

Northwestern Journal of International Law & Business

Volume 38
Issue 1 *Fall*

Fall 2017

Beyond Retaliation

Cherie O'Neal Taylor

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njilb>

Recommended Citation

Cherie O'Neal Taylor, *Beyond Retaliation*, 38 Nw. J. INT'L L. & BUS. (2017).
<https://scholarlycommons.law.northwestern.edu/njilb/vol38/iss1/2>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized editor of Northwestern University School of Law Scholarly Commons.

Beyond Retaliation

*Cherie O'Neal Taylor**

Abstract: This article examines the compliance problem in the World Trade Organization's dispute settlement system, in particular upon the disputes that went to retaliation and beyond. This article, using a case study approach, is the only consideration of what happened in all of these disputes and the effects of each upon the system. The article reveals four insights. First, the losing respondents have manipulated the rules and the system to avoid compliance for long periods and in some cases permanently. Second, the Dispute Settlement Understanding (DSU) itself has gaps and flaws that enable such manipulation. Third, the Dispute Settlement Body (DSB), which oversees the system, is currently limited in its ability to report and counteract compliance problems. Fourth, retaliation has its limits. The article concludes with a section about possible reforms for both the DSU and DSB that would improve the dispute settlement system and the WTO.

* Cherie Taylor is a Professor of Law at South Texas College of Law Houston. She also serves as the Director of the Institute for International Legal Practice & National Security.

I. Introduction: The Reality of Compliance in the DSU System	63
How the DSU Process Operates	63
Member- and Institution-Driven Aspects of the System.....	66
Systemic Compliance versus Inadequate and Sustained Non- Compliance	72
The Sustained Non-Compliance Disputes	74
EU: Hormones (WT/DS 26).....	75
Basis for dispute	75
Role of Retaliation.....	76
Beyond Retaliation	77
Legacy to the system	79
EU: Bananas III (WT/DS 27).....	80
Basis for Dispute	80
Role of Retaliation.....	81
Beyond Retaliation	83
Legacy for the system.....	84
U.S.: Foreign Sales Corporation	85
Basis for the Dispute.....	85
Role of Retaliation.....	86
Beyond Retaliation	87
Legacy for the system.....	88
Brazil/Canada: Regional Aircraft (WT/DS 46, 70 & 222)..	88
Basis for the Dispute.....	88
Role of Retaliation.....	89
Legacy for the System	91
United States: Anti-Dumping Act of 1916 (WT/DS 136 & 162).....	91
Basis for the Dispute.....	91
Role of Retaliation.....	92
Legacy for the system.....	93
U.S.: Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment).....	93
Basis for Dispute	93
Role of Retaliation.....	94
Beyond Retaliation	95
Legacy for the system.....	96
U.S.: Upland Cotton.....	96
Basis for the Dispute.....	96
Role of Retaliation.....	98
Legacy for the system.....	100
U.S.: Gambling	101

Basis for Dispute	101
Role of Retaliation.....	103
Legacy for the system.....	104
U.S.: Zeroing.....	104
Basis of the Dispute.....	104
Role of Retaliation.....	106
U.S.: Certain Country of Origin Labeling (COOL)	
Requirements (WT/DS 384/386).....	107
Basis of the Dispute.....	107
Role of Retaliation.....	110
II. What Does Not Work in the DSU System	113
Delay	113
Compliance Control Allows for Manipulation.....	114
Limitations of the DSU: A Flaw and a Gap.....	115
The Limits of Retaliation	117
DSU Reform Process and Options for Reform Regarding	123
What the Proposed Reforms Fails to Tackle and Why This	
Matters.....	129
III. Conclusion: A Possible Reform – Actualizing Surveillance in the DSU	
System.....	130

Anyone examining the World Trade Organization’s (WTO) dispute settlement system must confront one issue. The system does not resolve every dispute where the complainant prevails in a way the Member States intended. What the Dispute Settlement Understanding (DSU) provides for is compliance by the losing respondent Member State within a reasonable period of time, compensation by the losing respondent until compliance, or WTO-authorized retaliation against the losing respondent until compliance. What has happened is: (1) timely compliance by most respondents,¹ (2) rare use of compensation by respondents,² and (3) some retaliation being

¹ Multiple reviews have concluded that the compliance rate for the dispute settlement system is quite high for any dispute settlement system. See William Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. Int’l Econ. L. 17, 47 (2005) (Compliance rate at the end of the first decade of 83%) [hereinafter Davey]; Valerie Hughes, *Working in WTO Dispute Settlement: pride without prejudice*, A HISTORY OF LAW AND LAWYERS IN THE MULTILATERAL TRADING SYSTEM, at 414 (“The overall rate of compliance with WTO dispute settlement rulings is very high – somewhere between 85 and 95 percent, depending on when and how you count non-compliance.”).

² Instances of compensation, which is voluntary only, include the *U.S.—Section 110(5) Copyright Act* and the *Upland Cotton* disputes. See Petros C. Mavroidis, *Dispute Settlement in the WTO: Mind Over Matter* (EUI Working Paper, RSCAS 2016/04 (2016)), available at http://cadmus.eui.eu/bitstream/handle/1814/35980/RSCAS_2015_34.pdf?sequence=1 [hereinafter Mavroidis].

authorized and employed against respondents without the result expected. Retaliation has not been the end for all of the disputes where used. Instead, there has often been sustained non-compliance³ by the respondent, and this non-compliance has often gone to and beyond retaliation.⁴

There is a large literature about the operation of the system, the “problem of non-compliance,”⁵ the adequacy of,⁶ and the need to reform

³ “Sustained non-compliance” occurs when the respondent goes far beyond the allotted time for compliance and either never takes action to comply or tries strategic inadequate compliance to gain time. In all of the cases of sustained non-compliance, the respondent faced a retaliation request made by the complainant under Article 22 of the DSU.

⁴ These disputes – the ones that went to retaliation and beyond – actually ended in several different ways: 1) resolved by agreement after retaliation was authorized, 2) resolved after retaliation was used for some time, 3) settled after retaliation went on for a sustained period without the respondent compliance under the relevant WTO agreement, and 4) never resolved. The eleven disputes that went to retaliation and beyond are: *Hormones*, See Appellate Body Report, *European Communities–Measures Concerning Meat and Meat Products*, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *Hormones AB Report*]; *Bananas III*, See Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *Bananas III AB Report*]; *Regional Aircraft*, See two disputes – Decision by the Arbitrator, *Canada–Export Credits and Loan Guarantees for Regional Aircraft*, WTO Doc. WT/DS222/ARB (Feb. 17, 2003) [hereinafter *Canada - Regional Aircraft*] and Appellate Body Report, *Brazil–Export Financing Programmed for Aircraft*, WTO Doc. WT/DS46/AB/R (Aug. 2, 1999) [hereinafter *Brazil - Regional Aircraft*]; *Byrd Amendment*, See Appellate Body Report, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) [hereinafter *U.S. - Byrd Amendment*]; *Antidumping Act of 1916*, See Appellate Body Report, *United States–Antidumping Act of 1916*, WTO Doc. WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) [hereinafter *U.S. - Anti-Dumping Act*]; *Foreign Sales Corporations (FSC)*, See Appellate Body Report, *United States–Tax Treatment for “Foreign Sales Corporations*, WTO Doc. WT/DS108/AB/R (Feb. 24 2000) [hereinafter *FSC*]; *Upland Cotton*, See Appellate Body Report, *United States–Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R, March 3, 2015 [hereinafter *U.S. – Upland Cotton*]; *Gambling*, See Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R, Apr. 7, 2005 [hereinafter *U.S. – Gambling*]; *Zeroing* See two disputes – Appellate Body Report, *United States–Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, WTO Doc. WT/DS294/AB/R (Apr. 18, 2006)(EU as complainant) and Appellate Body Report, *United States–Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. WT/DS322/AB/R (Jan. 9, 2007); and the *COOL* dispute, See Appellate Body Report, *United States–Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384,386/AB/R (June 29, 2012) [hereinafter *U.S. – COOL*].

⁵ See also Rachel Brewster, *The Remedy Gap: Institutional, Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2011); Gary Horlick & Judith Coleman, *The Compliance Problems of the WTO*, 24 ARIZ. J. INT’L & COMP. L. 141, 142 (2007); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT’L L. 763 (2000); Mark Wu, *Rethinking the Temporary Breach Puzzle: A Window on the Future of International Conflicts*, 40 YALE J. INT’L L. 95, 98 (2016) (Attempting to analyze why since the WTO dispute settlement system allows for temporary breaches without consequence, why WTO Member States do not take advantage

WTO remedies,⁷ and proposed solutions for the non-compliance problem.⁸ What this scholarship has not offered is an examination of how the parties and the WTO dealt with *all* of the disputes that reached the retaliation stage, and went beyond.

A close examination of how these disputes actually resolved is necessary for understanding the non-compliance problem at the WTO. Non-compliance in these eleven disputes has stymied the DSU requirements and expectations in the different ways. Almost all of them involve sustained non-compliance but each was resolved in different ways. Some of the disputes ended with negotiated settlements after retaliation was threatened but not employed.⁹ One dispute ended in a negotiated settlement in part because one of the complainants was unable to use the authorized retaliation.¹⁰ One dispute has not resolved because the complainant is not in a position to use its authorization to sanction the respondent.¹¹ In others, the respondent resisted compliance, suffered some period of retaliation, and complied.¹² In yet another group, the respondent faced sustained retaliation and remained in non-compliance until the disputants reached a negotiated

of this feature more often).

⁶ For a thorough examination of all aspects of the ultimate remedy in the DSU system, the authorization of retaliation against a non-compliant Member State, *see generally* THE LAW, ECONOMICS, AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT (Chad P. Brown and Joust Pauwelyn eds. 2010).

⁷ *See* Marco Bronkers & Naboth Van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101, 121 (2005) [hereinafter Bronkers & Van den Broek]; William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT'L L.J. 119, 125 (2009); Joel R. Trachtman, *The WTO Cathedral*, 43 STANFORD J. INT'L L. 127 (2007) [hereinafter Trachtman – WTO Cathedral]; Naboth Van den Broek, *Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports: Interdisciplinary Approaches and New Proposals*, 37 J. WORLD TRADE 127, 134 (2003).

⁸ Korea, Ecuador, Mexico, and the African Group have filed major proposals for DSU reform of the remedies regime. *See* Sonia E. Rolland, *Considering Development in the Implementation of Panel and Appellate Body Reports*, 4 TRADE L. & DEV. 150 (2010) for an analysis of the major reform proposals suggested by these groups. [hereinafter Rolland].

The DSU Reform Negotiations conducted as part of the Doha Round have produced a draft text of changes to the DSU. This draft text along with a Report by the Chair of Negotiations on the status of negotiations through April of 2011 has the most publicly available version of what the revised text. Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Ronald Saborio Soto, to the Trade Negotiations Committee TN/DS/25* (April 21, 2011) [hereinafter DSB—Special Session].

⁹ *See* discussion *infra* Sections *Regional Aircraft, Zeroing, Anti-Dumping Act of 1916, Upland Cotton, and COOL*.

¹⁰ *See infra* pp. 30–31 for a discussion of the experience of Ecuador in the *Bananas III* dispute.

¹¹ *See infra* pp. 57–59 for a discussion of the *Gambling* dispute.

¹² *See infra* pp. 35–37 and 47–48 for a discussion of the *FSC* and *Byrd Amendment* disputes.

settlement that left the violation in place.¹³ The design of the compliance section of the DSU system—where the form and shape of compliance rests within the power of the disputants¹⁴—creates the potential for such variations.¹⁵

By most measures, the dispute settlement system of the WTO has been a success.¹⁶ The WTO has resolved most of the disputes brought to it and offered thorough and consistent interpretations—largely through the work of the Appellate Body (AB)—of the obligations contained in the WTO agreements.¹⁷ During the long and frequently interrupted march of the Doha Round of trade negotiations,¹⁸ which started in 2000 and remain

¹³ See *infra* pp. 23–26, 30–33 for a discussion of the *Hormones* and *Bananas III* disputes.

¹⁴ The compliance section of the WTO’s dispute settlement system is set out in Articles 21 and 22 of the Dispute Settlement Understanding (DSU). Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

¹⁵ See Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 415 (2003) (noting that the WTO dispute settlement system is political “both at its inception and at its end”).

¹⁶ Pascal Lamy, WTO disputes reach 400 mark, WTO Press Release 578 (Nov. 6, 2009), https://www.wto.org/english/news_e/pres09_e/pr578_e.htm (Former Director General Lamy noted on the occasion of the dispute settlement system reaching 400 disputes that “the dispute settlement system is widely considered to be the jewel in the crown of the WTO” and “[t]his is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations.”). See also Giorgio Sacerdoti, *The Future of the WTO Dispute Settlement System: Consolidating a Success Story*, FUTURE OF THE GLOBAL TRADE ORDER (Carlos Primo Braga and Bernard Hoekman eds., 2016) at 45 [hereinafter Sacerdoti].

¹⁷ The AB has garnered praise for developing strong working procedures and producing reports that are usually regarded as clear, coherent, and legitimate. For a discussion of these issues, see WTO Appellate Body Roundtable, *Proceedings of the 99th Annual Meeting of the American Society of International Law*, 99 AM. SOC’Y INT’L L. PROC. 175 (2005) (presenting views from three of the first seven AB members on how the AB set out to operate); see also Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 30 (1999) (noting that the AB panels heavily relied on the interpretation methods of Article 31.1 of the Vienna Convention on the Law of Treaties (as authorized by the DSU art. 3.2) in order to be prudent and to give the “legal rulings the greatest possible appearance of objective legal authority”); Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 26 (2005) (noting that the AB “like more conventional judicial bodies, has opted for a rigorous, impartial, and strictly legal approach to analyzing trade complaints”). For a more recent interpretation of the AB see Robert Howse, *The World Trade Organization 20 Years On: Global governance by the Judiciary*, 27 EUR. J. INT’L L. 9 (2016) (contributions by Howse, Pauwelyn, Hoekman, Lang and Fabri).

¹⁸ The Doha Round negotiations started in 2000, were suspended multiple times, and are ongoing as of this date. The Member States have worked on all of these years on drafts of texts, which represent potential agreements. The Doha Round has produced one major agreement, the Trade Facilitation Agreement, completed in the 2013 Bali Ministerial Conference. The Trade Facilitation Agreement went into force on February 22, 2017, when two-thirds of the 164 WTO Member States completed ratification and notified the WTO. In

unfinished in 2017, most have come to agree that the WTO is more effective at resolving disputes than the rule-making.¹⁹ Despite this agreement, there have been consistent calls by the Member States and scholars for reform of the DSU, particularly with respect to its remedies.

What has been driving this demand for reform? One reason is that the final remedy available to the Dispute Settlement Body (DSB)²⁰ is a flawed one. There are at least three obvious flaws. First, the use of DSB-authorized retaliation harms the state using it and undercuts the trade liberalization goals of the WTO.²¹ Second, all remedies offered by the

the Nairobi Declaration for the 10th WTO Ministerial, the WTO Member States summed up the still confused state of Doha Round negotiations with the following statements:

30. We recognize that many Members reaffirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conferences held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe that new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations. We acknowledge the strong legal structure of this Organization. 31. Nevertheless, there remains a strong commitment of all Members to advance negotiations on the remaining Doha issues.” World Trade Organization, Nairobi Ministerial Declaration, WTO Doc. WT/MIN (15)/DEC (adopted Dec. 19, 2015), available at: https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm. [hereinafter Nairobi Ministerial Declaration].

¹⁹ For one expression of this idea and one explanation, see Manfred, Elsig, *The Functioning of the WTO: Options for Reform and Enhanced Performance. E15 Expert Group on the Functioning of the WTO – Policy Options Paper*, E15 INITIATIVE 9 (2016). International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (According to Elsig: [W]e deal with a somewhat unintended consequence of legalization. The enforcement mechanism of the WTO (“the jewel in the crown”) has led to dynamics that additionally impact on trade negotiations. Under the shadow of a strong dispute settlement system, where concessions can actually be enforced, parties are sometimes reluctant to commit to future deals, and this has important distributional consequences as domestic interest groups grow more vigilant . . .”). *Id.*

²⁰ The Dispute Settlement Body (DSB) (comprised of all WTO Member States of the WTO) plays the coordinating role for the DSU process. Member States must notify the DSB of a dispute and of the request for a panel. *DSU, supra* note 14, at art. 12. The DSB also oversees the establishment of a panel in a particular dispute. *Id.* at art. 8. Once the panel process is underway, the DSB oversees it, and allows for any extension of time the panel finds necessary. *Id.* at art. 12.9. Once produced, the final panel report circulates to the DSB and becomes part of its agenda. The DSB takes comments until it takes action to adopt the report. *Id.* at art. 16. The DSB plays a role regarding the implementation of the panel or Appellate Body panel report. A losing respondent is required to notify the DSB of its plan to implement. *Id.* at art. 21.3. The DSB assists disputants over conflicts regarding how implementation should proceed. *Id.* at arts. 21.3 & 21.4. The DSB conducts surveillance of the respondent’s implementation. *Id.* at art. 21.6. See *infra* pp. 91–100 for a discussion of why and at pp. 93–100 for how the WTO must re-imagine the role of the Dispute Settlement Body.

²¹ Retaliation harms the country imposing it because it increases the cost of imports from a trading partner. The retaliating country then faces the choice of paying higher prices for inputs or shifting to other countries to supply those inputs. See Peter Van den Bossche, THE

WTO-compliance, temporary compensation until compliance, or retaliation—are prospective in nature.²² Third, there are stark power asymmetries within the organization that reveal the limits of the remedy. Some WTO Member States, to date larger developed countries,²³ have resisted the legal rulings and the trade sanctions authorized to compel compliance. By contrast, most of the other WTO Member States cannot²⁴ risk using or facing retaliation.

Another reason there has been a push for DSU reform is that there are gaps in the design and problems with the operation of the compliance portion of the system. The DSU, as written, is inadequate with regard to the issue of compliance, *i.e.*, to what should happen after the respondent loses.

What reforms to the DSU and dispute settlement practice would make the system more effective regard to the sustained non-compliance disputes? This article provides one answer by offering, first, a review of the disputes that have resulted in delayed,²⁵ inadequate,²⁶ and sustained non-compliance.

LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 223 (2005) (noting that “retaliation measures are trade destructive and the injured party imposing these measures is also negatively affected by these measures”).

²² The prospective nature of the remedy is widely regarded as one of the problems with the DSU remedy regime as it does not provide enough incentive for the losing respondent to comply. See Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PENN. L. REV. 171, 214 (2008).

²³ See *infra* pp. 23–26 (*Hormones*), 30–33 (*Bananas III*), and 35–37 (*FSC*).

²⁴ See Rolland, *supra* note 8, at 190–191 (noting that most developing countries have not been able to make use of the retaliatory system in the WTO and that “trade asymmetries and the limitations they pose to effective retaliation affects small developed countries as well as developing countries”). See also Marco Bronkers & Freya Baetens, *Reconsidering Financial Remedies in WTO Dispute Settlement*, 16 J. INT’L ECON. LAW 281, 281 (2013).

²⁵ Observers have noted that the least amount of time that it takes for a dispute to complete if it goes to the Appellate Body for review is three years. This process goes even longer if the case involves complex or highly contested facts. See Raj Bhala & Lucienne Attard, *Austin’s Ghost and DSU Reform*, 37 INT’L L. 651, 661 (2003) (noting that, in practice, Member States “believe they can go three years before having to worry about compliance.”) See also Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Enforcement*, 80 GEO. WASH. L. REV. 102, 117–25 (2011) (for a full analysis of the time it takes to complete DSU proceedings and what the delay means in practice) [hereinafter Brewster]. For the most recent statistics on the time WTO dispute settlement proceedings take at each step see Louise Johannesson & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2016* at 8-14, (European University Institute, RCAS 2016/72 EUI Working Papers, 2016) [hereinafter Johannesson & Mavroidis].

²⁶ “Inadequate compliance” occurs when a respondent represents before the complainant and the DSB that it has implemented but compliance review under Article 21.5 of the DSU concludes that it still has not come into compliance with the recommendations of the DSB. It is even possible that a respondent can comply, receive a blessing on its compliance in an Article 21.5 compliance review, and then re-enact a measure similar to the original WTO-illegal measure. See David R. Townsend & Steve Charnovitz, *Preventing Opportunistic Uncompliance by WTO Members*, 14 J. INT’L ECON. L. 437, 439–47 (2011) (identifying the practice as one that occurred in *Upland Cotton* and calling it as “uncompliance”) [hereinafter

Additionally, this review analyzes not only what happened in each dispute but also the legacy each has left the system. The second section of the article isolates the limitations in the DSU system revealed by the sustained non-compliance disputes. The third section of the article assesses the DSU reform process conducted by the WTO and whether it offers any solutions to the limitations revealed. Under examination in this section is the adequacy of the proposed reforms of the compliance and enforcement sections of the DSU. The article concludes with a proposed solution on how to enhance DSB surveillance. Despite the gains that might come from adopting a new remedy,²⁷ the WTO can make a slightly reformed system work and, importantly for legitimacy purposes, appear to work.²⁸ What is required, however, is a re-imagined role for the WTO acting as an organization and as the Dispute Settlement Body.

I. INTRODUCTION: THE REALITY OF COMPLIANCE IN THE DSU SYSTEM

The case for reforming the DSU remedy regime stems from critiques of what has happened in disputes involving delayed, inadequate, and sustained non-compliance. What exactly is the record of the DSU system in producing compliance with its decisions? Answering this question requires examining not only what has happened in the dispute settlement system but also what the DSU intended regarding compliance.

How the DSU Process Operates

WTO Members undertake several obligations relating to dispute settlement: (1) to bring all disputes based on any WTO agreement²⁹ into the

Townsend & Charnovitz].

²⁷ See Trachtman – WTO Cathedral, *supra* note 7, at 156–66 (discussing all aspects of how developing countries might benefit from a remedy system that focused on some form of monetary compensation); see also Bronckers & Van den Broek, *supra* note 7, for a similar discussion.

²⁸ The legitimacy spoken of here is the legitimacy the system holds in the eyes of its Member States. See Cosette D. Creamer & Zuzanna Godzimirska, *(De)Legitimation at the WTO Dispute Settlement Mechanism*, 49 VAND. J. TRANSNAT'L L. 275, 275–81 (According to Creamer and Godzimirska, legitimacy of institutions and international courts has both a normative and an empirical dimension. The normative dimension is based on whether the international court is worthy of support. The empirical dimension of legitimacy can be measured by examining the constituent views that support the court's exercise of authority.) [hereinafter Creamer & Godzimirska].

²⁹ The WTO dispute settlement process is triggered when a Member State complains that a benefit it expected under a GATT Agreement has been “nullified or impaired” by: (1) the failure of another Member State to carry out its obligations under the GATT, (2) the application by another Member State of any measure whether or not it conflicts with the GATT, or (3) the existence of any other situation. The WTO adopted a new dispute settlement mechanism in the DSU it retained the subject matter basis for all claims from the

system for resolution,³⁰ (2) to consult with other Member States prior to entering into the arbitral process to resolve the dispute;³¹ and (3) to settle any dispute by reaching a mutually satisfactory solution or complying if it loses with the recommendations of the arbitral process.

If the disputants do not reach a settlement after consultations, the dispute will go through the DSU arbitral process.³² If the disputants go to arbitration, the panel must hear the dispute and render a report.³³

If it loses, the respondent must comply by withdrawing the offending measure(s).³⁴ As an alternative, the respondent (and the complainant) may appeal the legal determinations made by the panel.³⁵ After the AB renders a decision on any appeal, a losing respondent must again comply by withdrawing the offending measure(s) within a reasonable period.³⁶ The

language set out in Article XXIII of the GATT. When filing a request for consultations under the DSU, the complainant must state whether the claim is brought under Art. XXII of the GATT (which allowed for mediation only) or Art. XXIII (which allowed for GATT dispute settlement). See DSU, *supra* note 14, at art. 3.1.

³⁰ A Member State can file a dispute alone or with other countries. See the *Shrimp/Turtle* dispute, Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), which was filed and prosecuted by India, Pakistan, Malaysia and Pakistan against the United States. That dispute began with multiple requests for consultations, see, e.g., Request for the Establishment of a Panel by Malaysia and Thailand, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/6 (Jan. 10, 1997) (requesting input on Section 609); Request for the Establishment of a Panel by Pakistan, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/7 (Feb. 7, 1997) (requesting input on Section 609); Request for Establishment of a Panel by India, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/8 (Mar. 4, 1997) (requesting input on Section 609), but was combined into one case for the issuance of the panel and AB reports.

³¹ DSU, *supra* note 14, at arts. 3.7 and 4.4. A WTO dispute begins when a Member State or group of Member States files a request for consultations with a respondent Member State setting out the basis for a claim—the violation of any WTO agreement(s) or the loss of benefits. If consultations between or among the disputants fail to resolve the dispute leading to a withdrawal of the claim or a mutually agreed solution, then the complainant(s) can ask for the appointment of an arbitral panel.

³² *Id.* at art. 6 (Establishment of Panels), art. 11 (Function of Panels) and art. 16 (Adoption of Panel Reports).

³³ *Id.* at art. 12.7.

³⁴ *Id.* at art. 3.7.

(“In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of measures the concerned if these are found to be inconsistent with the provisions of any of the covered agreements.”)

³⁵ *Id.* at arts. 16.4, 17.4 & 17.6.

³⁶ It is possible that the losing respondent could implement the recommendations of the DSB by removing the offending measure immediately. However, if it is “impracticable to comply immediately,” the respondent is given a “reasonable period of time” to comply. *Id.* at art. 21.3. The respondent is entitled to an arbitral panel on the issue of what constitutes a reasonable time under the circumstances of the case if that is not agreed upon by the

respondent can settle the case even after the arbitral process has completed through reaching a mutually agreed solution.³⁷ A respondent may offer compensation,³⁸ however, any compensation is a temporary measure to be employed pending full compliance. Should the respondent fail to take any action after the running of its reasonable period for compliance, the complainant may seek authorization from the DSB to suspend concessions (either tariff or other concessions) against the respondent.³⁹ The retaliation is prospective only and limited to amount of harm suffered by the complainant Member State.⁴⁰

If the respondent takes action to comply within the reasonable period but the complainant has doubts about that compliance, the DSU allows for a challenge to the respondent's implementation. This part of the system is a compliance review⁴¹ and operates by reinstating the original panel to review the respondent's actions and claims of compliance. This compliance review is also subject to appeal and appellate review.⁴² If this second level of

disputants. *Id.* at art. 21.3.

³⁷ *See id.* at art. 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements”).

³⁸ *Id.* at arts. 22.1 & 22.2.

³⁹ *Id.* at art. 22.2. If the suspension of concessions stage is reached in a dispute, the complaining party is required to retaliate only within the GATT world. It should first seek to suspend concessions in the same sector of trade in which a violation was found. If such a response is not “practicable or effective,” then the complaining party can turn to other sectors of trade in the same GATT agreement, or in sufficiently serious circumstances, to another GATT agreement altogether. In the worst-case scenario—where the nullification or impairment of benefits is severe and the offending party refuses to withdraw the offending measure or compensate—the DSU authorizes cross retaliation. For example, a country that was having its benefits under the Agriculture Agreement nullified or impaired by illegal subsidies could retaliate under the TRIPs Agreement by withdrawing protection for intellectual property rights held by foreigners.

