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Compliance Problems in WTO Dispute Settlement

William J. Davey[†]

This Comment surveys the problems of compliance facing the World Trade Organization (WTO) dispute settlement system and considers reforms that might improve compliance. In general, the WTO dispute settlement system has an excellent compliance record. A recent examination of the implementation record of WTO decisions for the first ten years of WTO dispute settlement found a compliance rate of 83%.¹ Although new problem cases continue to arise, several of the ten problem cases outstanding at the time of the study have since been resolved.² This compliance rate is very good for an international state-to-state dispute settlement system.³ Moreover, the success rate of consultations in WTO cases that do not result in either adopted panel or Appellate Body reports is impressive.⁴

The picture, however, is not so rosy if one looks beyond general statistics and considers the quality and timeliness of compliance actions. By “quality of compliance actions,” I am referring to how a WTO decision was implemented and whether the offending measure was withdrawn. If the offending measure was withdrawn, then there probably was not a problem with the quality of the compliance action. Alternatively, if the offending measure was modified or replaced, the compliance action may not have been truly satisfactory. When I refer to the “timeliness of compliance,” I am asking whether the implementing action was taken within the reasonable period of time set for implementation. Timeliness also encompasses inquiries into whether the time taken by the panel and appellate processes

[†] Guy Raymond Jones Chair in Law, University of Illinois College of Law.

1. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 46-48 (2005) [hereinafter *The First Ten Years*].

2. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 284 (5th ed. 2008).

3. Even though the WTO system has faced more challenging cases, the success rate is comparable to the success rate of the GATT dispute settlement system. *The First Ten Years*, *supra* note 1, at 48; see ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 344-51 (1991). The success rate in the WTO system is clearly better than the success rate in the International Court of Justice. See, e.g., Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-12 (2004) (finding a 68% compliance rate, as defined by the authors, for a sample of cases before the International Court of Justice).

4. William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?*, in *THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* 98, 102-07 (Yasuhei Taniguchi et al. eds., 2007) [hereinafter *Evaluating WTO Dispute Settlement*].

42 CORNELL INT'L L.J. 119 (2009)

has met the standards specified in the WTO Dispute Settlement Understanding (DSU).⁵

An examination of the quality and timeliness of compliance in the first ten years of the WTO dispute settlement system reveals some interesting patterns. General Agreement on Tariffs and Trade (GATT) and Trade-Related Aspects of Intellectual Property Rights (TRIPS) cases typically result in the timely withdrawal of the contested measure.⁶ The two TRIPS cases brought against the United States⁷ and the *European Communities - Bananas*⁸ case are the main exceptions to this trend.⁹ In other words, the desired result has generally been achieved in GATT and TRIPS cases. There have also typically been timely withdrawals of the contested measures in safeguard and textiles cases; however, the contested measures in these cases were often in place for all or most of the initially intended period of effectiveness.¹⁰ Thus, compliance was timely in terms of respecting the reasonable period of time for implementation set by the WTO dispute settlement process, but the overall WTO process took so long that implementation was not very meaningful in practical terms.¹¹ In 75% of trade remedy cases, the typical result has been a modification of the measure, which does not result in a significant change in the applied duty 50% of the time.¹² Trade remedy cases often take a long time, and almost one-half of the Article 21.5 compliance proceedings have involved trade remedy cases.¹³ Modifications and compliance disputes have also been common in agriculture, subsidy, and Sanitary and Phytosanitary (SPS) cases.¹⁴ Thus, in these cases—particularly in trade remedy cases—compliance is often not timely and may not have much practical effect.

5. See Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 12, 16.4, 17.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

6. *Evaluating WTO Dispute Settlement*, *supra* note 4, at 114–15, 139–40.

7. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002) [hereinafter *US—Section 211 Appropriations Act*]; Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) (adopted July 27, 2000) [hereinafter *US—Section 110(5) Copyright Act*].

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

9. *Evaluating WTO Dispute Settlement*, *supra* note 4, at 115, 140. The two cases in which the United States has been found to have violated the TRIPS Agreement required Congressional action for implementation, which has not been forthcoming. *Id.* at 115. The prevailing party in the two cases, the European Union, has never sought authority to retaliate, perhaps because the cases involve a relatively limited amount of trade.

10. *Id.* at 110.

11. *Id.* at 113–14.

