

The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement

Rachel Brewster*

ABSTRACT

One of the major innovations of the World Trade Organization's ("WTO") Dispute Settlement Understanding ("DSU") is the regulation of sanctions in response to violations of trade law. The DSU requires governments to receive multilateral approval before suspending trade concessions and limits the extent of retaliation to prospective damages. In addition, the DSU permits governments to impose only conditional sanctions: sanctions for violations that continue after the dispute resolution process is complete. This enforcement regime creates a remedy gap: governments cannot respond, even to obvious breaches, until the end of the dispute resolution process (and then only to the extent of prospective damages). This gap might not be particularly important if the dispute resolution process were short. In practice, however, the WTO dispute resolution process has proven increasingly time consuming. This Article explores the growth of delays in the WTO dispute resolution process and the increasing significance of the remedy gap. It highlights how the DSU system essentially provides respondent states with an option to violate trade rules for several years without facing trade retaliation. The remedy gap also has counterproductive effects on settlement negotiations: the system gives respondent states few reasons to settle before the end of dispute resolution unless the states are compensated for doing so. Finally, this system may lead frustrated complaining states to subvert the DSU regime by acting outside of the legal framework. This Article discusses several solutions to the remedy gap, most notably creating a procedure where WTO panels can issue preliminary injunctions.

* Assistant Professor, Harvard Law School. My thanks to Gabby Blum, Glenn Cohen, Einer Elhauge, John Goldberg, Jack Goldsmith, Jim Greiner, Larry Helfer, Vicki Jackson, Daryl Levinson, Katerina Linos, Eric Posner, Ben Roin, Jed Shugerman, Kathy Speir, Paul Stephan, Matthew Stephenson, Alan Sykes, Joel Trachtman, Mark Wu, the Duke University Law School Faculty Workshop, and the University of Michigan Law School Faculty Workshop for helpful comments on this paper. Andrew Breidenbach, Zack Hill, and Martha Vega-Gonzalez provided excellent research assistance. In the interests of full disclosure, it should be noted that I worked for the United States Trade Representative's Office ("USTR") during the time the *United States — Subsidies on Upland Cotton* case was proceeding through World Trade Organization dispute settlement. The views in this paper are my own and do not represent the views of the USTR or its staff.

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INTRODUCTION

Questions regarding the enforcement of trade law focus on a number of different remedies for violations: the use of trade sanctions, the effectiveness of informal sanctions, and the reputational costs to governments. Among these remedies, the systematized use of trade retaliation (“suspension of trade concessions,” in trade parlance) is the major innovation of the World Trade Organization (“WTO”).¹ Yet the WTO remedy regime contains a significant gap caused by the length of time that dispute settlement takes at the WTO. The WTO provides contract-like remedies for continued breaches of WTO rules, but the remedy is *conditional and prospective*, beginning only after the dispute resolution process is complete.² This gap in the remedy

¹ See generally Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002).

² See Gavin Goh & Andreas R. Ziegler, *Retrospective Remedies in the WTO After Auto-*

scheme creates a de facto escape clause where member states can violate trade rules, and complaining states do not have any right to rebalance trade concessions for the harm done by the breach from the time of violation onward. The conditional and prospective nature of the WTO's Dispute Settlement Understanding ("DSU") is well recognized,³ but the effects of the delay are not equally well explored. This Article examines how this gap in the WTO's remedial regime has significant negative effects on the efficient functioning of the dispute settlement system. The Article then explores several approaches to closing the remedy gap, most notably establishing a system through which DSU panels can issue preliminary injunctions.

The first negative effect of the remedy regime is its creation of a de facto escape clause for the duration of the legal proceedings, which allows states to violate WTO law without providing any way for injured states to respond by suspending trade concessions. As the time necessary to complete the dispute resolution process has lengthened, this de facto escape clause has grown broader and sometimes more generous than the WTO's de jure escape clause, the Safeguards Agreement.⁴ Second, the remedy scheme has a counterproductive influence on pretrial settlement negotiations; because the WTO's dispute settlement system essentially provides the respondent state with an "option" to violate trade rules for as long as litigation continues, the respondent state has little incentive to settle the case unless it is compensated for not exercising this option. Finally, the structure of the WTO dispute settlement system can give complaining states the incentive to subvert the regime by acting outside of the legal framework. Complaining states that do not wish to tolerate noncompliance during the dispute resolution process have few options but to act unilaterally to address trade violations.⁵ This final effect is potentially the most significant, because it undermines the WTO's credibility as an effective adjudicator of trade disputes.

To be clear, this Article does not claim that states consistently use the WTO's dispute resolution process as a means to maintain violations of trade law for as long as possible. States often sincerely negotiate compromises to trade disputes and use the WTO's adjudication

motive Leather, 6 J. INT'L ECON. L. 545, 548 (2003); Joel Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127, 132-33 (2007).

³ See *infra* Part I.

⁴ Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 154 [hereinafter Safeguards Agreement].

⁵ See *infra* Part I.A.

process to resolve good faith disagreements concerning the substantive requirements of trade law.⁶ At the same time, however, states learn through experience how the WTO system functions and act strategically on that knowledge. The terms on which a state is willing to settle a dispute depend, in part, on the alternatives. If the dispute resolution system effectively permits the state to maintain the violation for several years into the future, we would expect this alternative to influence settlement negotiations. Thus, the remedy gap is relevant not only to a limited class of “hit-and-run” cases, but also to a much broader class of disputes in which states are balancing domestic political demands with the obligations of WTO law.

Several options for closing the remedy gap exist. The most obvious is to make damages *unconditional and retrospective*. If the WTO system found that a respondent state had violated trade rules, the complaining government would be able to retaliate against the respondent state for all of the damages incurred even if the respondent state removed the offending policy. Such a remedy regime would more closely approximate a contract remedy regime. Yet this solution has two potential problems. First, WTO member states appear committed to the idea that retaliation should be conditional on the respondent state refusing to alter the successfully challenged policy.⁷ An unconditional and retrospective remedy regime would permit retaliation even if the respondent state fully complied with WTO rulings. Second, unconditional and retrospective remedies would be applied only at the end of the litigation period. Although this threat is often (but not always) sufficient to incentivize profit-maximizing firms to settle disputes, it is significantly less effective with governments.⁸ Governments often have shorter time horizons and prefer to push the costs of trade violations onto future governments.⁹ If WTO adjudication is expected to take four or more years, the current government may expect that the penalty will be borne by a successor government. In short, governments evaluate and internalize costs very differently than do firms, and thus the threat of unconditional and retrospective damages may not be optimal in encouraging compliance with WTO rules.