⁴⁰ The complaining country in a WTO dispute is cannot to determine the amount or extent of retaliation by itself. Any retaliation must be proportional—equivalent to the level of nullification or impairment—and can be objected to by the offending country. Thus, the level of retaliation can become the subject of an arbitral decision. The DSB surveillance done to ensure equitable retaliation, however, should not obscure the WTO goal of coercing the offending country into compliance with its GATT obligations. To the extent, it is possible to enforce a decision against a country; the drafting of the DSU achieves that goal in most cases.

⁴¹ DSU, *supra* note 14, at art. 21.5.

⁴² Although the DSU as written does not offer a right to AB, review of compliance review decisions that practice has always been followed. *See* Yang Guohua, Bryan Mercurio and Li Yongjie, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 242 (2005) (stating that “in disputes as to the consistency of the measures taken to comply with the rulings of the DSB, the parties will undergo consultations and, if necessary, the

litigation reveals that there has been no or inadequate compliance—that the violation has not been eliminated—the complainant is allowed to seek authorization by the DSB to suspend concessions. This suspension of concessions—or use of trade sanctions or retaliation—is meant to be temporary. It is to be applied only “until such time as the measure found to be inconsistent with the covered agreement has been removed,” or the respondent “provides a solution to the nullification or impairment of benefits” or the disputant agrees that a “mutually satisfactory solution.”⁴³ The drafters of the DSU made no provision for what would occur after the DSB authorized retaliation or how retaliation, if employed, would end. The sole paragraph of the DSU devoted to such issues merely states that the DSB shall “continue to keep under surveillance the implementation of adopted recommendations or rulings.”⁴⁴

Member- and Institution-Driven Aspects of the System

The WTO created the DSU to be a self-enforcing system, one that leaves the Member States to determine when to invoke the system, what parts of it to use and how to achieve relief. The DSU system, however, operates within the larger organization.⁴⁵ Thus, it is impossible to understand how the system operates without examining how the member-driven and institution-driven aspects of the system play out.

On the member-driven side, two aspects of the system stand out as crucial—the role of settlements and the way DSU decisions affect the trade policies of Member States. Negotiations, and the settlements arising from them, are a key feature of the system. As designed, the DSU provides the Member States with the right to bring claims against each other⁴⁶ and it

establishment of a panel and appellate review) [hereinafter Guohua, Mercurio & Yongjie]. The measures examined in a compliance review are new ones—those taken by the respondent to implement the DSB recommendation to bring its measure into compliance with WTO law. Consequently, the claims, arguments and facts in a compliance review will usually be different from those discussed and analyzed in the original dispute. See Appellate Body Report, Canada—Regional Aircraft, *supra*, note 4, at ¶ 41.

⁴³ DSU, *supra* note 14, at art. 22.8.

⁴⁴ *Id.* at art. 22.8.

⁴⁵ The WTO is a Member State organization. The Members do bring disputes against each other in the system described by the DSU as “a central element in providing security and predictability to the multilateral trading system.” *Id.* at art. 3.2. However, in the dispute settlement system Member States not only act as parties but as enforcers of the rules as part of the DSB. Moreover, dispute settlement is only one of the main functions of the WTO. The organization also has two other main functions—rulemaking and surveillance of rule implementation. The Member States negotiate the WTO agreements through consensus. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) at arts. III.2 & IX.1. The Member States also oversee implementation of the existing WTO agreements. *Id.* at art. III.1.

⁴⁶ *Id.* at art. 3.7.

establishes a panel system and the AB to “clarify the existing provisions” of WTO agreements. However, the disputants’ right to negotiate a “mutually agreed solution”⁴⁷ to the problem starts from the beginning and remains available throughout the entirety of a dispute and its resolution.⁴⁸ The disputants can always end a case by withdrawing a complaint, abandoning it or by coming to a mutually agreed solution. The DSU does impose some discipline on such settlements. Article 3.7 states that mutually agreed solutions are the preferred remedy in the WTO dispute settlement system and that they must be: (1) consistent with WTO agreements; (2) not nullify or impair the rights of any Member; and (3) not impede the attainment of the objectives of any WTO agreement.⁴⁹

In practice, some disputants have gone beyond this and reached agreements both on how the DSU rules operate⁵⁰ and on how to resolve the disputes where there has been sustained non-compliance. Several of the cases that have gone to retaliation and beyond have truly resolved⁵¹ only with one of these Member-crafted negotiated settlements. These disputes

⁴⁷ The DSU does not define the term “mutually agreed solution.” However, the DSU makes it clear how important such settlements are.

⁴⁸ See DSU, *supra* note 14, at arts. 4.3 (purpose of the consultations is to reach mutually agreed solution), 11 (the parties to a dispute are given the chance during the arbitral process to reach a mutually satisfactory solution), 12.7 (only after failure to reach a mutually satisfactory solution does the arbitral panel submit its report on the dispute to the Dispute Settlement Body), 22.2 (the parties can reach a mutually satisfactory solution after the reasonable period given for compliance has run) & 22.8 (the parties can end the use of DSB-authorized sanctions by reaching a mutually agreed solution).

⁴⁹ *Id.* at art. 3.7.

⁵⁰ The leading example is the Member negotiated agreement on how to handle the sequencing of the rights to seek and full compliance review (Art. 21.5) and the right to seek sanctions against the respondent which has failed to comply (Art. 22.6). According to Art. 21.5, if the parties to a dispute end up in a “disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” there can be review (whenever possible by the original panel) of the contested implementing measure. DSU art. 21.5. At the same time, Article 22 states that if a losing party fails to comply within a reasonable period, the winning party is entitled to invoke the process for seeking DSB authorization for a suspension of concessions. *Id.* at art. 22.2. Neither Art. 21.5 nor Art. 22.2 refer to each other. Consequently, the proper order or sequence that disputing parties should follow is unclear. The resulting gap in the DSU led to a political dispute and negotiations during the *Bananas III* dispute. See also Guohua, Mercurio & Yongjie, *supra* note 42, at 273–79 for a full discussion of the sequencing debate that arose in the *Bananas III* dispute. The Member-crafted resolution to the sequencing issue has been accepted as a solution to the original textual ambiguity. See DSB—Special Session, *supra* note 8, at A-15 (revealing the proposed amendments to DSU art. 22.2 *bis* that would expressly limit the right to pursue retaliation until after the complainant has had recourse to the Art. 21.5 compliance review process.) This draft text along with a Report by the Chair of Negotiations on the status of negotiations through April of 2011 has been derestricted.

⁵¹ See *infra* pp. 23–27, 30–34 & 51–54 for a discussion of the *Hormones*, *Bananas III*, and *Upland Cotton* disputes, respectively.

were resolved with a mutually agreed solution that was actually an interim settlement⁵²—with settlements that “typically outline compliance steps towards a final solution of the dispute” that will occur later. These interim settlements are not actually consistent with the DSU. This end game for troubled disputes can occur because the DSU lacks a procedure for what happens if retaliation does not resolve the dispute.

The other Member-driven aspect of the dispute settlement system is that it delivers answers about trade law but not changes in trade policy. True resolution of a WTO dispute that ends in favor of the complainant occurs only when the losing respondent internalizes the decision reached by the DSU process. If the case is resolved through negotiations, the respondent must accommodate the new understanding or settlement in its trade or regulatory policy. If the dispute goes through the whole DSU process, including the use of retaliation, the same thing must happen but under difficult political conditions. Most often disputes go through the full process either because the respondent believes the measure(s) targeted by the case are too politically important to abandon⁵³ or because of a well or ill-founded belief about its legality.⁵⁴

Once the respondent has lost the legal fight, the dispute turns into a compliance matter. Compliance is also inherently political. For one thing, there is no single way to comply. The DSU suggests that the goal of the arbitral panel part of the system is to “secure the withdrawal of the measures concerned.”⁵⁵ However, a losing respondent is not always in a position to make a measure simply disappear. What frequently happens is that the respondent must choose from a variety of options for compliance. It can pass a WTO-consistent new statute or regulation (that responds to the AB report on the WTO law in the dispute), approach the same trade or regulatory goal it seeks by new method or by abandon its goal and building a domestic political consensus around a new policy.⁵⁶ Large developed

⁵² Wolfgang Alschner, *Amiable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System*, 13 *WORLD TRADE REV.* 65, 68, 72 (2014) (Alschner coined the term “interim settlements” and has pointed out that the DSU does not provide authorization for this type of settlement as any mutually agreed solution should be consistent with WTO agreements.) [hereinafter Alschner]. Interim settlements used by WTO Member States always leave the violative measure in place for longer either than the respondent is allowed or in some cases permanently.

⁵³ See *infra* pp. 23–27, 30–34 for a full illustration of this in the *Hormones* and *Bananas III* disputes.

⁵⁴ See *infra* pp. 34–38, 60–63 for a discussion of this in the *Foreign Sales Corporation* and *Zeroing* disputes.

⁵⁵ DSU, *supra* note 14, at art. 3.7.

⁵⁶ See C. O’Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 *U. PA. J. INT’L ECON. L.* 309, 415 (2007) for an illustration involving the *FSC* dispute (where the U.S. shifted to a tax cut for U.S. corporations after trying and failing to save the *FSC* program) [hereinafter *Impossible Cases*].

countries with active democracies face difficulties complying because they receive large amounts of civil society input about any particular dispute and its outcome.⁵⁷ These countries also receive input and assistance⁵⁸ from domestic industries regarding which WTO cases to bring, how to conduct that litigation and how to resolve the dispute. Thus, WTO respondents are pressured by a focused constituency about how to resolve a tough dispute.

Two institution-driven aspects of the DSU system operates also explain why WTO disputes end as they do: (1) the WTO plays a role in every dispute and (2) the DSU has a role. While Member States have control at the beginning and the end of disputes, the WTO provides the arbitral process for resolving the dispute and the DSB tries to oversee the end. The DSB must receive notification about the filing of disputes⁵⁹ and it should receive notification when they are settled.⁶⁰ The DSB adopts the panel or AB report in each dispute and thus serves as the body recommending that the respondent bring itself into compliance with the legal rulings of the system.⁶¹ The DSB then engages in what the DSU labels “surveillance” of the compliance of the respondent. The DSB puts all decided disputes on its agenda for monthly meetings where it receives reports as well as questions and complaints about compliance by losing respondents.⁶² The DSB establishes compliance reviews⁶³ when the complainant alleges that the losing respondent has failed to comply. Finally, the DSB authorizes the suspensions of concessions for respondents finally adjudged as having failed to comply.⁶⁴

The DSB successfully plays its role in running the arbitral process. Where the DSB fails is at surveillance—as the overseer of compliance. The requirement that losing respondents file status reports on compliance does not provide any true discipline. Respondents often file status reports that do not share any information about plans or efforts to comply.⁶⁵ The DSB

⁵⁷ See *infra* 63–69 for this in the COOL dispute.

⁵⁸ Gregory C. Shaffer, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 23–24 (2003) (discussing U.S. support for Chiquita Brands’ opposition to the EC banana licensing regime) [hereinafter Shaffer].

⁵⁹ DSU, *supra* note 14, at art. 4.4.

⁶⁰ *Id.* at art. 3.6. See also Guohua, Mercurio & Yongjie, *supra* note 42, at 23 (“To guarantee the objectives [of the DSU], this understanding also requires the parties to a dispute to notify the DSB and the relevant councils and committees of any mutually agreed solution.”).

⁶¹ DSU, *supra* note 14, at arts. 16.4 and 17.14.

⁶² *Id.* at art. 21.6.

⁶³ *Id.* at art. 21.5.

⁶⁴ *Id.* at art. 22.

⁶⁵ See Guohua, Mercurio & Yongjie, *supra* note 42, at 245 (noting that “nothing more than status reports are required from respondents at the DSB meetings during the compliance period and that “no progress need be shown in the reports”).

does not follow up, question the respondent, or compile information about compliance. Rather, the DSB simply collects responses by Member States about a lack of compliance in particular disputes, and non-compliance as a problem for the system.⁶⁶ The inadequate surveillance done by the DSB has played a large role in the disputes that go to retaliation and beyond.⁶⁷

The DSU—which provides the procedural framework for all disputes—is flawed with regard to the end stage of disputes. The DSU process came largely from the dispute settlement system employed in the GATT, the predecessor to the WTO.⁶⁸ However, there were innovations added when the WTO chose to adopt a more adjudicative model for dispute resolution.⁶⁹ The DSU added the Appellate Body and gave it a role to play in reviewing original panel reports and compliance review reports.⁷⁰ Another major innovation was to create an enforcement phase for disputes.⁷¹ The GATT dispute settlement system allowed the GATT membership to authorize retaliation.⁷² The GATT system, however, lacked what the DSU established in Articles 21 and 22—a process for disputants to work through both to induce compliance and to respond to non-compliance.⁷³ The Appellate Body innovation has operated quite well. By

⁶⁶ The majority of the comments made in the monthly status meetings DSB meetings “are made in the context of surveillance of implementation of DSB recommendations and other issues related to compliance with dispute rulings”.) Cosette D. Creamer & Zuzanna Godzimirska, *The Rhetoric of Legitimacy: Mapping Members’ Expressed Views on the WTO Dispute Settlement Mechanism*, iCourts Working Paper, No 16 (Feb. 2015) at 10 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560780&download=yes [hereinafter *Rhetoric of Legitimacy*].

Member States also make other statements to the DSB. A large proportion of statements are made at the time of the adoption of the panel and AB reports by the DSB. By contrast, these “statements typically comment on legal interpretations developed or procedural decisions issued by panels or the Appellate Body.” Creamer & Godzimirska, *supra* note 28, at 286.

⁶⁷ See *infra* pp. 62, 23–26, 30–34 for illustrations in the *Zeroing*, *Hormones*, and *Bananas III* disputes.

⁶⁸ See Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES & LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS & TRIBUNALS 369, 372–76 (Friedl Weiss ed., 2000)[hereinafter Hudec].

⁶⁹ See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOB. TRADE 1, 7–11 (1999).

⁷⁰ See *Impossible Cases*, *supra* note 56, at 313–14.

⁷¹ See Hudec, *supra* note 68, at 376 (describing the lack of any enforcement system in the GATT where the losing respondent faced “no time limit on the order to comply, and the process could drag on for years”).

⁷² It was possible for the winning complainant to request retaliation but these requests could and were when requested vetoed by the losing respondent. *Id.* at 376.

⁷³ See Hudec, *supra* note 68, at 393 (“Judging by the text of the DSU, one of the main objections to the GATT dispute settlement was the lack of any follow-up procedure for approved legal rulings... the negotiations... set forth a precise procedure and schedule for what happens after a ruling is adopted.”).

contrast, the enforcement phase of the DSU has prompted disagreements among the membership, litigation by the Member States, and attracted the greatest number of reform proposals in the DSU reform negotiations.⁷⁴ The enforcement phase of the DSU has both gaps⁷⁵ and a limited conception of what it means for the DSB to conduct surveillance over compliance (Article 21) or oversee the suspension of concessions (Article 22).⁷⁶

Most of the WTO cases are resolved in accordance with the DSU process. However, a small number, eleven,⁷⁷ have required extended surveillance and the authorization of retaliation by the DSB. The number of these disputes is small but the impact of these disputes has not been. These disputes have resulted in questionable practices by the disputants and criticism of the system because of how these disputes have, and sometimes have not, worked out. In some of these disputes,⁷⁸ the complainants never used the DSB authorization of retaliation and the disputants settled the case. In all of the others, there was delayed and inadequate compliance, the use of retaliation often for many years, extended WTO litigation by the disputants⁷⁹ over every aspect of compliance and non-compliance, and heavily negotiated and *ad hoc* settlements.

Only a limited number of WTO Member States have been the major players⁸⁰ in the disputes involving sustained non-compliance and the presence of these Member States has been crucial. To date, the countries involved as complainants and respondents pushing disputes to a resolution

⁷⁴ See generally THOMAS A. ZIMMERMANN, NEGOTIATING THE REVIEW OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING 148–65, 204–09 (2006) [hereinafter Zimmermann].

⁷⁵ See *infra* pp. 16–17 and 77 for a discussion of one gap—the lack of a post retaliation procedure. This had led to a host of problems such as how the DSB should respond to a respondent passing a new measure to comply after sanctions have been authorized and used. See WTO INSTITUTIONS AND DISPUTE SETTLEMENT 518 (Riidiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser, eds., 2006).

⁷⁶ See Guohua, Mercurio & Yongjie, *supra* note 42, at 245–46. See *infra* pp. 75–77 for a discussion of the flawed surveillance of the DSB.

⁷⁷ See *supra* note 4 and *infra* pp. 69–74 for a discussion of the problems revealed by the eleven disputes.

⁷⁸ See *infra* pp. 51–54, 62–63, 40–41, and 67–68 for a discussion of the *Upland Cotton*, *Zeroing*, *Regional Aircraft*, and *COOL* disputes.

⁷⁹ In the *Hormones* dispute, there was actually a second-generation set of cases about the use of retaliation. The EU filed two cases against the U.S. and Canada for continuing to maintain sanctions authorized as part of the *Hormones* case after the EU argued that it has complied. See WTO, *Request for the Establishment of a Panel by the European Communities*, UNITED STATES - CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC - HORMONES DISPUTE (2005); WTO, *Request for the Establishment of a Panel by the European Communities*, CANADA - CONTINUED SUSPENSION OF OBLIGATIONS IN THE EC - HORMONES DISPUTE (2005).

⁸⁰ This is a listing of those Member States participating as complainants and the respondents. Many more WTO Member States have participated in the sustained non-compliance disputes as Third Parties.

are (listed according to frequency): United States (nine), the EU (six), Canada (five), Brazil (four), Mexico (three), Japan (three), Ecuador (one), Antigua (one), Australia (one), Chile (one), Guatemala (one), Honduras (one), India (one), Indonesia (one), Korea (one) and Thailand (one). The role of the largest and most powerful WTO Member States is the most noticeable aspect of these disputes. The United States has been involved in almost every case—the respondent in seven of these disputes and the complainant in two.⁸¹ The EU has been the respondent in two disputes and the complainant in four others.⁸²

Systemic Compliance versus Inadequate and Sustained Non-Compliance

The WTO DSU statistics reveal a high level of systematic compliance. According to its official tabulation—the Current Status of Disputes—as of September 2017, most of the disputes filed in the system have been resolved with no dispute over compliance.⁸³ A large number of cases, 27%, never move past the consultations phase.⁸⁴ The disputant, for whatever reason, decide not to pursue the dispute.⁸⁵ In a certain percentage of cases, 9%, a panel is established but not composed to hear the dispute, the panel is composed but never issues a report, the parties do not seek adoption of the

⁸¹ The U.S. was the respondent in *FSC*, *Upland Cotton*, *Gambling*, *Antidumping Act of 1916*, *Byrd Amendment* and *Zeroing*, and *COOL* disputes. The U.S. was the complainant in *Hormones* and *Bananas III*.

⁸² The EU was the respondent in *Bananas III* and *Hormones* disputes. The EU was the complainant against the U.S. in *FSC*, *Zeroing*, the *Byrd Amendment*, and *Antidumping Act of 1916* disputes.

⁸³ The WTO maintains and updates an accounting of the status and outcomes of all DSU disputes on the Dispute settlement page of the WTO website. WORLD TRADE ORG., CURRENT STATUS OF DISPUTES, http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (last visited September 25, 2017) [hereinafter Current Status Report]. All of the statistics used in this article come from this official accounting by the WTO. Periodically the WTO DSB publishes an Overview of the State of Play of WTO Disputes. The most recent version of the Overview comes as an Addendum to the WTO Annual Report for 2014. See WORLD TRADE ORG., OVERVIEW OF THE STATE OF DISPUTES ANNUAL REPORT ADDENDUM (2014), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=128838,120508,92133,99233,107504,102197,94202,70311,58777,51691&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [hereinafter 2014 Overview]. As of September 25, 2017, 530 disputes have been brought to the WTO dispute settlement system.

⁸⁴ See *supra* Current Status Report. One hundred and sixty disputes are listed as still in consultations, some going back to 1995 when the WTO dispute settlement system began. If the most recent cases to enter consultations are subtracted from this total – the sixteen disputes that started consultations in 2016 and 2017, then approximately 27% of the disputes have never left this phase.

⁸⁵ See Amelia Porges, *Settling WTO Disputes: What Do Litigation Models Tell Us?*, 19 OHIO ST. J. DISP. RESOL. 141, 164–70 (2003) for a discussion and analysis of when Members settle disputes.

panel or AB report or the authority for a panel lapses.⁸⁶ Approximately 18% of the cases that go to a panel or to an AB panel are settled or terminated prior to the adoption of any DSU report.⁸⁷ Together these categories of results account for what happens to 54% of all WTO disputes.

Of the cases that go to a panel and/or on a review by an AB panel, approximately 5.5% are victories for the respondent⁸⁸ and as a result require no further action. When the dispute results in a victory for the complainant, approximately 17% of the disputes are resolved when the respondent takes some action to implement the recommendation of the panel or AB panel.⁸⁹ Another set of disputes that go through DSU proceedings and resolve through a mutually acceptable solution or implementation; and these account for 4% of the total number of disputes.⁹⁰ Finally, there is a set of disputes that go through proceedings but the disputants never fully notify the DSB of the resolution. This category accounts for 8% of all disputes.⁹¹ What these statistics, covering 88.5 % of the cases reveal,⁹² is satisfaction achieved through consultations, implementation by the respondent, mutually satisfactory settlements, or by resolution in some period or fashion that satisfied the complainant.

There has been relatively little use of the final remedy⁹³—the suspension or concessions. According to the WTO Current Status Report, the DSB authorized retaliation as the final step for only six disputes. The WTO keeps Current Status Report statistics, however, in a manner that makes it impossible to unpack what actually occurred in the cases that went to retaliation and beyond. The WTO classifies each dispute in the Current Status report as falling under only one category. The WTO explains that this summary report “is intended to reflect the current status of disputes, based on the most recent event having taken place in the proceedings for each dispute.” The report reflects whatever the disputants report in their

⁸⁶ See Current Status Report, *supra* note 79. (panel established not composed – 26 disputes; panel composed no report – 12 without the 7 from 2016 and 2017 panel authority lapsed –12). These have all be added together to hit the 9%.

⁸⁷ *Id.* The Current Status Report lists ninety-six disputes in this category.

⁸⁸ *Id.* Twenty-nine disputes are listed in this category.

⁸⁹ *Id.* Eighty-nine disputes are listed in this category.

⁹⁰ *Id.* Twenty-three disputes are listed in this category.

⁹¹ *Id.* Forty-two disputes are listed as falling within this category.

⁹² *Id.* The percentages do not add up to 100% because some disputes are listed as in the early stages of consultations, or as involving appeals, requests for retaliations, and retaliation being granted.

⁹³ According to the WTO, there have been only seven cases where retaliation was authorized. However, these seven disputes cover only four matters – *Byrd Amendment*; *Regional Aircraft* (Brazil v. Canada); *Gambling, COOL*, and in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381 (where Mexico was authorized to suspend concessions in May 2017).

last notification to the DSB.⁹⁴ All of this makes it impossible to track from the summary all of the cases where retaliation played a role as a credible threat compelling settlement or implementation or to encourage an *ad hoc* settlement of some type after retaliation was used. The actual number of disputes where retaliation has played such roles is almost double the number reported by the WTO.⁹⁵ Moreover, it is important to note that compliance by all respondents takes place under the shadow of retaliation.⁹⁶ Any reading of the statistics kept by the WTO does suggest that retaliation serves as an effective threat.⁹⁷

The Sustained Non-Compliance Disputes

What follows is a series of short case studies setting out: (1) the basis for the dispute; (2) the role of retaliation; (3) what happened beyond retaliation and 4) the legacy, if any, left for the DSU system. The case studies are in chronological order and focus on implementation rather than on the legal issues raised in the dispute.⁹⁸

⁹⁴ According to Sacerdoti and his statistics for 2016, when there were 500 disputes, only 282 disputes went through the full DSU process. Of those that did not go through the panel process, 110 were resolved through bilateral negotiations, including formal withdrawal of the complaint, while in the remaining 108 the disputants have failed to inform the DSB about the status of the dispute. Sacerdoti says that these 108 disputes must be “considered dormant or de facto settled.” Sacerdoti, *supra* note 16, at 53.

The fact that so many of the disputes cannot be properly accounted for in the Current Status report makes these statistics of limited value.

⁹⁵ As pointed out earlier, there are eleven disputes where retaliation has played a pivotal role. In addition to the four disputes in this article noted in footnote 93 *supra*, there are three disputes, *Hormones*, *Bananas III*, and *FSC*, that turned on the use of retaliation, listed in the Current Status Report as “mutually acceptable solution on implementation notified.” The other disputes where retaliation was authorized and that authorization persuaded the respondent to offer a settlement or withdraw the trade policy under attack also include the *Regional Aircraft* (Canada v. Brazil), *Antidumping Act of 1916*, *Upland Cotton*, and *Zeroing*, disputes.

⁹⁶ There is extensive scholarly examination of why most of the losing respondents comply. See Joost Pauwelyn, *The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations*, THE LAW, ECONOMICS, AND POLITICS OF RETALIATION IN WTO DISPUTE RESOLUTION 34, 59 (Chad P. Bown & Joost Pauwelyn eds., 2010); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S194 (2002). There is no doubt that the Member States are committed to the organization and to maintaining their reputations for complying with their obligations. *Id.* But there is every reason to believe that the ultimate remedy, the right to request and thereby threaten retaliation, plays a role as well.

⁹⁷ See *infra* pp. 57-60 for a discussion of where this may not be true – where the threat of retaliation is being made by a small developing country against a large developed country. That is what happened in the *Gambling* dispute.

⁹⁸ Much more could be written about every one of the eleven disputes examined here including an analysis of whether the Appellate Body decisions and those of the Art. 21.5

EU: Hormones (WT/DS 26)

Basis for dispute

The basis for the *Hormones* dispute was the claim by the United States and Canada in 1996⁹⁹ that an EU ban on hormone-fed beef violated Articles 2, 3 and 5 of the Sanitary and Phyto-Sanitary Agreement (SPS Agreement).¹⁰⁰ A DSU panel determined in 1997 that the ban was inconsistent with Articles 3 and 5 of the SPS Agreement. The Appellate Body report, issued after both sides appealed, determined that the ban was not “based on” a risk assessment as required under the terms of Article 5.1 of the SPS Agreement.¹⁰¹ The AB recommendation was that the EU bring the relevant SPS measure into compliance with its obligation under the agreement.¹⁰² In this instance, the AB found the EU at fault for having a ban was that not been properly created and maintained.

The EU announced that it would comply with the AB report. Despite its claim of an intention to comply, the EU failed to lift the ban during the period granted for implementation of the report.¹⁰³ The EU was unwilling to lift the ban, as that would have allowed hormone-fed beef into its market. The EU idea of compliance was to justify its ban. The EU did this by conducting a risk assessment and passing new legislation that contained a ban.¹⁰⁴ When the EU did not withdraw the ban, the United States and

compliance panels were accurate. For a more in-depth examination of some of the disputes (*Hormones*, *Bananas III*, and *FSC*). See *Impossible Cases*, *supra* note 56.