12. William J. Davey, *Implementation of the Results of WTO Remedy Cases*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 33, 33–61 (Mitsuo Matsushita et al. eds., 2006).

13. Dispute Settlement Body, *Annual Report (2007), Addendum, Overview of the State of Play of WTO Disputes*, 92–95, WT/DSB/43/Add.1 (Dec. 7, 2007) [hereinafter *DSB Annual Report (2007)*].

14. *Id.*; *Evaluating WTO Dispute Settlement*, *supra* note 4, at 114–15, 139–40.

Overall, timely compliance occurred in about 60% of the cases.¹⁵ Trade remedies, subsidies, agriculture, and SPS cases were problem areas.¹⁶ Countries that failed to comply in a timely manner in the first decade of WTO dispute settlement included the United States, the European Union, Canada, Japan, and Australia.¹⁷ These countries often failed to comply in cases against each other.¹⁸ Accordingly, their on-time implementation rate was 50%.¹⁹ Developing countries achieved a higher on-time implementation rate of over 80%.²⁰ Trends observed during the first decade have continued during succeeding years, although trade remedy cases now predominate in contested dispute settlement proceedings,²¹ and the United States has become the main source of untimely implementation of WTO decisions.²²

Finally, with respect to the overall timeliness of the panel and appellate process, a detailed examination of the time taken by panels to issue their reports shows that panels typically exceed the targets set in the DSU by many months, especially in Article 21.5 compliance proceedings.²³ While the Appellate Body usually issues its report within ninety days of an appeal,²⁴ the overall time taken by the process—especially when the “rea-

15. *Evaluating WTO Dispute Settlement*, *supra* note 4, at 137–38 (discussing country-by-country implementation as of December 2004).

16. *Id.* at 114.

17. *Id.* at 113, 138.

18. *Id.*

19. *Id.*

20. *Id.*

21. See Appellate Body, *Annual Report for 2007*, 42–47, WT/AB/9 (Jan. 30, 2008) [hereinafter *Appellate Body 2007 Annual Report*].

22. The United States has reported to the Dispute Settlement Body monthly for many years on its failure to implement in three cases. See, e.g., Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on March 14, 2008*, ¶¶ 1–50, WT/DSB/M/248 (Apr. 30, 2008) (discussing Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003) [hereinafter *United States—Continued Dumping*]; *US—Section 211 Appropriations Act*, *supra* note 7; *US—Section 110(5) Copyright Act*, *supra* note 7). Moreover, there is one case in which the European Union and Japan comment monthly on the failure of the United States to implement or report. *Id.* ¶¶ 20–45 (discussing *United States—Continued Dumping*, *supra*). In addition, the United States has recently lost three Article 21.5 compliance actions. See generally Appellate Body Report, *United States—Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (June 2, 2008); Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW (Dec. 17, 2008); Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, WT/DS285/RW (Mar. 30, 2007) [hereinafter *US—Gambling*]. Another compliance action is pending against the United States as well. See WTO Secretariat, *Update of WTO Dispute Settlement Cases*, 77–78, WT/DS/OV/33 (June 3, 2008) (discussing how Japan requested the creation of an Article 21.5 panel to resolve compliance issues of *United States—Zeroing (Japan)*).

23. William J. Davey, *Expediting the Panel Process in WTO Dispute Settlement*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 409, 415–18, 420–21 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008) [*Expediting the Panel Process*].

24. *Id.* at 418.

sonable” periods of time for implementation are taken into account—is quite long.²⁵ This Comment will not further consider the problem of the length of proceedings, except to note that reforms are both needed and feasible.²⁶

Taken together, the foregoing suggests that although the WTO dispute settlement system may have an admirable record overall, considerable room for improving the quality and timeliness of compliance exists. Indeed, businesses have expressed concerns about non-compliance and delays as reasons not to use the WTO dispute settlement system, which raises serious concerns for the future.²⁷ Thus, it is appropriate to consider the question of what changes might be made to the system to address these problems. Accordingly, I will briefly consider changes in compensation and retaliation rules.

First, although compensation by definition does not produce compliance, it is worth examining because it compensates for non-compliance. Currently, the DSU provides for the possibility of negotiating compensation in lieu of retaliation within the twenty-day period following the expiration of the reasonable period of time.²⁸ Though parties seldom use compensation, there are several cases in which the parties agreed to compensation.²⁹ This raises two questions: (1) whether it would be desirable to promote more use of compensation and (2) how such greater use could be facilitated in practical terms.