⁶ See Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 809 (2001).

⁷ Retaliation is disfavored because it further raises barriers to trade, and WTO rules make explicit that retaliation should only be applied in the face of noncompliance. See *id.* at 814–15.

⁸ See *infra* Part IV.A.

⁹ See *infra* Part IV.A.

An alternative remedy, the one proposed by this Article, is to institute a procedure by which states may seek preliminary injunctions. At the outset of the WTO dispute resolution's panel hearing, the complaining state could request that the panel issue a preliminary injunction against the respondent state's policy. The panel would issue the injunction if its preliminary assessment is that the complaining state is likely to be successful on the merits of its complaint. The respondent state would then be provided with a reasonable period of time to remove its policy. If it fails to do so, the complaining government could begin retaliating against the respondent government during the litigation process. The panel would authorize a level of retaliation and could adjust that level based on the likelihood of the complaining party's success on the merits of its complaint. Preliminary injunctions have two advantages over contract-style remedies. First, they preserve the conditionality of the remedy. Retaliation remains conditional on the complaining state failing to comply with the ruling of the WTO. Second, preliminary injunctions motivate the respondent state's *current* government to comply, because retaliation can be threatened far more quickly, giving the government an incentive to amend their policies or settle the dispute earlier.

This Article explores the source of the remedy gap, the gap's effects, and some possible ways to close the gap. Part I of the Article focuses on the source of the gap. The Uruguay Round negotiations leading to the creation of the DSU reflected the very different goals that various states had for reforming the dispute resolution system in the General Agreement on Tariffs and Trade ("GATT").¹⁰ Some states, notably the United States, were interested in establishing a more formal system that would permit trade sanctions, while others, notably those members of the European Communities ("EC") and Japan, were interested in restricting the United States' use of unilateral sanctions. The resulting institution was a compromise that more easily authorized the use of trade sanctions—but only after the completion of the multilateral adjudication process.¹¹ So long as the trading system adjudicated claims quickly, a remedy gap would be small. As the system has developed, however, the time necessary to complete dispute resolution has grown increasingly lengthy.¹²

Part I also demonstrates how states have learned to delay dispute resolution proceedings. Both panels and the Appellate Body regu-

¹⁰ See *infra* Part I.A.

¹¹ See *infra* Part I.A.

¹² See *infra* Part I.B.

larly fail to meet the timelines set out in the DSU. The average time from the composition of a panel to the adoption of an Appellate Body report was over two years for cases brought between 2005 and 2009.¹³ This is more than double the one-year timeline established in the DSU.¹⁴ In addition, states have learned that requests for Article 21.5 compliance panels and appeals can further extend the time until trade retaliation is authorized.¹⁵ Together, these two strategies create a situation where states can effectively delay the end of dispute resolution for several years. During this time, complaining states have no legal recourse under WTO rules.

Part II examines the effects of the remedy gap. The remedy gap is harmful to states on several levels. The lack of remedy for the harm done to the complaining state during the dispute resolution process is itself a problem, particularly if the process takes three or more years to complete. In addition, the remedy gap has a negative influence on settlement negotiations; the remedy regime is prospective and conditional on continued noncompliance, so respondent states have few reasons to settle unless they are compensated for doing so. This issue of settlement also relates to why complaining states have such a high rate of success at the WTO. Commentators have hypothesized that the WTO has a free-trade bias because panels and the Appellate Body so often find in favor of complaining states.¹⁶ This study undermines that hypothesis by highlighting that the remedy gap provides respondent states with an incentive to extend the dispute resolution process as long as possible. The high win rate at the WTO more likely reflects the desire of respondent states to litigate cases, even when they expect to lose, rather than a bias on the part of the WTO.

Part III turns to the question of whether the remedy gap poses a significant problem to trade law enforcement. International trade scholars frequently note that the formal remedies at the WTO are not the only means of enforcing trade law. States that choose to breach trade rules generally face reputational costs and some informal sanctions. This Part discusses whether these less-formal sanctions are sufficient to solve the problems of trade enforcement caused by the remedy gap.

¹³ See *infra* Part I.B; *infra* Table 1.

¹⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 20, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

¹⁵ See *infra* notes 95–99 and accompanying text.

¹⁶ Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 387 (2009).

Part IV concludes by considering three ways to alter DSU remedies or dispute settlement procedures to mitigate the effects of the remedy gap. Although these proposals are not mutually exclusive, the article presents them separately to highlight the costs and benefits of each. The first is to change the remedy rule to permit retaliation to cover the complainant's total damages, rather than restricting the remedy to postlitigation prospective damages. The second proposal is to authorize panels to impose preliminary injunctions at the beginning of the dispute resolution process. The third proposal would change the sequencing of the WTO litigation process to allow complaining governments to retaliate earlier in the litigation process.

I. THE FUNCTIONING OF THE DSU: FROM THE URUGUAY ROUND NEGOTIATIONS TO CURRENT PRACTICE

A. *Uruguay Round Negotiations' Goals and DSU Remedies*

Like any international institution, the WTO dispute settlement system is the product of compromise. Many states wished to reform the GATT's dispute resolution procedures as part of the Uruguay Round negotiations,¹⁷ yet there was a wide range of opinions regarding what form the new regime should take. The United States and Canadian governments pushed for more radical reform of the GATT dispute settlement system, including more effective mechanisms for enforcing trade law.¹⁸ The United States, in particular, complained that the GATT system was unable to credibly threaten sanctions.¹⁹ Frustrated with the limits of the GATT system, the United States government had resorted to sanctioning perceived violations of trade rules or other unfair trading practices unilaterally (the so-called "301 sanctions").²⁰ The EC and the Japanese governments were less enthusiastic about adopting a rigorous international dispute settlement sys-

¹⁷ JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 123 (1995).