⁹⁹ World Trade Org., *Request for Consultations by Canada*, EUROPEAN COMMUNITIES - MEASURES AFFECTING LIVESTOCK AND MEAT (HORMONES) (1996). The results of the U.S. and Canadian panels in the dispute reached the same results. The appeal combined the disputes.

¹⁰⁰Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Amex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14 (1994) [hereinafter SCM Agreement] at art. 2, 3, 5.

The SPS Agreement sets out the major obligations of Member States in the adoption or maintenance of sanitary and phyto-sanitary measures. A Member State must ensure that any SPS measure is necessary to protect human, animal, or plant life, or health, and is based on scientific principles. A Member State must base its SPS measure on international standards and guidelines, except where the country intends to provide a higher level of protection. If a Member State does choose to provide that higher level of protection, it must base its SPS measure on “an assessment, appropriate to the circumstances, of the risks” to human, animal, or plant life or health.

¹⁰¹Hormones AB Report, *supra* note 4, ¶209.

¹⁰²*Id.* ¶¶ 195–209.

¹⁰³See *Impossible Cases*, *supra* note 56, at 365–66.

¹⁰⁴See Daniel Wuger, *The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 LAW & POL’Y INT’L BUS. 777, 806–09 (2002) (describing the pressure on President G.W. Bush to implement carousel retaliation).

Canada sought authorization under the terms of Article 22 of the DSU from the DSB to suspend concessions against the EU.¹⁰⁵ In 1999 both countries were granted the right to suspend concessions—\$116.8 million per year for the United States and \$11.3 million per year for Canada.¹⁰⁶ Sanctions began immediately and continued in parallel with negotiations between the disputants.

Role of Retaliation

There is no evidence that the use of sanctions by the United States and Canada affected the pace of the EU's decision about what to do with its ban. In 2003, after four years of sanctions, the EU announced new legislation that continued the ban.¹⁰⁷ The EU claimed that there was new scientific evidence justifying the ban and that this measure brought the EC into compliance.¹⁰⁸ The United States and Canada rejected the EU claim of compliance as well as the EU request that they initiate an Article 21.5 compliance review to resolve the compliance issue.¹⁰⁹ The EU sought a compliance review because a review in its favor would determine that sanctions should cease. Since the DSU lacked any post-retaliation procedure dictating the next step in the dispute settlement process, the EU decided to test the legality of the continued suspension of concessions by filing a new dispute in 2004.¹¹⁰ The United States and Canadian retaliation, while not prompting the withdrawal of the ban, did provoke the EU attempt to resolve the dispute through WTO involvement. The EU argued that the new dispute, *U.S.—Continued Suspension* (WT/DS320) was solely about the proper procedural obligations of Members maintaining retaliation after the respondent had properly notified its compliance.¹¹¹

¹⁰⁵Request for the Establishment of a Panel by the European Communities, United States - Continued Suspension of Obligations in the EC-Hormones Dispute, WT/DS320/7 (Jan. 14, 2005).

¹⁰⁶See *Impossible Cases*, *supra* note 56, at 368.

¹⁰⁷See Council Directive 2003/74, 2003 O.J. (L 262) 17–18 (EC).

¹⁰⁸See Communication from the European Communities, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/22, WT/DS48/20, Oct. 28, 2003, Annex 1 (The EC included Council Directive 2003/74 in the communication to the DSB and stated that “with the publication and entry into force of this Directive, the EC considers that it has now fully implemented the recommendations and rulings of the DSB in the aforementioned dispute.”).

¹⁰⁹DSB, Minutes of Meeting, 7 November 2003, ¶¶ 28–31, WT/DSB/M/157 (Dec. 18, 2003).

¹¹⁰See *Hormones AB report*, *supra* note 4.

¹¹¹First Written Submission by the European commission, United States – Continued Suspension of Obligations in the EC—Hormones Dispute, ¶¶ 7, 25, WT/DS320 (July 11, 2005).

Beyond Retaliation

The *Continued Suspension* dispute went on from November 2004 until the issuance of an Appellate Body Report in 2008. The Appellate Body determined that until the EU was found compliant, the complainants had the right to continue sanctions.¹¹² As part of its report, the AB designed a procedure for what should happen after retaliation,¹¹³ a procedure not endorsed by many Member States. The AB determined that not only respondents but also complainants could initiate Article 21.5 proceedings for a compliance determination. The Appellate Body found that there was non-compliance by the EU.¹¹⁴ Consequently, both the United States and Canada continued to suspend concessions right up until reaching a negotiated settlement in May 2009.¹¹⁵ By this time, sanctions had been in place against the EU for a decade.

The negotiated settlement between the disputants came from consultations that began in December 2008 and culminated in a 2009 Memorandum of Understanding.¹¹⁶ The disputants notified the WTO two years later of a mutually agreed solution.¹¹⁷ The Beef MOU set out phases. In the first phase, the EU agreed to expand market access allowing duty free access for non-hormone-fed beef in return for the U.S. agreements to: (1) maintain increased duties on a reduced list of products and (2) not impose new duties under the terms of its carousel retaliation procedure—which allows the United States to rotate the products that will suffer retaliation. In the second phase, after three years, duty-free access for beef produced

¹¹²Appellate Body Report, United States – Continued Suspension of Obligations in the EC-Hormones Dispute, WT/DS320/AB/R (Oct. 16, 2008) ¶360 (in so holding it reversed the panel’s finding that the U.S. was wrong to continue sanctions without recourse to the DSU process) [hereinafter Continued Suspension ABR].

¹¹³Steve Charnovitz, *Trade, Investment and Dispute Settlement: The Enforcement of WTO Judgments*, 34 YALE J. INT’L L. 558, 564–65 (2009) (describing the decision on this issue as “remarkable” for filling the DSU gap on what must happen after retaliation).

¹¹⁴See Continued Suspension ABR, *supra* note 112, ¶¶ 619–20, 734–35. The AB reversed the panel holding that the EU had not established that it had removed the ban. However, the AB also found that it was unable to determine whether the new EU legislation was in conformance with under the SPS Agreement.

¹¹⁵See USTR Press Release, *USTR Announces Agreement with European Union in Beef Hormones Dispute*, USTR (May 8, 2009), available at: <http://www.ustr.gov/about-us/press/office/press-releases/2009/May/ustr-announces-agreement-european-union-beef-hormones>.

¹¹⁶USTR Press Release, *Ambassador Punke Signs Agreement Ensuring Continued Access of High Quality U.S. Beef to the European Union*, USTR (Oct. 21, 2013), available at: <http://www.ustr.gov/about-us/press-office/blog/2013/October/Punke-US-EU-beef>.

¹¹⁷Joint Communication from the European Communities and the United States, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/28, 30 September 2009. [hereinafter Beef MOU] Joint Communication from the European Union and Canada, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/26 (March 22, 2011).

without certain hormones would increase and all remaining sanctions would end.¹¹⁸ The settlement contained an agreement between the disputants to suspend all further litigation (which would be in the form of an Article 21.5 compliance review) until February of 2011.¹¹⁹ The United States eliminated all sanctions as of May 2011 and Canada did the same in August 2011.¹²⁰

The United States and the EU agreed to an extension of the settlement in October 2013 that would extend through August 2015.¹²¹ The 2013 extension allowed importation into the EU of beef from animals not treated with growth hormones.¹²² USTR reported that U.S. access to the EU market because of the earlier agreement would quadruple the value of such exports before the MOU entered into force.¹²³

The United States continued to monitor the operation of the MOU in 2015 “including with respect to whether the MOU was providing meaningful market access to U.S. producers.”¹²⁴ In 2016, the United States regarded the authorization to impose sanctions from the WTO as still be available to and announced its willingness to pursue the issue into the WTO again “[i]f EU implementation and other developments do not proceed as contemplated. . . .”¹²⁵ At the end of the Obama administration, USTR sought public comment on whether the United States should reinstate sanctions against the EU. The United States extended the comment period after receiving over 11,000 comments about the possible sanctions.¹²⁶ The hormones issue has been a negotiating point between the EU and the United States in the talks to create a free trade area, the Transatlantic Trade and Investment Partnership (T-TIP).¹²⁷ The T-TIP negotiations have not made

¹¹⁸Beef MOU, *supra* note 117, at Annex, Art. 1.

¹¹⁹*Id.* at Annex, Art. 7.

¹²⁰*USTR Ends Duties on EU Goods Related to Beef Hormones Dispute*, 28 Int’l Trade Rep. (BNA) 904 (June 2, 2011); *Canada Repeals Surtax on EU Products in Compensation for Beef Hormones Dispute*, 28 Int’l Trade Rep. (BNA) 1387 (Aug. 25, 2011).

¹²¹Joint Communication from the European Union and the United States, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/29 (Apr. 17, 2014) at Art. V.

¹²²Jalissa Nugent, *U.S., EU Sign Agreement Extending Hormone-Free U.S. Beef Imports*, 30 Int’l Trade Rep. (BNA) 1642 (Oct. 24, 2013).

¹²³*Id.*

¹²⁴*Trade Policy Agenda 2016 and 2015 Annual Report*, USTR 1, 182 (2016), <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/2016-trade-policy-agenda-and-2015-Annual-Report>.

¹²⁵*Id.*

¹²⁶Brian Flood, *Stampede of Comments about the U.S.-EU Beef Dispute Hits Trade Rep.*, 34 Int’l Trade Rep. (BNA) 367 (March 2, 2017)(two beef industry groups support the reintroduction of sanctions arguing that U.S. beef has not benefitted enough from the quota and that dialogue with the EU is “going nowhere.”).

¹²⁷*See* website of the United States Trade Representative for what it is sharing about T-TIP, <https://ustr.gov/ttip>.

progress in the early days of the Trump administration.¹²⁸ If the United States re-imposes sanctions, this will mark the first time that a settlement of a WTO dispute has failed.

Legacy to the system

The *Hormones* dispute started a pattern that would repeat in the many of the cases of sustained non-compliance: the respondent claims compliance without delivering it and pursues additional WTO arbitration instead of removing the offending measure. The EU has never lifted the ban found to be in violation of the SPS Agreement. Because of the *Continued Suspension* dispute and the *ad hoc* settlements afterwards, there has never been a DSB determination of compliance by the EU.

The *ad hoc* settlements reveal another pattern—they fail the DSU requirement for a legal mutually agreed solution under the DSU¹²⁹ (that any settlement be consistent with WTO agreements). What the disputants agreed to in the *Hormones* dispute is what Alschner describes as an “interim settlement” in which the disputants agree to a solution that will later be notified to the WTO as a mutually agreed solution.¹³⁰ To date there has been no notification of a mutually agreed solution to the DSB. In 2017, two decades after the dispute began, the goal of the EU continues to be to keep all hormone-fed beef out of the EU market¹³¹ and the interim settlement could break down in favor of a return to sanctions.

¹²⁸Rosella Brevetti, *EU, U.S. Tout Trade Talks' Progress, See Way Forward*, 34 Int'l Trade Rep. (BNA) 110 (Jan. 19, 2017). See also Casey Wooten, *Brexit May Hurt Agriculture Trade Gains from T-TIP, Report Says*, 33 Int'l Trade Rep. (BNA) 1031 (July 21, 2016) (citing to a Congressional Research Service report noting that non-tariff barriers such as the beef hormone issue have been part of the T-TIP negotiations).

By contrast, Canada has settled its part of the *Hormones* dispute with the EU. Canada and the EU notified the DSB of a settlement reached as part of the completion of the free trade agreement between the two. See Andy Hoffman & Bryce Baschuk, *EU Canada End Decades-Old Spat Over Hormone Treated Meat*, 34 Int'l Trade Rep (BNA) 1354 (Oct. 12, 2017).

¹²⁹See Alschner, *supra* note 52, at 74 (listing the *Hormones* dispute as one involving an interim settlement).

¹³⁰The WTO website describes the extension of the Beef MOU entered into by the disputants in 2009 as a “Mutually acceptable solution on implementation.” See European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO (Sep. 25, 2009), www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm. (There is no such term in the DSU, which only speaks of the “mutually agreed solution.”)

¹³¹Michael Scaturro, *EU Seeks Exemptions from Tariff Cuts for Poultry, Dairy*, 33 Int'l Trade Rep. (BNA) 201 (Feb. 11, 2016).

EU: Bananas III (WT/DS 27)

Basis for Dispute

The EU triggered the *Bananas III* dispute in 1993 by adopting a harmonized policy regarding banana imports.¹³² The banana regime—which operated through a complex, tariff, quota and licensing system—limited the access of South American bananas to the EU market in favor of bananas from former EU colonies: African, Caribbean and Pacific countries.¹³³ The United States got involved in the dispute when a U.S. producer, Chiquita, filed a Section 301 petition arguing that the banana regime and its framework agreement violated the GATT.¹³⁴ The United States along with affected South American countries negotiated with the EU. After these negotiations failed in 1998, the United States, Ecuador, Guatemala, Honduras, and Mexico filed the dispute. The panel¹³⁵ and AB reports¹³⁶ both concluded that the banana regime violated GATT, the General Agreement on Trade in Services (GATS) and the Import Licensing Agreements.¹³⁷ The biggest difference between the two reports was that the AB report rejected the panel's broad reading of the EU's waiver of WTO rules, the Lomé Convention (which allowed for preferential treatment for developing countries).¹³⁸ The AB determined that the Lomé Waiver—which the EU had obtained to excuse its violations—covered only claims of Article I (Most Favored Nation) violations but not claims relating to Article XIII (Allocation of Quotas).¹³⁹ The AB report rejected the banana import regime. The disputants negotiated but the United States rejected a temporary compensation offer.¹⁴⁰ The EU was given ten months (until January 1999) to comply with the DSB recommendation. The EU response,

¹³²Council Regulation 404/93 on the Common Organization of the Market in Bananas, 1993 O.J. (L 47) 1 (EC).

¹³³See F. Weiss, *Manifestly Illegal Import Restrictions and Non-compliance with WTO Dispute Settlement Rulings*, TRANSATLANTIC ECONOMIC DISPUTES 121, 123 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003) (discussing the claims and results in *Bananas I, II and III*) [hereinafter Weiss].

¹³⁴See Disclosure to Investors in Systemwide and Consolidated Bank Debt Obligations of the Farm Credit System, 59 Fed. Reg. 5341 (proposed Feb. 4, 1994) (to be codified at 12 C.F.R. pt. 630) (responding to the Section 301 petition); see also Shaffer, *supra* note 58 at 23–24 (discussing U.S. support for Chiquita Brands' opposition to the EC banana licensing regime).

¹³⁵Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/R/USA (adopted May 22, 1997) [hereinafter *Bananas III Panel*].

¹³⁶*Bananas III AB Report*, *supra* note 4, at ¶ 132.

¹³⁷*Id.* at ¶ 203.

¹³⁸*Id.* at ¶¶ 184–88.

¹³⁹*Id.*

¹⁴⁰See *Impossible Cases*, *supra* note 56, at 350.

over objections, was to approve a new banana import regime in 1998.¹⁴¹ The U.S. moved under Article 22 to suspend concessions for the EU's failure to comply.

What happened next in the dispute was a series of negotiations between the disputants over how to proceed with the dispute. This was required because the DSU had a gap—it lacked a process for how disputants should move forward when there was a dispute over compliance. At issue was whether the complainant should seek a compliance review or can go straight to the DSB to authorize retaliation for non-compliance. This dispute produced the first major procedural battle in the WTO over the terms of the DSU. The EU and Ecuador filed Article 21.5 compliance reviews.¹⁴² The United States took the position that it had the right to seek the suspension of concessions. The arguments over “sequencing”—the name given to dilemma created by the DSU gap—were resolved in a compromise negotiated by the WTO Director General.

The DSB suspended the U.S. request for retaliation pending an EU agreement to arbitrate over what would be an appropriate level of arbitration.¹⁴³ Ultimately, there was one Article 21.5 report written to cover the issues of whether there had been compliance and whether to authorize retaliation.¹⁴⁴ This report found the EU's second banana regime to be non-compliant and the panel placed the suspension of concessions at \$191.4 million per year.¹⁴⁵ The Article 21.5 panel refused to determine what would be the proper “sequencing” of procedural steps and stated that the issue belonged to the WTO itself for consideration in the DSU review process.¹⁴⁶

Role of Retaliation

Following the compliance report, the EU failed to produce a revised version of the banana regime.¹⁴⁷ The United States responded by implementing its sanctions authorization in 1999.¹⁴⁸ Ecuador also

¹⁴¹See Weiss, *supra* note 133, at 130.

¹⁴²*Id.*

¹⁴³Request for the Establishment of a Panel by the European Communities, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/40 (Dec. 15, 1998). Recourse to Article 21.5 of the DSU, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/41 (Dec. 18, 1998).

¹⁴⁴See Mauricio Salas & John H. Jackson, *Procedural Overview of the WTO EC – Banana Dispute*, 3 J. INT'L ECON. L. 145, 165 (2000) [hereinafter Salas & Jackson].

¹⁴⁵Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/RW/ECU (adopted Apr. 12, 1999).

¹⁴⁶*Id.* See *WTO Banana Arbitrators Find for U.S. on Procedure, Substance*, INSIDE U.S. TRADE, Apr. 9, 1999.

¹⁴⁷*Impossible Cases*, *supra* note 56, at 353.

¹⁴⁸Gary G. Yerkey, *U.S., Europe Agree to Begin New Talks on Bananas, Beef Hormones*

proceeded under Article 22 and received DSB authorization to suspend concessions under the GATS and Trade-Related Intellectual Property Rights Agreements by establishing that the traditional retaliation available—retaliation in trade in goods—was “impracticable and ineffective.”¹⁴⁹ Ecuador conducted subsequent negotiations with the EU armed with the threat of this cross-retaliation.¹⁵⁰ The United States imposed sanctions for two years until it negotiated an understanding with the EU that provided for the U.S. suspension of retaliation in exchange for an EU adoption of a new banana regulation.¹⁵¹ Left out of the talks about the U.S.-EU settlement, Ecuador negotiated a settlement with the EU. The two settlements went to the DSB as mutually agreed solutions.¹⁵² The EU agreed to abandon quotas and go only to tariffs regarding bananas by 2006.¹⁵³ Until the new system could come into effect—from July 2001 through December 2005—the EU could continue using the tariff and quota system as long as it reflected the actual market shares of the affected countries.¹⁵⁴ The settlement left in place the GATT inconsistencies and required two waivers from the WTO membership to allow it to go forward.¹⁵⁵ Retaliation appears to have driven the speed—two years—with

Within Week, Int’l Trade Daily (BNA), April 20, 1999.

¹⁴⁹See also Salas & Jackson, *supra* note 144, at 161–62 (providing an explanation of the request Ecuador made to the DSB).

¹⁵⁰Recourse of Ecuador to Article 22.2 of the DSU, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/52 (Nov. 9, 1999). See also Salas & Jackson, *supra* note 144, at 156–57 and 161–62 (providing an explanation of the request Ecuador made to the DSB).

¹⁵¹See James McCall Smith, *Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute*, NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA, 257–86 (John S. Odell ed., 2006) [hereinafter Smith]. Smith contends that Ecuador greatly improved the results of the Bananas III dispute in its favor by going its own way on the sequencing issue. *Id.* at 267. Ecuador was also successful because it carefully selected the TRIPs retaliation to hit the EU Members the most resistant to changing the banana regime. *Id.* at 270.

¹⁵²*U.S.-EU Banana Agreement*, INSIDE U.S. TRADE, Apr. 13, 2001, at 20. See John H. Jackson & Patricio Grane, *The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring*, 4 J. INT’L ECON. L. 581, 588–89 (2001) (discussing the agreement by which Ecuador was still bound); see also Press Release, U.S. Trade Representative, The U.S.-EU Banana Agreement: Frequently Asked Questions (Apr. 11, 2001) (on file with the author).

¹⁵³Both understandings were submitted by the EC to the DSB as a mutually agreed solution to the dispute. Notification of Mutually Agreed Solution, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/58 (July 2, 2001).

¹⁵⁴See *Impossible Cases*, *supra* note 56, at 355.

¹⁵⁵Press Release, Council of the European Union, European Union Adopts New “Tariff-Only” Import Regime for Bananas from 1 January 2006 (Nov. 29, 2005), http://europa.eu/rapid/press-release_IP-05-1493_en.htm). The EU countries were in sharp disagreement about the tariff level to set for the new import regime. Seven countries, led by

which the EU sought and achieved settlement of a dispute that had started four years earlier.¹⁵⁶ The United States chose for its retaliation 100% tariff increases on nine non-agricultural products coming from the EU member countries that had continued to support the banana regime.¹⁵⁷ The imposition of these tariffs caused large losses and lost market share for the UK and France.¹⁵⁸

Beyond Retaliation

The 2001 mutually agreed solutions failed to resolve all of the issues between the disputants. In late 2006, the United States challenged the EU revision of the banana regime (done to meet the 2006 deadline for the new system) as GATT-inconsistent and filed to join the consultations Ecuador has started for an Article 21.5 compliance review.¹⁵⁹ The United States sought an Article 21.5 compliance review in June 2007.¹⁶⁰ The Article 21.5 panel and AB reports found the EU regime to be inconsistent with DSB recommendations.¹⁶¹ The disputants carried negotiations over what would constitute compliance into negotiations at the 2008 WTO Ministerial Conference but still failed to reach an agreement.¹⁶² The EU and Latin

Germany, argued that the tariff was set too high. See *Bananas | Tariffs: EU Imposes, WTO to Rule*, Latin American Caribbean & Central America Report, Dec. 2005, at 7.

¹⁵⁶See *Impossible Cases*, *supra* note 56, at 354.

¹⁵⁷See Scott D. Andersen & Justine Blanchett, *The United States' Experience and Practice in Suspending WTO Obligations*, *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 238, 238–39 (Chad P. Brown & Joost Pauwelyn eds., 2010).

¹⁵⁸*Id.* at 238.

¹⁵⁹Request to Join Consultations by the United States, Recourse to Article 21.5 of the DSU by Ecuador, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/76 (Dec. 13, 2006). See also Summary, DS27: European Communities – Regime for the Importation, Sale and Distribution of Bananas (Nov. 20, 2012), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm.

¹⁶⁰Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by the United States, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/83 (July 2, 2007).

¹⁶¹Panel Report, Recourse to Article 21.5 of the DSU by the United States, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.720, WTO Doc. WT/DS27/RW/USA (May 19, 2008); Appellate Body Reports, Second Recourse to Article 21.5 of the DSU by Ecuador and Recourse to Article 21.5 of the DSU by the United States, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, para. 354, WTO Doc. WT/DS27/AB/RW2/ECU and WT/DS27/AN/RW/USA (Nov. 26, 2008).

¹⁶²Daniel Pruzin, *EU, Latin Nations Formally Sign Agreement on Bananas; First Tariff Cut Takes Place*, 27 Int'l Trade Rep. (BNA) 828 (June 3, 2012) at 1 [hereinafter Pruzin-GATB]; Geneva Agreement on Trade in Bananas, May 31, 2010 available as an attachment to Agreement on Trade in Bananas Between the United States and the EU, June 8, 2010 [hereinafter US/EU/Bananas]. The text of the two agreements are available at

American countries continued negotiations until they achieved a settlement in May 2010—the Geneva Agreement on Trade in Bananas¹⁶³ (GATB). The GATB covered meaningful market access in the form of much lower tariffs for not only the eleven Latin American countries involved in those negotiations but also other MFN suppliers.¹⁶⁴ The EU Parliament signed off on the GATB in February 2011.¹⁶⁵ The disputants designed the GATB to produce a steady decline in tariff rates until a new final rate in 2017.¹⁶⁶ The EU agreed that it would: (1) maintain a non-discriminatory, tariff-only regime for the importation of bananas; and (2) not reintroduce measures to discriminate among banana distributors based on ownership or control of the distributors or the source of the bananas.¹⁶⁷

The *Bananas III* dispute and its ultimate resolution dragged on for 14 years before the GATB became the solution. During that time there was a continuous series of comments from many members about the sustained non-compliance¹⁶⁸ making it one of the top three disputes in WTO history to generate negative comments at DSB surveillance meetings. *Bananas III* illustrates the limits of what developing country complainants can achieve. Ecuador “won” the dispute—and the right to use cross-retaliation—but still settled the dispute after losing effective access to the world’s largest banana market.¹⁶⁹

Legacy for the system

The *Bananas III* dispute revealed, and then as a practical matter dealt

<http://www.ustr.gov/about-us/press-official/press-releases/2010/june-us-eu-sign-agreement-designed-settle-bananas-dispute>.

¹⁶³See Len Bracken, *U.S., EU Agree to Settle Dispute Over Latin American Bananas*, *USTR Says*, 27 Int’l Trade Rep. (BNA) 856 (June 10, 2010); GATB, *supra*, at p. 4 (the GATB represents the EU’s final market access commitment for bananas in the Doha Round negotiations.).

¹⁶⁴See Pruzin-GATB, *supra* note 162, at 2.

¹⁶⁵Joe Kirwin, *EU Parliament Backs Banana Trade Deal With Latin America to Reduce Tariffs*, 28 Int’l Trade Rep. (BNA) 224 (Feb. 10, 2011).

¹⁶⁶See US/EU/Bananas, *supra* note 162, at p. 2.

¹⁶⁷*Id.*

¹⁶⁸*Rhetoric of Legitimacy*, *supra* note 66, at 14, n.24. The *Bananas III* dispute provoked 971 statements by 47 Member States. *Id.* at 14, n.24 and 19. This dispute, along with the *U.S.-Section 211 Appropriations Act* and the *Byrd Amendment* disputes are the three disputes that account for almost half of the statements made by WTO Member States from 2005 to 2013. *Id.*

¹⁶⁹Johannesson & Mavroidis, *supra* note 25, at 22 (“Did Ecuador win though? For Ecuador, trade in bananas represents a substantial percentage of its GDP . . . , and EU one of its most lucrative markets. Well, it lost the EU market for more than twenty years, since the EU changed its policy only in 2011. Ecuador never received any compensation for the loss of the trade during these years, and, wisely, did not make matters worse for it by imposing countermeasures, as it could against the EU.”).

with, one gap revealed in the DSU: the “sequencing” problem. Negotiating a solution over how to proceed when the triggering events occur has become the practice in all later DSU disputes involving Articles 21 and 22.¹⁷⁰ It has also become the proposal in the DSU reform negotiations to fill this DSU gap. The *Bananas III* dispute also involved the first consideration and authorization of cross-retaliation as well as the first decision to refrain from using that authorization. Most importantly, the *Bananas III* dispute is notable because the disputants sought a WTO waiver for a mutually agreed solution. To this extent, the dispute provides a model for how the DSB and thus the WTO should be involved in settlements where there has been a problem with sustained non-compliance. In most of the other disputes going to retaliation and beyond, the disputants have negotiated interim settlements that do not satisfy the WTO requirements.

U.S.: Foreign Sales Corporation

Basis for the Dispute

The Foreign Sales Corporation (FSC) dispute (WT/DS108) began in 1998 when the EU challenged the U.S. tax treatment of foreign earned income as a prohibited export subsidy.¹⁷¹ As in *Hormones* and *Bananas III*, there had been prior disputes under the GATT about essentially the same practice.¹⁷² The EU pursued the case when it did—coming right after the two earlier disputes—as a response to the perceived aggressive action by the United States¹⁷³ in the other disputes.

