Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives

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I. Introduction

One of the most critical issues to emerge in the WTO recently is that of compliance with the decisions of dispute settlement panels and the Appellate Body. Once a decision has been rendered, how can a complaining party seek to ensure that the defending party faithfully implements it? What recourse is available to the complainant if the defendant refuses to comply?

These issues have emerged in a relatively small number of high profile and usually highly politicized disputes. Under the rules of the WTO, where a defending party fails to implement a panel or Appellate Body decision, a complaining party ultimately has the right to respond with retaliatory trade sanctions. Yet the imposition of sanctions often hurts the commercial interests of the complaining party as much as the defendant, and the ability of such retaliation to induce compliance is far from certain.

This article examines key issues of compliance and retaliation under the WTO Agreement. It is divided into three parts. First, it examines the theory of retaliation. This includes a discussion of the remedies provided for in the WTO Agreement, and the purpose of retaliation under the GATT and the WTO.

Second, it examines the practice of retaliation. It reviews the cases to date in which the retaliation provisions of the DSU have been invoked. It considers issues such as who determines non-compliance, the means by which a complaining party can obtain the right to retaliate, the quantification of the level of authorized sanctions, and the termination of retaliation. It also examines problems associated with the application of sanctions. Third, it considers alternative and additional means of seeking compliance, including compensation, fines, rotating or "carousel" retaliation, collective retaliation, and punitive sanctions.

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II. The Theory of Retaliation

A. The WTO Dispute Settlement System: Hierarchy of Remedies

The WTO dispute settlement system contains three key features that are absent from the dispute settlement provisions of most international treaties: (1) panels that have compulsory jurisdiction to examine complaints about violations of the Agreement; (2) appellate review of panel decisions, again with compulsory jurisdiction; and (3) the ability to render binding decisions.1

Decisions of panels and the Appellate Body are adopted virtually automatically by the WTO Dispute Settlement Body (DSB), pursuant to the so-called "negative consensus" rule. 2 Where a country has been found to have breached its commitments, the panel and Appellate Body reports normally recommend that the offending country bring itself into conformity with its WTO obligations. Upon adoption of the reports, the recommendations of the panel and Appellate Body become DSB rulings. In order to comply with a DSB ruling, the defendant may have to repeal or amend its laws to eliminate the WTO-inconsistency.

How does the complaining party enforce such WTO rulings?

It should be noted at the outset that DSB rulings are not self-executing. It remains up to each defending party—a sovereign government—to choose how, and even if, it will implement the ruling.

Article 21.3 of the DSU provides that if it is "impracticable" for the defending country to comply immediately with the DSB rulings, it is given a "reasonable period of time" for implementation. 3 The issue of retaliation may arise if the defending party has not implemented the DSB rulings at the end of this compliance period.

Article 3.7 of the DSU sets out the hierarchy of remedies in WTO dispute settlement. It seeks to encourage, in descending order of preference: (1) bilateral settlement; (2) withdrawal by the defendant of the WTO-inconsistent measure; (3) compensation and (4) as a "last resort" retaliation. 4


2. The "negative consensus" or "automaticity" rule provides that certain specified requests to the DSB must be granted unless all WTO Members at the DSB meeting—including the Member that made the request—choose to reject it. The negative consensus rule applies to panel establishment, to the adoption of panel and Appellate Body reports, and to requests to retaliate. DSU, supra note 1, art. 6.1, 16.4, 17.14, 22.6 and 22.7.

3. If the disputing parties cannot agree on the "reasonable period of time" for implementation, DSU Article 21.3(c) provides that it can be determined through arbitration. DSU, supra note 1, art. 21(3)(c).

4. DSU, supra note 1, art. 3.7. Article 3.7 provides in part as follows:

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. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.
A complaining party retaliates when it "suspends concessions or other obligations under the covered agreements." In other words, the complainant denies benefits that it would otherwise be legally required to extend to the other WTO Member.

Most retaliation requests seek to suspend concessions. One example of a concession is a tariff binding, which is a commitment not to impose duties on a product above a certain specified rate. By "suspending" such a concession, the complaining party could impose duties above the bound rate on products from the defending party. It would do so with the authorization of the DSB. It would also suspend concessions on a non-most-favoured-nation basis—the retaliatory rates would be imposed solely on the imports of the defending party.

More recently, the EC and Japan sought to suspend "other obligations" by requesting DSB authorization to adopt laws to "mirror" the WTO-inconsistent U.S. Anti-Dumping Act of 1916. This is discussed below in the "Cases to Date" section (infra Part III.A).

