an increase in interest charges that might have been avoided by an earlier settlement. Delays (intentional or not) are common in slow-moving bureaucracies of many Third World countries. If they could not afford the principal amount of the judgment in the first place, then *a fortiori* they could not cover the added interest charges either.

42. Interestingly, during 2000 and 2001, a sizeable percentage of the AD and countervailing duty cases in the WTO were brought by Brazil, Argentina, South Africa, and India, and that trend appears to be continuing.

43. That is not to demean or forecast the effects of the efforts of the developed world to assist in building legal capacity. Over the past ten years (1990–2000), the United States has provided \$550 million in trade

system as a "legal" one. The only "orders" of consequence for the pro-Third World argument are issued by the authorities on behalf of rich countries. The one-sidedness of the orders and threats backing them cast doubt on their legitimacy, and that of the authorities.⁴⁴

Not surprisingly, therefore, some Third World WTO Members have offered a radical proposal—radical, unless it is remembered that it resembles the "English Rule" in litigation. The "Like-Minded Group," which consists of nine developing country WTO Members and includes Cuba, India, Pakistan, and Malaysia, proposes "that rich states that lose a WTO case should be forced to pay part of a poor complainant's costs."⁴⁵ After all, what good is retaliation if raising trade barriers against products from a rich country that refuses to change its offending measure would inflict more economic damage—in addition to the litigation costs—on the poor country that won the case than on the rich country that lost it? Some developing and least-developed countries answer this question by going further than the Group's proposal. These countries call for "collective retaliation," whereby all developing and least-developed countries could retaliate against a non-compliant rich

capacity building assistance, which is more than any other country. However, any suggestion that the assistance ought to be linked to defending WTO actions and not bringing complaints seems patently unjust.

One should also not neglect the fact that some developing countries have to share in the blame for their woes, an important reality that the USTR has pointed out. In 1967, the annual per capita GNP of Korea was \$550 and of Ghana it was \$800. In 1997, Korea's annual per capita GNP had skyrocketed to \$10,360, while Ghana's had plummeted to \$370. One explanation for the radically different results is that Korea pursued an open economy, and had good management. Ghana produced a closed economy, and had poor management. See Ambassador Robert B. Zoellick, U.S. Trade Representative, *The WTO and New Global Trade Negotiations: What's at Stake?* Address to the Council on Foreign Relations (Oct. 30, 2001), Washington, D.C., at 8.

44. It is important not to turn the identification of this problem into a broad attack on globalization. As United Nations Secretary-General Kofi Annan has indicated, the poor are not poor because of too much globalization, but because of too little. There is considerable truth to the argument that protectionism remains commonplace in developing countries. Roughly consider the differences in average tariffs between rich and poor countries as of the eve of the Doha Round. In developed countries the approximate average tariff on industrial products was 8 percent, but 21 percent in developing countries. Pakistan's textile sector provides an interesting example. Textiles account for 84 percent of Pakistan's exports. Textile tariffs are far higher in Pakistan than in the United States. Thus, the United States has insisted on some degree of reciprocity in lowering textile barriers, notwithstanding the special and differential treatment afforded by GATT article XXXVI. Tariffs on agricultural commodities tend to be very high in many developing countries. While the developed countries afford considerable support to their farmers, the tariffs on imported farm products tend to be low relative to the sometimes-prohibitive tariffs imposed by developing countries. The United States and the EU have tariff spikes on some agricultural products. But, overall average tariffs on these products are low relative to Third World countries. The tariffs are still detrimental not only of Third World farmers, but also First World consumers. See Zoellick, *supra* note 43, at 9–10.

It also is important to distinguish the problem of compensation versus retaliation in a general context from the problem in the specific contexts of violations of labor or environmental obligations. In negotiations for a free trade agreement with Chile and Singapore, the United States suggests that fines would be a better approach to rectifying such violations rather than imposing trade sanctions. As a practical matter, there may be an insufficient volume of trade to which sanctions could be applied to generate a sufficient dollar amount of punishment. Moreover, the American Congress has insisted that the mechanism in trade agreements for enforcing labor and environmental rights be equivalent to the mechanism used for commercial disputes. Accordingly, the Bush administration suggests that the "first best" solution would be imposition of a fine for a proven trade-related labor or environmental violation, and the "second best" solution would be a trade sanction (specifically, increased import duties) up to the amount of the fine. See Edward Alden, *U.S. in Plan for Fines to Replace Trade Sanctions*, FIN. TIMES, Oct. 25, 2002, at 7.