Both the panel and the AB found that the FSC exemption to be an export-contingent subsidy that violated Article 3.1(a) of the Subsidies and Countervailing Measures Agreement.¹⁷⁴ The U.S. options for compliance were to either eliminate or revise the FSC program. The U.S. response was

¹⁷⁰Guohua, Mercurio & Yongjie, *supra* note 42, at 273-274 (“[N]on-compliance cases arising after *EC—Bananas* are forced to proceed through ‘voluntary understandings’ to negotiate around the textual shortcomings.”). See also Zimmermann, *supra* note 74, at 150. Negotiating a solution to the sequencing problem has been an issue in the DSU reform negotiations. According to Zimmermann, Members viewed this as a “less acute” problem “in light of the practice to conclude bilateral agreements which has developed.” *Id.* For a description of the terms of these bilateral agreements generally work see *id.* at 150-51. For an example of one of these negotiated agreements on sequencing see Understanding Between the United States and Canada Regarding Procedures under Articles 21 and 22 of the DSU, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS/384/23 (June 13, 2013).

¹⁷¹See *Impossible Cases*, *supra* note 56, at 409.

¹⁷²*Id.* at 405–09.

¹⁷³*Id.* at 409.

¹⁷⁴Panel Report, *United States - Tax Treatment for “Foreign Sales Corporations*, ¶ 7.130, WTO Doc. WT/DS108/R (Oct. 8, 1999) [hereinafter *FSC Panel*]; U.S.-FSC, *supra* note 4, ¶ 90.

to pass in less than a year the FSC Repeal and Extraterritorial Income Exclusion Act (ETI Act). The United States argued that the ETI Act brought it into argued compliance with the DSB recommendation. There was, in fact, little basis for the U.S. claim as the new statute kept major aspects of the FSC system in place. By appearing to comply, however, the United States did achieve a delay in having to comply fully. The EU challenged the new legislation in an Article 21.5 compliance review and the panel and the AB found the new statute flawed.¹⁷⁵

Role of Retaliation

Following this two-year litigation process over this solution to the original dispute, the EU sought authorization to retaliate against the United States. The EU received DSB authorization to suspend concessions at just over \$4 million per year.¹⁷⁶ The EU chose to wait and make strategic use of the retaliation authorization. The EU targeted the tariff increases to hit products from states whose U.S. Congress members,¹⁷⁷ regarded as responsible for passing legislation that might satisfy the findings of the WTO AB report. The EU picked products for the tariff increases from states in play for the reelection campaign of President G.W. Bush. Within the year, Congress passed the American Jobs Creation Act of 2004 (JOBS Act).¹⁷⁸ The JOBS Act eliminated the ETI and any attempt at keeping foreign sales corporations. The JOBS Act instead provided all U.S. corporations manufacturing in the United States with a ten percent tax reduction.¹⁷⁹

However, the U.S. attempt to resolve the dispute was not without flaws. The JOBS ACT contained a transition period over to the new tax code that allowed the SCM-illegal subsidies to remain in place for a time.¹⁸⁰

¹⁷⁵*Impossible Cases*, *supra* note 56, at 413–14.

¹⁷⁶The EC sought an Article 22.6 arbitration decision about the amount of the sanctions. See Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, *United States - Tax Treatment for "Foreign Sales Corporations"*, ¶ A.34, WTO Doc. WT/DS108/ARB (Aug. 30, 2002) (“In these circumstances, we find that the amount of \$4, 043 million, which falls between the range of values calculated on the basis of the parties’ respective methodologies can be considered to be a reasonable approximation of the actual subsidy for the year 2000.”). The DSB then granted the authorization to impose sanctions in May 2003. WTO Set to Authorize EU on May 7 to Impose Trade Sanctions Against U.S. in Tax Dispute, 20 Int’l Trade Rep. (BNA) 751 (May 1, 2003).

¹⁷⁷*Impossible Cases*, *supra* note 56, at 414–15.

¹⁷⁸American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) [hereinafter *Jobs Act*]; *Id.* at §101-02.

¹⁷⁹*Id.* at §101(d), (f).

¹⁸⁰See Paul Meller, *European Trade Chief Says Sanctions on U.S. Will End*, N.Y. TIMES, Oct. 26, 2004, at C2 (noting that the EC trade commissioner “balked” at the transitioning provisions). According to Meller, “[t]he legislation allows the United States to give \$4

The EU responded to this continuation of the illegal conduct by making plans to withdraw the sanctions and challenging the U.S. actions in an Article 21.5 compliance review. Putting a transition period in the JOBS Act not only contravened the U.S. obligation under the original AB report but also Article 4.7 of the SCM Agreement, which requires WTO members to withdraw prohibited subsidies immediately.¹⁸¹

When challenged, the United States focused most of its arguments during the panel and AB compliance reviews on the nature of Article 21 of the DSU and Art. 4.7 of the SCM Agreement rather than on a defense of the JOBS Act.¹⁸² Both the reports completed in 2005 and 2006 rejected all U.S. arguments.¹⁸³ The AB report determined that: (1) the United States had failed to meet its earlier obligation to comply; (2) it had not withdrawn all prohibited subsidies; and (3) it remained under an obligation to remove the subsidies.¹⁸⁴ Facing a threat by the EU to reintroduce the sanctions, Congress passed and the President signed in May of the 2006, the Tax Increase and Prevention and Reconciliation Act of 2005, which repealed the transition periods. The EU responded by dropping its plans to reintroduce the sanctions.¹⁸⁵ The sanctions, both in regard to how they were used to leverage the U.S. political process and as a threat when the United States stalled compliance, forced Congress to focus on the passage of implementing legislation to resolve the dispute.

Beyond Retaliation

Unlike the earlier disputes between the United States and the EU, the *FSC* dispute ended in a complete victory for the complainant. Nevertheless, the dispute introduced new patterns for how a disputant could game compliance. The United States extended the time it got for coming into compliance to six years by passing not one but two SCM-illegal legislative reforms and then litigating over whether each one constituted a true attempt

billion, or 80 percent of the amount distributed under the [FSC] program, to American companies [in 2005]. In 2006 this will fall to \$3 billion, or 60 percent.”

¹⁸¹See *Impossible Cases*, *supra* note 56, at 416.

¹⁸²Panel Report, *Second Recourse to Article 21.5 by the European Communities, United States – Tax Treatment for “Foreign Sales Corporations”*, ¶ 6.14, WTO Doc. WT/DS108/RW2 [hereinafter Art. 21.5 II Panel Report]; Appellate Body Report, *Second Recourse to Article 21.5 by the European Communities, United States – Tax Treatment for “Foreign Sales Corporations”*, ¶ 20-27, WTO Doc. WT/DS108/AB/RW2 (Feb. 13, 2006) [hereinafter Art. 21.5 II AB Report].

¹⁸³Art. 21.5 II Panel Report, *supra* note 182, at ¶ 7.87 and 8.1; Art. 21.5 II AB Report, *supra* note 182, at ¶ 100.

¹⁸⁴Art. 21.5 II AB Report, *supra* note 182, at ¶ 100.

¹⁸⁵Rory Watson, *Repeal Heals US-EU Rift*, LONDON TIMES, May 13, 2006, at 54 (“The European Commission confirmed that it would now shelve the sanctions which it was preparing to introduce against US exports . . .”).

to comply.

Legacy for the system

The dispute also marks an effective use of strategic retaliation by the EU. The *FSC* dispute also saw the introduction of the practice of passing legislation to comply that only appeared to be compliant. This “appear to comply while buying time” strategy proved effective in getting the United States additional time (five years) to comply.

Brazil/Canada: Regional Aircraft (WT/DS 46, 70 & 222)

Basis for the Dispute

The dispute between Canada and Brazil involved competing claims about illegal subsidization of regional aircraft—an industry that had been producing more planes and taking a larger percentage of flights from the 1970s through the 1990s.¹⁸⁶ In 1996, Canada filed the first complaint, WT/DS46 accusing Brazil of offering prohibited export subsidies in the form of a government-backed financing program.¹⁸⁷ Brazil responded with its own complaint in 1997 arguing that Canadian federal and provincial subsidies to regional aircraft producers were also export subsidies in violation of Article 3.1 of the SCM Agreement.¹⁸⁸ Both disputes failed to resolve in consultations and went to the panel level. Two panel reports addressing the competing claims were issued on the same day in April 1999.¹⁸⁹ Canada successfully established that almost all of the Brazilian subsidies were export subsidies.¹⁹⁰ Brazil was also successful regarding its claims of export subsidization.¹⁹¹ The Appellate Body reports issued in August 1999 largely upheld the panel’s findings that each country had provided prohibited export subsidies. Under the terms of the SCM Agreement, prohibited subsidies must be withdrawn immediately. Consequently, the AB reports in each dispute provided the respondent with

¹⁸⁶See Helena D. Sullivan, *Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution*, 12 MINN. J. GLOB. 71, 74 (2003) [hereinafter *Sullivan*] for a description of the regional jet market.

¹⁸⁷Request for Consultations, *Brazil—Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/1 (June 19, 1996).

¹⁸⁸Request for Consultations by Brazil, *Canada—Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/1 (March 10, 1997).

¹⁸⁹Panel Report, *Brazil—Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/R (Apr. 14, 1999); Panel Report, *Canada- Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/R (Apr. 14, 1999).

¹⁹⁰Panel Report, *Brazil—Export Financing Programme for Aircraft*, *supra* note 189, at ¶ 8.1.

¹⁹¹Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, *supra* note 170, at ¶ 10.1.

ninety days in which to remove the subsidies.¹⁹²

By November of 1999, Canada announced that it had complied and it requested an Article 21.5 compliance review for Brazil. Brazil, in turn, filed a request for a compliance review.¹⁹³ The panel¹⁹⁴ reviews found that neither country had altered their subsidies programs to bring them into line with SCM requirements. Even before the AB 21.5 ruling, Canada sought authorization for retaliation that would cover not only aircraft but also trade in goods and rights under the Import Licensing and Textile and Clothing Agreements.¹⁹⁵ The AB 21.5 compliance review for Brazil found that the measures it took to comply were not consistent with the SCM.¹⁹⁶ By contrast, the AB 21.5 compliance review for Canada determined that Brazil had failed to prove that the revised Canadian subsidy program was inconsistent with the SCM Agreement.¹⁹⁷

Role of Retaliation

Both countries tried to resolve the dispute through negotiations in order to avoid having to seek or use retaliation. However, those negotiations broke down in June 2000.¹⁹⁸ In August 2000, an Article 22.6 panel gave Canada the right to retaliate at the level of \$344.2 Canadian dollars for six years.¹⁹⁹ Brazil took additional measures to revise its export-financing program and argued that its third variation PROEX III brought it into compliance. Canada sought a second compliance review. The 21.5 compliance review panel determined in July 2001 that while on its face PROEX III seemed consistent with the requirements of the SCM Agreement,²⁰⁰ it was not in a position to determine whether application of PROEX III would be compliant.²⁰¹

¹⁹²Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/AB/R (Aug. 2, 1999) at ¶ 196; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R (Aug. 2, 1999) at ¶ 220.

¹⁹³See Sullivan, *supra* note 185, at 84.

¹⁹⁴Recourse to Article 21.5, *Brazil – Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/RW (May 9, 2000) at ¶ 7.1-7.3; Recourse to Article 21.5, *Canada C Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS79/RW (May 9, 2000) at ¶ 6.1-6.3.

¹⁹⁵See Sullivan, *supra* note 185, at 87.

¹⁹⁶*Recourse to Article 21.5 (AB)*, Brazil.

¹⁹⁷*Recourse to Article 21.5 (AB)*; *Canada C Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/RW (July 21, 2000) at ¶ 53.

¹⁹⁸See Sullivan, *supra* note 186, at 88.

¹⁹⁹Recourse to Article 22.6 Arbitration, *Brazil – Export Financing Programme for Aircraft*, WTO Doc. WT/DS46/ARB (Aug. 28, 2000).

²⁰⁰Panel Report, *Second Recourse by Canada to Article 21.5 of the DSU, Brazil – Export Financing Programme for Aircraft*, ¶ VI.324, WTO Doc. WT/DS46/RW/2 (July 26, 2001).

²⁰¹*Id.* at ¶ VI.325-VI.326 (providing Canada with the right to challenge any future

Shortly before Canada sought the second compliance review, Brazil filed a request for consultations on a new dispute, WT/DS222, accusing Canada again of export subsidies in the form of export credits and loan guarantees to the regional aircraft industry.²⁰² The panel report issued in January 2002 found against Canada on three of the claims of loan guarantees as export subsidies.²⁰³ Canada chose not to appeal the decision against it. Brazil sought the right to retaliate when Canada failed to remove the identified export subsidies within ninety days. The two countries announced a settlement the next month, but Brazil quickly threatened to request authorization to suspend concessions for \$3.6 billion.²⁰⁴ When Canada objected, Brazil followed the Article 22 procedure of seeking arbitration over the amount of retaliation. In February 2003, the Article 22.6 report authorized a trade in goods retaliation of approximately \$247.8 million.²⁰⁵

The two countries reported to the DSB that they would intensify efforts to arrive at a mutually acceptable solution in order to forestall the use of retaliation.²⁰⁶ Brazil, like Canada, never used its authorization to retaliate. The countries instead focused their energies on adopting a new version of the Organization for Economic Cooperation and Development (OECD) voluntary rules on use of government export credits to support aircraft sales.²⁰⁷ The Sector Understanding on Export Credits for Civil Aircraft²⁰⁸ addressed many of the issues the two countries had litigated in the series of WTO disputes.²⁰⁹ Although not a member of the OECD, Brazil chose to participate in the negotiations and sign the agreements as part of its attempt to end the dispute.²¹⁰

application of the PROEX III program).

²⁰²Request for Consultations, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WTO Doc. WT/DS222/1 (Jan. 22, 2001).

²⁰³Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 8.1, WTO Doc. WT/DS222/R (Jan. 28, 2002).

²⁰⁴See Daniel Pruzin, *WTO Gives Brazil Green Light to Impose Sanctions in Canadian Aircraft Dispute*, 20 Int'l Trade Rep. (BNA) 564 (March 27, 2008).

²⁰⁵Recourse to Arbitration by Canada under Article 22.6 of the DSU and Art. 4.11 of the SCM Agreement, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WTO Doc. WT/DS222/ARB (Feb. 17, 2003). The arbitrator authorized Brazil to suspend of concessions of \$247,797,000. *Id.* at para. 4.1.

²⁰⁶*Id.*

²⁰⁷See Lawrence J. Speer, *Brazil Joins Updated OECD Pact on Export Credits for Civil Aviation*, 24 Int'l Trade Rep. (BNA)1107 (Aug. 2, 2007) [hereinafter Speer].

²⁰⁸OECD, *Sector Understanding on Export Credits for Civil Aircraft*, TAD/PG(2007)4/FINAL(July 27, 2007), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/pg\(2007\)4/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/pg(2007)4/FINAL&doclanguage=en).

²⁰⁹Speer, *supra* note 206, at 1107.

²¹⁰*Id.*

Legacy for the System

The resolution of the regional aircraft dispute illustrates the reality facing most WTO disputants—WTO authorization of retaliation is too expensive and harmful to employ. With the WTO option for resolution removed, the disputants shifted to another forum to arrange a settlement over the underlying legal issues.

United States: Anti-Dumping Act of 1916 (WT/DS 136 & 162)

Basis for the Dispute

The EU²¹¹ brought the Anti-Dumping Act of 1916 (WT/DS136) dispute in 1998 to try to force the United States to repeal the statute. The 1916 Act was made a part of antitrust law²¹² and provided a private right of action for relief from “any person importing . . . any articles . . . into the United States . . . at a price substantially less than the actual market value or wholesale price . . . at the time of exportation to the United States”²¹³ The 1916 Act allowed for treble damages for violations. The 1916 Act, however, also required the plaintiff to prove not only the act of dumping²¹⁴ but also a predatory intent to dump. Because of the latter, the statute was underused. Soon after passing the statute, Congress created another way to police anti-dumping through the imposition of tariffs on imports. It is the second system, which forms the basis for the current version on anti-dumping law in the United States,²¹⁵ that was revised in 1998. The United States did not eliminate the 1916 Act at that time even though it satisfied none of the GATT and Anti-Dumping Agreement limitations on such a

²¹¹The EU brought the first dispute (WT/DS136); Japan brought another dispute (WT/DS162). The two disputes were heard separately but before the same panel.

²¹²15 U.S.C. § 72 (2000).

²¹³*Id.* The full text of the act is available in the panel report for the first dispute. Panel Report, *United States –Anti-Dumping Act of 1916*, ¶ 2.1, WTO Doc. WT/DS136/R (March 31, 2000) (panel finding for the EU against the U.S.) [hereinafter Panel Report DS/136].

²¹⁴See *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 925 n. 1 (6th Cir. 2000) (citing 15 U.S.C. §72).

²¹⁵The United States amended its anti-dumping law after the Uruguay Round to bring it into compliance with the WTO’s new Anti-Dumping Agreement. See 19 U.S.C. § 3501 (2000); H.R. Rep. No. 103–826, at 22–23 (1994) (*reprinted in* 1994 U.S.C.C.A.N. 3773. Under Article VI of the GATT, Members are allowed to have statutes to protect against the unfair practice of dumping (transnational price discrimination) if dumping is proven and the country imposing a remedy requires a showing that a domestic industry has been injured by dumping. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, at Art. VI:1 [hereinafter GATT]. The Antidumping Agreement was adopted in 1994 to provide further guidance on how antidumping procedures had to operate to be in compliance with GATT Article VI. See General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round); Agreements on Trade in Goods, Dec. 15, 1993, 33 I.L.M. 28 (1994).

trade action. While underused, some parties did file actions under the 1916 Act, and these triggered the disputes filed by the EU and Japan.

Panel and Appellate Body reports in 2000 found that the United States had violated both Article VI of the GATT and the Antidumping Agreement by maintaining the 1916 Act.²¹⁶ The United States was given a ten-month period to repeal the 1916 Act.²¹⁷ The United States announced its intent to go to Congress for the necessary repeal. The United States asked and received an extension of time to take action, but by the end of 2001, it still had not withdrawn the Act. The EU, along with Japan,²¹⁸ sought authorization in January 2002 to suspend concessions.

Role of Retaliation

In February 2002, the disputants suspended an Article 22.6 arbitration over the appropriate amount of concessions with the understanding that the sanctions would be reactivated if the United States failed to make substantial progress towards compliance. The EU gave the United States until September of 2003 before it did reactivate the arbitration. In early 2004, the 22.6 arbitrator found for the EU.²¹⁹ Usually requests for retaliation focus on the appropriate amount of sanctions in light of the injury caused by the non-compliant measure. The 1916 Act dispute, however, involved a facial attack on the statute rather than its application. The 22.6 arbitrator thus chose to focus on the damages paid by EU companies coming from judgments under the 1916 Act and any settlements between an EU and U.S. company.²²⁰

Before the year was out and before any retaliation, Congress repealed the 1916 Act in November of 2004.²²¹ There is little doubt that a viable threat of retaliation persuaded Congress to repeal. Until the threat was available, the United States delayed responding to the AB report and DSB recommendation through negotiations and promises of action while keeping

²¹⁶See Panel Report DS/136/R, *supra* note 213; Panel Report, *United States – Anti-Dumping Act of 1916*, WTO Doc. WT/DS/162/R (May 29, 2000) (finding for Japan). The two panel reports were reviewed together in one Appellate Body report. See Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WTO Doc. WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000). The Appellate Body affirmed the Panel determinations that the 1916 Act violated both Article VI:1 of the GATT and the Anti-Dumping Agreement for providing anti-dumping relief in a form not allowed by the GATT or the Anti-Dumping Agreement. *Id.*

²¹⁷The United States sought and was granted the ten months to comply under an Article 21.3 arbitration. See DSU, *supra* note 14, at art. 21.3.

²¹⁸See *infra* note 221 (discussing Japan's role in the case).

²¹⁹Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916*, WTO Doc. WT/DS136/ARB (Feb. 24, 2004).

²²⁰*Id.*

²²¹Act of Dec. 3, 2004, Pub. L. No. 108–429, 118 Stat. 2434, § 2006(a).

the statute in play for four years after the issuance of the AB report. The repeal of the statute did not bring relief to all parties affected, as it was prospective only—leaving in place any cases and possible judgments won under the Antidumping Act of 1916 that were initiated before November 2004.²²² Japan responded by passing a statute that authorized “Japanese parties against whom a judgment was issued under the 1916 Act . . . to recover the full amount of the judgment, interest, and expenses.”²²³

Legacy for the system

The 1916 Act dispute illustrates the pattern developed in earlier disputes: the respondent uses both the settlement negotiations and promises to comply as methods for gaining additional time to comply. One aspect of the dispute’s resolution was unique, though; the United States offered a measure to comply aimed at offering prospective relief only to the traders impacted by the GATT-illegal statute.

U.S.: Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment)

Basis for Dispute

Congress passed the Continued Dumping and Subsidy Offset Act of 2000 (best known by its proponent Sen. Byrd) with the knowledge that it could provoke an attack in the WTO DSU system.²²⁴ The Byrd Amendment awarded cash payments to domestic firms that brought and prevailed in dumping and countervailing duty actions against importers. Normally when a domestic industry brings and wins these unfair trade actions, the U.S. government imposes tariffs on the imports. The tariffs go to the U.S. Treasury while the industry receives what is supposed to be a level playing field that makes it competitive against imports that have been subsidized or dumped.²²⁵ The Byrd Amendment went further than standard practice by

²²²Japan has complained of one of its companies being hit by a treble damages finding after the DSB recommendation that the U.S. remove the measure but before the repeal. The United States contends the repeal has brought it into compliance. Toshio Aritake, *Japan’s Trade Barriers Report Cites U.S. For Byrd, Dumping, Buy American Measures*, 26 Int’l Trade Rep. (BNA) 744 (June 4, 2009).

²²³*Id.*

²²⁴See Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 269–70 (2006) (noting that Senator Byrd attached the amendment to an agricultural appropriations bill “knowing it would violate international trade law, but also knowing that the bill was too politically important for the president to veto”). President Clinton signed the agriculture appropriations bill containing the Byrd Amendment even though he opposed this particular trade measure. *Id.* at 270.

²²⁵For a description of how the anti-dumping and countervailing duties work, see Cong. Budget Office, Letter in Response to Request for *Economic Analysis Of The Continued*

providing that the tariff revenues gained from the import relief actions should go directly to the industries, thus arguably over-protecting the industries filing for trade relief.

Two groups of countries filed complaints seeking DSU consultations just months after the passage of the legislation. In the first complaint Australia, Brazil, Chile, the EU, India, Indonesia, Japan, Korea and Thailand filed a joint complaint (WT/DS 217). The second joint complaint was filed by Canada and Mexico (WT/DS 234). Both sets of complaints alleged that the Byrd Amendment violated both the Antidumping and SCM Agreements.²²⁶ When consultations failed, all eleven countries asked for a panel.

Both the panel²²⁷ and the Appellate Body²²⁸ found against the United States.²²⁹ After the DSB adopted the AB report and its recommendations in January of 2003, the United States announced its intent to comply.

Role of Retaliation

The United States received until the end of 2003 to withdraw the Byrd Amendment. Legislation for repealing the Act went before Congress in June 2003, but the Act was still in place in January of 2004. At that time, eight of the complainants (Brazil, Canada, Chile, the EU, India, Japan, Korea, and Mexico) requested authorization to retaliate. The Article 22.6 arbitration over the amount of retaliation provided a formula for the complainants to use when each calculated the amount of retaliation it would seek.²³⁰ The United States reached agreements with Australia, Thailand, and Indonesia and each of these countries promised not to suspend concessions.

Dumping And Subsidy Offset Act Of 2000, at 1–3 (Mar 2, 2004), <https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/03-02-thomasletter.pdf>.

²²⁶Request for Consultations, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/1 (Jan. 9, 2001) (Australia group); Request for Consultations, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS/234/1 (May 21, 2001).

²²⁷Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/R, WT/DS234/R (Jan. 16, 2003).

²²⁸U.S. – Byrd Amendment, *supra* note 4.

²²⁹The Appellate Body agreed with the panel that the Byrd Amendment was a specific action against dumping and subsidies. Furthermore, The Appellate Body explained that the Byrd Amendment was not in accordance with Article VI of the GATT because the terms of the Anti-dumping or SCM Agreements did not provide for it. U.S. – Byrd Amendment, *supra* note 4, at ¶ 230, 263, and 273.

²³⁰Each party received authorization to retaliate annually to cover payments made out to U.S. industries under the Byrd Amendment against each country's imports multiplied by 0.72. See Office of the U.S. Trade Rep., *2011 Trade Policy Agenda and 2010 Annual Report of the President on the Trade Agreements Program*, at 75 (Mar. 2011), https://ustr.gov/2011_trade_policy_agenda [hereinafter TPA Agenda].

The EU, Canada, Mexico, and Japan, however, all proceeded to retaliate at different points in 2005.²³¹ Even facing retaliation, the United States took more than two years after the deadline to comply by repealing the Byrd Amendment as part of the Deficit Reduction Act.²³²

Beyond Retaliation

The repeal of the Byrd Amendment did not go into effect immediately. As it had done in resolving the *FSC* dispute, the United States added a transition period to the repeal.²³³ The EU regarded the measure as not truly compliant and renewed its retaliation.²³⁴ Japan and Mexico also followed suit and renewed retaliation as well in 2006.²³⁵ The EU has renewed every year from 2007 through to the present since U.S. companies are still collecting payments.²³⁶ Japan also maintained sanctions, dropped them over time as payments started to dwindle,²³⁷ and then increased them again as payments started to increase.²³⁸ Complaints about the U.S. non-compliance in the *Byrd Amendment* dispute by many countries including the EU, Japan, Brazil, Canada, India and Thailand have been persistent and numerous at almost every monthly session of the DSB surveillance meetings.²³⁹

²³¹*Id.*; see also Michael O'Boyle, *Mexico Slaps Punitive Duties on U.S. Goods Due to Noncompliance with WTO Byrd Ruling*, 22 Int'l Trade Rep. (BNA)1386 (Aug. 25, 2005).

²³²On balance, The *Byrd Amendment* measure was more valuable to maintain than the losses from retaliation. See Benjamin H. Leibman & Kasaundra Tomlin, *World Trade Organization Sanctions, Implementation, and Retaliation*, 48 EMPIRICAL ECON. 715, 725 (2015).

²³³TPA Agenda, *supra* note 230, at 76. See also Daniel Pruzin, *Trading Partners Reject U.S. Claims of WTO Compliance in Byrd Act Dispute*, 23 Int'l Trade Rep. (BNA) 260 (2006).

²³⁴TPA Agenda, *supra* note 230 at 76.

²³⁵*Id.* (Mexico did not keep up retaliation after 2006).

²³⁶Daniel Pruzin, *EU Sanctions on U.S. Imports Tumble in Byrd Amendment Feud*, 31 Int'l Trade Rep. (BNA) 688, 688 (2014) (noting that the EU has slashed retaliation in 2014 given the sharp decline in 2013 in duties collected on EU imports and distributed to U.S. firms under the Byrd Amendment). Duties were still being paid in 2016. See Rossella Brevetti, *Senate Clears Customs Bill, Sends It to President*, 33 Int'l Trade Rep. (BNA) 222, 222 (2016).