I think that it would be beneficial to expand the use of compensation. It could be particularly desirable for developing countries if they find themselves in a situation where timely implementation is not going to occur and retaliatory action is not practical, as is typically the case. Although I acknowledge concerns that this is tantamount to allowing coun-

25. *Id.* at 419-20.

26. *Id.* at 421-30.

27. See, e.g., Gary G. Yerkey, *U.S. Poultry Producers Do Not Plan to Urge U.S. to File Case at WTO over EU Import Ban*, INT'L TRADE DAILY (BNA), June 9, 2008 (noting EU failure to comply in the *Hormones* case). In the DSU reform negotiations, Mexico has been particularly critical of what it calls the “fundamental problem” of the WTO dispute settlement system, namely the ‘period of time which a WTO-inconsistent measure can be in place without the slightest consequences’ to the offending party.” Daniel Pruzin, *Mexico Presents ‘Radical’ Proposal for WTO Dispute Resolution Reform*, 19 INT'L TRADE REP. (BNA) 1984, 1984 (2002).

28. DSU art. 22.1-22.2.

29. Generally, compensation has been used when certain implementing measures have been delayed beyond the end of the reasonable period of time set for implementation. See, e.g., *Mutually Acceptable Solution on Modalities for Implementation, Japan—Taxes on Alcoholic Beverages*, WT/DS8/20, WT/DS10/20, WT/DS11/18 (Jan. 12, 1998) (Japan provided trade compensation to Canada); *Notification of Mutually Acceptable Solution, Turkey—Restrictions on Imports of Textile and Clothing Products*, WT/DS34/14 (July 19, 2001) (Turkey provided trade compensation to India); *Agreement Under Article 21.3(b) of the DSU, United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/18 (July 31, 2002) (the United States provided trade compensation to Korea); *Notification of a Mutually Satisfactory Temporary Arrangement, United States—Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2003) (the United States provided monetary compensation for three years of non-implementation).

tries—particularly rich countries—to buy their way out of obligations, I think that, on balance, promoting this option—which would not be a requirement—would be useful.³⁰

The more difficult question is how the use of compensation could be facilitated. The most promising suggestion involves establishing a procedure to set the level of nullification or impairment earlier than it is presently set.³¹ This procedure would facilitate the use of compensation because the procedure would establish a more clear basis for conducting compensation negotiations and there would be a concrete starting point—and perhaps ending point—for negotiating the amount owed. The offending party, however, would still have to agree to provide compensation. Although ideas positing ways that compensation might be “compelled” exist,³² these ideas are difficult to implement as long as the respondent is recalcitrant.

An alternative solution contemplates improving compliance by increasing the effectiveness of the WTO’s ultimate weapon—retaliation—or through other remedies.³³ It is worth noting that the overall effectiveness of retaliation may be somewhat questionable. The third edition of the classic Hufbauer study on the effectiveness of economic sanctions finds that economic sanctions work only about one-third of the time, although the study does not look at economic sanctions taken for GATT/WTO-related

30. It is worth mentioning that although there are some notable exceptions, most long-term non-compliance has occurred in disputes between developed countries. See, e.g., Request to Join Consultations, Communication from Cameroon, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/74 (Dec. 11, 2006) (dispute arising between Cameroon and European Communities); *US—Gambling*, *supra* note 22 (dispute involving Antigua and Barbuda). However, poorer and smaller developing countries might make greater use of the WTO dispute settlement system if it seemed more probable that a useful result could be achieved. See William J. Davey, *The WTO Dispute Settlement System: How Have Developing Countries Fared?* 24–40 (Ill. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 05-17, 2005) [hereinafter *How Have Developing Countries Fared?*], available at <http://ssrn.com/abstract=862804> (analyzing the use of dispute resolution by small and large developing countries). So far, only large developing countries are significant users of the system. *Id.*

31. Korea has proposed that Article 21.5 compliance panels set the level of nullification or impairment in cases where they find non-implementation. See Special Session of Dispute Settlement Body, *Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO*, ¶¶ 9–10, TN/DS/W/35 (Jan. 22, 2003). It would also be possible for panels to set that level in original proceedings.

32. See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT’L L. 335, 337–38, 345–46 (2000) (discussing methods to induce compensation payments).