B. RETALIATION UNDER THE GATT

The WTO retaliation system is based in part on the rules of the WTO's predecessor organization, the GATT. An important reason why the drafters of the original GATT 1947 included a provision on retaliation was to curb the customary international law right of unilateral reprisal, and to replace it with multilaterally-authorized retaliation. As stated by one of the drafters:

We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order.

This notion of "taming retaliation" was carried into the WTO. DSU Article 23 prohibits unilateral, unauthorized action by the complaining party.

Article XXIII:2 of GATT 1947 provides, in part, that if the members of the GATT, acting collectively, considered that the circumstances were "serious enough," they could "authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they may determine to be appropriate in the circumstances."

However, this provision was subject to the normal "positive consensus" rule of the GATT, which meant that any request by a complaining party to retaliate required the consent of all GATT Contracting Parties, including the defendant itself. This effectively ensured that the retaliation provisions of the GATT remained a dead letter. Indeed, in the entire history of the GATT (1948–1994), the GATT General Council approved a request for retaliation only once, and this was never implemented.

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5. Id.
7. Id.
8. DSU, supra note 1, art. 23.
C. PURPOSE OF RETALIATION

Under the GATT, one of the primary purposes of retaliation was to allow for a restoration of the "balance of concessions" between the complaining and defending parties under the Agreement. Each party to the GATT received commercial benefits from the legally binding market access commitments (concessions) made by the other parties. It was argued that since a violation of the GATT by a country upset this equilibrium of commercial benefits, retaliation would permit the restoration of the balance. As one informed observer wrote: "retaliation is fair because it re-establishes the balance of concessions between the two parties, a balance that is thrown into disequilibrium when one party has violated GATT's rules."11

Under the WTO, however, it is clear that the main objective of the complaining party is not a restoration of the balance of concessions, but is rather to induce the defending party to comply with its obligations. As noted by the arbitral panel in Bananas: "the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this temporary nature indicates that it is the purpose of countermeasures to induce compliance."12 (Emphasis in original)

A similar statement was made by the arbitral panel in Brazil Aircraft, in seeking to define the term "appropriate countermeasures" in Article 4 of the Agreement on Subsidies and Countervailing Measures:

While the parties have referred to dictionary definitions for the term "countermeasures", we find it more appropriate to refer to its meaning in general international law and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures. We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. When considering the definition of "countermeasures"... we note that countermeasures are meant to "induce (the State which has committed an internationally wrongful act) to comply with its obligations..." We note in this respect that the Article 22.6 arbitrators in the EC—Bananas (1999) arbitration made a similar statement. We conclude that a countermeasure is "appropriate" inter alia if it effectively induces compliance [original emphasis].13


If the purpose of WTO retaliation is to induce compliance, has it met this objective? Have the threat and use of sanctions led defending parties to comply with WTO rulings? These issues are considered in the next section.

III. The Practice of Retaliation

A. Cases to Date

Since the WTO Agreement entered into force in January 1995, there have been a number of instances in which complaining parties have sought, and in some cases received, authorization to retaliate.

1. EC—Bananas

There were two retaliation requests that arose from the WTO-inconsistent import regime for bananas, one from the United States and the other from Ecuador. In April 1999, the DSB authorized the United States to suspend concessions to the EC and its Member States in the amount of U.S.$191.4 million per year for the failure of the EC to comply with the DSB rulings in Bananas.15 In May 2000, the DSB authorized Ecuador to suspend concessions in the amount of U.S. $201.6 million.16 (The Ecuador case was the first time in which “cross retaliation” was authorized, i.e., retaliation in a different sector, or under a different WTO agreement than that in which the violation occurred.) The United States implemented its authorized retaliation, although Ecuador did not. In April 2001, the United States and the European Union reached a provisional settlement in this dispute. Under the terms of this agreement, U.S. sanctions were suspended on July 1, 2001, and will be “definitively lifted” once the EU carries out the agreed changes to its banana import regime.17

2. EC—Hormones

There were two retaliation requests made against the EC (one from the United States, and the other from Canada) arising from the failure of the EC to withdraw its WTO-inconsistent ban on hormone-treated beef. On July 26, 1999, the DSB authorized the United States to suspend concessions against the EC and its Member States in the amount of U.S.$116.8 million per year.18 At the same DSB meeting, Canada received authorization to suspend concessions in the amount of Cdn$11.3 million per year.19 Both Canada and the United States implemented this retaliation by imposing 100 percent duties on certain agricultural imports from the EC. However, the EC has not lifted its ban on hormone-treated beef, and the U.S. and Canadian sanctions remain in place.

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14. This section is current as of January 2002.
15. Bananas: Decision by the Arbitrators, WT/DS27/ARB.