45. See Frances Williams, *WTO Minnows Cry Foul on Mediation*, FIN. TIMES, Oct. 24, 2002, at 6 [hereinafter *WTO Minnows*].

country if any one of them prevailed in an action against the rich country.⁴⁶ That would be truly radical. Might Austin approve, insofar as it would strengthen enforcement and thereby enhance the probability of compliance?

C. SEQUENCING

In Austin's legal positivism, there ought to be no doubt as to the timing of imposition of a punishment. Once the central authority has issued an order and that order has been disobeyed after a reasonable period for compliance, then the threat of sanction should become manifest. Otherwise, no credible threat existed in the first place. The obvious relevance of the imminent threat of punishment in the Command Theory to contemporary DSU matters is in the area of sequencing. In simple terms, the sequencing issue refers to the order in which articles 21:5 and 22 apply in the resolution of trade disputes. As became obvious during the *Bananas* dispute, there is a problem in defining precisely when, and under what circumstances, a successful complainant can retaliate against a non-compliant respondent. This problem was resolved in the *Bananas* case, and other disputes, in an *ad hoc* way. But, until the relationship between articles 21 and 22 of the DSU is clarified, it shall be a specter in every case in which compliance is in dispute.

The communication to the WTO from Australia is instructive in this regard. Countries have been adopting one of two approaches discussed in the Australian proposal. The first allows procedures under DSU articles 21:5 and 22 to be commenced concurrently. In this case, retaliation under article 22 is then suspended until the procedure under article 21:5 is complete. Should a defendant Member not comply with a panel's recommendation and ruling under the article 21:5 procedure then the retaliation under article 22 which had been previously commenced may be continued.

In the second approach, sequencing is applied in a way that DSU article 21:5 procedures are initiated first. However, in this practice a defendant Member may not block a request for the procedure under article 22 on the basis that the retaliation request comes outside the thirty-day time limit. Australia suggests there is no need to seek formal treaty amendments to the DSU to clarify the question of sequencing, other anomalies on questions of compensation, rights of non-parties, and the level of retaliation amongst others. Australia considers that improvements to the DSU can be introduced "through the adoption of decisions on agreed practice by the DSB."⁴⁷

46. *Id.*

47. See World Trade Organization, *Preparatory Process in Geneva and Negotiating Process at Ministerial Conferences—Communication from Australia; Canada; Hong Kong; China; Korea; Mexico; New Zealand; Singapore; Switzerland*, Doc. TN/DS/W/8, available at www.wto.org (last visited Feb. 5, 2003).

In addition to discussing sequencing, and to its proposal on compensation of third parties (discussed *supra*, note 40) Australia urges amendments to the DSU to allow for an accelerated time-frame in which to deal with safeguard measure disputes. Specifically, Australia argues in favor of:

- (1) the composition of a panel after a thirty-day consultation period (rather than the usual sixty days);
- (2) the establishment of a panel upon first request (eliminating the possibility of blockage at the first meeting of the Dispute Settlement Body); and
- (3) cutting in half the time deadlines (set out in Appendix 3 of the DSU) for working procedures.

Australia points out these expedited procedures exist in disputes about subsidies, and believes safeguard remedies can have trade-distorting effects analogous to those of illegal subsidies. Moreover, Australia urges delays in obtaining a safeguards decision can harm the winning WTO Member. By virtue of the sunset rule in the WTO Agreement on Safeguards, a safeguard remedy is

The DSU undergoes period review, and the sequencing problem was a focal point of that review (particularly in 1998–99). Unfortunately, no generally applicable, definitive solution was reached through the review process. Likewise, no solution was reached at the Seattle Ministerial Conference in November–December 1999, nor at the Doha Ministerial Conference in November 2001 (though review of the DSU is part of the Doha Development Agenda). Thus, the question remains open whether a winning WTO Member must take the issue of compliance to a panel before undertaking retaliation against the allegedly recalcitrant Member. Austin would argue that the “enforcement sanction” adopted by the Appellate Body or panel decisions, if they are “real” law, is weakened by *ad hoc* outcomes negotiated by interested parties.