33. Under WTO rules, if a WTO member fails to bring an offending measure into compliance with its WTO obligations within the reasonable period of time set for implementation, the prevailing WTO member may ask the WTO Dispute Settlement Body for authority to suspend concessions that it owes to the offending member and such authority is to be granted absent a consensus to the contrary. DSU art. 22.2. Such suspension of concessions is typically referred to as retaliation and usually consists of raising tariffs beyond bound limits, often to prohibitive levels, on certain products from the offending member. The DSU limits the level of suspension of concessions to the level of nullification or impairment caused by the offending measure. *Id.* art. 22.4. If there is a dispute over that level, it is resolved by arbitration. *Id.* art. 22.6–22.7.

trade reasons.³⁴ Retaliation was never formally used under GATT rules, and retaliatory measures have been applied to date in only four cases under WTO rules: *European Community–Bananas*,³⁵ *European Community–Hormones*,³⁶ *United States–Foreign Sales Corporation (FSC)*,³⁷ and *United States Byrd Amendment*.^{38,39} The *Hormones* retaliation has not changed EU policy after almost nine years.⁴⁰ It is arguable that retaliation in the other three cases, plus the possibility of retaliation under the safeguards agreement in the *United States–Steel Safeguards* case,⁴¹ may have had some effect on resolving those disputes, but it would be difficult to establish that retaliation was the key factor in eventual implementation.⁴²

34. See GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. 2007).

35. See Panel Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU by the United States, passim*, WT/DS27/RW/USA (May 19, 2008) (discussing the United States' retaliation measures).

36. See Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, ¶¶ 12–15, WT/DS320/AB/R (Oct. 10, 2008) [hereinafter *US–Continued Suspension*].

37. See generally Decision of the Arbitrator, *United States–Tax Treatment for “Foreign Sales Corporations”*, *Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB (Aug. 30, 2002).

38. See generally Decision of the Arbitrator, *United States–Continued Dumping and Subsidy Offset Act of 2000, Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS234/ARB/CAN (Aug. 31, 2004).

39. Retaliation was also authorized, but not imposed, in two of the cases arising out of the Canada–Brazil dispute over export subsidies to regional jet makers. Arbitration reports setting the permissible levels of retaliation were issued in the *United States 1916 Act* case and the *United States–Gambling* case, although the Dispute Settlement Body has yet to be requested to authorize retaliation in those cases. JACKSON ET AL., *supra* note 2, at 365; see *DSB Annual Report (2007)*, *supra* note 13, at 97, 99.

40. See *US–Continued Suspension*, *supra* note 36, ¶ 737 (noting that the Appellate Body could not ascertain at this stage whether the European Communities had substantially complied with Article 22.8 of the DSU).

41. Appellate Body Report, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Nov. 10, 2003).

42. In the *Steel Safeguards* case, the threat of significant and imminent retaliatory action by the European Union seemed to play a major role in the prompt removal of the United States steel safeguards that had been found to violate WTO rules. Rossella Brevetti & Christopher S. Rugaber, *Bush Ends Steel Safeguard Tariffs in Face of Threat by EU to Retaliate*, 20 INT'L TRADE REP. (BNA) 2021 (Dec. 11, 2003). In the *FSC* case, some congressional leaders and staffers cited actual and threatened European Union retaliation to justify changing the contested measures, but the overall impact of the retaliatory measures was not clear. Compare Kurt Ritterpusch & Gary G. Yerkey, *Conferees Reach Reconciliation Accord, Strip Some FSC Benefits to Offset Cost*, 23 INT'L TRADE REP. (BNA) 720 (May 11, 2006), with Alison Bennett, *Export Tax Repeal Conference Major Priority with Only Days Left for Senate, Frist Says*, 21 INT'L TRADE REP. (BNA) 1591 (Sept. 30, 2004) [hereinafter *Export Tax Repeal*], and Alison Bennett, *Retaliatory EU Taxes Not Seen Creating Expected Pressure to Pass Export Tax Bills*, 21 INT'L TRADE REP. (BNA) 1193 (July 15, 2004) [hereinafter *Retaliatory EU Taxes*]. In the *Byrd Amendment* case, the role of actual and threatened retaliation was less clear. The EC and Canada imposed retaliatory sanctions in May 2005, while Mexico and Japan did so in August and others threatened to do so. Rossella Brevetti & Michael O'Boyle, *EC, Canada Move to Impose Retaliatory Duties in Byrd Dispute*, 22 INT'L TRADE REP. (BNA) 546 (Apr. 7, 2005); 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); Daniel Pruzin, *Remaining Complainants*

The reality is that the overall good record of the system is due mainly to the good faith desire of WTO members to see the dispute settlement system work effectively.⁴³ The more active users of the system are repeat players, and they appear as both complainants and respondents.⁴⁴ It is in their overall interest that the system functions effectively. However, there will be cases in which such good faith cannot be relied upon, compliance becomes an issue, and retaliation may be helpful to promote compliance.