¹⁸ JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 70 (2006); CROOME, *supra* note 17, at 149; 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992) 2762 (Terence P. Stewart ed., 1993).

¹⁹ See BARTON ET AL., *supra* note 18, at 69; CROOME, *supra* note 17, at 149; 2 *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY*, *supra* note 18, at 2726-39, 2763-79.

²⁰ See THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* 14-16, 32-40 (1994); Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 1, 1-2 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990); Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 525-26 (1975); Andreas F. Lowenfeld, *Edi-*

tem, preferring, at least initially, a more diplomatic approach.²¹ These governments were adamant, however, that the dispute settlement system should end the American practice of unilateral sanctioning.²²

The resulting institution, the WTO's DSU, reflected these dual agendas; it provided mandatory dispute settlement, with sanctions to be approved only after the process was completed.²³ To increase the institution's ability to credibly threaten sanctions, the WTO established a system of dispute resolution with strict timelines and near-automatic adoption of dispute resolution decisions.²⁴ To restrict unilateralism, members of the WTO agreed not to retaliate against violators of trade rules until granted authorization by the WTO, and then only to the extent and in the form authorized by an arbitration panel.²⁵

The new WTO system also included an explicit remedy regime.²⁶ If the respondent state failed to bring the challenged measures into compliance with WTO rules, the Dispute Settlement Body ("DSB") would authorize the complaining state to suspend trade concessions equal to the complaining state's level of injury from the violation (the state's "nullification or impairment," in WTO parlance).²⁷ The choice of this remedy rule suggests that, even from the beginning, the governments designing the institution viewed the optimal level of sanctions for violations as approaching contract law remedies.²⁸ Rather than at-

torial Comment, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 481 (1994).

²¹ See CROOME, *supra* note 17, at 147–51; 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 18, at 2727–35.

²² CROOME, *supra* note 17, at 151, 263; 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 18, at 2761–62, 2777–79.

²³ DSU art. 23; *see also* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 256–57 (2006) (discussing the WTO negotiations regarding dispute settlement).

²⁴ Lowenfeld, *supra* note 20, at 481.

²⁵ DSU art. 23.

²⁶ This was a significant change to the GATT self-help-remedy regime. *See* Schwartz & Sykes, *supra* note 1, at S200–03.

²⁷ DSU art. 22.4. There is a different remedy for prohibited and actionable subsidies. With prohibited subsidies, the Subsidies and Countervailing Measures Agreement ("SCM Agreement") provides for "appropriate countermeasures." Agreement on Subsidies and Countervailing Measures art. 4.10, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 14 [hereinafter SCM Agreement]. With actionable subsidies, the standard is "commensurate" countermeasures. *Id.* art. 4.9.

²⁸ Professors Warren Schwartz and Alan Sykes argue that the WTO system works on contract principles designed to permit breaches of the contract when the political gains from defection are greater than the political costs to the injured states. *See* Schwartz & Sykes, *supra* note 1, at S183 (discussing at length how the WTO works on contract principles); Alan O. Sykes, *The*

tempting to deter all breaches of WTO rules (and thereby imposing a sanction equal to the expected gains from a violation),²⁹ the negotiating governments calibrated the sanctions for breach to the complaining state's injury.³⁰

Yet the WTO remedy regime has two additional attributes that deviate from most contract-type remedy regimes: WTO remedies are both prospective and conditional. First, the WTO rules are widely understood by scholars and WTO arbitration panels to permit only prospective remedies, meaning that trade retaliation must be based exclusively on the *current* effects of the violation, not any past effects.³¹ For instance, in the *European Communities — Bananas III* decision, the arbitration panel reviewing Ecuador's request for trade remedies found that retaliation against the EC could only be based on injuries to Ecuador *after* the EC's failure to comply with the DSB ruling, not from the start of the violation.³²

Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 347 (Marco Bronckers & Reinhard Quick eds., 2000); see also Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 *HARV. INT'L L.J.* 337, 365–67 (2007) (discussing various goals of WTO remedies while observing that these sanctions are often insufficient to induce compliance *ex ante* or *ex post*); Rufus Yerxa, *The Power of the WTO Dispute Settlement System*, in *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS* 3, 4 (Rufus Yerxa & Bruce Wilson eds., 2005) (noting that “the [WTO] dispute settlement system works on the basis of contractual remedies”).

²⁹ The level of retaliation needed to deter the breach is equal to the gains the state has accrued over the life of the policy (or greater if the probability of the sanction being imposed is less than one), while the level of retaliation needed to convince the state to come into compliance with trade law is equal to the state's present gains from the breach. See George W. Downs, David M. Locke & Peter N. Barsboom, *Is the Good News About Compliance Good News About Cooperation?*, 50 *INT'L ORG.* 379, 384–86 (1996); Shannon K. Mitchell, *GATT, Dispute Settlement and Cooperation: A Note*, 9 *ECON. & POL.* 87, 89–92 (1985) (noting that the DSU cannot deter breaches because it does not eliminate the gains from defection).

³⁰ Schwartz & Sykes, *supra* note 1, at S188; Sykes, *supra* note 28, at 351; see also John H. Jackson, *International Law Status of WTO Dispute Settlement: Obligation to Comply or Option to “Buy Out”?*, 98 *AM. J. INT'L L.* 109, 123 (2004) (acknowledging that the damages remedy does not deter breach but arguing against the idea that the DSU provides states with the option to accept retaliation and refuse compliance).

³¹ Goh & Ziegler, *supra* note 2, at 564. The *Automotive Leather* decision is the lone DSU ruling that provided retrospective remedies, in that case, for a one-time subsidy. Panel Report, *Australia — Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW (Jan. 21, 2000). The WTO membership was generally critical of the decision and no WTO arbitration panel has recommended retrospective damages. Goh & Ziegler, *supra* note 2, at 547.