In line with Austin’s positivistic theory with regards to the timing of punishment, Korea has called for a strengthening of the initial stage of implementation of a panel or Appellate Body ruling.⁴⁸ Korea observes that the number of days taken to fix the reasonable period of time (RPT) through arbitration is too long:

Korea noted in its submission that the average time gap between the adoption of a WTO ruling and the time for determining the reasonable period has gone well beyond the 90-day period prescribed under Article 21:3(c) of the DSU. For cases decided between 1995–2000, the time gap has averaged over 136 days, with the gap increasing to more than 157 days for cases decided since 2000.⁴⁹

In its proposal Korea maintains that as the system stands now thirty days are lost between the adoption of a panel or Appellate Body report and the declaration of a Member’s intent under DSU article 21:3. In this thirty-day period Korea claims the parties concerned make no significant, substantive efforts resulting in time lost and more importantly, lost trading opportunities for exporters.

Thus, Korea suggests the complaining party should be given the explicit right to engage the responding party in bilateral discussions on the RPT immediately upon adoption of a report. Should the parties to the dispute fail to agree on the RPT or an arbitrator, then the complaining party may request the Director-General appoint an arbitrator within ten days. According to Korea’s proposal, this amendment would ensure that an arbitration award is made within the ninety-day deadline in conformity with article 21:1 and the principle of prompt compliance.

The question of implementation and prompt compliance with a ruling under the DSU is also connected to the level of nullification or impairment. Korea proposes that an early determination of this level can of itself facilitate implementation of the ruling. Korea

constrained in most instances to a duration of four years. A losing Member that has imposed a safeguard might not implement an Appellate Body or panel ruling until after its safeguard measure expires. Accordingly, the quicker a safeguards case can be brought under the DSU, the more certain this outcome does not occur. In the DSU case Australia and New Zealand brought successfully against the American escape clause action against lamb meat, the United States withdrew the offending measure in November 2001, roughly seven months before its pre-set three-year expiration date. However, Australia and New Zealand were swift to file a complaint; doing so almost immediately after the United States imposed the action. See *Australia, South Korea Outline Proposals*, *supra* note 40, at 1296–97.

48. See World Trade Organization, *Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO—Communication from the Republic of Korea*, Doc. 02–3865 TN/DS/W/11, available at www.wto.org (last visited Feb. 5, 2003) [hereinafter *Communication from the Republic of Korea*].

49. See *Australia, South Korea Outline Proposals*, *supra* note 40, at 1297.

suggests if the same panel, composed under article 21:5, were asked to determine both the existence of measures taken to comply with a DSB ruling, as well as the level of the nullification or impairment, then this request could lead to three positive outcomes:

1. The Member concerned would be immediately aware of the consequences of non-compliance which would provide an incentive to conform;
2. Negotiation for compensation is greatly facilitated; and
3. In those cases where compensation is out of the question and suspension of concessions is being sought it is likely that an arbitration panel under Article 22:6 would be unnecessary since the level of impairment or nullification has already been determined.⁵⁰

The EU has advocated a similar stand to the Korean one on this question—indeed, in the *Bananas* case, the article 21:5 compliance issue and article 22:6 arbitration issue were dealt with in a single proceeding by the same panel.⁵¹ The EU maintains that the complaining party could obtain an independent decision from an arbitrator about the level of nullification or impairment before a request for suspension of concessions were submitted. This decision could be made either before the RPT expires if the respondent indicates it will not be able to comply with the DSB rulings, or after the end of the RPT when both parties agree there was no implementation, or, alternatively, in the absence of such agreement, when a panel finds there was no compliance with WTO obligations.

The proposal of the Philippines and Thailand, which was presented more or less at the same time as that of the EC, gives a detailed draft of the amendment proposed to article 22:7.⁵² It is suggested that:

the arbitrator shall first determine the level of the nullification or impairment of the benefits accruing to the complaining party under the WTO Agreement in accordance with the recommendations and rulings of the DSB. The complaining party shall provide sufficient trade information and data to enable the arbitrator to determine such level.⁵³

It is also up to the complaining party to submit a detailed proposal containing a list of concessions or other obligations it intends to suspend. The arbitrator would then determine whether the level of suspension resulting from this list is equivalent to the level of nullification or impairment. Should the arbitrator determine that they are not equivalent, the complaining party would be asked to modify its list up to the point the arbitrator determines is necessary.