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3. **Australian Salmon**

   In July 1999, Canada made a request to the DSB to retaliate against Australia for Cdn$45 million in response to Australia's failure to lift its WTO-inconsistent ban on imports of Canadian salmon.  

   Canada and Australia put in place the first *ad hoc* "sequencing" arrangement in the WTO, to allow for a prior ruling by an Article 21.5 compliance panel on the WTO-consistency of Australia's implementing measures. The Article 21.5 panel subsequently ruled that Australia had not complied. However, this dispute has since been largely settled between the parties, and no sanctions have been imposed.

4. **U.S. Foreign Sales Corporations (FSC)**

   In November 2000, the EC put in a retaliation request for U.S.$4.043 billion in the FSC dispute. This is the largest retaliation request ever made in the history of the multilateral trading system. The EC and the United States negotiated a "sequencing" agreement, to allow for a prior ruling on the WTO-consistency of the U.S. FSC implementing legislation through the compliance panel process. The August 2001 report of the Article 21.5 compliance panel concluded that the United States had not implemented the DSB rulings; the Appellate Body affirmed this in January 2002. At the time of writing (January 2002), the United States is expected to challenge the level of retaliation sought by the EC through arbitration under DSU Article 22.6.

5. **Brazil Aircraft**

   In December 2000, the DSB authorized Canada to suspend concessions to Brazil in the amount of Cdn$344.2 million as "appropriate countermeasures" within the meaning of Article 4 of the *Agreement on Subsidies and Countervailing Measures*, following Brazil's failure to withdraw WTO-inconsistent subsidies in the regional aircraft sector. To date, Canada has not yet implemented these countermeasures.

6. **Canada Dairy**

   In February 2001, the United States and New Zealand each sought to suspend concessions in the amount of U.S.$35 million per year in the Dairy dispute. In July 2001, an Article 21.5 panel concluded that Canada had not implemented the DSB rulings. This
finding of inconsistency was overturned on appeal in December, although the Appellate Body also found that it did not have a sufficient factual basis to make a definitive determination on Canadian compliance.\textsuperscript{28} A second Article 21.5 panel is now re-examining the Canadian measures.\textsuperscript{29} The disputing parties put in place (and later extended) sequencing agreements to ensure a prior ruling on the WTO-consistency of Canada’s measures through the compliance panel process.

7. \textit{U.S. 1916 Anti-Dumping Act}

In January 2002, the EC and Japan took the unprecedented step of seeking DSB authorization to adopt laws to “mirror” the U.S. Anti-Dumping Act of 1916.\textsuperscript{30} The Appellate Body had earlier found that this law—which, among other things, allows for treble damages against dumped imports—violates U.S. obligations under GATT Article VI and the WTO Anti-Dumping Agreement.\textsuperscript{31} When the United States failed to implement the DSB rulings in this dispute by the expiration of the compliance period, the EC and Japan sought retaliation in the form of DSB authorization to adopt parallel legal regimes.\textsuperscript{32} The EC and Japanese laws would replicate the substantive and procedural aspects of the 1916 Act, and would apply solely to U.S. imports. This unusual request seemed to be based on the fact that the U.S. legislation has not been applied, and so a monetary-based request to suspend tariff concessions could be vulnerable to attack on the ground that the level of nullification or impairment was either negligible or non-existent. (The Japanese retaliation request states, “it is not practical to indicate the level of nullification or impairment in terms of monetary value.”)\textsuperscript{33} The EC and Japanese requests were referred to arbitration under DSU Article 22.6. The three disputing parties also announced that they would immediately suspend the arbitration to allow additional time for the U.S. Congress to pass the necessary implementing legislation.

8. \textit{U.S. Copyright Act}

In January 2002, the EC sought authorization to retaliate against the United States in the dispute over Section 110(5) of the U.S. Copyright Act.\textsuperscript{34} This law, which exempts certain smaller bars, restaurants, and other public places from copyright liability when playing music, was found to violate U.S. obligations under the TRIPS Agreement.\textsuperscript{35} This case is

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unusual, in that before the expiration of the compliance period, the parties sought an advance ruling on the level of nullification or impairment through an *ad hoc* arbitration under DSU Article 25. This arbitration facilitated the negotiation of a temporary compensation agreement, in the form of U.S. contributions to projects for EU musicians for a three-year period. The EC then put in a retaliation request to preserve its rights pending Congressional funding for the compensation arrangement. The EC sought DSB authorization to suspend its obligations under TRIPS "to permit the levying of a special fee from U.S. nationals in connection with border measures concerning copyright goods." This "special fee" would apparently be imposed on U.S. companies seeking the enforcement of copyright in the EU. The EC request was referred to arbitration under DSU Article 22.6. The two disputing parties also announced that they would immediately suspend the arbitration to allow additional time for Congressional approval for the compensation package.