Initially, it is important to bear in mind that the ultimate WTO remedy of retaliation is prospective. Prospective retaliation gives the losing country an incentive to delay the time of reckoning as long as possible and probably explains the extensive delays in the system as well as the frequent use of Article 21.5 compliance proceedings. However effective retaliation may be when used by a major player in the WTO, retaliation is probably not an effective remedy for a small or developing country (even if that country can target sensitive large country sectors such as copyright holders). It is certainly the case that developing and small countries have never utilized the possibility of taking such measures, even following WTO authorization.⁴⁵

There are several practical changes in the WTO remedy provisions that offer hope for improving implementation of WTO dispute settlement decisions. Three changes in particular should be given serious consideration. The WTO remedies for non-implementation should incorporate (i) the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions; (ii) some degree of retroactivity, so as to help encourage compliance within the reasonable period of time;⁴⁶ and (iii) some adjustment mechanism to increase the level of sanctions over time, so as to pre-

Warn of Intent To Proceed With Byrd Sanctions by July, 22 INT'L TRADE REP. (BNA) 938 (June 9, 2005). Following a September GAO report showing that few firms benefited from the Byrd Amendment, a House committee approved legislation repealing it, which was finally approved in early 2006. Rossella Brevetti, *Byrd Act Beset by Problems*, GAO Says; *Five Firms Get 46 Percent of Distributions*, 22 INT'L TRADE REP. (BNA) 1557 (Sept. 29, 2005); Rossella Brevetti, *House Approves Budget Measure Containing Byrd Amendment Repeal*, 23 INT'L TRADE REP. (BNA) 184 (Feb. 2, 2006); Rossella Brevetti, *House Ways and Means Panel Approves Repeal of Byrd Law in Budget Measure*, 22 INT'L TRADE REP. (BNA) 1747 (Nov. 3, 2005). While the retaliatory measures certainly played a role, the limited number of beneficiaries of the Byrd Amendment was also important. In the *Bananas* case, the United States retaliatory measures served to increase the profile of the dispute, but other factors such as the desire by new administrations in the United States and in the European Union to improve their bilateral relations seemed at least as important in its resolution. Joe Kirwn, Daniel Pruzin & Gary G. Yerkey, *U.S. and EU End Decade-Long Dispute over EU's Banana Import Regime*, 18 INT'L TRADE REP. (BNA) 564 (Apr. 12, 2001).

43. See generally *Appellate Body 2007 Annual Report*, *supra* note 21, at 42-47 (describing the way that repeat players use this system).

44. *Id.*

45. The only arguable exception is Mexico in the *Byrd Amendment* case where the European Union, Canada, and Japan acted first. O'Boyle, *supra* note 42, at 1386; see *How Have Developing Countries Fared?*, *supra* note 30, at 37-38.

46. I have argued elsewhere that the typical reasonable periods of time for implementation set by the WTO system are too long and should be systematically shortened. See *Expediiting the Panel Process*, *supra* note 23, at 426-28.

clude non-compliance from becoming an acceptable status quo position. I will discuss each in turn.

First, I think it is evident that another remedy more meaningful to the typical WTO member is needed, because only a small group of powerful countries can be expected to effectively use retaliation. The obvious possible remedy is to allow a prevailing party to choose between suspension of concessions and receipt of a periodic monetary payment. Two particular problems would arise from implementing such a change. The first problem is that WTO members obviously vary in their abilities to pay fines. The system would have to be designed to avoid the possibility that rich members could effectively buy their way out of obligations in a way not available to the poor members. That result might be accomplished by tying the amount of fines to the size of the member's economy or otherwise providing for a sliding scale that would minimize "discrimination" against poor members. The result could also be accomplished by giving the choice between suspension of concessions and receipt of a periodic monetary payment only to developing countries and small developed countries; however this "discrimination" against the larger, richer countries might make the reform considerably less viable. Additionally, because this change would resemble forced compensation, an enforceability problem arises here as well. However, if the amount has been set by a DSU Article 26 arbitration, one could provide that the award would be enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, thus largely eliminating the enforceability issue.⁴⁷ Even if this alternative is sometimes problematic, the right to receive a payment will presumably work out in some circumstances and still be more valuable than the never-used and probably unusable right to suspend concessions.