D. VIGILANTISM

Austin's legal positivism has no place for vigilante justice. The commands of the sovereign are to be obeyed under threat of punishment and by implication there is to be habitual obedience without the necessity of imposing punishment. The idea that a rule would need to be enforced to be a "law" by private parties acting on their own volition would be inconsistent with this Command Theory.

50. See *Communication from the Republic of Korea*, *supra* note 48.

51. See *Australia, South Korea Outline Proposals*, *supra* note 40, at 1297.

52. See World Trade Organization, *Proposal to Review Article 22.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes—Communication from the Philippines and Thailand*, Doc. TN/DS/W/3 02-1471, available at www.wto.org (last visited Feb. 5, 2003) [hereinafter *Communication from the Philippines and Thailand*].

53. *Id.*

That inconsistency is presented by the controversial American enforcement legislation known as the “carousel retaliation law.” “Carousel” law refers to the way in which the United States may retaliate against countries that do not comply with a ruling of the WTO. Thus, if the United States receives a favorable ruling of a WTO panel or Appellate Body and there has been no compliance with the ruling by the losing party, then the retaliation list that the United States identifies would be periodically revised to reflect different products. Under its provisions, however, if the United States Trade Representative (USTR) determines an offending country will imminently implement the WTO ruling, or through consultations with affected domestic industry there is agreement that it is unnecessary to change the retaliation list, the USTR is not required to make revisions.⁵⁴

The carousel provisions have prompted strong objections from other WTO Members. The main reason for the objection is that the idea behind this law is to vary the targeted products and thereby maximize the disruption and economic pressure imposed on foreign governments subject to retaliation under Section 301 of the Trade Act of 1974. A number of WTO Members (e.g., the EU, the Philippines, and Thailand) have taken stands against this law.⁵⁵ One possible reform to the DSU to blunt the legislation would be to bar a successful complainant from modifying its retaliatory measures, unless the losing respondent agreed to the modification.⁵⁶ However, from the standpoint of Austin’s legal positivism, this proposal would make matters worse than they are with the carousel law. The proposal would take yet more sanctioning power away from the adjudicatory authorities. It would empower the losing party—ironically, in Austin’s paradigm—to assent, or not, to the kind of retaliation it faces. In that paradigm, if the DSB, Appellate Body, and panels are to have meaningful “command” powers, and contribute to the sense their decisions about GATT-WTO rules are “hard” law, then any diminution of these powers would have to be opposed.

V. Habitual Obedience Issues

According to Austin, habitual obedience to the commands of a central authority, the sovereign, is necessary if those commands are “law.” In Austin’s own definition of the term, “a command is a signification of desire. But command is distinguished from other significations of desire by this peculiarity—that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.”⁵⁷ Is there habitual obedience to the “commands,” framed as “recommendations,” in adopted Appellate Body and panel reports? To provide a thorough answer, it is necessary to treat that question as an empirical one and to define what “compliance” means in each instance. Suffice it to say, many international trade lawyers would agree that, on balance, the record of compliance with these recommendations is far from failing. It only seems poor when one large case, like *Foreign Sales*

54. Timothy C. Brightbill et al., *International Legal Developments in Review: 2000, Business Regulation, International Trade*, 35 INT’L LAW. 407 (Summer 2001).

55. Is the EU unwise to attack the carousel retaliation law? In light of the EU’s victory in the *Foreign Sales Corporation* case, it might want the same flexibility for retaliation as the United States has under the carousel legislation.

56. This possibility is suggested by the recommendation of the Philippines and Thailand. See *Communication from the Philippines and Thailand*, *supra* note 52. A related idea would be to calculate the allowed level of retaliation according to the degree of nullification and impairment.

57. See AUSTIN, *supra* note 1, at 21.

Corporation, Bananas, or Beef Hormones, where compliance is a problem, overshadows the dozens of less publicized cases in which there is no such problem.

Notwithstanding what appears to be a reasonably positive pattern of compliance thus far, there are three issues within the category of "Habitual Obedience." They involve transparency, participation, and advisory opinions. What connects them to this category (albeit, perhaps, loosely) is legitimacy. The legitimacy of the DSU process is common to all three issues. Plainly, the greater the sense in the international trade community that the process is legitimate, then the greater the obedience to outcomes from that process. In this community, there is doubt among NGOs, as well as some private importers and exporters, and some WTO Member governments, about the legitimacy of the process.