B. Who Determines Non-Compliance?

One of the most difficult compliance issues that has confronted the WTO has been the proper "sequencing" between the determination of WTO-consistency of the implementing measures and the recourse by the complaining party to retaliation. In principle, the DSU provides for a multilateral process to adjudicate disputes over whether a defending party has implemented the DSB rulings. Article 21.5 provides in part as follows:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the [DSB] recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it.

Thus, Article 21.5 sets up a ninety-day procedure to determine compliance. However, it is possible to read Article 22 to require that retaliation requests must be approved by the DSB within thirty days of the expiration of the compliance period, or else the complaining party would lose its right to have the request approved by negative consensus. This is the U.S. position. If this interpretation is correct, then the ninety-day compliance process would be completed long after the thirty-day deadline for retaliation.

This problem has arisen principally because of poor drafting in the DSU. WTO Members have responded to this ambiguity in two ways. First, as noted earlier, there has been a growing number of cases in which the disputing parties have entered into bilateral "sequencing" agreements to provide that the Article 21.5 panel process must precede any retaliation under Article 22. These have been *ad hoc*, case-specific solutions.

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39. DSU, supra note 1, art. 21.5.
Second, in an effort to find a more durable solution to the sequencing problem, a number of Members, including Canada, made a proposal to amend the DSU to provide clearly that a determination of WTO-inconsistency must precede any request to suspend concessions. This proposal was made at the December 1999 Seattle Ministerial Conference\(^1\) and then again in November 2001 Doha Ministerial Conference.\(^2\) However, any amendment to the DSU requires the consensus of all Members, and such a consensus has not been achieved. The November 2001 Ministerial Conference also mandated new negotiations on WTO dispute settlement, and the sequencing issue will likely be part of those negotiations.

C. Obtaining Authorization to Retaliate

The complaining party triggers its right to retaliate by invoking DSU Article 22.2:

If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time...such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.\(^43\)

The drafting of this provision leaves much to be desired. Nevertheless, the procedure set out in Article 22.2 is as follows:

- the complaining party makes an initial determination that the defending party has failed to comply with the DSB rulings within the implementation period;
- the complaining party may—but is not required to—seek compensation from the defendant;
- while the text is not completely clear on this point, if the complaining party chooses not to seek compensation, it then waits until twenty days after the expiration of the compliance period before seeking to retaliate; and
- if the complaining party does seek compensation, but the negotiations fail to produce satisfactory compensation within twenty days after the expiration of the compliance period, it may request authorization from the DSB to retaliate.\(^44\)

Article 22.6 provides that the DSB shall, upon request, grant authorization to suspend concessions or other obligations within thirty days of expiration of the compliance period, unless the defending party invokes its right to arbitration. The defending party may seek arbitration on the grounds that the retaliation sought is excessive. In a situation of “cross-retaliation,” the defendant may also argue that certain principles, as set out in Article 22.3, have not been followed.\(^45\) The arbitration is supposed to be completed within sixty days, during which time no retaliation may occur.

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\(^2\) Amendment of Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes: Amendment Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela, WT/MIN(01)/W/6 (Nov. 1, 2001), at http://www.wto.org.

\(^3\) DSU, supra note 1, art. 22.2.
Article 22.7 provides that the arbitrator cannot “examine the nature of the concessions or other obligations to be suspended” but must instead “determine whether the level of such suspension is equivalent to the level of nullification or impairment.” The arbitrator may also examine whether the principles of Article 22.3 have been followed.

The decision of the arbitrator is final and is not subject to appeal. The DSB is “informed promptly” of the decision, but does not adopt it. When requested to do so, the DSB grants authorization (by negative consensus) to suspend concessions or other obligations, consistent with the decision of the arbitrator. In practice, this means that where the arbitrator has reduced the level of suspension requested, the complaining party puts in a new retaliation request, matching the level of nullification or impairment as determined by the arbitrator. This revised request will be approved virtually automatically by the DSB.