²³⁷See Daniel Pruzin, *Japan Further Cuts Retaliation on U.S. Imports in WTO Byrd Dispute*, 28 Int'l Trade Rep. (BNA) 1444, 1444 (2011).

²³⁸Daniel Pruzin, *Japan Hikes Retaliatory Duties on U.S. Imports in Byrd Dispute*, 30 Int'l Trade Rep. (BNA) 1372, 1372 (2013).

²³⁹Dispute Settlement Body, *Annual Report*, at 10, WTO Doc. WT/DSB/61 (Nov.1, 2013). There were 1013 statements made by WTO Member States at DSB meetings about the delays in compliance in this dispute. *Rhetoric of Legitimacy*, *supra* note 66, at 14, n.24.

Legacy for the system

The *Byrd Amendment* dispute marked a continuation by the United States of delaying compliance by adding a transition provision to the repeal of the offending measure. Taking this approach has kept the statute alive as an issue with all WTO Member States that face duties on anti-dumping cases that started before 2005.

U.S.: Upland Cotton

Basis for the Dispute

The *Upland Cotton* (WT/DS267) dispute arose from a challenge by Brazil in 2002 to the provision by the United States of both export and domestic subsidies to cotton producers and purchasers.²⁴⁰ Agricultural subsidies and their legality in the WTO system had become a major negotiating issue in the Doha Round. Both export and domestic subsidies can violate the SCM Agreement. Export subsidies, if proven, are prohibited under Article 3.1²⁴¹ Domestic or actionable subsidies are allowed but may violate the SCM Agreement if they cause “serious prejudice.”²⁴²

Actually, the name of the dispute is misleading. The challenge brought by Brazil was to key aspects of the U.S. farm support system,²⁴³ and covered other commodities as well. Given the high level of argument in the Doha Round over how much to cut back subsidization, many other countries were also concerned about U.S. practices in this area. By the time the dispute reached the panel stage in 2003, sixteen other countries had filed third-party submissions expressing an interest and gaining the right to participate in the dispute.²⁴⁴

Both the panel and the AB report which followed, found the United

²⁴⁰See Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/1 (Oct. 3, 2002).

²⁴¹SCM Agreement, *supra* note 100, at art. 3.1.

²⁴²*Id.* at art. 6.3.

²⁴³Among the subsidies under attack were the Marketing Loan benefits and Counter-cyclical payments, which are provided to cotton but also other commodity groups like spars, soybeans and rice. See Randy Schnepf, CONG. RESEARCH SERV., RL 32571, BRAZIL’S WTO CASE AGAINST THE U.S. COTTON PROGRAM 3 (2011) [hereinafter Schnepf]. See also Townsend & Charnovitz, *supra* note 26, at 442 for a full description of both programs. See also David J. Townsend, *Stretching the Dispute Settlement Understanding: U.S.—Cotton’s Relaxed Interpretation of Cross-Retaliation in the World Trade Organization*, 9 RICH. J. GLOBAL L. & BUS. 135, 158 (2010) (describing the programs as “pillars of U.S. farm policy”) [hereinafter Townsend].

²⁴⁴The countries filing as third parties in the dispute were: Argentina, Australia, Benin, Canada, Chad, China, Chinese Taipei, EU, India, New Zealand, Pakistan, Paraguay, Venezuela, Bolivia, Japan and Thailand. See WTO, *US – Upland Cotton*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

States to be in violation of the SCM Agreement and the Agreement on Agriculture with regard to four different subsidy programs.²⁴⁵ In doing so, both reports rejected the U.S. argument that none of those subsidies were a violation of the SCM Agreement because of the understanding on agricultural subsidies reached in the Agreement on Agriculture.²⁴⁶ Under attack in the dispute were: (1) Export Credit Guarantees (in which the USDA provided assistance in financing export transactions); (2) Step 2 Cotton user subsidies (subsidies provided to alleviate the difference between the foreign and the higher priced U.S. cotton); (3) Counter-Cyclical Payments (payments made on cotton and other commodities when prices declined); and (4) Marketing Loan Payments (subsidies to get farmers through a growing season).²⁴⁷ The first two subsidy programs were found to be prohibited export subsidies. The AB found the other programs to be actionable subsidies that caused serious prejudice to Brazil by causing price suppression in the worldwide cotton market.²⁴⁸ The AB report gave the United States six months to remove the export subsidies and nine months to remove the others.²⁴⁹

The United States announced its intention to comply with the DSB recommendation. Given the dimensions of the farm support programs found to be illegal, and that there are multiple ways to respond, the United States took different steps to come into compliance. The United States altered the export credit guarantee programs in a way that would no longer make them “subsidies” under the SCM Agreement.²⁵⁰ The United States also eliminated the Step 2 program altogether.²⁵¹ The last two programs

²⁴⁵U.S. – Upland Cotton, *supra* note 4, at 288–94.

²⁴⁶This provision of the Agreement on Agriculture, Article 13, exempted certain agricultural subsidies from scrutiny and attack under the SCM Agreement. The AB found that the subsidies provided to cotton from 1999-2003, the period covered by the dispute were not entitled to the protection of the “peace clause” because they were in excess of the 1992 benchmark levels set in Article 13. See U.S. – Upland Cotton, *supra* note 4, at 146.

²⁴⁷See Townsend & Charnovitz, *supra* note 26, at 442. See also Karen Halverson Cross, *King Cotton, Developing Countries and the “Peace Clause”*: *The WTO’s US Cotton Subsidies Decision*, 9 J. INT’L. ECON. L. 149, 184–87 (2006) (provides a full description of the findings of the Appellate Body).

²⁴⁸U.S. – Upland Cotton, *supra* note 4, at 290–93.

²⁴⁹Decision by the Arbitrator, *United States—Subsidies on Upland Cotton, Recourse to Arbitration Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WTO Doc. WT/DS267/ARB/1 (Aug. 1, 2009) [hereinafter ARB 1].

²⁵⁰See Schnepf, *supra* note 243, at 15; See also U.S. Department of Agriculture USDA Announces Changes to Export Credit Guarantee Programs to Comply with WTO Findings (June 30, 2005), available at http://www.fas.usda.gov/scripts/PressRelease/pressrel_dout.asp?PrNum=0092-05.

²⁵¹This elimination was made part of the Deficit Reduction Act of 2005. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 1103, 120 Stat. 4 (2006).

were left untouched.²⁵²

When Brazil found the U.S. response inadequate, it sought a compliance review panel under Article 21.5. The compliance review process ended with a 2008 finding that U.S. attempts were inadequate: the export credit guarantees functioned as export subsidies and no changes had been made with regard to the counter-cyclical and marketing loan subsidies.²⁵³ The elimination of one of the programs—the Step 2 program—did constitute some compliance. By 2008, however, even that limited compliance was undone when the United States reinstated the Step 2 program in the 2008 Farm Bill.²⁵⁴ The United States attempted to look as if it was complying with the AB report while delaying any real efforts to come into compliance.

Role of Retaliation

Brazil ultimately sought an authorization for sanctions for the U.S. failure to remove all of the subsidy programs, including the Step 2 reenactment. The 2009 Article 22.6 arbitration resulted in two reports and findings for Brazil on all claims but the one about the Step 2 program.²⁵⁵ The panel stated that it lacked authority to authorize a remedy for a measure enacted after the start of the dispute process.²⁵⁶ Brazil received authorization, with regard to the other programs, to retaliate with sanctions on trade in goods calculated annually to reflect the current spending on cotton subsidies.²⁵⁷ Brazil argued for, and received, the right to use cross-retaliation under the GATS and TRIPs Agreement if the amounts of cotton benefit subsidies exceeded a certain threshold level.²⁵⁸ The Article 22.6 report did not accept all of Brazil's arguments about sanctions. It rejected

²⁵²See Townsend & Charnovitz, *supra* note 26, at 444–45 (pointing to the Arbitrator's decision that the United States had achieved substantive compliance).

²⁵³Appellate Body Report, *United States—Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU*, ¶ 448, WTO Doc. WT/DS267/AB/RW (adopted June 8, 2008).

²⁵⁴See Townsend & Charnovitz, *supra* note 26, at 445–47 (discussion of this instance of “uncompliance”).

²⁵⁵See ARB 1, *supra* note 249, at ¶ 3.64 for the first Arbitrator's opinion issued regarding retaliation. This opinion covered the retaliation appropriate for the export guarantee and Step 2 subsidies. See also Decision by the Arbitrator, *United States—Subsidies on Upland Cotton, Recourse to Arbitration under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, WTO Doc. WT/DS267/ARB2 (Aug. 31, 2009) (covering the Marketing Loan benefits, the Counter-cyclical Payments and the Step 2 payments that were actionable subsidies).

²⁵⁶See ARB 1, *supra* note 249, at ¶ 3.60.

²⁵⁷See Daniel Pruzin, Gary G. Yerkey & Ed Taylor, *WTO Gives Brazil Green Light to Impose Sanctions on U.S. Imports in Cotton Case*, 26 Int'l Trade Rep. (BNA) 1209, 1209 (2009) (the decision allowed cross-retaliation only if the amount of sanctions and the amount of trade between the countries hit a certain threshold.) [hereinafter Green Light].

²⁵⁸*Id.*; see also ABR 1, *supra* note 249, at ¶¶ 5.230–34.

the Brazilian claim that retaliation solely in goods was not useful. The report also found that given the large scale of trade between the two countries, Brazil did not prove that class-retaliation was necessary because trade in goods retaliation was impracticable or inefficient.²⁵⁹ Despite its status as a developing country, Brazil could not persuade the 22.6 panel that it lacked credible retaliatory power over trade in goods.²⁶⁰

As with all requests for authorization of sanctions, Brazil and the United States offered widely divergent estimations of what the appropriate amount should be.²⁶¹ After receiving authorization to retaliate, Brazil announced that it would take time to do an “in-depth re-examination of the situation” and then decide whether and how to pursue sanctions.²⁶² Both disputants immediately announced a willingness to negotiate rather than allow retaliation to go forward.²⁶³ In 2010, eight years after the dispute started, Brazil and the United States adopted a Framework Agreement to settle the dispute.²⁶⁴ In exchange for Brazil’s agreement to suspend any implementation of the authorized sanctions for two years, the United States agreed to create a fund of \$147 million to finance technical assistance for Brazil’s cotton farmers.²⁶⁵ The basis for the agreement to suspend retaliation was Brazil’s willingness to await the removal of cotton subsidies and export guarantees until the 2012 Farm Bill.²⁶⁶ The disputants agreed in

²⁵⁹See ABR 1, *supra* note 249, at ¶ 5.166–78.

²⁶⁰*But see* Townsend, *supra* note 243, at 149–51 (arguing that Brazil should not have been given permission to use cross-retaliation.).

²⁶¹See Green Light, *supra* note 258, at 1209 (in its second request to suspend concessions brought after the 21.5 compliance review process Brazil argued for \$2.2 billion a year in sanctions. The United States by contrast, argued “the maximum amount of retaliation should be fixed at no more than \$22.8 million.”).

²⁶²*Id.* at 1210.

²⁶³*Id.* at 1210–11.

²⁶⁴See Framework of a Mutually Agreed Solution to the Cotton Dispute in the World Trade Organization, June 17, 2010, WTO Doc. WT/DS267, <https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/Cotton%20Framework%20June%202010.pdf>; *see also* Randy Schnepf, CONG. RESEARCH SERV., R43336, STATUS OF THE WTO BRAZIL-U.S. COTTON CASE (2014) (for an analysis of the main aspects of the 2010 settlement)[hereinafter CRS Report].

²⁶⁵*Id.* at 3–4 (the Framework also contained a commitment by the United States to limit the domestic support paid for cotton and to meet quarterly with regard to the export guarantee program up through the adoption of the 2012 Farm Bill.); *see also* Press Release, USTR, U.S., Brazil Agree on Framework Regarding WTO Cotton Dispute (June 17, 2010), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2010/june/us-brazil-agree-framework-regarding-wto-cotton-disput> (describing how the April 2010 negotiations between the two countries produced an agreement that Brazil would not use the final list of goods chosen for retaliation if the U.S. agreed to work with it “to establish a fund of approximately \$147.3 million per year on a pro rata basis to provide technical assistance and capacity building to the cotton sector in Brazil”).

²⁶⁶Ed Taylor, *Brazil Suspends Sanctions Against U.S Until 2012 in WTO Cotton Subsidy*

2010 that the Framework Agreement was not a definitive solution²⁶⁷ but an interim settlement. Brazil did not see the immediate results it hoped for as the Farm Bill did not pass in 2012. The United States stopped making payments under the 2010 Framework Agreement in 2013.

When the Farm Bill was finally signed into law in 2014, Brazil initially took the view that provisions of the new legislation were suspect and announced that it would seek WTO review of the compliance of the new legislation as its preliminary analysis indicated “that elements persist in the new U.S farm bill that distort international cotton trade.”²⁶⁸ By October 2014, Brazil decided to accept a final settlement, later notified to the DSB as such, in which it waived rights to pursue retaliation or further proceedings in *Upland Cotton*.²⁶⁹ What Brazil received in exchange was payment of \$300 million to the Brazil Cotton Institute and new rules governing the U.S. farm subsidies program. These new rules singled out cotton for less subsidization than other farm products and allowed Brazil to negotiate with the USDA about aspects of how the export credit guarantee program would operate for the term of the Farm Bill.²⁷⁰ The settlement left in place some subsidies, although the major program left in place is one that Brazil could not establish as a violation of the SCM Agreement. As of 2017, Brazil remains concerned about U.S. cotton subsidies programs and has threatened to bring a WTO action if new subsidies cause damage to Brazilian farmers.²⁷¹

Legacy for the system

The *Upland Cotton* dispute was the first dispute in which a complainant in a position to use cross-retaliation received such authorization. Yet rather than employ retaliation, Brazil accepted first an interim settlement that did not offer much and then a final settlement that failed to resolve the issue of illegal subsidies. The *Upland Cotton* result reveals that interim and final settlements following the authorization of sanctions often leaves in place some, if not all, of the conduct attacked in the dispute.

Systemically, the resolution of the dispute is a loss. Brazil brought the

Dispute, 27 Int'l Trade Rep. (BNA) 950 (June 24, 2010).

²⁶⁷This makes the settlement here an interim settlement – the type of settlement that the Member States have by practice added to the WTO dispute settlement system.

²⁶⁸Michael Kepp, *Brazil to Ask WTO to Review U.S. Farm Bill Before Taking Retaliatory Measures*, 31 Int'l Trade Rep. (BNA) 411 (Feb. 27, 2014).

²⁶⁹Rosella Brevetti, *CRS Report Says Settlement in Cotton Brawl Could Have Spillover Effects*, 31 Int'l Trade Rep. (BNA) 1860 (Oct. 16, 2014).

²⁷⁰CRS Report, *supra* note 264, at 8–10 (for a description of all of the changes made to support the U.S. cotton industry in the 2014 Farm Bill).

²⁷¹Gerson Freitas, Jr., *Brazil Says It May Contest Additional U.S. Cotton Subsidies*, 34 Int'l Trade Rep. (BNA) (July 27, 2017).

action not only on its own behalf but to benefit cotton producers in many developing and least-developed African countries that lacked the resources to pursue a WTO dispute. While Brazil prevailed on the legal arguments, it reached a settlement with the United States that was solely a bilateral settlement.²⁷² The larger WTO membership²⁷³ would have benefitted from a resolution that would have lessened the impact of the U.S. subsidies on all impacted Member States. Such a settlement would have come about only if the disputants had gone to the WTO for a waiver.

While the operation of the dispute settlement failed the cotton producing nations, the WTO did deliver a decision on *Cotton* as part of the Nairobi Ministerial Conference in December 2015. The *Cotton* decision, reached 13 years after the *Upland Cotton* dispute began, calls for real aid to least developed and developing country cotton producers. The *Cotton* decision provides for an immediate end to cotton export subsidies by developed countries and for duty and quota-free access to developed country markets from January 1, 2016.²⁷⁴

U.S.: Gambling

Basis for Dispute

The *Gambling* dispute (WT/DS 285) began when Antigua and Barbuda filed a request for consultations in March 2003.²⁷⁵ Antigua complained that the cumulative effect of the U.S. federal, state, and local rules was to prevent the supply of gambling and betting services being supplied on a cross-border basis, (i.e., offshore through the internet) by another WTO Member. Antigua contended that these measures were

²⁷²Krzysztof J. Pelc, *Why the deal to pay Brazil \$300 million just to keep U.S. cotton subsidies is bad for the WTO, poor countries and the U.S. taxpayers*, WASH. POST (Oct. 12, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/10/12/why-the-deal-to-pay-brazil-300-million-just-to-keep-u-s-cotton-subsidies-is-bad-for-the-wto-poor-countries-and-u-s-taxpayers/>(According to Pelc: “In Benin, Burkina Faso, Chad, and Mali, known collectively as the “Cotton Four”, the more than 10 million people relying on cotton revenue will continue to compete against subsidized American farmers. The promise of WTO litigation is that complainants provide a public good by seeking enforcement on behalf of all countries with a stake in the matter. Bilateral settlements such as the U.S.-Brazil deal negate this hope.”).

²⁷³Simon Evenett & Alejandro Jara, *Settling WTO disputes without solving the problem: Abusing compensation*, VOX EU, Dec. 9, 2014, <http://voxeu.org/article/settling-wto-disputes-without-solving-problem-abusing-compensation>.

²⁷⁴Briefing Note, WTO, Cotton Negotiations, (2015), https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_cotton_e.htm (for a description of the decision and what it provides).

²⁷⁵Request for Consultations, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (March 13, 2003).

inconsistent with U.S. obligations under the GATS²⁷⁶ and on the commitment that the United States had made to open services in this area.²⁷⁷ The dispute was important to Antigua because it had an online gambling industry that lost crucial market access due to the U.S. measures.²⁷⁸

When the United States refused to conduct extensive consultations, Antigua requested a panel. Both the panel²⁷⁹ and the AB panel²⁸⁰ found for Antigua. The Appellate Body report concluded that the three federal gambling laws under attack—the Wire Act, The Travel Act, and the Illegal Gambling Act—did restrict Antigua’s market access but qualified that holding since the laws fell within Article XIV exception for the protection of public morals.²⁸¹ The United States could not be fully excused under Article XIV, however, as it still allowed some online gambling operations, largely those focused on horse racing. As a result, the U.S. actions banning Antigua from offering online gambling amounted to discrimination.²⁸²

The DSB adopted the AB report and recommendations in April 2005 and the United States announced its intention to comply.²⁸³ Upon the expiration of its reasonable period to comply, the United States announced that it was in compliance. Antigua, however, sought an Article 21.5 compliance review and won a decision stating that the United States had not brought its measures into compliance. The United States did take one course of action prior to the 21.5 compliance review report—it initiated the procedure under Article XXI of the GATS to modify the schedule of U.S. service commitments. The U.S. position was that this rescheduling reflected the country’s original intent that had always been to exclude gambling and betting services from services it meant to open under the GATS Agreement.²⁸⁴ The DSB adopted the Article 21.5 panel report in 2007. Since the United States had made no steps towards compliance, Antigua requested authorization to suspend concessions.²⁸⁵

²⁷⁶*Id.* at 1.

²⁷⁷The measures were alleged to violate Articles II, VI, VIII, XI, XVI and XVII of GATS. *Id.* The Market Opening Commitments for Services are contained in the U.S. schedule for commitments annexed to GATS.

²⁷⁸See Anupam Chander, *Globalization and Distrust*, 114 YALE L. J. 1193, 1211–18 (2005). See also Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, J. INT’L COM. & ECON. 1, 2 (2009) (about the importance of the gaming industry to the Antigua economy).

²⁷⁹Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO DOC. WT/DS285/R (Nov. 10, 2004).

²⁸⁰U.S. – Gambling, *supra* note 4.

²⁸¹*Id.* at ¶ 326.

²⁸²*Id.* at 369.

²⁸³TPA Agenda, *supra* note 230, at 80.

²⁸⁴*Id.* (This was the U.S. position during the litigation and the U.S. continued to claim the same in 2011.).

²⁸⁵*Id.*

Role of Retaliation

The United States followed the standard practice of seeking an arbitral panel over the appropriate amount of retaliation. In December 2007, this Article 22.6 arbitration resulted in a finding that Antigua suffered an annual level of nullification or impairment of benefits of \$21 million. Given the country's small size compared to the United States and its limited ability to impose retaliation on trade in goods effectively, the DSB authorized Antigua to pursue cross-retaliation by suspending concessions under the TRIPs Agreement relating to five of the protected forms of intellectual property under that agreement—copyrights, trademarks, industrial designs, patents and trade secrets.²⁸⁶

In 2007 and 2008, the United States proceeded to reach agreement with every WTO Member affected by the change put in place by its Article XXI rescheduling.²⁸⁷ This modification arguably eliminated the original basis for the violation claimed by Antigua. However, this change came after a WTO determination of illegality.²⁸⁸

Antigua was not one of the WTO Members that received benefits from the scheduling, as it was not pleased with the offer of compensation made to it by the United States. Antigua was also not in a position to retaliate. The U.S. position has been that the two countries are still seeking a mutually satisfactory resolution.²⁸⁹ The view of Antigua, four years after getting authorization for retaliation, is that it won the “ultimate Pyrrhic victory.”²⁹⁰ Antigua has argued that the WTO needs to find solutions for cases like its own and requested the Director General find some way to use his good offices to help with the resolution of the dispute.²⁹¹ In January 2014, Antigua received authorization to employ cross-retaliation against U.S. intellectual property rights in an annual amount of \$21 million. Antigua asked the United States to make one last effort at arriving at a negotiated settlement.²⁹² Antigua considered setting up an online platform,

²⁸⁶Arbitration Report *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO DOC. WT/DS285 (DEC. 21, 2007) ¶ 4.20.

²⁸⁷See TPA Agenda, *supra* note 230, at 80 (under Article XXI of GATS WTO Members are allowed to modify or withdraw market access commitment if they offer compensation. Members that are affected can then claim compensatory adjustments under Art. XXI:2(a)).

²⁸⁸See Andrew D. Mitchell & Constantine Salonidis, *David's Sling: Cross-Retaliation in International Trade Disputes*, 45 J. WORLD TRADE 457, 475–76 (2011) [hereinafter Mitchell & Salonidis].

²⁸⁹TPA, *supra* note 230, at 80.

²⁹⁰Statement by Colin Murdoch, Antigua and Barbuda Ambassador to the WTO at the 8th Session of the WTO Ministerial Conference (Dec. 17, 2011), https://www.wto.org/english/thewto_e/minist_e/min11_e/min11_statements_e.htm.

²⁹¹*Id.*

²⁹²Daniel Pruzin, *Antigua Asks U.S. to Make 'Last Effort' to Comply with WTO Gambling Ruling*, 30 Int'l Trade Rep. (BNA) 437 (Mar. 28, 2013).

which would allow it to offer downloads of films and music held by U.S. intellectual property rights holders.²⁹³ The U.S. response was that the DSB authorization for retaliation would not justify intellectual property theft or violations of intellectual property rights.²⁹⁴ Although Antigua announced that it was close to formalizing its plans to retaliate, it has never done so. The last time Antigua and the United States had negotiations aimed at settling the dispute was in July 2015.²⁹⁵ The dispute has gone on for thirteen years from its start and for two years since the DSB granted Antigua authorization to retaliate. As of September 2017, Antigua is still considering cross retaliation if the United States fails to reach a final agreement.²⁹⁶

Legacy for the system

The *Gambling* dispute reveals in starkest terms how difficult it is for a smaller WTO member state to prevail against a well-developed member that chooses to neither comply nor settle. Antigua was able to bring its dispute and win a WTO decision and a DSB authorization to retaliate. Nevertheless, the country has been unable to get the United States to focus on serious negotiations for a settlement. Moreover, the complainant in this instance would take on a great risk if it experimented with cross-retaliation.

U.S.: Zeroing

Basis of the Dispute

Zeroing encompasses eighteen different disputes filed with the WTO's dispute settlement system.²⁹⁷ All but the first dispute on this issue, *EC: Bed*

²⁹³See Daniel Pruzin, *Antigua Readies Retaliation against U.S. Intellectual Property Rights Holders*, 31 Int'l Trade Rep. (BNA) 462, (Mar. 6, 2014); see also Daniel Pruzin, *Antigua to Set Up Platform for Enforcing IP Sanctions Against U.S. in WTO Dispute*, 87 PAT. TRADEMARK & COPYRIGHT J. (BNA) 60 (Nov. 8, 2013).

²⁹⁴*Id.*

²⁹⁵Bryce Baschuk, *U.S. to Settle WTO Online Gambling Dispute*, 32 Int'l Trade Rep. (BNA) 1380 (Aug. 6, 2015).

²⁹⁶In 2016 Antigua threatened to retaliate. See Bryce Baschuk, *Antigua Issues Ultimatum to U.S. Over Gambling Dispute*, 33 Int'l Trade Rep. (BNA) 1686 (Dec. 1, 2016). At a meeting of the DSB on September 29, 2017, Antigua and the United States discussed the dispute. The United States said that it "remains committed" to resolving the dispute but did not offer a settlement. Antigua announced that it was still considering using its DSB authorization to cross-retaliate. See Bryce Baschuk, *Antigua and Barbuda Urges U.S. to Settle Gambling Ban Dispute*, 34 Int'l Trade Rep. (BNA) 1321 (Oct. 5, 2017).

²⁹⁷The WTO Dispute Settlement page cross-references eighteen different disputes in which "zeroing" was at issue between the disputants. World Trade Organization, "Index of Disputes," (Sept. 1, 2017), https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm.

Linen,²⁹⁸ were filed against the United States and its practice for calculating margins of dumping when determining what tariffs to put in place following anti-dumping determinations.²⁹⁹ Article VI of the GATT and the WTO Anti-Dumping Agreement allows member states to impose extra duties on dumped goods—those sold in the target market below the price in home market sales or the cost of production. The Anti-Dumping Agreement contains limitations on how member states choosing to fight this unfair trade practice must administer their proceedings. The Anti-Dumping Agreement did not clarify whether “zeroing” was illegal.³⁰⁰ Prior to the *EC: Bed Linen* dispute, the United States and the EU both calculated the margin of dumping between the home market (“normal value”) price and the export price (the price in the country receiving the good) for each type of product and aggregated these prices while leaving out or “zeroing” any calculation where the export price was higher. The use of zeroing inflates dumping margins. The EU abandoned the practice after *Bed Linen*, when the AB report ruled the practice to be illegal.³⁰¹

The United States, by contrast, continued to insist that zeroing was not illegal and continued to use this method of calculation. By sticking to zeroing, the United States ensured that all of its antidumping determinations issued in original cases and in administrative reviews done on each case (necessary for calculating a margin for each of the five (5) years of antidumping relief) would reflect the contested practice.

Starting in 1999, a series of disputes were filed arguing that U.S. practice violated the Anti-Dumping Agreement. Although some panels supported the U.S. position on the legality of zeroing, the AB consistently

²⁹⁸Appellate Body Report, *European Communities - Anti-Dumping Duties on Imports on Cotton-type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001). This was the first decision by an AB panel that the practice of zeroing in antidumping actions violated the Anti-Dumping Agreement.

²⁹⁹The U.S. has always been a proponent of the practice and remains so as of this date. See Press Release, USTR Kirk Announces Solution to Years-old Zeroing Disputes, Office of the United States Trade Representative, (Feb. 2012) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/united-states-trade-representative-ron-kirk-announces-solu> (“The United States has repeatedly explained that the WTO Appellate Body—in making its findings on zeroing—did not apply the text of the Antidumping Agreement and, therefore, exceeded its mandate.”).