A. TRANSPARENCY

Should oral arguments in front of the WTO adjudicatory authorities be open to the public? Currently, they are closed to all but government officials involved in the hearing and the decision-makers themselves. The antipodal position would be to open them to any person and even broadcast them on television. An intermediate possibility would be to open them only if both complainant and respondent agree.

As suggested, the legitimacy of the authorities would be enhanced if the process by which they come to a decision—if not their actual deliberations, at least the evidence presented to them in oral argument—were available for inspection. This rationale seems consistent with the paradigm of Austinian positivism, insofar as it would mean the "recommendations" of panels and the Appellate Body would be seen as "commands" to which obedience is owed. In turn, obedience might become more habitual than before. However, this rationale is not necessarily tied exclusively to the paradigm.

Austin's jurisprudence need not be interpreted as saying only a central authority that issues commands in a "democratic" fashion creates "hard" law. It is patently untenable to think the governments of all, or even most of the WTO Members are "democratic" in the modern, Anglo-American sense of the term. Many are not, nor would they take kindly to the notion that participation in WTO affairs ought to catalyze democratic reform in their home-country judicial systems (even if that does occur in some instances). Yet, Austin would not say the pronouncements issued by every non-democracy fail to satisfy the criteria for "law," or that these countries lack a "legal system." In his paradigm, for example, the commander can be a monarch and the commands issued from that sovereign are "law" in a strict positivistic sense.

That debate about what the jurisprudence does or does not require aside, increasing transparency in WTO adjudication is problematic for at least three reasons. First, what effect would increased transparency have on adjudicatory proceedings? An increased transparency would probably have little, if any, effect at all on adjudicatory proceedings. Still, arguments commonly made by opponents of "cameras in the courtroom" are that publicity could "chill" a free flow of debate, and that some litigators might "play" to the media. Rebuttals are that adjudicators and litigants would become accustomed to the "cameras," and attorneys inclined to become "media celebrities" are nearly incorrigible anyway.

Second, what effect might increased transparency have on panelists and Appellate Body members? Certain prospective panelists might be hesitant to serve if hearings were open. Officials from (or with close ties to) some governments, or officials from NGOs, might not welcome the possibility of reporters recording for publication what they say and do in the hearing room. Third, is there a link between increased transparency and the establishment

of permanent panels? Open hearings may be more acceptable to permanent panelists. After all, the fact of their long-term appointment ought to give them an independence to insulate them from short-term "flaps" with governments and NGOs.

As it made clear in its proposal on August 9, 2002, the United States favors public and open hearings, because it sees them as a move towards greater transparency and confidence in the whole WTO system.⁵⁸ The American government highlights the fact that decisions of the Appellate Body and panels do affect civil society at large. But, as the adjudicatory process stands now, many members of this society are neither observers of nor direct participants in the proceedings. The United States maintains there is no reason why the WTO should operate differently from other long-established international forums in which proceedings are public, such as the International Court of Justice, the *Ad Hoc* Tribunals for Former Yugoslavia and Rwanda and the European Court of Human Rights. The United States suggests public hearings actually may facilitate implementation of the rulings of the DSB, by increasing confidence in the fairness and adequacy of the process.⁵⁹ Concomitant with its proposal for public hearings, the United States favors the publication (e.g., through posting on a Web site) of all briefs, except for portions thereof dealing with confidential business information, and for timely release of final panel reports (e.g., as soon as the parties to a dispute receive them).⁶⁰

Significantly, the United States urges that the public nature of proceedings would assist non-party WTO Members by giving them greater familiarity and experience with dispute settlement. (Presumably, the same benefit would flow from publication of briefs.) A large volume of trade disputes have mainly involved developed nations and only a handful of developing nations. A substantial majority of WTO Members still have virtually no meaningful experience in the dispute settlement process, as the *Financial Times* reports:

[P]oor nations . . . make up four-fifths of the 144-strong WTO membership.

...

Just over 90 disputes—about a third of the 270-odd cases brought to the WTO in its eight-year history—have been filed by developing countries, roughly half against industrialized nations.