D. QUANTIFYING THE NULLIFICATION OR IMPAIRMENT

Article 22.4 provides that the level of suspension of concessions or other obligations authorized by the DSB shall be “equivalent to the level of the nullification or impairment.” Arbitral panels have generally determined that the date from which nullification or impairment should be measured is the date on which the defending party was to have been in compliance, i.e., the end of the “reasonable period of time” for implementation. They have not chosen the date of the adoption of measure that has subsequently been found to be WTO-inconsistent.46 This is consistent with the well-established principle that the GATT/WTO dispute settlement system generally does not provide damages for past losses. Instead, as noted above, the preferred remedy is prospective, not retrospective: the defending party is to withdraw the WTO-inconsistent measure.47

Arbitrators have also determined the level of nullification or impairment through the use of so-called “counterfactual” situations (i.e., a hypothetical state of affairs that would have

46. For example, the arbitrators in Hormones stated:

[W]e consider that our starting point is as follows: what would annual prospective . . . exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999? 13 May 1999 is the date of expiration of the reasonable period of time granted to the EC to implement the panel and Appellate Body reports . . . We cannot assume that the EC from 1989 onwards, i.e. from the time it imposed the ban, was under a legal obligation to withdraw the ban. We note, in this respect, that the violations found were violations of the SPS Agreement, an agreement only in existence from 1 January 1995 onwards [original emphasis].

Hormones, supra note 12.

47. Since the special arbitration in Copyright Act was conducted during the implementation period, the arbitrators found that it was not feasible to use the end of the implementation period as the point at which nullification or impairment should be assessed. Instead, they chose the date on which the matter was referred to them. See United States – Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration under Article 25 of the DSU, Award of the Arbitrators, WT/DS160/ARB25/1 (Nov. 9, 2001), at http://www.wto.org.
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existed if the defending party had complied with its obligations). The use of "counterfactuals" to establish the level of nullification or impairment sustained by the complainant can involve a fair degree of subjective assessment by the arbitrators.

For example, the arbitrators in Bananas considered a range of counterfactual situations in order to determine the monetary value of the nullification or impairment sustained by the United States. They compared the value of EC imports from the United States under the then-existing, WTO-inconsistent regime with the value under various alternative, WTO-consistent (counterfactual) regimes. Each counterfactual was based on a different import regime, such as a tariff-only import system, a licensing system, or a tariff quota. The arbitrators selected what they considered to be "a reasonable counterfactual" and made their calculations on nullification or impairment based on this selection. There is virtually no analysis in the report as to why the counterfactual they chose was a reasonable basis to calculate the nullification or impairment suffered by the complainant.

The counterfactual approach has been followed in other cases. For example, in Hormones, the arbitrators made a series of assumptions on what U.S. and Canadian exports of hormone-treated beef to the EC would have been if the EC had withdrawn its ban. The counterfactual included assumptions on issues such as trade volumes, price, and the division of market share between Canada and the United States. A change in any one of these assumptions could have led to very different conclusions regarding the level of nullification or impairment sustained by the two complaining parties.

Robert Hudec has suggested that although the methodology followed by such arbitrators may be flawed, their overall result may be politically acceptable. Writing about the report of the arbitrators in Bananas, Hudec stated:

The report contained a lengthy description of the voluminous and complex information and arguments submitted by the parties, but at the end the panel explained its conclusions in a paragraph, announcing which of several alternative methods of measurement it had chosen and then simply announcing the 'correct' number with little further explanation. As a scientific explanation, the panel's report was disappointingly obscure. As a political solution to the issue, however, it obviously looked objective enough to persuade the relevant audiences in both countries that a neutral tribunal had made an objective assessment of equivalence. As long as the relevant audiences were willing to accept the decision, it did all that was politically necessary.

Given the rather subjective nature of this process, it remains open to question whether the "relevant audiences" will always be willing to accept such arbitral decisions. To the extent that the arbitrators are rendering decisions that do not easily withstand analytical scrutiny, affected parties may not be willing to concede the legitimacy of the results in all future cases.

E. ENDING RETALIATION

The DSU contains only skeletal provisions on how and when retaliation should be terminated. Article 22.8 states in part:


The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

Thus, as noted above, retaliation should apply only until one of three things happens: (1) the WTO-inconsistent measure has been removed; (2) the defending party provides a "solution" to the nullification or impairment, perhaps by providing temporary compensation; or (3) there is a mutually satisfactory settlement.

There are a number of problems with this provision. First, it provides no clear procedure whereby the defendant can seek to have the retaliation lifted. Presumably, the defending party would make a request to the DSB to withdraw the authorization to suspend concessions, but Article 22.8 does not specifically say this.

Second, it provides no mechanism to resolve a dispute over whether the defending party has, in fact, complied with the DSB rulings. What if the defending party asserts that it has removed the WTO-inconsistent measure, but such an assertion is contested by the complainant? What if the defending party in fact withdraws the WTO-inconsistent measure, but immediately puts in place a new, equally restrictive replacement measure? There is nothing in Article 22.8 on how such disputes could be resolved.50

Third, there is no express language imposing on the DSB the obligation to withdraw the authorization if the conditions set out in Article 22.8 have been met. To date, the issue of the withdrawal of the authorization to suspend concessions has not been brought before the DSB. Nevertheless, the scope and application of Article 22.8 could well be the subject of dispute in future.