³⁰⁰See generally Sungjoon Cho, *Global Constitutional Lawmaking*, 31 U. PA. J. INT’L L. 621, 644–49 (2010) [hereinafter Cho] for a discussion of how the AB position on zeroing can be seen as a constitutional one since there has been division on this issue among Members in the Doha Negotiations.

³⁰¹See Chad P. Bown & Thomas Prusa, *U.S. Antidumping Much Ado About Zeroing* (World Bank Working Paper 2010) at 4 available at <http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5352>. Bown and Prusa note that it was easier for the EU and any other WTO members to drop the practice of dumping because all of them use a prospective duty assessment system. By contrast, the U.S. uses a retrospective system. As a result, eliminating the zeroing practice would affect calculations of margins in all subsequent reviews. *Id.* at 30.

rejected those decisions. The United States responded to this series of losses by trying to get the issue of zeroing into the Doha Round negotiations on the Anti-Dumping Agreement³⁰² and by eliminating the practice in its original actions.³⁰³ The United States, however, refused to eliminate the practice in all of the numerous administrative reviews done for outstanding antidumping orders.

Both the EU and Japan brought disputes in 2003 and 2004 (WT/DS294 and WT/DS322) focused on U.S. use of the zeroing practice in administrative reviews.³⁰⁴ The United States lost those cases in 2006 and 2007.³⁰⁵ Even after these losses, the United States retained the practice. After compliance reviews also went against the United States in 2009,³⁰⁶ the EU and Japan sought authorization from an Article 22.6 arbitration to suspend concessions in late 2010.³⁰⁷

Role of Retaliation

During negotiations over how to resolve the dispute, the EU and Japan agreed to suspend the 22.6 proceedings so that the United States could come into compliance. The United States made a commitment in late 2010 to remove zeroing once it adopted a final rule to that effect. However, there was not real progress on change until February of 2012. At that time, the EU and Japan signed agreements with the United States to finalize the required rule changes and to reopen the administrative reviews and reviews the anti-dumping tariffs on multiple cases faced by imports from each country.³⁰⁸ The United States published the final rule in February 2012 eliminating the use of zeroing for all reviews pending before the Department of Commerce as of April 2012.³⁰⁹ The United States also

³⁰²See Cho, *supra* note 300 at 647–48.

³⁰³*Id.*

³⁰⁴Request for Consultations by Japan, United States—Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS322/1 (Nov. 24, 2004); Request for Consultations by EC, United States—Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/1 (June 12, 2003).

³⁰⁵Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS322/AB/R (Apr. 18, 2006).

³⁰⁶Article 21.5 Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/RW (August 18, 2009); Article 21.5 Appellate Body Report, United States—Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/RW (Dec. 17, 2008).

³⁰⁷See TPA Agenda, *supra* note 230, at 82.

³⁰⁸See Daniel Pruzin, *U.S. Seeking Talks with EU to Avert Sanctions for Zeroing*, 27 Int'l Trade Rep. (BNA) 780 (May 27, 2010).

³⁰⁹See Sungjoon Cho, *ASIL Insight, No More Zeroing: The United States Changes its Antidumping Policy* (March 9, 2012) at 1 available at: <https://www.asil.org/insights/volume>

agreed to recalculate the antidumping margins in two zeroing disputes brought by the EU, one by Mexico and the one by Japan.³¹⁰

The settlement and rule change did not resolve all zeroing issues faced by the United States. The United States has not reopened and recalculated all of the dumping margins in cases determined prior to April 2012. Even after resolving the *Zeroing* dispute, the United States has faced challenges on other aspects of the use of the practice from Brazil, China, South Korea and Vietnam.³¹¹

Retaliation was threatened but not exercised in the *Zeroing* dispute. While under threat, the United States delayed compliance for two years. Even though it took time to adopt an administrative rule change—not subject to Congressional review or input—retaliation served as a prompting factor in the U.S. decision to make a change.

U.S.: Certain Country of Origin Labeling (COOL) Requirements (WT/DS 384/386)

Basis of the Dispute

The Certain Country of Origin Labeling (COOL) requirements dispute began in late 2008 when Canada requested consultations regarding the mandatory country of origin labeling on beef and pork products required in the Farm Bill of 2008.³¹² The United States has a long tradition of requiring labels of origin for imported products but also of exempting from agricultural commodities in their natural state.³¹³ The United States changed its position on this issue in the 2002 Farm Bill, but concerns raised by the food and agriculture industries about how implementation would work kept any measure requiring labeling stalled until the 2008 Farm Bill.³¹⁴ Mexico later joined Canada in consultations with the United States.

/16/issue/8/no-more-zeroing-united-states-changes-its-antidumping-policy-comply-wto_

³¹⁰*Id.* at 3, 4.

³¹¹See Brian Flood, *WTO to Rule in September on Washer, Solar Panel Disputes*, 33 Int'l Trade Rep. (BNA) 1130 (Aug. 11, 2016) (regarding a challenge by South Korea); Bryce Baschuk, *Shrimp Exporter No Longer Subject to Antidumping Duties*, 33 Int'l Trade Rep. (BNA) 1023 (July,21, 2016) (regarding a dispute brought by Vietnam); Daniel Pruzin, *WTO Issues Final Rule Condemning U.S. Use of Zeroing in China Dumping Cases*, 29 Int'l Trade Rep. (BNA) 758 (May 10,2012); Daniel Pruzin, *Brazil Signals Possible WTO Challenge on U.S. Compliance with Orange Juice Ruling*, 29 Int'l Trade Rep. (BNA) 629 (Apr. 19,2012).

³¹²Request for Consultations, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WTO Doc. WT/DS/384/1 (Dec. 1, 2008). The COOL dispute was one of a trio of contemporaneous disputes brought against the United States alleging violations of the Technical Barriers to Trade Agreement (TBT Agreement).

³¹³Joel L. Green, CONG. RESEARCH SERV., RS22955, COUNTRY OF ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING, at 2 (2015), available at: <https://www.fas.org/sgp/crs/misc/RS22955.pdf> [hereinafter CRS COOL Report].

³¹⁴There was not complete accord within the United States about the value or utility of

Both Canada and Mexico alleged that the COOL provisions violated the Article III National Treatment obligation of the GATT and Article 2 of the Technical Barriers to Trade.³¹⁵ Mexico also filed a dispute, WT/D386, based on the same claims. When consultations failed, Canada requested a panel. Sixteen countries requested third-party rights in the Canada/U.S. dispute.³¹⁶

In 2011, the panel considered the claims of Canada and Mexico together and found that the country of origin labeling measures qualified as a technical regulation under the TBT Agreement because they are legally enforceable requirements governing the labeling of meat products offered for sale.³¹⁷ With this threshold issue decided, the panel went on to find that the COOL measures violated both Article 2.1 (national treatment obligation under that agreement) and 2.2 (the measure failed to fulfill legitimate objectives).³¹⁸ The panel found that in order to comply with COOL requirements, producers in the U.S. had to segregate imported and domestic livestock and that this discouraged the use of imported livestock.³¹⁹ Both the United States and Canada appealed the panel decision. The United States argued against the panel interpretation of the TBT Agreement while Canada appealed aspects of the TBT interpretation and raised issues about the National Treatment claim. The Appellate Body report, issued in August 2012, upheld the Panel determination against the United States but for different reasons. The Appellate Body found a violation of Article 2.1 of the TBT Agreement³²⁰ but found no violation of Article 2.2.³²¹

The United States requested a reasonable period to comply with the

country of origin labeling. Throughout the process of the creation of the COOL measure in 2008 and its revision in 2009, there were organized U.S. industry groups on both sides of the issue. See Erik Wasson & Alan Bjerga, *Congress to Repeal Meat Labeling Rules to Stop Penalty*, 32 Int'l Trade Rep. (BNA) 2195 (Dec. 17, 2015) [hereinafter Wasson & Bjerga].

³¹⁵Other violations were also alleged – based on Articles IX.4 and X.3 of the GATT and Article 2 of the Agreement on Rules of Origin – but the dispute hinged on the National Treatment and TBT claims.

³¹⁶Argentina, Australia, Brazil, China, Colombia, the EU, Guatemala, India, Japan, South Korea, Mexico, New Zealand, Peru, and Taiwan all filed as Third Parties in the Canada dispute.

³¹⁷Panel Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, ¶¶ 7.216–.217, WTO Doc. WT/DS384,386/R (Nov. 18, 2011).

³¹⁸*Id.* ¶¶ 7.547–.548 (regarding Art. 2.1 of the TBT Agreement), 7.718 (regarding Art. 2.2 of the TBT Agreement). See WTO, *US – COOL*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

³¹⁹The panel did not reach the GATT National Treatment claim in its report.

³²⁰U.S. – COOL, *supra* note 4, at ¶¶. 349–50. The gist of the Appellate Body determination was that the COOL measure required record keeping and verification requirements that were not included in the label information provided to consumers. The necessary recordkeeping and verification requirements to comply with COOL gave U.S. producers an incentive to select U.S. products over imports.

³²¹*Id.* at ¶ 491.

AB determination. After an arbitration of the issue, the United States received until December 2012, ten months from the date of the adoption of the Appellate Body report, to come into compliance with its recommendation.³²² The day after the reasonable period to comply expired, the United States informed the DSB that the U.S. Department of Agriculture had revised the COOL requirements and that the new final rule brought the United States into compliance.³²³ Under the revised rule, country of origin labels for the meat products were required to include a country of origin reflecting each step in the production process—where the animal was born, raised, and slaughtered. The new rule also did not allow meat products to be comprised of portions comingled from different countries.³²⁴ Canada objected to the new COOL final rule for its lack of compliance with the AB report and because it was more restrictive than the original measure reviewed by the WTO. The United States argued that the revised measure responded to issues raised in the AB report. Since it passed a revised version of the COOL rule, the United States gained additional time to deal with the dispute and the problem of having to meet the concerns of a U.S. industry backing the legislation.³²⁵

In August 2013, Canada requested an Article 21.5 compliance panel in August 2013 and one was established in September 2014. The Article 21.5 panel ruled on the common objections raised by Canada and Mexico³²⁶ about how the new rule also violated Article 2.1 of the TBT Agreement. The Article 21.5 panel found that the new rule increased the detrimental impact on beef and pork imports into the U.S. market.³²⁷ The Article 21.5 panel also found that the new rule violated the National Treatment obligation of GATT.³²⁸ In May 2015, the Appellate Body 21.5 report was issued.³²⁹ The AB 21.5 report focused most of its efforts on rejecting the

³²²Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Certain Country of Origin Labeling (COOL) Requirements*, ¶ 123, WTO Doc. WT/DS384/24 and WT/DS386/23 (Dec. 4, 2012).

³²³See Rossella Brevetti, *Proposed COOL Changes Would Provide Consumers With more Information*, 30 Int'l Trade Rep. (BNA) 384 (Mar. 14, 2013).

³²⁴For a description of how the revised rule operated see CRS COOL Report, *supra* note 314, at 16–18.

³²⁵The industry groups supporting the COOL legislation were happy with the U.S. decision to revise COOL. The groups that had been in opposition to the measure also decried the new version and filed a federal lawsuit against the revised measure. *Id.* at 19, app. F.

³²⁶Mexico also challenged whether the new rule brought the United States into compliance in its dispute with the United States.

³²⁷Recourse to Article 21.5 of the DSU, Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.285, WTO Doc. WT/DS384,386/RW (Oct. 20, 2014).

³²⁸*Id.* at ¶ 7.643.

³²⁹Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL)*

U.S. attempt to justify the new rule. The AB report agreed with the Article 21.5 panel that there was a violation of Article 2.1 of the TBT Agreement. The AB pointed out that the record keeping and verification requirements necessitated by the implementation of the revised country of origin labeling rule imposed a disproportionate burden on foreign producers and processors of livestock not explained by the need to provide country of origin information to consumers.³³⁰

Role of Retaliation

Even before going through the appeal of the 21.5 report, Canada and Mexico had established retaliation lists. Canada's list targeted beef and pork imports, among other products, from the United States.³³¹ After prevailing in the AB 21.5 compliance review, Canada and Mexico sought DSB authorization to suspend concessions against the United States. The Article 22.6 arbitration determined that the amount of suspended concessions was approximately \$1,054.73 million CAD for Canada and \$227.76 million for Mexico.³³² Canada and Mexico pushed to have the final authorization for the suspension of concessions issued at the Nairobi Ministerial Conference in December of 2015. The United States blocked that effort, arguing that it was unprecedented for the DSB to meet during a ministerial conference.³³³ The DSB authorized the suspension right after the conference on December 21, 2015.

As the dispute progressed through the arbitration over the amount of retaliation, the U.S. Congress was already considering options for action that would allow the United States to avoid the imposition of sanctions aimed directly at the meat industries.³³⁴ Congress considered revising the COOL legislation yet again, including making it into a voluntary program.³³⁵ In the end, however, there was a great deal of support for the

Requirements, WTO Doc. WT/DS384,386/AB/RW (adopted May 29, 2015).

³³⁰*Id.* at ¶¶ 5.117–5.122.

³³¹See Global Affairs Canada, *Statement by Ministers Fast and Ritz on U.S. Country of Origin Labelling* (June 7, 2013), http://www.international.gc.ca/media_commerce/comm/news-communiqués/2013/06/07a.aspx?lang=eng (the press release in which Canada rejected the new COOL rule had an attached retaliation list); see also Bryce Baschuk, *Canada, Mexico Threaten Retaliation After WTO Adopts Final Labelling Ruling*, 32 Int'l Trade Rep. (BNA) 1006 (June 4, 2015).

³³²Decision by the Arbitrator, *Recourse to Arbitration under Article 22.6 of the DSU by the United States, United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 6.80–82, ¶ 7, WTO Doc. WT/DS384, 386/ARB (Dec. 7, 2015).

³³³Bryce Baschuk, *U.S. Blocks Canada, Mexico From Labeling Retaliation*, 32 Int'l Trade Rep. (BNA) 2214 (Dec. 24, 2015).

³³⁴The National Cattlemen's Association had estimated that if retaliation went into effect, U.S. beef producers would lose about 10 cents per pound on each pound of imports it sold to Canada and Mexico. Wasson & Bjerga, *supra* note 315.

³³⁵Catherine Boudreau, *Sen. Stabenow Proposes Meat Labeling Alternative to Solve WTO*

easier-to-implement solution of repealing the legislation.³³⁶ The House of Representatives passed legislation in June 2015 repealing COOL as it applied to all meat products. The repeal was part of an omnibus spending bill, passed by both the House and the Senate and signed by President Obama in December 2015.³³⁷ The final rule implementing the repeal went into effect in March 2016,³³⁸ seven years after the beginning of the WTO dispute.

The threat of sanctions from both NAFTA partners provided enough incentive for the United States to move to quick action regarding the repeal of the COOL legislation. Even after the repeal, Canada sought DSB authorization of retaliation so that it could take action if the United States failed to follow through on the repeal.³³⁹

Problems revealed by the disputes involving sustained non-compliance

The disputes that went to retaliation and beyond reveal three problems for the WTO dispute settlement system. First, large, developed member states can avoid compliance by taking and continuing to take the hit of retaliation until they can arrange interim and final settlements or decide to terminate the offending policy. The *Hormones*, *Bananas III*, *Foreign Sales Corporations (FSC)*, and *Byrd Amendment* disputes all illustrate this reality. In three of these disputes, *Bananas III*, *Hormones* and the *Byrd Agreement*, the sanctions continued for years—*Bananas III* (two years), *Hormones* (over a decade with the potential for a return) and *Byrd Amendment* (seven years). Large, developed member states have stalled compliance and gained more time to maintain the WTO-illegal policy by returning to the dispute settlement process. Eight of the eleven disputes that have gone to retaliation or beyond have spawned either multiple disputes over compliance with the final AB decision, follow-up DSU litigation, or both.³⁴⁰ In every dispute where the United States fixed an illegal measure and faced a compliance review for the new measure—in *FSC*, *Byrd Amendment*, *Upland Cotton*, and *COOL*—the compliance review panel found the U.S. fix to be illegal.

Dispute, 32 Int'l Trade Rep. (BNA) 1204 (July 2, 2015).

³³⁶See Bryce Baschuk & Catherine Boudreau, *WTO Rejects U.S. Appeal of COOL Requirements Covering Meat Labeling*, 32 Int'l Trade Rep. (BNA) 924 (May 21, 2015); see also CRS COOL Report, *supra* note 314, at 23 (There was a COOL Reform Coalition of more than one hundred businesses pushing Congress to repeal the COOL legislation).

³³⁷Peter Menyasz, *Canada Celebrates Resolution of the COOL Dispute*, 32 Int'l Trade Rep. (BNA) 2235 (Dec. 24, 2015).

³³⁸Rosella Brevetti, *UDSA Nixes Some Labeling Requirements*, 33 Int'l Trade Rep. (BNA) 319 (Mar. 3, 2016).

³³⁹Peter Menyasz, *Canada Celebrates Resolution of COOL Dispute*, 32 Int'l Trade Rep. (BNA) 2235 (Dec. 24, 2015)

³⁴⁰The only disputes where the threat of retaliation was enough to get the U.S. to respond were the *Antidumping Act of 1916*, *Zeroing*, and *COOL* disputes.

Second, large, developed member states can delay resolution of a dispute long enough to encourage the complainant to settle the dispute on favorable terms or give them longer to continue the violative measure.³⁴¹ As part of this delay, these respondents have signaled compliance by changing the measure found to be illegal, but in ways that fail to solve the market access problem of the complainant or to remove the WTO illegality.³⁴² In most cases, this course of conduct provokes a compliance challenge by the complainant and additional years of dispute resolution before a compliance panel (and usually, an appellate review of that panel) also finds the new measure to violate the WTO rules in play. The EU engaged in this course of conduct in *Hormones* and *Bananas III*. The U.S. used this approach in the *FSC*, *Byrd Amendment*, *Upland Cotton*, and *COOL* disputes.

Third, the case studies suggest that developing countries cannot use the ultimate penalty effectively as a threat or a sanction.³⁴³ Crucial asymmetries exist between developed and developing member states with regard to the incentive to deviate from compliance and the capacity to respond to such deviations.³⁴⁴ Large, developed member states can and have taken the hit of retaliation in order to preserve a measure they want to keep. Similarly, these member states can afford to absorb harm that comes from using retaliation to try to get compliance from a resisting member state.

By contrast, developing member states have not yet proven able to take the hit of retaliation or use it against non-complying respondents. To date, only one developing country, Brazil, has resisted compliance and provoked a request for sanctions. Brazil followed this path in *Regional Aircraft*. However, it is worth noting that Brazil did so only where it had launched a companion dispute against Canada. Developing member states up against larger developed member states have not always found access to retaliation helpful.³⁴⁵ In none of the disputes where the suspension of concessions was authorized (*Bananas III*, *Regional Aircraft*, *Upland Cotton*, and *Gambling*) was it employed. Even where the DSU has

³⁴¹See Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, THE POLITICS OF INTERNATIONAL LAW, OXFORD UNIV. PRESS (Wayne Sandholtz & Christopher Whytok eds., 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883_at_22.

³⁴²*Id.* See *Upland Cotton* at 51–54 for a discussion of how the settlements worked.

³⁴³*Id.*

³⁴⁴See Bernard Hoekman, *Proposals for WTO Reform: A Synthesis and Assessment* 16 (World Bank, International Trade Department, Poverty Reduction and Economic Management Network, Policy Research Working Paper No. 5525, 2011) (“There are asymmetric incentives for countries to deviate from the WTO, as the ultimate threat that can be made against a member state that does not comply is retaliation.”).

³⁴⁵Rolland, *supra* note 8, at 191.

authorized suspension of concessions, developing Member States have never employed it. In *Bananas III*, Ecuador sought and received the right to use retaliation but accepted a settlement that required many more years of negotiation and litigation before providing true relief.³⁴⁶ In the *Gambling* dispute, Antigua was also authorized to retaliate. Years after this authorization, Antigua remains unable to obtain a negotiated settlement from the United States or develop a plan for retaliation that would not create significant problems for the small country.³⁴⁷ Brazil, a large developing country, and therefore in a better position to retaliate, was content to negotiate settlements in *Upland Cotton*³⁴⁸ for far less than the harm suffered according to retaliation authorization. Brazil did better in *Regional Aircraft* but only because Canada also faced sanctions and the two countries decided to settle the issue outside the WTO.

II. WHAT DOES NOT WORK IN THE DSU SYSTEM

The disputes involving sustained non-compliance highlight how certain aspects of the system—delay, member-control over compliance, limitations in the DSU, and limitations in the remedy of retaliation—harm the DSU system.

Delay

The DSU has strict time limits for pursuing claims through the panel and Appellate Body stages.³⁴⁹ The member states considered timeliness to be an important enough issue to insist that: “the prompt settlement of situations . . . is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members.”³⁵⁰ If member states abided by these time limits, an average dispute would resolve in one year.³⁵¹ Studies conducted on the timelines in the DSU system establish that the process as it operates fails to meet almost every DSU timeline.³⁵² Two things have made the time limits built into the system illusory. Panels have the right to report that they require additional time when a case has substantive or procedural complexities.³⁵³ Many

³⁴⁶See *infra* pp. 81–84.

³⁴⁷See *infra* pp. 81–84.

³⁴⁸See *supra* note 240, at 51–54.

³⁴⁹DSU, *supra* note 14, at art. 20.

³⁵⁰*Id.* at art. 3.3.

³⁵¹See Brewster, *supra* note 25, at 107.

³⁵²See Johannesson & Mavroidis, *supra* note 25, at 8–15. The study covers all disputes from the inception of the DSU system in 1995 through 2016. *Id.* at 8 (a chart showing all of the timelines and for the actual average times taken in the WTO disputes). See also Brewster, *supra* note 25, at 117–25.

³⁵³Brewster, *supra* note 25, at 121.

WTO disputes, and almost every one of the disputes analyzed above, were either factually complex and/or required the panel or the AB panel to rule on procedural aspects of the DSU.

Wholly apart from the delays springing from the panel and AB proceedings are the delays that occur during the implementation process. Respondents can gain extra time to comply or avoid sanctions by requesting an Article 21.3 decision on what constitutes a reasonable time to comply and by declaring that they have come into compliance thereby triggering an Article 21.5 compliance review. Respondents are also entitled to an AB level consideration of the compliance review panel report. If the complainant proceeds to request a suspension of concessions, the respondent then becomes entitled to seek an Article 22.6 arbitration about the proper amount of that retaliation.

In each of the cases of sustained non-compliance, the disputants went through every stage of the process and often added on additional time seeking a negotiated settlement.³⁵⁴ Consequently, almost every one of the disputes added two to four years to the time taken just to get to the imposition of retaliation.³⁵⁵ Even after retaliation, delay creeps into the process. Several of the cases examined above were resolved with a mutually agreed solution that was actually an interim settlement.³⁵⁶

Delay itself constitutes a serious problem as it undercuts the ability of the successful complainant to procure the relief. Compounding the problem of delay is the prospective nature of the DSU remedy, which assures that no relief to the complainant until the dispute settlement process is completed. The longer the compliance process—at whatever stage it occurs—the longer the complainant suffers from the WTO-illegal measure.³⁵⁷ This means delay of full compliance in some disputes for years. The case studies reveal that delay also occurs whenever a member state complies, it phases in the new measure over time. The United States has used this strategy in the *FSC* and *Byrd Amendment* disputes.

Compliance Control Allows for Manipulation

The panel and Appellate Body reports clarify the legal rights and obligations of the members. The conclusion of every report finding against the losing respondent states that the member should bring the measure(s) found inconsistent “into conformity with its obligations under that [WTO] Agreement.”³⁵⁸ However, the reports do not tell the losing respondent how

³⁵⁴See discussion *supra* Sections *Hormones*, *Bananas III*, *FSC*, and *Upland Cotton*.

³⁵⁵Brewster, *supra* note 25, at 124–25 (noting that the period for the panel to retaliation authorization in *Upland Cotton* was six and one-half years).

³⁵⁶See *supra* pp. 12–13 for a discussion of the problem with such interim settlements.

³⁵⁷Brewster, *supra* note 25, at 120.

³⁵⁸See DSU, *supra* note 14, at art. 19.1 (“Where a panel or the Appellate Body concludes

to comply with this recommendation. These respondents have full freedom to decide how to comply. The member states clearly want a system that allows member control over compliance. However, the DSU offers such complete freedom that a losing respondent can comply in a way that amounts to avoidance, if not bad faith.³⁵⁹ member states seeking to avoid compliance have learned to game the system.³⁶⁰ A respondent can take advantage of all of the stages of the process to obtain delays. A respondent can take legislative action to comply that does not truly address the WTO-illegality thus forcing more litigation. A respondent can litigate at great length exploiting every textual ambiguity and gap in the WTO agreement in contest and in the DSU itself. All of these courses of action occurred in the *Bananas III*, *Hormones*, *FSC*, *Upland Cotton*, *Zeroing*, and *COOL* disputes. These compliance avoidance techniques now offer a roadmap for other losing respondents to follow.

Limitations of the DSU: A Flaw and a Gap

The disputes going to retaliation and beyond prove that the enforcement articles of the DSU have a flaw and a gap. The flaw is the lack of any true system of surveillance. Article 21.6 requires the DSB to keep a dispute, including whether or not the losing respondent has implemented its obligation, “under surveillance.”³⁶¹ However, the DSU does not set out a procedure for the DSB to follow when conducting this surveillance³⁶² despite its great importance.³⁶³ The DSB clearly has authority to create such a surveillance procedure and to specify what would be required to satisfy its

that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.” For an illustration of this see U.S.—COOL, *supra* note 4, at para. 497 (“The Appellate Body *recommends* that the DSB request the United States to bring its measures found in this Report, and in the Mexico Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and the TBT Agreement, into conformity with its obligations under those Agreements.”).

³⁵⁹See *supra* pp. 23–25 (*Hormones*—EU never withdrew the ban), 34–36 (*FSC*—passage of a measure to comply that did not and later phase-in of a repeal), and 51 (*Upland Cotton*).

³⁶⁰Brewster, *supra* note 25, at 122.

³⁶¹DSU, *supra* note 14, at art. 21.6.

³⁶²Jonathan T. Fried, *2013 In WTO Dispute Settlement, Reflections from the Chair of the Dispute Settlement Body*, WORLD TRADE ORGANIZATION (Aug. 30, 2017), http://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm [hereinafter Fried].

According to Fried, there has been a “collective failure to do just to one of the most important roles accorded to the DSB” in how the DSB has handled surveillance. Fried suggests that part of the problem has been the lack of rules in this area.