58. See World Trade Organization, *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO related to Transparency—Communication from the United States*, Doc. TN/DS/W/13 02-4538, available at www.wto.org (last visited Feb. 5, 2003); Gary G. Yerkey, *U.S. Submits Proposal at WTO Calling for Greater Openness in Dispute Proceedings*, 19 Int'l Trade Rep. (BNA) 1417 (Aug. 15, 2002) [hereinafter *U.S. Submits Proposal*]. The American proposal has been faulted for being insufficiently ambitious, and the possibility of further proposals from the Bush administration for DSU reform certainly exists. See Gary G. Yerkey, *U.S. Still Long Way Off from Offering Plan in WTO to Reform Dispute Settlement Regime*, 19 Int'l Trade Rep. (BNA) 1726-27 (Oct. 10, 2002).

59. As Ambassador Zoellick put it:

WTO rules have brought tremendous benefits to U.S. farmers, workers, and businesses. Public confidence in how those rules are enforced improves with greater openness. Today's proposal would open the door to the public, and thereby open the door to greater understanding and acceptance of the WTO.

Quoted in *U.S. Submits Proposal*, *supra* note 58, at 1417-18 (emphasis added). See also Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7-22 (2002) (arguing, *inter alia*, that the WTO needs to re-establish its legitimacy by widening its links to the public); Ernesto Hernández-López, *Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes*, 35 J. OF WORLD TRADE 469-98 (2001) (considering the opportunities, or lack thereof, for non-state actors to participate in WTO adjudication).

60. See *U.S. Submits Proposal*, *supra* note 58, at 1418.

However, a dozen developing countries in Latin America and Asia, led by Brazil and India, account for almost all [of] the 90-plus filings. *No African or least-developed country has brought a case*: they say the system is too expensive and complex, and does not provide adequate remedies if they win.

...

[T]aking a case through the WTO requires the services of specialist trade lawyers. For countries without their own expertise, using a private law firm can cost upwards of Dollars \$300,000, way beyond the reach of most WTO Members.⁶¹

It is uncertain whether the American proposals on transparency would bring litigation costs down. But, they might at least make it easier to see how the system "works" in practice. In turn, the stock of legal capital—in terms of lawyers with trade expertise in poor countries, might rise.

At the same time, not everything in a DSU case can be put in plain view for all to inspect. The United States qualifies its position by emphasizing the need to protect confidential information and security. The United States suggests that panels and Appellate Bodies should be able to impose limited and justified restrictions on the opening of proceedings, especially with regard to confidential business information.

While the EU shares the American views on transparency, the EU also proposes the DSU provide sufficient flexibility for parties to decide whether certain parts of the proceedings before panels or the Appellate Body should be open to the public for attendance. The EU advocates the rights of third parties to decide whether their interventions should take place in open or closed sessions. This proposal can be considered a departure from the American position that proceedings should be open to all, and that only certain confidential information should be protected. It remains to be seen whether reform will take the form of (1) complete openness, or (2) the preservation of certain privileges of the main actors. The fact is the American proposal on DSU transparency has been criticized by developing countries, including Brazil, Chile, India, Mexico, and Uruguay.⁶²

These developing countries argue too much transparency could undermine the "inter-governmental nature of the organization."⁶³ The same criticism is levied at proposals to institutionalize *amicus* briefs. India, a particularly strong opponent of the American proposal on transparency, maintains that opening WTO dispute hearings to the public would give rise to "trials by media." Trials by media would result in a miscarriage of justice, as opposed to enhancing confidence in the proceedings. Even a casual observer of the Indian legal system should find it easy to see both the irony of India making this point and the experiential base from which India is able to make it! Countries other than India have expressed doubt about the American proposal. For instance, Switzerland and Norway have done so, with Switzerland in particular expressing concern about adding yet more burdens on the DSU process.

B. *AMICUS* BRIEFS

Though occasionally confused with one another, transparency and participation are distinct phenomena. Suppose a dispute resolution mechanism is closed to the public, but

61. See *WTO Minnows*, *supra* note 45 (emphasis added).

62. See Daniel Pruzin, *U.S. Proposal on Dispute Transparency Gets Cool Reception with WTO Members*, 19 Int'l Trade Rep. (BNA) 1540 (Sept. 9, 2002).