F. PROBLEMS WITH RETALIATION

There are a number of well-known problems associated with the use of retaliation, most notably the following. First, sanctions are usually imposed at a punitive rate, which has the effect of stopping trade in the product that is the subject of the retaliation. Many have argued that compliance issues should be resolved in a manner that promotes, rather than harms, liberalized trade. As noted by the Report of the International Financial Institution Advisory Commission: "Retaliation is contrary to the spirit of the WTO. Sanctions increase restrictions on trade and create or expand groups interested in maintaining the restrictions. Domestic bargaining over who will benefit from protection weakens support for open trading arrangements."51

Second, the use of retaliation may provide little or no relief to the affected industry in the complaining party. Such an industry has been denied market access because of WTO-illegal measures maintained by another country. To hit back against imports from the defendant does not, from the standpoint of the affected industry, address this central problem.

50. In practice, given the lack of precision in Article 22.8, the disputing parties would likely reach an ad hoc agreement to resolve such disagreements through the compliance panel process under Article 21.5.

51. The Commission was established by the U.S. Congress to make recommendations on future U.S. policy toward a number of international institutions, including the WTO. The Commission’s report is available online at http://www.house.gov/jec/imf/meltzer.htm. See also Steve Charnovitz, Should the Teeth Be Pulled? A Preliminary Assessment of WTO Sanctions (Sept. 15, 2000) (on file with the University of Minnesota Law School).
Moreover, abstract theories about the "rebalancing" of the bilateral commercial relationship will likely be of scant interest to the industry whose goods or services still face WTO-inconsistent market access barriers abroad.

Third, retaliation invariably imposes economic costs on the consumers and businesses of the complaining party. For example, where tariffs are raised on the consumer goods of the defendant, the consumers of the complaining party will face higher prices. Where the imported products are used as intermediate goods in the production process, certain businesses in the complaining party will similarly face commercial hardship. Given the integrated nature of many economies, particularly among developed countries, it is often very difficult to design a retaliation list that does not inflict harm on the complainant.

Fourth, and perhaps most importantly, there is little hard evidence that retaliation can and does achieve its objective of inducing compliance by the defendant. In Bananas, U.S. sanctions were in place for over two years before a settlement was reached. The April 2001 U.S.-EU settlement was based on a number of factors, including the desire of both parties to remove this significant irritant from the agenda in the run-up to the November 2001 WTO Ministerial Meeting in Qatar. The U.S. sanctions may have played a part in promoting a resolution of the dispute, but few observers would argue that retaliation was the principal cause of the settlement. Moreover, as noted above, the EC has still not complied with the DSB rulings in Hormones, and the U.S. and Canadian sanctions imposed in May 1999 remain in place.

Given these problems with retaliation, what are some possible alternatives?

IV. Additional and Alternative Means of Seeking Compliance

A. Political Pressure

Political pressure is invariably the sub-text that accompanies all trade disputes, and it is rarely mentioned as supplementary means of seeking compliance. Nevertheless, it is worth recalling briefly that a non-compliant defending party will usually face at least three separate forms of political pressure.

First, it will face pressure from its own exporters, whose products are facing prohibitive sanctions in the market of the complaining party. Members of the affected industry in the defending party will press their own government to resolve the dispute in order to bring about the removal of the sanctions. This pressure will usually commence before the actual sanctions are put in place, particularly if the complaining party publishes an initial retaliation list, from which it will prepare a narrower final list of products subject to sanctions. Indeed, engendering an adverse reaction from a range of industries in the defending party is one of the reasons that a complainant will release such an initial retaliation list.

Second, the defending party may face growing bilateral political pressure in its relations with the complainant. The failure of a defending party to comply with its obligations can cloud bilateral relations, and what started out as a commercial dispute can develop into a

52. Petros Mavroidis writes: "WTO countermeasures, the ultima ratio of the system, fail on both effectiveness and impartiality grounds... In all cases, economic theory suggests that the country adopting them 'shoots itself in the foot' by imposing costs on its society." Petros Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11(4) European J. Int'l. Law 763 (2000).
major irritant in the broader political relationship. This will often generate additional pressure on the defendant to resolve the dispute.

Third, the defendant will face multilateral political pressure within the WTO. The DSU provides that issues of implementation are subject to the multilateral surveillance by the DSB. This may require the defendant to explain to all WTO Members at DSB meetings why it has not complied.