³² Decision by the Arbitrators, *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU (EC Bananas III)*, WT/DS27/ARB/ECU (Mar. 24, 2000).

The WTO remedy regime has a second requirement that sanctions only be “temporary measures available in the event that the recommendations or rulings [of the DSB] are not implemented within a reasonable period of time.”³³ WTO arbitration panels have interpreted this “conditional” requirement to forbid sanctions when the violation has been removed, even if the effects of the violations continue.³⁴ Thus if a state removes a challenged measure at the end of dispute resolution, the complaining states may not sanction the breaching state for its violation even if the effects of the violation persist (i.e., through previously granted subsidies or a government procurement decision).³⁵ Interestingly, the conditional requirement means that it is impossible for states to deter breach, even an “inefficient breach,” through formal sanctions via the DSU.³⁶ Deterrence is impossible because a respondent state can always eliminate the threat of any formal sanctions by complying with the DSU ruling at the end of the dispute resolution process.

Based on the WTO remedy regime, it appears that the designers of the DSU recognized that there would be some remedy gap. Damages are contingent on continued noncompliance with the WTO ruling, and so there was always the possibility that complaining states would suffer some harm from the violation that would not be redressed if the respondent state ceased its violation. However, the

³³ DSU art. 22.1.

³⁴ For instance, in the *United States — Subsidies on Upland Cotton* dispute, the Article 21.5 panel refused to allow Brazil to impose trade retaliation for a U.S. program that was removed after the reasonable period of time set by the DSB had expired. Decision by the Arbitrators, *United States — Subsidies on Upland Cotton*, WT/DS267/ARB/2 (Aug. 31, 2009). *But see* Goh & Ziegler, *supra* note 2, at 546–47 (discussing the panel decision in the *Automotive Leather* case).

³⁵ The requirement that retaliation be conditional has influenced the interpretation of the prospective element of the remedy rule by focusing the attention on the effects of the current violation and ignoring past violations. The current understanding that the WTO only provides prospective remedies is not required by the text of the DSU. The conditional requirement does not demand that trade retaliation, when applied, be prospective. The remedy rule that trade retaliation be equivalent to the level of nullification or impairment could be interpreted to include current and past harms to the complaining party. The sanctions would still be conditional, as the trade retaliation would only be authorized only if and so long as the respondent state refuses to comply with an adverse ruling. Arguably, this is a more natural reading of the remedy standard, as the text does not exclude past harms. Nevertheless, this is not the interpretation generally used by WTO arbitration panels. *See, e.g.*, Decision by the Arbitrators, *United States — Upland Cotton*, *supra* note 34, ¶¶ 2.2, 5.77, 6.5; Decision by the Arbitrator, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.3, WT/DS285/ARB (Dec. 21, 2007); Decision by the Arbitrators, *EC Bananas III*, *supra* note 32, ¶¶ 171, 173–76.

³⁶ *See* Trachtman, *supra* note 2, at 129; *see also* Mitchell, *supra* note 29, at 89–92.

remedy gap was designed to be narrow. As envisioned by the member states and set out in the DSU text, panels are supposed to take six months to issue a report³⁷ and appeals are to take sixty days.³⁸ Were these time limits met, the detrimental effects of the remedy gap would be minimal.

Today, the time required for WTO dispute settlement has expanded dramatically and the remedy gap is far wider than the designers of the system seem to have anticipated. Instead of a brief delay between the request for a panel and a final resolution of the case, dispute resolution before the WTO can now continue for several years. By expanding the remedy gap, this situation poses significant practical problems for the WTO: it leaves states without any remedy, even for obvious trade law violations, for years at a time and threatens to undermine member states' support for the DSU system.

B. The WTO's Dispute Resolution Process

Although it was designed to be a relatively quick process, in practice, WTO dispute settlement can easily take three years or longer to complete. The first part of this Section describes the many proceedings in the adjudication process and reviews the timeline as specified in the DSU and as it works in practice. The second part discusses how states have learned to use the litigation delays and the compliance stage of adjudication to extend the dispute resolution process.

1. The Treaty's Description of the DSU Process

The DSU creates the WTO's dispute settlement system and provides the WTO's DSB with compulsory jurisdiction to hear claims regarding violations of WTO rules.³⁹ The DSB consists of the entire membership of the WTO sitting in a dispute settlement role. If one member state wishes to bring a complaint against the actions of another member state, the complaining party brings the dispute to the DSB and requests consultations. The disputing parties engage in consultation for at least sixty days.⁴⁰ If consultations fail to resolve the dispute within that time, the complaining state may request the forma-

³⁷ DSU art. 12.9 (providing that panels reports should be issued within six months, nine months at the longest).

³⁸ *Id.* art. 17.5 (providing that Appellate Body reports should be issued within sixty days, ninety days at the longest).

³⁹ *Id.* art. 1.1 (stating that dispute settlement rules apply any dispute between members concerning their rights and obligations under the WTO agreement); *id.* art. 3.1 (affirming the members' agreement to adhere to the rules of the dispute settlement understanding).

⁴⁰ *Id.* art. 4. The parties can obviously communicate informally without officially request-

tion of a panel to hear the dispute.⁴¹ Upon receiving a request for a panel, the DSB must decide whether to begin the (surprisingly long) adjudicative process. The DSB makes this decision by reverse consensus,⁴² meaning that the case will proceed to an adjudicatory panel unless there is a consensus among the members of the DSB, including the interested parties, *not* to do so.⁴³

The DSU dispute resolution process has three stages, and the parties can settle the case at any point.⁴⁴ The first stage is the “adjudication” phase, where a panel of three arbitrators chosen by the parties⁴⁵ receives evidence from both parties and issues a ruling of fact and law.⁴⁶ The panel process is designed to take no longer than six months,⁴⁷ but panels often exceed this timeline in complex cases.⁴⁸ When the panel reaches its initial decision, it circulates the report to

ing consultations. Many trade disputes (or potential disputes) are probably resolved this way and never reach the WTO’s radar screen.