³⁶³Fried, *supra* note 364, sets out how surveillance should operate: “Multilateral surveillance of implementation of the recommendations and rulings of the DSB is one of the unique features of this system, designed to foster compliance in a positive spirit, with a spotlight shining on non-compliance in front of other members, but accompanied by an open and standing invitation to find mutually agreeable solutions.”

terms. What the DSU now does is inadequate. DSB surveillance consists of putting the implementation of each outstanding dispute on the agenda for each monthly meeting. By providing space on the agenda, the DSB allows all interested members to raise implementation problems or concerns regarding any dispute.³⁶⁴ The losing respondent is required to file status reports about its implementation efforts starting within six months of the implementation period.³⁶⁵

The DSB has not established requirements for the form or detail of these status reports.³⁶⁶ Often the reports contain only bald statements that the respondent member is working on the issue.³⁶⁷ While the DSB retains jurisdiction over the implementation “until the issue is resolved,”³⁶⁸ it has not adopted any procedure to follow up if the continuous finger-pointing of the surveillance process of discussions at the DSB meetings fails to bring a timely or adequate response. The DSB holds special sessions to establish panels or adopt panel reports³⁶⁹ and to discuss issues of great importance and for DSU negotiating sessions. However, the DSB has never held extended meetings regarding compliance in individual cases, not even when they have gone on for years and provoked concerns from within the membership.³⁷⁰

³⁶⁴The fact that all WTO Members—not affected parties—are free to raise issues about compliance signals that the surveillance is a community function the entire DSB has a stake in whether the respondent complies promptly and in good faith.

³⁶⁵DSU, *supra* note 14, at art. 21.6.

³⁶⁶The status reports provided are often without any details that would allow the complainant or the DSB to judge whether the respondent is working towards compliance. *See* Guohua, Mercurio & Yongjie, *supra* note 42, at 245 (“The implementing Member is not required to identify the changes, such as the offending measures it will remove or implementing legislation that will bring it into compliance with the ruling. Members are not even required to specify any sort of implementation schedule or consult with the winning party over implementation. Put simply, no good faith need be shown during the entire implementation period.”). *See also* Carolyn G. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POL’Y INT’L BUS. 709, 719 (2000) (noting that the system requires little; the parties could, if both agree, to consult during the process but that nothing stops the respondent from using the period as “a tool for buying several months of additional time to evade its obligations”).

³⁶⁷*See* the response of the Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.135 (May 13, 2016), where the U.S. made a status report on a case – the U.S. Section 110(5) of the U.S. Copyright Act – filed in 1999 and for which a temporary solution was negotiated for the period ending on December 20, 2004. The sole report of the U.S. consists of this sentence: “The U.S. Administration will work closely with the U.S. Congress and will continue to confer with the European Union in order to reach a mutually satisfactory resolution of this dispute.”

³⁶⁸DSU, *supra* note 14, at art. 21.6.

³⁶⁹Guohua, Mercurio & Yongjie, *supra* note 42 at 10.

³⁷⁰Fried, *supra* note 364 (noting “[i]t is not hard to imagine a more robust two-way interaction between the DSB and the DSB in Special Session” as a way of doing more to

The WTO is aware of the problem with its surveillance system. However, the DSB has done nothing to date but point out that “the Membership has not made the best use of this unique surveillance tool” and acknowledge that the system requires fixing.³⁷¹ Giorgio Sacerdoti, a former member of the Appellate Body, argues for a more effective surveillance system “to induce more prompt compliance” and tightened procedures that do not “reward the dragging of feet by the losing party with regards to compliance with adverse decisions.”³⁷² As the case studies illustrate, the surveillance system has played no role in the resolving any of the disputes that have gone to retaliation and beyond.³⁷³

A gap in the enforcement provisions of the DSU also poses significant problems for the system. As noted earlier, the DSU lacks any procedure in Article 22 for dealing with what happens after retaliation. This gap either provoked or gave cover to the EU when it decided to extend the fight in the *Hormones* dispute by bringing a new dispute over the use of retaliation—the *Continued Suspension* dispute. The lack of a post-retaliation procedure has also left dissatisfied complainants struggling over how to proceed when retaliation, or the threat of it, produces an inadequate settlement.

The Limits of Retaliation

Along with inadequate surveillance and the lack of a post-retaliation procedure, the limits of retaliation also empower losing respondents trying to avoid compliance. The DSU contemplates the use of retaliation but only under constraints. Any retaliation must be prospective in nature, provided in a form allowed by the DSU, and in proportion to the harm suffered by the complainant.³⁷⁴ Many scholars³⁷⁵ and WTO members agree that the

improve DSB surveillance).

³⁷¹Fernando De Mateo, *WTO Dispute Settlement Body – Developments in 2014*, WORLD TRADE ORGANIZATION (Mar. 24, 2014), https://www.wto.org/english/tratop_e/dispu_e/fimateo_14_e.htm. (Amb. De Mateo noted “[t]he start of each DSB meeting is more tolerance than surveillance, more a formality than a genuine effort at ensuring prompt compliance.”).

³⁷²Sacerdoti, *supra* note 16, at 51.

³⁷³DSB oversight, apart from compliance reviews and sanctions requests, has not affected how the losing party responds. See Steve Charnovitz, *An Analysis of Pascal Lamy’s Proposal on Collective Preferences*, 8 J. INT’L ECON. L. 449, 458–59 (2005) (noting that there really is no connection between the surveillance carried out by the DSB and the domestic parties’ process for considering how and whether to come into compliance); see also Christopher Arup, *The State of Play of Dispute Settlement “Law” at the World Trade Organization*, 37 J. WORLD TRADE 897, 902 (2003) (noting that what happens to disputes still remains within the control of the Member States and the DSU uses soft methods—monitoring and reporting on implementation and discussions in WTO meetings—to encourage compliance).

³⁷⁴DSU, *supra* note 14, at art. 22. (prospective —art. 22.6; allowed by the DSU—art. 22.3 specifying that the suspension of concessions should generally be in the same trade sector as that of the violative measure; proportional to injury —art. 22.4).

point of allowing sanctions is both to induce compliance and the rebalance the level of concessions that would have been in place but for the illegal measures.³⁷⁶ Yet there is also agreement that the DSU limits on retaliation were not designed to achieve either goal in every dispute. The disputes that have gone to retaliation and beyond illustrate this reality. Retaliation has proven useful only when it is credible,³⁷⁷ when used strategically,³⁷⁸ and when the complainant has been willing to accept partial compliance.³⁷⁹

In choosing retaliation as one of the remedies for non-compliance, the DSU built implied threats into the dispute settlement system.³⁸⁰ It is, in part, this threat of what sanctions could do which gets most members to settle or to comply in a timely and adequate manner.³⁸¹ A DSB-authorized retaliation brings a great deal more pressure to bear because it carries with it

³⁷⁵See Joost Pauwelyn, *The Calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations?*, THE LAW, ECONOMIC AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT 34, 36–38 (Chad B. Bown & Joost Pauwelyn eds., 2010) (identifying these goals and noting that most of the lawyers writing about the goal in this length study of retaliation focus on the retaliation goal of inducing compliance). *Id.* at 38. *But see* John H. Jackson, *Editorial Comment: International Law Status of WTO Dispute Settlement: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT’L L. 109, 121–22 (2004) (expressly rejecting the idea of retaliation being aimed at rebalancing concessions).

³⁷⁶See Lothar Ehring, *The European Community’s experience and practice in suspending WTO obligations*, THE LAW, ECONOMIC AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT 244, 245 (“The EC, one can safely say, has invariably adopted trade sanctions for the sole purpose of inducing the responding party . . . to bring about compliance.”) [hereinafter Ehring]. *But see* Hudec, *supra* note 68, at 388. Robert Hudec argues perhaps the acknowledged expert on both GATT and WTO dispute settlement disagreed completely with the idea of rebalancing rationale for retaliation. He pointed out that in economic terms it was “a fiction” and that governments were aware that the rationale made no sense.

³⁷⁷For example, when sanctions power is granted to developed Member States. *See* discussion *supra* Sections *Bananas III*, *FSC*, and *Byrd Amendment* disputes.

³⁷⁸See discussion *infra* p. 80 for how the EU approached the use of retaliation authorization in the *FSC* dispute.

³⁷⁹Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT’L L.J. 259, 288 (2013) [hereinafter *Pricing Compliance*].

³⁸⁰The Member States definitely act within the shadow of the sanctions remedy. Many scholars argue that countries comply for a number of reasons including: 1) wanting a reputation as a supporter of WTO law and the institution, and 2) supporting the WTO DSU system. *See* Claus D. Zimmerman, *Toleration of Temporary Non-compliance: The Systematic Safety Value of WTO Dispute Settlement Revisited*, 3(2) J. TRADE L. & DEV. 382, 388 (2011); Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optional Remedies, “Legalized Non-compliance” and Related Issues*, 110 MICH. L. REV. 243, 254 (2011) [hereinafter Posner & Sykes], Trachtman—WTO Cathedral, *supra* note 7, at 141–43 (2007).

³⁸¹Hudec, *supra* note 68, at 388, (noting that the “threat of harm is probably more influential than the actual harm itself, which can provoke anger”); *see also* Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the WTO’s Dispute Settlement System*, 6 THEORETICAL INQ. L. 214, 218 (2005).

the weight of the membership announcing the harm caused by the illegal activity and a statement of the respondent's non-compliance.³⁸² The implied threat becomes a credible threat.³⁸³ This does not mean that the credible threat will produce the compliance desired by the complainant and the system. A dispute involving an important enough policy (*Bananas III*—colonial preferences; *Hormones*—food safety; *Upland Cotton*—pillars of the farm support system; *FSC*—how to tax all foreign earned income; *Zeroing*—an interpretation of a heavily used import relief statute) or large enough stakes (large market impacts in cases like *Bananas III*, *Upland Cotton*, and *FSC*) has led the losing respondent to discount the harms and take retaliation sometimes for years in effect buying the right to breach.³⁸⁴

Other disputes, like *Antidumping Act of 1916*, *Regional Aircraft*, *Upland Cotton*, and *Zeroing*, however, reveal that a credible threat can prompt some type of resolution. In the case of *Zeroing*, the threat became credible when two major complainants announced they would pursue retaliation authorizations. Despite its insistence on being right about the legal issue, the United States was not willing to take the hit of retaliation delivered by two developed countries and trading partners.³⁸⁵ In the case of *Upland Cotton*, the United States also proved unwilling to experiment with cross-retaliation used against U.S. owned intellectual property rights.³⁸⁶

The case studies reveal that neither the use³⁸⁷ nor the size of the retaliation³⁸⁸ has actually forced a resolution. Instead, what seems to hasten compliance is the design of the retaliation. The quick resolution of the *FSC* dispute suggests that strategic retaliation can work. The EU decision to target at the U.S. election cycle was clever both in design and in execution because it made the administration focus on the dispute.³⁸⁹ A similar strategic targeting of the recalcitrant EU member states fighting to retain the

³⁸²See Andrew W. Shoyer, Eric M. Solovy & Alexander W. Koff, *Implementation and Enforcement of Dispute Settlement Decisions*, 1 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1341, 1342 (Patrick F.J. Macrory et al. eds., 2005) (noting that the chance for retaliation “provides a continuing incentive to change the offending measure and clearly brands the Member as a violator of the WTO”).

³⁸³See Brewster, *supra* note 25, at 138 (noting that the reputational loss to the respondent is greatest once sanctions that had been authorized “because the respondent state is continuing to act outside of the WTO legal framework”).

³⁸⁴See Posner & Sykes, *supra* note 382, at 260; see also ROBERT Z. LAWRENCE, CRIMES & PUNISHMENTS? RETALIATION UNDER THE WTO 47 (2003).

³⁸⁵See *supra* pp. 62–63 for a discussion of the ultimate resolution of the *Zeroing* dispute.

³⁸⁶See *supra* pp. 53–54 for a discussion of the ultimate resolution in *Upland Cotton*. This reluctance to experiment is linked to the fact that cross-retaliation could, in fact, inflict some true harm on U.S. intellectual property interests

³⁸⁷See Rolland, *supra* note 8, at 196–97.

³⁸⁸DSB authorizations for large amounts of retaliation have never been employed. The EU used only a portion of its authorized retaliation right in the *FSC* dispute.

³⁸⁹See *supra* at p. 36 for a discussion of how the EU use of retaliation in the *FSC* dispute.

banana regime in *Bananas III* also worked effectively in getting the EU to a negotiated settlement.³⁹⁰ Employing the threat of sanctions strategically, however, requires a country to use effort at home and abroad designing lists of products for retaliation that will make settlement seem necessary or attractive.³⁹¹ The work at home is crucial for choosing retaliation targets in such a way as to limit the harms that would fall upon domestic importers counting on the goods from the non-complying country. The work of selecting, refining and publishing a version of the retaliation lists, which begins even before seeking formal DSB authorization,³⁹² is also important for making the retaliation threat more credible and providing leverage in settlement negotiations.

Another limit of retaliation is that the alternative remedy of cross-retaliation has been underutilized. The literature on cross-retaliation makes the case for this form of sanction as a valuable way of mitigating the power asymmetries inherent in the DSU system.³⁹³ If a non-complying country has a strong intellectual property tradition and thriving IP-based industries, the suspension of intellectual property protection could impose substantial harms.³⁹⁴ It is not clear that the negotiating group will go forward with this proposal but it is notable that this is the only change to the remedy to make it to the discussion level. The Chairman's report on the draft indicates that as of April 2011 there had not been lengthy discussion of this proposed

³⁹⁰See *supra* at pp. 31–32 for how this played out.

³⁹¹See Hudec, *supra* note 68, at 388 n. 34; see also Scott D. Anderson and Justine Blahat, *The United States' experience in suspending WTO obligations*, THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT 235–43 (2010); Ehring, *supra* note 377, at 248–50 (describing the process of determining the retaliation list for the *FSC* dispute).

³⁹²Hudec explains that the country planning to use the retaliation authorization counts on the effects of the retaliation working in several stages. The first stage comes with the publication of a list of potential targets “a list which is usually considerably larger than the list eventually chosen.” Second, comes the actual request for authorization, which involves a “‘final’ list of targets that is also larger than the list that the WTO arbitration will actually approve. These stages leave those targeted industries with an incentive to get their government to change its course of action. The third stage is the actual imposition of sanctions and sometimes “seems less important for its direct political impact than for its function in giving credibility to the earlier, broader threats in cases to come.” Hudec, *supra* note 68, at 388, n.34.

³⁹³See Mitchell & Saloniadis, *supra* note 289; Henning Grosse Ruse-Khan, *La Pirate of the Caribbean? The Attractions of Suspending TRIPs Obligations*, 11(2) J. INT'L ECON. L. 313 (2008); Henning Grosse Ruse-Khan, “*Gambling*” with Sovereignty: *Complying with international obligations or upholding national autonomy*, INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY 150, 150–55 (Meredith Kolsky Lewis et al. eds. 2010) [hereinafter Ruse-Khan]; Frederick M. Abbott, *Cross-Retaliation in TRIPs: Options For Developing Countries* INT'L CENTRE TRADE & SUSTAINABLE DEV. (Apr. 2009).

³⁹⁴See Ruse-Khan, *supra* note 395, at 151–52; see also Mitchell & Saloniadis, *supra* note 289, at 457–73.

amendment. Since collective retaliation would be a community sanction³⁹⁵ and a shift away from the traditional self-help remedy, the report points out that there would need to be clarification on both when to allow it and on “the exact sequence of events that would arise under this proposed procedure.”³⁹⁶

The disputes involving cross-retaliation prove some things. First, the arbitrators will authorize cross-retaliation for both small and larger developing countries.³⁹⁷ Second, countries seeking cross-retaliation can use the threat of retaliation to improve their negotiating position in what will become a negotiated settlement.³⁹⁸ In the *Bananas III* dispute, Ecuador was innovative in creating the first case for cross-retaliation and in designing a workable way to impose sanctions based on withdrawing intellectual property protection. Evidence is mixed about whether seeking cross-retaliation helped Ecuador in its negotiation with the EU. Although the EU was concerned about the precedent of cross-retaliation, it was not worried about Ecuador’s ability to impose significant economic harm through the device.³⁹⁹ Nevertheless, there is some indication that the pace of negotiations for the first settlement of the case accelerated by the approaching deadline once Ecuador received the DSB authorization to proceed.⁴⁰⁰

The arbitral interpretation of the right to access cross-retaliation, however, places real limits on the use of this form of sanctions. Article 22.6 and the reports interpreting it have made it clear that the complainant bears burdens. The complainant must establish that normal retaliation is neither “practicable” nor “effective.”⁴⁰¹ The complainant must also show

³⁹⁵A move to a sanction by even a group of WTO Member States rather than by the prevailing complainant is an action by the community rather than authorization of the self-help remedy currently employed.

³⁹⁶DSB—Special Session, *supra* note 8, at A-43. Some countries noted the problems that could flow from allowing collective retaliation—that any members using retaliation would risk causing themselves harm and that even collectively developing countries might have a limited incentive to join in enforcement. See DSB—Special Session, *supra* note 8, at B-2 including a comment by some Members that those countries choosing to join in an attempt at collective retaliation would be “likely to suffer from the imposition of retaliatory measures and thus have limited incentive to join in a ‘group’ to impose retaliation with regard to a dispute they were not part of.”

³⁹⁷Cross-retaliation was authorized for Ecuador, a small developing country in *Bananas III* and for Brazil, a larger developing country in *Upland Cotton*. Both the United States and the EU have also sought cross-retaliation rights in the *Large Aircraft* dispute.

³⁹⁸There is general agreement that this is what happened to Ecuador in *Bananas III*. See Mitchell & Salonidis, *supra* note 288, at 474; Smith *supra* note 151, at 267–70.

³⁹⁹See Smith, *supra* note 151, at 267–70.

⁴⁰⁰*Id.*; Mitchell & Salonidis, *supra* note 289, at 475.

⁴⁰¹These are two of the requirements established for access to the use of cross-retaliation in Article 22.3. See DSU *supra* note 14, at art. 22.3(b). In the 22.6 Arbitrator’s decision

that circumstances are “serious enough” to warrant the use of cross-retaliation.⁴⁰² In *Bananas III*, *Upland Cotton* and *Gambling*, the complainants made such showings. The kinds of circumstances they argued—the importance of the impaired trade to the overall economy (Ecuador and Antigua),⁴⁰³ trade disparities with the respondent (Antigua)⁴⁰⁴ and the losses that would come from normal retaliation in trade in goods (Brazil)⁴⁰⁵—would prove relatively easy for most developing countries to establish.

A more limiting requirement for most countries seeking to use cross-retaliation, however, is that the complainant is not entitled to complete discretion over what cross-agreement concessions may be suspended. The arbitrators’ decisions in these disputes have determined that they have the right to review and amend the list of proposed sanctions.⁴⁰⁶ This is markedly different from the complete discretion—except with regard to

regarding Ecuador’s request, it was noted that the term “practicable” referred to “availability” or “suitability”. About the concept of “effective” the decision stated that the term “connotes ‘powerful’ in effect, (making a strong impression), (having an effect or result). The thrust of this criterion empowers the party seeking suspension to ensure that the impact of the suspension has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.” Decision of the Arbitrators, EC—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU (Mar. 24, 2000) at paras.70, 72 [hereinafter 22.6 *Bananas III*]. This showing by the Member seeking cross-retaliation is subject to review by the arbitral panel. *Id.* at 52.

⁴⁰²This is also a requirement for access to cross-retaliation in Article 22.3. See DSU, *supra* note 14, art. 22.3(a). 22.6 *Bananas III*, *supra*, at para. 73 (discussing whether the issue was serious enough for Ecuador); Decision by the Arbitrator, U.S.—Measures Affecting the Cross Border Supply of Gambling and Betting Services, Recourse to Arbitration under Article 22.6 WT/DS285/ARB (Dec. 21, 2007) at Section IV.3 [hereinafter 22.6 *Gambling*]. (In performing its “case-by-case” analysis of this factor circumstances justifying cross-retaliation are “serious enough” only when “the circumstances reach a certain degree or level of importance” and that this was satisfied in the case of Antigua that was met by the disparities in size and economies between Antigua and the U.S., Antigua’s limited ability to export and its extreme reliance on tourism.) The Arbitrator’s decision noted that “the extremely unbalanced nature of the trading relations between the parties makes it all the more difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions or other obligations against the United States under the same agreement. *Id.* at Section IV.9

⁴⁰³See Frederick M. Abbott, *Cross-retaliation in TRIPs: issues of law and practice* 536, 540, THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT (Chad P. Bown & Joost Pauwelyn, eds. 2010) (discussing Ecuador) [hereinafter Abbott/Cross-retaliation].

⁴⁰⁴22.6 *Gambling*, *supra* note 402, at Section IV.9.

⁴⁰⁵Decision by the Arbitrator, U.S.—Subsidies on Upland Cotton, Recourse to Arbitration under Art. 22.6 and Article 4.11 of the SCM Agreement, WT/DS267/ARB1 (Aug. 31, 2009) at ¶ 5.221.

⁴⁰⁶22.6 *Bananas III*, *supra* note 401, at ¶ 3.7.

amount—that members have in designing normal trade in goods retaliation lists.⁴⁰⁷

There are also two other limitations on the use of cross-retaliation. The arbitrators in *Bananas III* determined that when designing cross retaliation under the TRIPS Agreement a country should be careful to: (1) suspend intellectual property obligations of only rights-holders having the same nationality as the non-complying country, and (2) that cross-retaliation should have its effects only within the territory of the country using it.⁴⁰⁸ All of the WTO countries provide intellectual property rights to both foreign and domestic parties and the goods produced by those rights are potential exports. Consequently, designing a workable retaliation scheme under these restraints—even if properly suggested to limit any spillover impacts on other members—is quite difficult.⁴⁰⁹ This puts the developing country planning to seek cross-retaliation to significant or often overwhelming efforts to come up with a credible threat.

DSU Reform Process and Options for Reform Regarding

The DSU was from the beginning intended for review and potential amendment by the WTO membership. The first DSU review was to take place in 1999 after the system had been in place for five years. The review began at that time but was extended and later extended yet again by a decision at the 2001 Doha Ministerial Conference. In recent years, the

⁴⁰⁷In such cases, the requesting party must set out a specific level of suspension (the level equal to the nullification or impairment it has suffered because of the WTO-inconsistent measure) and specify the agreement and sectors under which it seeks to suspend concessions. Decision of the Arbitrators, EC—Measures Concerning Meat and Meat Products (Hormones), Recourse to Arbitrator under Article 22.6 of the DSU, WT/DS26/ARB (July 12, 1999) at para.16. Article 22 does not “define what constitutes a sufficient request for the suspension of concessions or other obligations.” Guohua, Mercurio & Yonjie, *supra* note 42, at 260.

⁴⁰⁸With regard to suspending the IPR obligations of only those sharing the same nationality of the respondent see 22.6 *Bananas III*, *supra* note 401, at ¶¶ 140–47. This limitation makes it necessary for the requesting party to figure out some methodology for targeting the appropriate rights holders. See Mitchell & Salonidis, *supra* note 289. With regard to the requirement that retaliation to territorial in nature see 22.6 *Bananas III*, *supra* note 377, at 153. This requirement comes about because of the possibility of exports and obligations of other WTO Member States to allow challenges of infringing goods. See Mitchell & Salonidis, *supra* note 289, at 481; Weiner Zdouc, *Cross-retaliation and suspension under the GATS and TRIPs agreements* at 523–26, *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* (Chad P. Bown & Joost Pauwelyn, eds. 2010) (explaining the challenges posed by those requirements regarding the operation of different types of intellectual property rights); Abbott/Cross-retaliation, *supra* note 403, at 563–75 (discussing the nationality issue and the different ways cross-retaliation could be used with the various types of intellectual property rights).

⁴⁰⁹See Mitchell & Salonidis, *supra* note 289, at 480–83.

DSU negotiations have become reform negotiations.⁴¹⁰ As of 2017, DSU negotiations remain on the agenda for the WTO⁴¹¹ and may produce outcomes for adoption at the 11th Ministerial Conference in December 2017.⁴¹²

The reform negotiations take place in special sessions of the DSB devoted solely to these issues and kept apart from the standard work of surveillance done regarding existing disputes. The reform negotiations have produced almost twenty major proposals from individual members and groups of members (such as the Least-Developed Countries and the African Group) to amend almost every phase of the DSU system and thus virtually every article in the understanding. This is true despite the general belief that the overall experience of the DSU system has been positive.

The WTO membership did not provide guidelines or specific objectives for the DSU negotiations but rather a general mandate to “agree on improvements and clarifications.”⁴¹³ The DSU negotiations are stand-alone negotiations. Nevertheless, the DSU negotiations seem to run in tandem with the other Doha Round negotiations.

The most recent in-depth information publicly available on the status of the DSU negotiations is a report by the then chair of the DSU negotiations, Ambassador Soto of Costa Rica.⁴¹⁴ Chairman Soto’s 2015

⁴¹⁰See generally Zimmermann, *supra* note 74, at 93–123 (following the evolution of the DSU negotiations from 1997-2004).

⁴¹¹See WTO, Nairobi Ministerial Declaration, *supra* note 18.

⁴¹²The current DSU negotiations are focused on 12 thematic issues:

- Third Party Rights
- Panel composition
- Remand
- Mutually agreed solutions
- Strictly confidential information
- Sequencing
- Post-retaliation
- Transparency and amicus curiae briefs
- Timeframes
- Developing country interests, including special and differential treatment
- Flexibility and Member control
- Effective compliance

The goal of the current chair, Stephan Karau, is to have negotiations on DSU reform far enough along for outcomes to go to the WTO’s 11th Ministerial in Buenos Aires, Argentina in December 2017.

⁴¹³This has left the DSU negotiators free to determine what issues are important enough to move forward for amendment. It was also made clear when the 2001 authorization was provided that the DSU negotiations did not have to await the conclusion of the Doha Round and become part of the single undertaking—the WTO tradition of having all agreements adopted together at the same time.

⁴¹⁴WTO, Special Session of the Dispute Settlement Body, Report by the Chairman,

report provides a discussion of the twelve themes pursued in the recent DSU negotiations but offers no draft text.⁴¹⁵ The 2011 Special Session report provided draft text on one theme highly relevant to the problem of sustained non-compliance—“Effective compliance.”⁴¹⁶ The draft text from that period would add new procedures to the enforcement phase of the DSU—Articles 21 and 22.

The draft text and its accompanying report are illuminating for what they say and what they do not say. There have been numerous proposals made by members and analyzed by scholars advocating either replace or supplement the retaliation remedy with a system of monetary damages or fines,⁴¹⁷ or collective retaliation.⁴¹⁸ Most of these proposals have not achieved real traction in the negotiations.

Rather than offer a new remedy the negotiators have focused on improving some of the problems in the DSU provisions dealing with compliance. For example, the draft text would amend Article 21 to deal with one aspect of delay in compliance. The amendment would allow disputants to begin consultations that could lead to a settlement at the midpoint of the “reasonable period of time” given for a losing respondent to comply.⁴¹⁹ This would mean that the winning disputant would not have to

TN/DS/27, Aug. 6, 2015 [hereinafter 2015 DSU Report].

⁴¹⁵There is a draft text the Member States are currently working on from 2013, JOB/DS/14, that has not been de-restricted.

⁴¹⁶See DSB-Special Session, *supra* note 8, at B-2 (June 21-25, 2010), B-4-5 (September 20-24, 2010), B-6-7 (November 1-5, 2010), B-11-13 (January 17-21, 2011), B-17-19 (March 7-11, 2011), and B-22-23 (April 4-8, 2011).