B. Compensation and Fines

As noted above, voluntary compensation is currently provided for in the DSU as a temporary measure pending full implementation. Such compensation could take the form of increased access to the market of the defending party. For example, the defending party could agree to lower its bound rate on specified products as a form of interim compensation pending the withdrawal of the illegal measure. It would do so on a most-favoured-nation basis.

This has the advantage of expanding trade, rather than restricting trade through sanctions. Nevertheless, this has been used rarely, in part because the complaining and defending parties may have widely divergent views on the appropriate level of compensation. Since the entry into force of the WTO Agreement, formal compensation has been agreed in only two disputes.

Another form of compensation—not provided for in the current rules—would be the imposition of fines on the non-implementing defending party. Indeed, the International Financial Institution Advisory Commission recommended the use of fines:

If countries do not accept WTO decisions, injured parties have the right to retaliate by putting restrictions on imports from the offending country or region. The injured country then suffers twice—once from the restrictions on its exports, imposed by foreign governments, and again when tariffs or duties raise the domestic cost of the foreign goods selected for retaliation. To compensate for the injury done by others, we impose costs on ourselves as well as them. The Commission proposes that, instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel or provide equivalent trade liberalization.

While the concept of fines for non-compliance is not unknown in the international treaty system, it does give rise to a number of issues. If a defending party insists that it has complied with its WTO obligations, it may be completely unwilling to pay a fine, which in turn would raise the issue of the enforceability of such a remedy. In addition, to whom

53. Since all WTO Members would have a right to benefit from such lower rates, the complaining party would presumably seek compensation in sectors or tariff lines in which it is the principal supplier.

54. The first was in Japan—Taxes on Alcoholic Beverages: Mutually Acceptable Solution on Modalities for Implementation, WT/DSB17 (July 30, 1997), at http://www.wto.org. The second was in the U.S. Copyright Act dispute. As noted above, in the latter case temporary compensation has been negotiated, although (as of January 2002) not yet provided.


56. For example, the North American Agreement on Environmental Cooperation and the North American Agreement on Labour Cooperation provide for fines ("monetary enforcement assessments"). Similar mechanisms are found in the Canada-Chile Agreement on Environmental Cooperation and the Canada-Chile Agreement on Labour Cooperation. To date, none of these provisions have been applied.
would such a fine be paid? To all WTO Members? To the complaining party alone? Would the government of the complaining party be entitled to distribute the proceeds of such a fine to the affected industry?

In any event, in many disputes the provision of compensation or the payment of fines may do little to resolve the core basis of the dispute, which is the continued maintenance of a WTO-inconsistent measure.

C. Rotating the Sanctions List: "Carousel" Retaliation

In May 2000, the U.S. Trade and Development Act 2000 was signed into law. This legislation included a provision (section 407) that requires the U.S. Trade Representative (USTR) to modify regularly the list of goods to which retaliation would apply. The press has dubbed this law the "Carousel Retaliation Act," since it requires the list of products subject to sanctions to be rotated—like a carousel.

In revising the retaliation list, the law requires the USTR to "act in a manner that is most likely to result in the country... implementing the [DSB] recommendations." A number of Members, particularly the EC, strongly oppose the notion of "carousel," principally on the basis that it could lead to the imposition of sanctions above the level authorized by the WTO. They note that when punitive tariffs are applied, it may not lead to additional customs duties for the importing country—instead, it can stop trade in that product. Therefore, they argue that a rotation of sanctions may have a cumulative effect in excess of the level of suspension authorized by the DSB.

In June 2000, the EC requested WTO consultations on carousel, the first step in the dispute settlement process. However, this dispute has not yet moved to the panel stage, in part because, to date, the United States has not applied the legislation. No rotation of sanctions has taken place.

D. Collective Retaliation

The notion of "collective retaliation" was first raised in the GATT in the mid-1960s, when a number of developing countries argued that they lacked the ability to inflict commercially meaningful retaliation on the economies of large developed countries. They urged the adoption of a new system that would require all countries, not just the complainant, to retaliate against the non-implementing party.

The idea of collective retaliation raises a number of problems, including establishing a system to ensure that the sanctions applied by the entire WTO community do not exceed the specific amount authorized by the DSB (the "double-counting" problem). Moreover,
there could be possible trade diversion effects, in that imports may flow to a country that—
despite its obligations—has declined to impose the retaliation.

More to the point, however, is that an amendment would be required to the DSU in
order to implement the principle of collective retaliation, and many countries would not
agree to this. As argued above, it is extremely difficult for a complaining party to impose
sanctions in a way that does not hurt its own consumers and businesses. Many governments
would be even more reluctant to impose commercial harm on their economies in order to
resolve a completely unrelated trade dispute.