⁴¹ *Id.* art. 4.7. The timeframe can be shorter in special situations, such as when the dispute involves perishable goods. *Id.* art. 4.8. If the responding party entirely fails to engage in consultation, then the complaining party can request a panel in thirty days. *Id.* art. 4.3. The complaining party can choose to continue consultations after sixty days. Alternatively, it is can request good offices, conciliation, or mediation. *See id.* art. 5.2. The complaining party is under no obligation to proceed to a panel. *See id.* art. 6.2 (noting that the complaining party must officially request the formation of a panel).

⁴² The term “reverse consensus” has its origins in the GATT dispute resolution process. The early practice in the GATT regime was that a case would not be referred to a panel for adjudication unless the membership of the GATT—including the responding party—reached a consensus that it should go forward. Thus, in the early days of the GATT, the responding party had the option of vetoing the dispute resolution process. What is surprising is that the responding party often did not. Later GATT practice gave parties the “right” to a panel. However, the process of adopting a panel decision was still based on consensus, meaning that the responding party could block the adoption of the final report. Again, parties often did not block the adoption of the report even though it was in their power to do so. *See generally* ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE GATT LEGAL SYSTEM (1993).

The term “reverse consensus” is derived from the idea that the WTO was reversing the GATT consensus rule. All members—including the complaining state—would have to object to the establishment of a panel to stop the dispute resolution process. To be exact, the responding state could delay the formation of the panel temporarily. If the responding state objects to the formation of the panel at the DSB meeting, then the matter is tabled until the next meeting. At that point, the respondent’s objection cannot prevent the DSB decision by reverse consensus to begin the adjudicatory process.

⁴³ DSU art. 6.1.

⁴⁴ *See id.* arts. 8, 21, 22.

⁴⁵ *Id.* art. 8.5. Alternatively, the panel can be composed of five arbitrators if the parties so chose. *See id.*

⁴⁶ *Id.* art. 11 (placing an obligation on panels to make an objective assessment of the facts before it).

⁴⁷ *Id.* art. 12.8.

⁴⁸ *See, e.g.,* Panel Report, *European Communities and Certain Member States — Measures*

the parties, and the parties have an opportunity to make comments or suggestions.⁴⁹ The panel's final report is directed to the DSB, which adopts the report by reverse consensus (it adopts the panel report unless there is consensus against the report)⁵⁰ unless one of the parties announces its intention to appeal.⁵¹

Either or both of the parties can appeal the arbitrator's decision on issues of law to the Appellate Body, a standing body of judges.⁵² The appeals process is designed to take no longer than sixty days (ninety days in exceptional cases),⁵³ but several appeals have taken longer than ninety days.⁵⁴ The Appellate Body does not have the power to remand a case to the adjudicatory panel for rehearing or to make additional evidentiary findings, so the Appellate Body's decision is the end of the adjudication phase.⁵⁵ The DSB votes to adopt the Appellate Body report by the reverse consensus rule.⁵⁶ In the fifteen-year history of the WTO, the DSB has never failed to adopt an Appellate Body report.⁵⁷ If the Appellate Body report finds that the respondent state has violated the WTO agreements,⁵⁸ then the respondent state may announce its intention to comply,⁵⁹ and the DSB pro-

Affecting Trade in Large Civil Aircraft, WT/DS316/R (June 30, 2010) (showing that the request for consultation was first made six years earlier, on October 6, 2004).

⁴⁹ DSU art. 15.

⁵⁰ See James Bacchus, *Lone Star: The Historic Role of the WTO*, 39 TEX. INT'L L.J. 401, 408 n.21 (2004); see also Lowenfeld, *supra* note 20, at 480 (describing the negotiations that ultimately resulted in the reverse consensus procedure).

⁵¹ DSU art. 16.4. The responding party (or any other member) can object to the report at its first presentation to the DSB. *Id.* art. 16.2. An objection blocks the adoption of the report for one meeting. *Id.* At the next meeting of the DSB, the panel report is either adopted or rejected. *Id.* art. 16.4.

⁵² *Id.* art. 17.1–2. A three-judge panel of Appellate Body members hears the appeal. *Id.* art. 17.1. The WTO agreements have no provision for the Appellate Body to sit en banc. Appellate Body members serve for a four-year term that may be renewed by the membership once. *Id.* art. 17.2.

⁵³ *Id.* art. 17.5.

⁵⁴ See *infra* notes 59–60 and accompanying text.

⁵⁵ DSU art. 17.13 (stating only that the Appellate Body may “uphold, modify or reverse” the panel's conclusions, but not remand); see also Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INT'L & COMP. L.Q. 325, 336 (2002) (recommending that the Appellate Body be given the power to remand cases).

⁵⁶ DSU art. 17.14.

⁵⁷ See Bacchus, *supra* note 50, at 408 n.21.

⁵⁸ Technically, there can be either a violation of the WTO agreements or a “nullification or impairment” of the complaining members' benefits under the agreement. See DSU art. 26.1. This Article uses the term “violation” to refer to both for ease of exposition.

⁵⁹ States almost always declare their intention to comply even when compliance is not forthcoming. See *infra* note 62 and accompanying text.

vides the responding government with a reasonable period of time in which to do so—typically no longer than fifteen months.⁶⁰

The second stage of the dispute resolution process is the “compliance” phase, in which the responding government reports to the DSB the actions that it has taken to comply with the ruling.⁶¹ Respondent governments can claim that they are in compliance after taking little or no action to alter the challenged policy.⁶² If the complaining government disagrees that the responding state is in compliance, then the complaining government can request a compliance panel to evaluate the sufficiency of the respondent state’s actions. Like the adjudication panel, the compliance panel is composed of three arbitrators selected by the parties. One or both parties can appeal the compliance panel’s ruling to the Appellate Body. If the Appellate Body finds that the violation is ongoing, then the DSB recommends that the respondent state comply with the Appellate Body’s ruling within a reasonable period of time.