⁴¹⁷Many Member States have proposed monetary damages as a replacement remedy. See Proposal by the African Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/15 at 3 (Sept. 25, 2002) [hereinafter African Group Proposal]; Communication from Ecuador: Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, TN/DS/W/9 at 3-4 (July 8, 2002); [hereinafter African Group Proposal]; Communication from Ecuador: Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO, TN/D5/W/9 at 3-4 (July 8, 2002); Communication from China: Improving the Special and Differential in the Dispute Settlement Understanding, TN/DS/W/29 at 2 (Jan. 22, 2003); Communication from Kenya’s Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, TN/DS/W/42 at 3 (Jan. 24, 2003) [hereinafter Kenya Proposal].

⁴¹⁸See Kenya Proposal, *supra* at 3; Communication from Haiti, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, TN/DS/W/37 at 3 (Jan. 22, 2003); African Group Proposal, *supra* at 3.

⁴¹⁹See DSB—Special Session, *supra* note 8, at A-14.

[(a) After the midpoint of the reasonable period of time, or after the DSB meeting referred to in paragraph 3 where the Member concerned does not [have][need] a reasonable period of time pursuant to paragraph 3, each party (to the dispute shall, if requested by another party, accord sympathetic consideration to any request for consultations in good faith with a view to reaching a mutually satisfactory solution regarding the implementation of the recommendations and rulings of the DSB.

wait until the respondent has exhausted all of the time given for compliance before knowing what the respondent intends to do. If this amendment goes into the DSU, the disputants would be on the way to an earlier settlement.

The draft text also contains proposals aimed at addressing the power asymmetries that limit the value of the current DSU remedy.⁴²⁰ A proposed amendment to Article 22 would allow in any developing/developed country dispute for the developing country complainant to have complete freedom over the form of retaliation it would employ. The amendment would provide “the right to seek authorization to suspend concessions or other obligations in any sectors under any covered agreements.”⁴²¹ If adopted, this amendment would remove all of the limitations currently placed by the DSU text and AB interpretation on access to cross-retaliation for developing countries in disputes. Cross-retaliation would become a much more useful tool for developing country members.

The other proposed amendment to the remedies article, Article 22, would allow for the use of collective retaliation. What this contemplates is the DSB authorizing another member or group of members to retaliate on the behalf of a developing country member if it can demonstrate that suspending concessions would have negative economic consequences in the winning developing country.⁴²² It is not clear that the negotiating group

[The party requesting consultations shall notify its request to the DSB and the relevant Councils and Committees.]

⁴²⁰Some, more than others, might help with this problem. One proposed amendment would make all compensation offers be made in monetary form for developing country members. Since compensation is almost never offered, however, such an alteration would not be useful.

⁴²¹See DSB—Special Session, *supra* note 8, at A-16.

[3bis Notwithstanding the provisions contained in paragraph 3, in a dispute between a developing country Member and a developed country Member, the developing country Member shall have the right to seek authorization to suspend concessions or other obligations in any sectors under any covered agreements.]

⁴²²See DSB—Special Session, *supra* note 8, at A-16.

[(b) Where it is demonstrated that the suspension of concessions or other obligations would have negative consequences on the economy of a developing country Member, the DSB may, upon request, authorize a Member or a group of Members to suspend concessions on behalf of the affected Member. The following principles and procedures shall apply to such requests:

(I) Before making such a request; the developing country Member shall refer the matter to arbitration for determination of the level of nullification and impairment, which shall be done [taking into account the legitimate expectations of the developing country Member]. The arbitration shall further take into account the effects of the suspension of concessions upon the

will go forward with this proposal but it is notable that this is only change to the remedy to make it to the discussion level. The Chairman's report on the draft indicates that as of April 2011 there had not been lengthy discussion of this proposed amendment. Since collective retaliation would be a community sanction⁴²³ and a shift away from the traditional self-help remedy, the report points out that there would need to be clarification on both when to allow it and on "the exact sequence of events that would arise under this proposed procedure."⁴²⁴

Another important part of the 2011 Chairman's draft text deals with another major aspect of sustained non-compliance—the acceptable discipline for the end game. The negotiators were considering two competing proposals to establish a post-retaliation procedure. Either proposal would fill the biggest enforcement gap in the current DSU.⁴²⁵ As of 2015, a similar concern was expressed about the need to strengthen surveillance by having administrative measures applied in the event of non-compliance beyond the reasonable period of time,⁴²⁶ having the respondent "provide an enhanced notification of compliance."⁴²⁷

In the 2011 text, the focus was on how to establish whether true compliance has occurred so that the authorized retaliation can end.⁴²⁸ The

economy of the developing country.

(ii) The arbitration shall consider whether the suspension of concessions or other obligations in other sectors by the developing country Member would be [appropriate to effectively encourage the withdrawal of the measure found to be inconsistent with a covered Agreement, taking into account possible effects on that developing country Member].

⁴²³A move to a sanction by even a group of WTO Member States rather than by the prevailing complainant is an action by the community rather than authorization of the self-help remedy currently employed.

⁴²⁴DSB—Special Session, *supra* note 8, at A-43. Some countries noted the problems that could flow from allowing collective retaliation—that any members using retaliation would risk causing themselves harm and that even collectively developing countries might have a limited incentive to join in enforcement. *See* DSB—Special Session, *supra* note 8, at B-2 including a comment by some Members that those countries choosing to join in an attempt at collective retaliation would be "likely to suffer from the imposition of retaliatory measures and thus have limited incentive to join in a 'group' to impose retaliation with regard to a dispute they were not part of."

⁴²⁵*See infra* p. 76-83 for a discussion of the lack of a post-retaliation procedure. For a discussion of the consequences of this lack, *see also* Townsend & Charnovitz, *supra* note 26 (detailing what happened in the battle over compliance in *Upland Cotton*).

⁴²⁶2015 DSU Report, *supra* note 388, at 9 (¶ 3.43).

⁴²⁷*Id.* at 10 (¶ 3.52).

⁴²⁸DSB—Special Session, *supra* note 8, at B-14, ¶ 84.

"Participants confirmed the objective of having explicit rules on post-retaliation to address the question of how a disagreement as to the existence or consistency of measures taken to

two proposals in that text differ mainly on when the non-complying disputant must provide information to the DSB that it has taken action to come into compliance. One version would have this notification come as part of the respondent's request for an Article 21.5 compliance panel to review whether the new measure that it has passed brings it into compliance.⁴²⁹ The other version would have the respondent—prior to entering into any consultations about withdrawing sanctions or any 21.5 review—provide the DSB with a much more detailed notification of what it has done to comply. This notification would include a detailed description of its new measure, its date of entry into force, the text of the measure and all relevant documentation as well as a “detailed factual and legal explanation of how the measure . . . has removed any inconsistency with, or provided a solution to any nullification or impairment of benefits under, the covered agreements.”⁴³⁰ The second version of the post-retaliation

comply might be resolved where retaliation has been authorized, and how the authorization may be terminated.”

⁴²⁹DSB—Special Session, *supra* note 8, at A-17. The first version would amend Article 22.8 by adding the following:

[(b) Where the DSB has authorized the suspension of concessions or other obligations against a Member and there is a subsequent disagreement as to the existence of consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB, the Member concerned may have recourse to the procedures of paragraph 5 of Article 21 as modified by this paragraph. In such a case:

(i) in its request for the establishment of a panel, the Member concerned shall set out the specific measures taken to comply, the text of these measures, and a factual and legal description of how these measures bring the Member into compliance with the recommendations and rulings of the DSB;

(ii) where a member that has been authorized to suspend concessions or other obligations considers that a measure taken to comply is inconsistent with any other provision of the covered agreements, or that the Member concerned has otherwise not brought itself into compliance with the recommendations and rulings of the DSB, it may submit to the DSB, no later than [xx days] after the establishment of a panel, a notice setting out any additional measure taken to comply and a brief summary of the legal basis for its disagreement with the Member concerned; and

(iii) for the purpose of these proceedings, the word “document” in the terms of reference of the panel under paragraph 1 of Article 7 comprises the request for the establishment of the panel and the notice submitted under subparagraph (ii) [of this provision].

⁴³⁰DSB—Special Session, *supra* note 8, at A-18.
The second version, with its greater requirements for detail, is:

procedure would provide the material necessary for real negotiations between the disputants and for useful surveillance by the DSB. It would limit the chances that the losing respondent could game the system with proposed “solutions” that do not really offer compliance.

There has also been consideration of the need for also more thorough reporting to the DSB when disputants reach a mutually agreed solution to a dispute. In 2015, Ambassador Soto reported that the DSU negotiations on this issue had reached a “convergence on the goal of improving notification” of such settlements.⁴³¹ According to his report, the work ahead is to finalize the text “clarifying in particular the level of detail to be required in the notification.”⁴³² A requirement that such notifications to the DSB be more complete could only improve the DSU as it operates.

What the Proposed Reforms Fails to Tackle and Why This Matters

The DSU reform negotiations and the proposals for reforming Article 21 fail to address a major flaw in the enforcement phase of the DSU—the absence of anything approaching an adequate system of surveillance. There are two possible reasons for this WTO failure to engage on oversight as part of an institutional response to non-compliance. One reason could be that the members regard the dispute settlement system solely as a self-enforcing regime. In such a vision, successful complainants should bear the weight and do the work to procure a settlement or to resort to retaliation to induce any compliance. After all, the default by the respondent affects only the complainant(s) and third parties.

Such a reading of the DSU and its role in the WTO system, however,

[(b) After the DSB has authorized a complaining party to suspend concessions or other obligations pursuant to paragraph 6 and 7 (in this paragraph referred to as the “authorized party”), the Member concerned may notify the DSB that it has fully removed the inconsistency with a covered agreement, or that it has provided a solution to the nullification or impairment of benefits. Such notification shall be accompanied by:

(i) a detailed description of any measure taken by the Member concerned, its date of entry into force, any text of such measure, and a list of documents that the Member concerned considers relevant for the assessment of implementation; and

(ii) a detailed factual and legal explanation of how the measure taken by the member concerned has removed any inconsistency with, or provided a solution to any nullification or impairment of benefits under, the covered agreements.

⁴³¹2015 DSU Report, *supra* note 388, at 11.

⁴³²*Id.*

is too narrow. As the disputes going to retaliation and beyond illustrate,⁴³³ the failure of major players to accept and incorporate WTO discipline in difficult cases erodes the institution. To remain effective and productive, an international organization must create not only results but also legitimate results. There can be no legitimacy, real or perceived, in a system that provides one type of resolution for the powerful and another set for the weak. It is not just the disputants that are affected when institutional resources and expertise⁴³⁴ are used on major disputes that drag on and on without resolution. As many of the cases show (*Bananas III*, *Upland Cotton*, *Zeroing*, and the *Byrd Amendment*), there are major effects on the recognized third parties to the disputes as well as on world markets impacted by the continuance of the WTO-illegal measure.⁴³⁵ The third parties and often many other members without the capacity⁴³⁶ to join in the dispute suffer trade losses when sustained non-compliance occurs. In other words, there is a strong systemic interest in this problem.

Another reason for a failure to grapple with how the DSB conducts surveillance is that the drafters of the DSU did not spend much time on this part of the design of the DSU. Even though “effective compliance” is a theme, the reform negotiations have followed this pattern. The proposals in the 2011 Chairman’s draft giving the DSU greater control over what happens post-retaliation are a good starting point, but only that.

III. CONCLUSION: A POSSIBLE REFORM – ACTUALIZING SURVEILLANCE IN THE DSU SYSTEM

The drafters of the DSU understood that some disputes would not resolve without encouragement and oversight from the members. However, there was no model upon which to base a surveillance system and a preference for member-control over resolving disputes. As the case studies and the examination of how the DSU system operates reveal, the result has been no real oversight of compliance. The WTO failure to deal with the surveillance is a large gap in a dispute system that otherwise illustrates legal accountability.⁴³⁷ The DSU system offers internal accountability. It holds

⁴³³See *infra* p. 82-83 for illustrations of how these cases have spillover effects for many countries.

⁴³⁴The WTO as an institution has made major commitments in the form of the Secretariat, the panelists and the Appellate Body to the cases involving sustained non-compliance. Large developed Member States benefit not only from access to the DSU system but also from the resources that the system devotes to dispute resolution.

⁴³⁵See *Pricing Compliance*, *supra* note 355, at 289 (discussing the impacts on other countries in the *Hormones* dispute).

⁴³⁶Many developing country Member States suffer from a lack of capacity to participate in WTO disputes. Even the existence of the WTO Legal Advisory Centre and its legal aid approach cannot fill the gap.

⁴³⁷Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World*

members to a set of standards, judges whether the standards are met, and sanctions those members failing to meet those standards.⁴³⁸ Nevertheless, the DSU system lacks an effective surveillance component that would enhance accountability.⁴³⁹

Accountability theory⁴⁴⁰ suggests asking six important questions about any regime purporting to provide accountability. *Who* is liable or accountable *to whom*; *what* are they called to account for; through *what* processes are used to assure accountability; by *what* standards is acceptable behavior to be judged; *and what* are the . . . effects of finding a breach of those standards?⁴⁴¹

It is useful to ask these six questions about the surveillance component of the DSU system to search for how to make it effective. The first question is about who must answer. In the DSU system, this answer is actually two-fold. Obviously, the losing respondent is accountable, as it has taken on an obligation to comply.⁴⁴² If the respondent fails, it is denying another member its rights under the relevant WTO agreement(s) and it may be failing its obligations under the DSU. However, the DSB is also

Politics, 99 AM. POL. SCI. REV. 29, 37 (2005) (describing the WTO Dispute Settlement Mechanism, the operations of the Hague Tribunal on the Former Yugoslavia, and the creation of a new International Criminal Court as illustrating the “incursions that conceptions of legal accountability have made in world politics”). Grant and Keohane define accountability as occurring when “some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.” *Id.* at 29.

⁴³⁸Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance*, 108 AM. J. INT’L L. 211, 245 (2014) (Stewart agrees with Grant and Keohane that legal type of institutional accountability mechanism like the other four (electoral, hierarchical, supervisory, and fiscal) satisfies these three requirements. According to Stewart, these are the only essential requirements.) [hereinafter Stewart].

⁴³⁹With ineffective surveillance, a losing respondent does not face the full consequences of non-compliance. It does not have to calculate how to behave based on a concern about the DSB. According to Stewart, the “prospect of having to provide such accounting [of the accountant’s conduct] and the potential consequences of a negative evaluation provide ex ante incentives for the accountant to give appropriate consideration to the interests of the account holder in making decisions.” *Id.* at 246.

⁴⁴⁰See Jerry Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, at 17 (2005). For an analysis of the accountability literature, see Anna Drake, *Locating Accountability: Conceptual and Categorical Challenges in the Literature*, POLICY REPORT 02, Entwined and the International Institute for Sustainable Development (Nov. 2012), available at: http://www.iisd.org/pdf/2012/locating_accountability.pdf.

⁴⁴¹Mashaw, *supra* note 440, at 17, argues that all accountability regimes should be able to answer these interconnected questions.

⁴⁴²DSU, *supra* note 14, at art. 21.1 (“Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes to the benefit of all Members.”)

accountable to the WTO membership. It is the body entrusted with maintaining “surveillance [of] the implementation [of] adopted recommendations or rulings.”⁴⁴³ If the DSB inadequately performs this function, it leaves the policing of a WTO system to the disputants. This is problematic in a system that defines itself as “a central element in providing security and predictability in the multilateral trading system.”⁴⁴⁴ The DSU system does not operate as well as it should when disputes fail to resolve, some members flout obligations to act in good faith and comply, and there are no observable consequences for defaults.⁴⁴⁵

The answer to the second question—about to whom an account is made—also involves the disputants and the WTO. The winning complainant deserves a full and prompt report from the respondent about what steps it plans to take and when it plans to do so. Neither a full report about actions taken or planned nor a believable period for compliance is currently required. The WTO membership deserves an account of not only about how difficult cases resolve and how long that takes, but also about how the DSB oversees compliance.

The third accountability question focuses on what should be in the report. This is perhaps the easiest question to answer about the DSB surveillance regime. The respondent must show that it has complied with its WTO obligations and not abused the DSU process. The DSB must prove that it actually performs a surveillance function that contributes to the functioning of the dispute settlement system.

The fourth question asks what processes are available to assure accountability. The current DSB surveillance regime has little in the way of process, and as a result, it is ineffective. There is a lack of transparency in DSB surveillance. Transparency about compliance—the how and when of it—has an important role to play in any accountability mechanism.⁴⁴⁶ The DSB does not make available to the membership any information about the details of compliance or the period actually taken for compliance. What the current DSU system offers is a searchable database on all DSU disputes and their resolutions. However, as explained earlier, the database is inadequate.⁴⁴⁷ There is no listing of the compliance record for all WTO

⁴⁴³*Id.* at art. 21.6.

⁴⁴⁴*Id.* at art. 3.2.

⁴⁴⁵Stewart, *supra* note 438, at 254 (A legal accountability mechanism should “enable account holders to enforce the obligations of accountants ‘to reveal, to explain, and to justify what one does,’ and to obtain remedies for deficient performance.”).

⁴⁴⁶*Id.* at 253 (Transparency is not an accountability mechanism but a practice that “may play a role in the operation of accountability mechanisms.”). Without transparency, it is impossible to “effectively track and evaluate an accountant’s performance and take appropriate [] action.” *Id.* at 258.

⁴⁴⁷See Edward Lee, *Measuring TRIPs Compliance and Defiance: The WTO Compliance Scoreboard*, 18 J. INTELL. PROP. L. 401, 417 (2011), who points out that: “The WTO website

disputes available in one place. Finding out the compliance details of any particular dispute—whether by settlement or by the losing respondent’s withdrawal of the offending measure—requires extensive research into the WTO website, the DSB Annual Report, non-WTO materials, publicly available materials from the disputants or communications from the disputant governments, and following the research efforts of WTO scholars.⁴⁴⁸

The lack of a procedure for complete compliance reporting and the transmission of such reports results in less accountability. Only required to provide status reports, losing respondents file reports often consisting of bald statements that action is being taken. The DSB makes the minutes of its monthly meetings containing the status reports and responses publicly available.⁴⁴⁹ Since there are no detailed compliance reports in these minutes, however, it is impossible to track the compliance status of a dispute without extensive research. Once a dispute has failed to resolve and drags on for years, only the most motivated member states and scholars can find out what, if anything, has been done about compliance.

The proposed revisions to Article 21, requiring detailed reports by the respondent, would ease some of the problems. However, the DSB needs to do much more to have a process that would both encourage compliance and inform the membership. First steps in such a process would be to: (1) require the posting of detailed status reports and; (2) create a full compliance scoreboard.⁴⁵⁰ Maintaining a scoreboard on the WTO website would be in keeping with the WTO commitment to transparency⁴⁵¹ and to surveillance.⁴⁵² To do this scoreboard, the DSB would have to create a

administered by the WTO Secretariat, tracks every dispute brought before the WTO, including in the event of a violation, a country’s efforts to correct a law found by a WTO decision to be in violation of a treaty obligation. But the WTO website does so in a way that is not all that helpful.” [hereinafter Lee].

⁴⁴⁸All of these sources—except for direct interviews with WTO Member States—were necessary to compile the case studies in this article.

⁴⁴⁹The WTO issues the DSB monthly reports shortly after each meeting.

⁴⁵⁰See Lee, *supra* note 447, at 418–20 who first offered the suggestion of such a scoreboard. Lee wanted a scoreboard to highlight the importance of tracking compliance with TRIPs obligations. However, the problem is broader than compliance with any one WTO agreement. As it stands now, it is impossible to track the compliance in any WTO dispute that goes to retaliation and beyond.

⁴⁵¹The WTO commitment to transparency comes in GATT Article X.

⁴⁵²The WTO made a major commitment to monitoring and surveillance as part of the machinery necessary for creating an effective organization. See Pascal Lamy, Director General of the WTO, Speech, *Evolving trade increases need for “active transparency”* (Oct. 22, 2007), available at: https://www.wto.org/english/news_e/sppl_e/sppl78_e.htm. See also Craig VanGrasstek, THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION 271, 273–77 (concerning the WTO obligations on Member States for notifications) and 287–292 (describing the history of how surveillance has been done through the Trade Policy Review Mechanism of the organization).

compliance report rather than just rely on the notifications it receives. To be complete, the scoreboard would have to note the method and timing of compliance.⁴⁵³

Another method for enhancing surveillance would be for the DSB to go beyond reporting information. One way to do this would be to establish a peer review system. The DSB would have to move beyond the standard WTO practices of surveillance through self-reporting and publication of information⁴⁵⁴ and into peer review of the type conducted by organizations such as the Organization for Economic Cooperation and Development and the International Monetary Fund. While these institutions have different missions and different sets of powers from the WTO, each has developed surveillance mechanisms that monitor whether individual members comply with obligations.⁴⁵⁵ As a result, they have achieved much more with surveillance.⁴⁵⁶ The WTO should get ideas from these institutions for how to design a peer review system.

One part of a peer review system should be a compliance committee within the DSB. The committee membership could consist of interested members. The role of the compliance committee would be to review the state of each dispute. For those that go to retaliation and beyond, the committee should confer after a losing respondent provides a detailed report

⁴⁵³The scoreboard would need to show whether the dispute ended with the withdrawal of the offending measure, by compensation, or by a settlement (including the form of the settlement, i.e., whether the settlement was a final settlement or an interim settlement on the way to a final settlement).

⁴⁵⁴For discussions of these types of surveillance see Terry Collins-Williams & Robert Wolfe, *Transparency as a Trade Tool: The WTO's Cloudy Windows*, 9 WORLD TRADE REV. 551–81 (2010); Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575–614 (2009). According to Collins-Williams and Wolfe, the dispute settlement process provides one of the principal forms of monitoring and surveillance in the WTO “although it is based on the dubious behavioral proposition that ‘legally binding’ judicial decisions are implemented automatically.

⁴⁵⁵The most effective example of a peer review mechanism comes in the system set up by the OECD to track implementation by its Member States of their obligations under the Anti-Bribery Convention. The OECD describes the peer review system and posts the reports it produces as well as an annual report regarding compliance on its website, available at: <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>.

For a discussion of peer review mechanisms and how they work, see Georgios Dimitropoulos, *Compliance Through Collegiality: Peer Review in International Law*, 37 LOY. L.A. INT'L & COMP. L. REV. 275 (2016). Dimitropoulos describes the phases and procedures of peer review systems at 292–294 and analyzes the efforts of the OECD peer review mechanism at 305–08.

⁴⁵⁶The OECD peer review system issues reports each year about the effectiveness of each country's efforts at implementation of anti-bribery laws and enforcement in the form of prosecutions against those bribing foreign governments for business advantage. The U.K. responded to critical peer review by passing new anti-bribery legislation in 2010.

about expected compliance and periodically report to the DSB membership and the disputants on the status of compliance and a timeline for an expected resolution. The compliance review reports from the committee should become part of the DSB annual report that currently produces an overview of how the system operates. The creation of such a committee and the publication of its reports would not undercut any post-retaliation procedure or interfere with the disputants' ability to negotiate a settlement. Rather, a DSU compliance committee would complement those efforts. According to a former chair, the DSB does better if it has a rule or procedure to follow.⁴⁵⁷ Having to respond to a peer review report and see an annual report publishing detailed evidence about its of non-compliance would highlight the reputation costs for a non-complying member state.

The fifth accountability question asks about the appropriate standards for judging acceptable behavior. The best place to look for these standards is the DSU itself. According to the DSU, the standards for a well-functioning system include: (1) prompt settlement,⁴⁵⁸ (2) a resolution consistent with the relevant WTO agreement or agreements,⁴⁵⁹ and (3) absent a mutually agreed solution, a resolution after the arbitral process that secures the withdrawal of the offending measure.⁴⁶⁰ The current system fails the first standard. Even the average DSU dispute fails to resolve promptly, the cases involving substantial non-compliance typically drag on much longer.⁴⁶¹ Most WTO disputes end with resolutions consistent with the WTO agreements. The disputes that go to retaliation and beyond do not meet this standard. In five of the disputes, the losing respondent gained a settlement that allowed it to continue a WTO-illegal practice in some cases temporarily and in others permanently.⁴⁶² Such resolutions are never preferable but allowable if the WTO membership approves by granting a waiver.⁴⁶³ In such cases, the membership is making a determination that the good of settlement outweighs the bad of the continued illegal conduct.

⁴⁵⁷See Fried, *supra* note 364, at 5 (“The perceived weakness of the DSB’s surveillance function is perhaps part of a more fundamental institutional weakness of the DSB in fulfilling its function of ‘administering’ the DSU.... Where the rules allow for automatic action, the DSB acted quickly and without fail. But where the outcome was not prescribed by the DSU, the DSB fostered a healthy debate but then “takes note of the statements”, and leaves for another day and another forum the identification of a solution.”).

⁴⁵⁸DSU, *supra* note 14, at art. 3.3.

⁴⁵⁹*Id.* at art. 3.5.

⁴⁶⁰*Id.* at art. 3.7.

⁴⁶¹See discussion *supra* Sections *Hormones*, *Bananas III*, and *Foreign Sales Corporation*.

⁴⁶²See discussion *supra* Sections *Bananas III*, *Hormones*, *Byrd Amendment*, *Upland Cotton*, and *Zeroing*.

⁴⁶³This route was only used in one of the cases of sustained non-compliance – *Bananas III*. The more recent practice has been for the disputants to create interim settlements that they agree to report later to the DSB as mutually agreed solutions. See Alschner, *supra* note 52.

However, only in the *Bananas III* dispute did the disputants pursue the waiver option. In the four other disputes, the disputants simply reported negotiated settlements to the DSB.

The final standard for judging the DSU system—if the disputants cannot reach a mutually agreed solution—is whether the losing respondent removes the offending measure. In two of the disputes, *Hormones* and *Gambling*, the losing respondent may never remove the offending measure.⁴⁶⁴ Given the nature of the U.S. measures and the settlements it reached in *Upland Cotton*, it is also unlikely that the United States will ever completely withdraw the illegal subsidies.⁴⁶⁵ What this suggests is that the DSB surveillance has failed to meet its own requirements.

The final accountability question asks the consequences for breaches. The current DSB regime imposes no real consequences. It is true that the DSB minutes of meetings publish the complaints by frustrated complainants, third parties and other members about a losing respondent's failures. However, the DSB never takes steps beyond recording the complaints. Here it is more difficult to offer a prescription. Even if it had an effective surveillance regime of the type proposed above, the DSB could not guarantee compliance. However, by having such a system it could make the losing respondent pay a heavier price in loss of reputation.⁴⁶⁶ If it becomes clear to the membership through surveillance that sustained non-compliance is occurring, the losing respondent might choose compliance or partial compliance to preserve its reputation as well as its power in the rule-making aspects of the WTO. A new surveillance process focused on timeliness, transparency in information about compliance efforts, and coordinated naming and shaming from peer review and WTO annual reports could only constitute an improvement.

⁴⁶⁴At this point, it is difficult to determine whether the EU and U.S. will completely resolve the *Hormones* dispute or continue to extend the Beef MOU. With regard to the *Gambling* dispute, the U.S. appears unwilling to negotiate with Antigua.

⁴⁶⁵In *Upland Cotton*, the U.S. has established a pattern of passing post-dispute legislation that continues subsidy practices found illegal by the WTO. See Townsend & Charnovitz, *supra* note 26, at 439–47.

⁴⁶⁶See Brewster, *supra* note 381, at 269 (Brewster points out that are a reputation issues that drive countries and that the dispute resolution systems adopted in international law attempt to take advantage of this reality.).