E. PUNITIVE RETALIATION

Some have argued that in order to give sanctions more commercial force, the WTO
should have the ability to impose sanctions at a punitive level, instead of having them simply
match the level of nullification or impairment sustained by the complaining party. Punitive
retaliation is not permitted under current WTO rules.62

However, punitive retaliation would significantly compound the problem of the com-
mercial harm that sanctions impose on the economy of the complaining party, with no
assurance that it would actually induce compliance. Moreover, punitive sanctions may en-
gender sufficient resentment in the defending party so as to stiffen its resolve not to bow
to this form of pressure.63

V. Conclusions

At this relatively early stage in the development of the WTO dispute settlement system—
slightly over seven years since the entry into force of the Agreement—a number of conclu-
sions may be drawn about the compliance and retaliation in the WTO. First, in general
terms, the record of compliance with WTO rulings has been very good. Most defending
countries, in most cases, have fully implemented the panel and Appellate Body reports.
Many countries clearly view it in their interest to promote the integrity of a rules-based
system, even if this means occasionally having to accept and implement an unpalatable
decision.

Second, the record of compliance tends to be better where the dispute is exclusively or
primarily a commercial one. Implementation problems are more likely to arise in cases that
also involve non-trade concerns. For example, the EC commitment to assist the economic
development of former European colonies in the Africa, Caribbean, and Pacific (ACP)
region significantly complicated efforts to seek full EC compliance with the WTO rulings
in the Bananas dispute. Thus, the so-called “trade and” disputes have resulted in a higher
number of compliance problems.

Third, there has been relatively little use of compensation as an alternative to retaliation.
In principle, it is widely accepted that compensation is clearly preferable to retaliation.
However, compensation negotiations have often been unsuccessful. In many cases, the dis-

62. The arbitrators in the 1999 Bananas case noted that there was “nothing in Article 22.1 of the DSU, let
alone in paragraphs 4 and 7 of Article 22, that could be read as justification for counter-measures of a punitive
nature.” (Emphasis in original) Bananas: Decision by the Arbitrators (1999 U.S. complaint), supra note 12, para
6.3.

63. See Hudec, supra note 49, at 392.

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pute will remain unresolved until the illegal measure has been withdrawn. The provision of compensation, particularly in unrelated sectors, may do little to address this.

Moreover, even where there is a will to negotiate compensation, the complaining and defending parties may have markedly different ideas as to what would constitute an appropriate level of compensation. The compensation negotiations typically begin after a retaliation request has been made, when there is usually no agreement as to the level of “nullification or impairment” sustained by the complainant. However, in the *Copyright Act* case, as noted above, the United States and the EC held a special arbitration during the implementation period on the level of nullification or impairment. This facilitated the subsequent negotiation of a temporary compensation agreement between the parties. This is an interesting and constructive precedent, which will likely be followed in the future.

Fourth, the nature of retaliation has undergone a certain evolution since its first invocation by the United States in *Bananas* in 1999. In most cases, complainants have sought what might be regarded as “traditional” retaliation, in the form of punitive tariffs on certain imported goods of the defendant. However, there have been cases in which “non traditional” retaliation has been sought, such as the requests made by the EC and Japan to adopt laws to “mirror” the WTO-inconsistent U.S. Anti-Dumping Act of 1916. Similarly, the proposed EC retaliation in the *Copyright Act* dispute—invoked in the event that the U.S. Congress fails to fund the compensation package—would target U.S. copyright holders by imposing an additional fee for enforcement of intellectual property rights in the EU. In both these cases, it would seem that the complaining parties have sought to hasten the withdrawal of the WTO-inconsistent measure by targeting the industries or sectors that they regard as the principal beneficiaries of it.

Fifth, it is fair to say that retaliation has been less successful in inducing compliance than anticipated by the drafters of the DSU. At the conclusion of the Uruguay Round, many officials were optimistic that the mere threat of automatic retaliation would serve as a powerful tool to force recalcitrant defending parties to comply with their obligations. However, there have been disputes in which retaliation has either been threatened or actually implemented, and yet the defending party has done nothing to comply. To date, such cases have been relatively few in number. However, the effective enforcement of DSB rulings is essential to ensure the continuing integrity of the WTO dispute settlement system.

The Uruguay Round brought about a number of significant improvements to the system of trade dispute settlement. Nevertheless, it is evident that the much-heralded principle of “automaticity” has its limitations. The automatic adoption of panel and Appellate Body reports, and the automatic approval of retaliation requests, are no guarantee of automatic compliance.