The timing of the compliance phase in the adjudicatory process remains a point of contention.⁶³ The DSU text provides for the compliance panel to monitor the respondent state’s compliance with any DSB decision but does not provide a timeframe for when the compliance phase should be initiated—specifically, whether it should occur before or after the DSB’s authorization to suspend concessions.⁶⁴ This uncertainty regarding the timing of the compliance panel has been referred to as the “sequencing problem.”⁶⁵ Member states have en-

⁶⁰ DSU art. 21.3.

⁶¹ *Id.* art. 21.

⁶² For instance, the United States claimed that it was in compliance with the Appellate Body’s ruling in the *United States — Gambling* case based on a letter from the Attorney General’s office that reiterated the United States’ legal position during the adjudication phase. See Status Report by the United States, Addendum, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/15/Add.1 (Apr. 11, 2006) (noting that the Justice Department confirmed the position of the U.S. government, and that the United States was therefore in compliance with the DSB rulings).

⁶³ See, e.g., Recourse by the United States to Article 22.2 of the DSU, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/43 (Jan. 14, 1999) (noting that the “reasonable period of time” in which to conform with the EC’s obligations had passed).

⁶⁴ DSU art. 21. Professor Petros Mavroidis has argued that it is possible to resolve the issue without amendment by reading Article 21.5 and Article 22.6 together to require that requests for the suspension of concessions be made only if there is no action to comply or the action has been determined to be insufficient by an Article 21.5 panel. See Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT’L L. 763, 796 (2000).

⁶⁵ Cherise M. Valles & Brendan P. McGivern, *The Right to Retaliate Under the WTO Agreement: The “Sequencing” Problem*, 34 J. WORLD TRADE 63, 63 (2000).

gaged in multilateral negotiations to resolve the dilemma for over a decade without resolution.⁶⁶

The sequencing issue is particularly important when considering the third stage of the dispute resolution process, the “remedy stage.” If the Appellate Body finds that the respondent government is still in violation of the WTO agreements after the compliance stage, then the complaining government can request that the DSB authorize the suspension of trade benefits to the respondent state.⁶⁷ The respondent state can—and almost always does—object to the extent and the form of the suspension.⁶⁸ The DSB will then establish a panel to determine the maximum extent and the possible forms of the suspension.⁶⁹ The panel determines the level of sanctions based on the extent to which the violating policy (as it currently exists) nullifies or impairs the complaining state’s benefits under the agreement.⁷⁰ The panel also determines the form of the trade retaliation; suspension can be in the same sector as the violation, in a different sector (but within the same agreement), or in a different agreement.⁷¹ The parties cannot appeal this ruling. The DSB adopts the arbitration panel’s decision by reverse consensus and authorizes the complaining government to suspend trade concessions to the level (and in the form) authorized by the arbitration panel.⁷² It is only after the third stage that a complaining party can retaliate by suspending trade concessions to the respondent state.⁷³ Because the complaining state can only retaliate *after* the adjudication and compliance phases, the period of time that the respondent state can violate WTO obligations without formal consequences is longer than if retaliation were permitted after the adjudication phase.⁷⁴

⁶⁶ In 1999, the Canadian government proposed replacing Article 21 of the DSU with Article 21*bis*, which would require that states refrain from requesting the suspension of concessions until the Article 21*bis* procedure was completed. *Id.* at 82–83. As of this writing, the member states have not adopted an amendment to cure the sequencing issue.

⁶⁷ DSU art. 22.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* art. 22.3 (discussing when different forms of retaliation are permitted). “Sectoral retaliation” refers to the sectors in the General Agreement on Trade in Service (“GATS”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) (all goods are considered to be in the same sector under the GATT agreement). *See id.* “Across agreement retaliation” refers to complaining state actions that withdraw benefits in an agreement (GATT, GATS, or TRIPS) other than the one the violation was in. *See id.*

⁷² DSU art. 22.

⁷³ *Id.*

⁷⁴ *See* SIMON LESTER & BRYAN MERCURIO, *WORLD TRADE LAW: TEXTS, MATERIALS*

2. *The DSU Process in Practice*

The result of these three separate phases of dispute resolution is that the WTO process is often lengthy. This is in contrast to the common representation that dispute settlement at the WTO is swift, taking under a year and a half.⁷⁵ For instance, the WTO itself represents the system of dispute resolution as fast, explaining:

The [Uruguay Round] agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year—15 months if the case is appealed.⁷⁶

Yet, many WTO cases can take well over fifteen months to complete. The extreme examples are the Airbus and Boeing subsidy disputes. The United States and the EC each filed complaints about the other's subsidies to their domestic aircraft industries.⁷⁷ Both parties eventually requested the establishment of a panel to hear the case. The United States' request for a panel was made in May 2005 and the EC's request was made in January 2006.⁷⁸ The Airbus panel issued its initial ruling on June 30, 2010, some five years later.⁷⁹ The EC has announced its intention to appeal, and the WTO Appellate Body already signaled that it expects significant delays in issuing its ruling.⁸⁰ The Boeing panel issued its report in January 2011, five years after the panel was established.⁸¹ The United States has not yet declared whether it intends to appeal. Although this pair of cases may be unique in terms of the extent of the delay, the cases are not unique in

AND COMMENTARY 172–74 (2008) (discussing the dispute between the United States and the European Communities over sequencing).

⁷⁵ See Amelia Porges, *The WTO and the New Dispute Settlement*, 88 AM. SOC'Y INT'L L. PROC. 131, 134 (1994) (asserting that the timetable in which reports must be issued is of "unheard-of brevity" compared to other international proceedings).

⁷⁶ See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Sept. 8, 2011).

⁷⁷ Daniel Pruzin, *EU Submits Revised WTO Request for Consultation on Boeing Subsidies*, WTO Rep. Online (BNA) (June 30, 2005).

⁷⁸ Daniel Pruzin, *U.S., EU Ask WTO to Appoint Panelists in Airbus-Boeing Disputes over Subsidies*, WTO Rep. Online (BNA) (Oct. 11, 2005).

⁷⁹ Daniel Pruzin, *WTO Panel Ruling Slams Illegal Subsidies for Europe's Airbus in Case Brought by U.S.*, WTO Rep. Online (BNA) (July 1, 2010).