63. *Id.*

representatives from all constituencies potentially impacted by the decisions of the adjudicator are allowed to submit arguments in written form and also make oral presentations. The mechanism is highly participatory, but not transparent. Conversely, suppose proceedings are open for all to observe. But, only the complainant and respondent can present arguments, and only one class of entities can bring or be the target of a complaint. Then, the mechanism is transparent, but not participatory.

To some observers WTO adjudication combines the "worst" of two extreme examples: (1) it is not open to witness, and (2) only sovereign states can make or be named in a complaint. Austin does not seem to have worried much about transparency or participation, but an indirect link exists to his criteria for "hard" law. Habitual obedience to the commands of a central authority follows not only from the threat of a negative sanction but also from a positive sentiment, namely, a sense of legitimacy of the authority, its commands, and its enforcement power. That is not to imply a "warm attitude" is a substitute for the specter of punishment. It is not, as the rubric for Austin's approach—the "Command Theory"—clearly indicates.

Rather, the point simply is that, as a secondary matter in a *bona fide* "legal" system, habitual obedience follows from logicity regarding the authority, and from a belief that its commands indeed merit conforming behavior. When the commands are being debated and drafted participation in the law formulation stage surely contributes to their legitimacy. Those affected by the orders understand the deciding authority exercises an informed, considered judgment in formulating obligations before imposing them.

It is no small wonder why NGOs and other would-be reformers of the DSU, and some WTO Members, favor acceptance by the Appellate Body, and perhaps even by panels, of *amicus curiae* briefs.⁶⁴ In the *Asbestos* case, the Appellate Body articulated a process to determine whether to accept an *amicus* brief. One possibility is to retain that process. However, a difficulty with this proposal is its failure to distinguish among types of *amicus* briefs. What if it deals with factual matters? (This question is acute at the panel stage, where facts are at issue.) By definition, the writer of an *amicus* brief is not a litigant, but actually "a friend of the Court." However, should its discussion of such matters disqualify the brief from consideration?

How these questions are resolved could influence an Austinian-based assessment of the WTO as a "legal" system. The proposal from the EU refers to the *status quo*, i.e., that the Appellate Body allows the submission of *amicus curiae* briefs on a case-by-case basis, a situation they consider in need of a better framework. The acceptance of such briefs, they maintain, should not delay, even further, proceedings before the panels or Appellate Body. However, once these briefs are accepted in the proceedings, then sufficient time needs to be given both to render them meaningful and for the parties to review them.⁶⁵

C. ADVISORY OPINIONS

There is a third potential legitimacy-enhancing reform to the DSU, which might encourage habitual obedience to "recommendations" in Appellate Body and panel reports adopted by the DSB. That reform involves the consideration and/or issuance of advisory

64. The United States favors, as part of the DSU reform discussions, consideration of rules on the submission of *amicus* briefs, apparently to facilitate their submission. See *U.S. Submits Proposal*, *supra* note 58, at 1418.

65. *Contribution of the European Communities*, *supra* note 19.

opinions. Might it be worthwhile for the WTO adjudicatory authorities to receive advisory opinions? Conversely, might it be useful for them to render advisory opinions?

As to the first question, an affirmative answer might be sensible in the following context. Suppose a rule in a treaty, other than a WTO agreement, is raised as a defense to a claim in a complaint brought under the DSU. The rule might lie in an International Labor Organization (ILO) convention or, perhaps, in a multilateral environmental agreement. Should the Appellate Body, or a panel, be able to obtain the opinion of the relevant body operating under the treaty whose provision is being invoked as a defense? The quality of the consequent report, and hence its acceptability in terms of obedience, might be enhanced if the Appellate Body or panel could obtain an advisory opinion from the relevant international organization. For example, could the WTO seek the assistance of the ILO in coming to a fully informed and considered judgment?

This proposal is hardly a new idea in international law. Article 34:2 of the Statute of the International Court of Justice (ICJ) serves as a relevant "precedent." It states the ICJ may request information from an international organization relevant to a case before the Court. It further requires the ICJ to take such information, saying the ICJ "shall receive" the information.⁶⁶

As for the second question, a non-binding, pre-clearance advisory opinion issued by a WTO adjudicatory authority would have at least one obvious potential virtue. It might minimize the likelihood of a WTO challenge to the trade measure that is the subject of the opinion. After all, if a panel or the Appellate Body already has "blessed" a measure (for example, under the *WTO Agreement on Technical Barriers to Trade*), then a frontal attack on the measure is unlikely, unless the measure plainly strays far outside the scope of the "blessing."