Second, the prospective nature of WTO remedies currently gives countries no incentive to comply promptly and may even encourage foot dragging. To minimize this problem and to create incentives for prompt compliance, any remedy (whether retaliation or money payment) should be calculated from a date prior to the date set for implementation (e.g., date of adoption of the relevant report or date of panel establishment or even earlier). Because the current rule would continue so that no remedy would be imposed if implementation occurs within the reasonable period of time, there would be an incentive to meet that deadline for implementation.

Third, increasing sanctions over time would also seem to offer some real possibilities for improving implementation. Such a procedure would help to avoid the perception that the payment of fines or damages is simply an alternative to compliance. In a sense, the European Community used this concept in the *FSC* case when it imposed a duty on a long list of U.S.

47. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. The vast majority of WTO members are party to the convention. As a backup, non-parties could be required to create funds from which fines or damages could be paid without specific legislative approval.

products that started at 5% and was increased by 1% each month.⁴⁸ The monthly change focused attention on the case each month, and the impending increase, even if small, created an incentive to act to forestall it.⁴⁹ In U.S. congressional debates on the FSC implementation legislation, some members of Congress made this point.⁵⁰ The huge size of the FSC sanctions—\$4 billion—made a phase-in of the sanctions practical in any event.⁵¹ However, the same concept could be used in other cases to encourage more prompt implementation.

If the changes suggested above were made, how effective would they be in addressing the problems of timeliness and quality of implementation? The use of retrospective remedies and increased sanctions over time would likely help solve the particular implementation problems in the subsidy, agriculture, and SPS areas.⁵² In each case, the cost of non-compliance would increase and that increase would help offset the political opposition to implementation. However, that would not necessarily be the case for safeguards and trade remedies. As outlined above, the assumption of the current system (and the proposed changes thereto) is that compliance within the set reasonable period of time would absolve a country from suffering the application of any remedy. However, in the area of safeguards and trade remedies such a rule would still allow a country to impose the safeguard or remedy and enjoy its effect; the country would only be compelled to remove the safeguard or remedy after the WTO dispute settlement procedure had run its course. Thus, questionable safeguards and trade remedies might continue to be imposed and then removed after a couple of years of disrupting trade. While removal would be more timely with these changes, significant trade disruption would continue to occur.

It seems to me that the only way to solve this problem would be to require payment of reparations if the imposition of such measures is found to be WTO-inconsistent. I think that other possible reforms are unlikely to work. For example, WTO disputes are often too complex to expect that a system of provisional remedies could make much difference. Because these measures often stop trade—resulting in no collection of duties—a rule on refund of duties would also not address the problem in general. Providing for reparations for damages to trade flows might work. However, although reparations are the standard remedy in international law for violations of a state's obligations,⁵³ importing such a concept into the WTO would proba-

48. Ritterpusch & Yerkey, *supra* note 42, at 722.

49. *See id.*

50. *See id.* at 720; *see also Export Tax Repeal*, *supra* note 42, at 1591; *Retaliatory EU Taxes*, *supra* note 42, at 1193.

51. *See Ritterpusch & Yerkey*, *supra* note 42, at 721.

52. *See Isabelle Van Damme*, *Fifth Annual WTO Conference: An Overview*, 8 J. INT'L ECON. L. 769, 779-80 (2005).

53. *See JAMES CRAWFORD*, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 201-06* (2002) (noting that Article 31(1) of the International Law Commission's Articles on State Responsibility provides: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").

bly be viewed by WTO members as a more drastic and less acceptable change than the adjustments to the current reforms proposed above.

In conclusion, the WTO dispute settlement system has an admirable record, but one that is in need of reinforcement through thoughtful improvements, especially with respect to remedies. In particular, as argued above, the WTO remedies for non-implementation should incorporate: (i) the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions; (ii) some degree of retroactivity, so as to help encourage compliance within the reasonable period of time; and (iii) some adjustment mechanism to increase the level of sanctions over time, to preclude non-compliance from becoming an acceptable status quo position. These changes would likely improve the WTO dispute settlement system's implementation record.