⁸⁰ Daniel Pruzin, *WTO Signals Long Delay in Issuing Ruling on EU's Appeal Against Airbus Decision*, WTO Rep. Online (BNA) (Sept. 23, 2010).

⁸¹ Daniel Pruzin, *WTO Panel Issues Final Ruling Siding in Part With EU Claims of U.S. Subsidy for Boeing*, WTO Rep. Online (BNA) (Feb. 1, 2011).

terms of the WTO system failing to meet the time limits set out in the DSU.

To get a better grasp of the overall extent of the delay and the trend toward greater delays, Table 1 provides information on the average amount of time elapsed from the establishment of a panel to the DSB's adoption of the report over three different time periods: the first five years of the DSU (1995–1999), the second five years (2000–2004), and the third five years (2005–2009).⁸² The DSB adopts a dispute settlement report after the panel report is issued when the parties do not appeal.⁸³ If there is an appeal, the DSB adopts the report after the Appellate Body report is issued.⁸⁴ This procedure applies to both the merits stage and the compliance stage of the dispute resolution process.⁸⁵

According to DSU rules, it should take no longer than nine months (twelve months at the extreme) from the establishment of the panel to the adoption of the report by the DSB, when the parties do not appeal.⁸⁶ When there is an appeal of a panel report, the whole process should take no longer than twelve months (sixteen months at the extreme).⁸⁷ Table 1 provides information on the average time from the establishment of a panel to the adoption of the DSB's report for all four categories: merits panel without an appeal, merits panel

⁸² All data is taken from WorldTradeLaw.net's statistics on WTO dispute resolution. *Time Between Panel Establishment and Adoption of WTO Panel/AB Reports*, WORLDTRADELAW.NET, <http://www.worldtradelaw.net/dsc/database/adoptiontiming1.asp> (last visited June 4, 2011).

⁸³ See *Understanding the WTO: Settling Disputes*, *supra* note 76.

⁸⁴ *Id.*

⁸⁵ DSU art. 16 (merits); *id.* art. 21 (compliance).

⁸⁶ Under DSU rules, the panel should issue its report within six months of the establishment of the panel. *Id.* art. 12.8. In no case should the panel take more than nine months to issue its report. *Id.* art. 12.9. Any interim review of the panel report is supposed to be included in the six-month time period set out in Article 12.8. *Id.* art. 15.3. Once the panel report is issued, the report is circulated to all WTO members. *Id.* art. 15.2. The DSB must vote on adopting the report within sixty days of the report's circulation. *Id.* art. 16.4.

All told, the process should take no longer than nine months: six months for the panel report, one month to circulate the report, and two months for the DSB to vote on the report. In no case should the process take longer than twelve months: nine months for the panel report, one month to circulate the report, and two months for the DSB to vote on the report.

⁸⁷ When there is an appeal, the DSB does not consider the adoption of the panel report. Under DSU rules, the Appellate Body report should be issued within sixty days of a party's announcement of intention to appeal. *Id.* art. 17.5. In no case should the Appellate Body take more than ninety days to issue its report. *Id.* The DSB must vote on adopting the Appellate Body's report within thirty days of the report being circulated to the members. *Id.* art. 17.14.

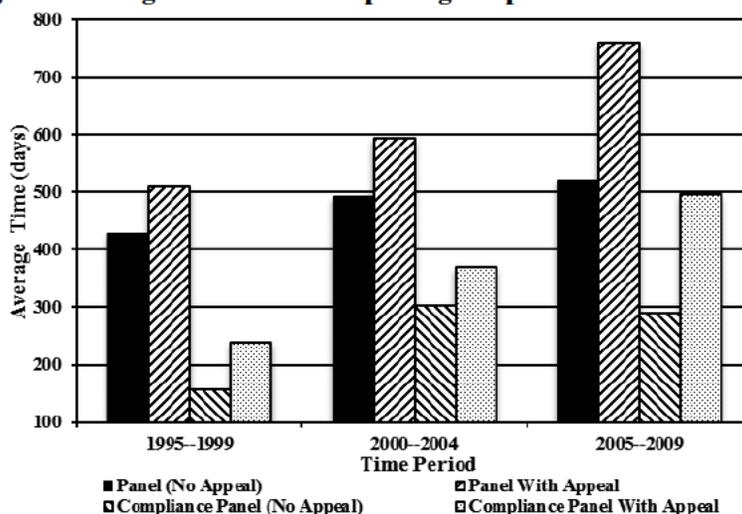
In total, the panel and appeals process (including the vote by the DSB) should take no longer than twelve months. *Id.* art. 20. Where the panel and the Appellate Body have taken the maximum extended time to issue their reports (respectively, three additional months and thirty additional days), the process should take no longer than sixteen months to complete.

with an appeal, compliance panel without an appeal, and compliance panel with an appeal. The data is incomplete for the latter two time periods—there are cases in the dispute resolution process that began after 2000. Nonetheless, Table 1 and the figure below present all of the data that is currently available. The figure provides a graphic illustration of these averages.

Table 1. Average Time for Completing Dispute Resolution Stages

	Initial Panel (no appeal)	Initial Panel (with appeal)	Compliance Panel (no appeal)	Compliance Panel (with appeal)
Average Time: First Five Years (1995–1999)	14.0 months (426 days) 13 cases	16.7 months (510 days) 42 cases	5.1 months (157 days) 3 cases	7.8 months (239 days) 2 cases
Average Time: Second Five Years (2000–2004)	16.1 months (492 days) 19 cases	19.6 months (593 days) 32 cases	9.9 months (303 days) 3 cases	12.1 months (370 days) 6 cases
Average Time: Third Five Years (2005–2009)	17.0 months (520 days) 9 cases	24.9 months (759 days) 13 cases	9.5 months (290 days) 2 cases	16.2 months (495 days) 11 cases

Figure. Average Time for Completing Dispute Resolution Stages



The data show that the WTO dispute resolution system is failing to meet the time limits set by the DSU. Moreover, there is a trend toward longer periods of time for completing each stage of dispute resolution.⁸⁸ The average time from the establishment of a panel to

⁸⁸ To test whether the difference between the three time periods (1994–1999, 2000–2004, and 2005–2009) could be explained by random variation, I performed an F-test, a common statistical test used for comparing two or more samples. The F-test is the ratio of the variance in the

the adoption of a merits stage panel report by the DSB in all three periods has averaged over nine months. The trend is toward greater delays. In the 1995–1999 period, the average time necessary to adopt a panel report was fourteen months. By the 2005–2009 time period, the average time was up to seventeen months, almost double the time allocated by the DSU text.