Here, too, the proposal is not new. There is a precedent from the ICJ. Frequently, the Hague court is asked to render advisory opinions. At the request of the Committee of Ministers, the ECHR may also give advisory opinions on legal questions concerning the interpretation of the Convention and its Additional Protocols. Advisory opinions are given by the Grand Chamber on a majority vote, and any judge may attach a separate opinion or statement of dissent to the majority opinion. Moreover, in the WTO there is a precedent. Article 24:3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) creates a Permanent Group of Experts (PGE), consisting of five independent, highly qualified experts in the area of trade and subsidies. Article 4:5 of the SCM Agreement empowers panels to get the help of the PGE to determine whether a disputed measure is a prohibited subsidy. However, it appears panels rarely, if ever, asked the PGE for advice.⁶⁷ Were they to do so, their decisions about the illegality of a subsidy and the need for its removal might be received by losing respondents with all the more deference.

66. Statute of the International Court of Justice, concluded at San Francisco, June 24, 1945, 1978 Y.B.U.N. 1052, reprinted in BURNS H. WESTON et al., SUPPLEMENT OF BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 32, 35 (3rd ed. 1997).

67. Article 24:4 of the SCM Agreement authorizes any Member to consult the PGE for an advisory opinion about a proposed or extant subsidy. The opinion, given confidentially, cannot be invoked in a subsequent case. Interestingly, under chapters 19 (article 1903 and Annex 1903:2) of the NAFTA, a panel may examine proposed government legislation rendering a declaratory opinion on its consistency with the NAFTA. A similar possibility exists under chapter 20. However, no such opinion appears yet to have been sought or obtained. The reason may be a disinclination to become involved in the political process of the NAFTA Parties (e.g., in the legislative process on Capitol Hill).

VI. Conclusion

Putting DSU reform issues in the categories of “Central Authority,” “Enforcement Sanction,” and “Habitual Obedience” evinces the high stakes associated with how the issues are resolved. Those stakes are the choice between advancing or retreating from the international rule of law. To what extent do WTO Members want to reform the DSU in ways that qualify international trade law as “law,” in the sense of one of the strictest jurisprudential definitions—Austin’s positivism? By “translating” Austin’s severe nineteenth century positivism into the modern global arena, and using its basic insights into a commanding authority, the threat of punishment, and habitual obedience, the crossroads at which the Members now stand as they consider DSU is evident.

This exercise in translation could lead to excessive pessimism. It may be tempting to conclude that well, Austin was right, the WTO’s mechanism for settling disputes does not produce ‘law’ in any rigorous sense of the word. It may seem the issues threaten the overall efficacy and operation of the DSU, and cast doubt on its long-term viability. However, that ominous conclusion ought to be avoided—at least for now. It is in this sense that Doha encouraged the DSU negotiations to be conducted as a separate item on the agenda. In this way they will not be tied to the other negotiations’ outcomes, giving opportunity for more flexibility in the conduct of debates and the eventual endorsement of reforms.⁶⁸ Should the mere fact of considering reforms be taken as a weakness in the whole system? Does it make international trade law less “law”? One would hope not. The reform of the United Nations itself has been the subject of much debate for years now (hopefully this will not be the case for WTO reform). Even the European Court system, after substantial revamping in 1998, is once more engaged in reform discussions and has set up an Evaluation Group that will address the capacity of the Court to deal with an increase in the volume of cases of 130 percent. Is it that countries are committing more human rights violations? Or is it that international law is really being perceived as real law?

The fundamental requisites for “law” and a “legal” system in Austin’s paradigm are not all satisfied by the WTO and its DSU. The central authority is not quite as central or stable, enforcement is not quite as smooth or automatic, and compliance is not quite as habitual as that school of jurisprudence would demand. Yet, the adjudicatory mechanism is neither rotten to the core, nor irreparably broken. If the WTO Members will it so, they may rid Geneva of Austin’s ghost.

68. See United States General Accounting Office, Report to Congressional Requesters, *World Trade Organization: Early Decisions Are Vital to Progress in Ongoing Negotiations*, GAO-02-879 (Sept. 2002) (providing a full analysis of the WTO negotiations).