The same trend toward greater delays is true with appeals. In all three time periods, the average time necessary to hear a merits-stage appeal was greater than twelve months. During the 1995–1999 period, the average time for the DSB to adopt an Appellate Body report was over sixteen months. By the 2005–2009 period, the average time increased to nearly twenty-five months, more than double the time allocated by the DSU text.

The compliance stage for both panels and appeals has not experienced notable delays, although it demonstrates a trend toward longer adjudication times.⁸⁹ In the 1995–2000 period, compliance panel reports that were not appealed were adopted by the DSB in five months on average. Compliance panel reports that were appealed took an average of 7.8 months to be adopted by the DSB. By the 2005–2009 period, the average time elapsed from the establishment of the compliance panel to the adoption of the panel's report by the DSB was 9.5 months with no appeal, and over 16 months when there was an appeal.

Delay, by itself, is not necessarily a major concern for dispute resolution systems. In fact, the time period necessary for WTO dispute resolution to function is not extreme by either domestic or international dispute resolution standards. Delay is important in the context of the WTO because *none of the damage done during the dispute resolution process is subject to a remedy*. Unlike domestic litigation, where damages are traced to and calculated from the beginning of a violation and subject to interest,⁹⁰ the WTO remedy regime does

means between the samples and within the samples. The F-tests for the samples in the four categories (merits panel without an appeal, merits panel with an appeal, compliance panel without an appeal, and compliance panel with an appeal) are all significant at the 0.01 level. This allows us to reject the hypothesis that there is no difference between the three time periods in any one of the four categories with 99% confidence. However, the F-test does not tell us what is causing the difference between the samples.

⁸⁹ Table 1 provides information on the time needed to complete various stages of the dispute resolution process. The data presented here include all compliance panels and appeals, even if those panels occurred after an authorization for the suspension of concessions.

⁹⁰ See generally Louis Kaplow & Steven Shavell, *Economic Analysis of Law: Damage Measures for Breach of Contract*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1708–10 (Alan J.

not provide states with any remedy for the injuries incurred from the time of the violation to the authorization to suspend concessions.⁹¹ As explored more fully in Part II, the WTO's remedy regime thus makes DSU delays far more significant than dispute resolution delays in other systems.

This trend toward longer dispute resolution delays is consistent with some academic and popular discussions of the increased complexity of cases before the WTO.⁹² Complaints certainly take longer to resolve if the case is complex, but complexity is not entirely exogenous to the litigation strategy of the parties. While some cases are inherently more complex than others, much of the complexity in a case comes from the selection and presentation of issues raised by the parties. The more defenses a respondent state offers and the more documents submitted to the panel, the more complex the case becomes. Many respondent states have learned how to increase the complexity of a case (and thus the time necessary to adjudicate the case) as a means of delay.⁹³ The remedy gap essentially rewards this strategy by allowing a respondent state to maintain the domestic benefits of the challenged policy for a longer period of time without exposing itself to a higher damage award.

In addition to creating delays, respondent states have learned to extend the dispute resolution process through the increased use of compliance panels under Article 21.5. The appropriate use and timing of a compliance panel is still a matter of controversy. Scholars have described the drafting of Article 21.5 as "careless" because it does not set out the role of the compliance stage in the overall dispute resolu-

Auerbach & Martin Feldstein eds., 2002) (providing a review of the goal of contract damages); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980).

⁹¹ See, e.g., Decision by the Arbitrators, *EC Bananas III*, supra note 32, ¶ 171.

⁹² See, e.g., William J. Davey, *The WTO Dispute Settlement System*, 3 J. INT'L ECON. L. 15, 16 (2000); Isabelle Van Damme, *Eighth Annual WTO Conference: An Overview*, 12 J. INT'L ECON. L. 175, 184 (2009) (reviewing the discussion of trade law professionals); see also Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 870 (2005) (dividing legal fees for WTO cases into low- and high-complexity categories).

⁹³ See Gary Horlick & Judith Coleman, *The Compliance Problems of the WTO*, 24 ARIZ. J. INT'L & COMP. L. 141, 142 (2007) ("Even assuming, charitably, that all WTO Members act in good faith to fulfill their obligations, and that they only discover they are in violation after an Appellate Body ruling, there are numerous cases where the post-Appellate Body process stretches on for years. Again, this is not just one or two Members—it is obvious that numerous governments are deciding to 'game the system' and string out non-compliance for as long as possible. (And this ignores the numerous delays in litigation before the Appellate Body rulings—it is fascinating to hear lawyers for Members state openly that they are taking every delay they can.)").

tion process in a clear manner.⁹⁴ Consequently, it was unclear early on what role compliance panels would serve, when the compliance hearing would be held, or whether compliance panel reports could be appealed to the Appellate Body.⁹⁵ In the first five years of WTO dispute settlement, respondent states would seldom request compliance panels. The use of compliance panels has dramatically increased over time, as have appeals of compliance panel reports to the Appellate Body. This increased use of the compliance stage of dispute resolution significantly extends the time period between when the violation occurs and when a complaining state's threat to suspend concessions is credible. Table 2 below provides information on the percentage of cases where compliance panels have been requested and the percentage of those that are appealed.⁹⁶

Table 2. Compliance Panel Requests and Appeals⁹⁷

	Compliance Panel Reports (no appeal)	Compliance Panel (with appeal)	Percentage Appealed	Average Time for Compliance Panel (no appeal)	Average Time for Compliance Panel (with appeal)
First Five Years (1995–1999)	3	2	40%	5.1 months (157 days)	7.8 months (239 days)
Second Five Years (2000–2004)	3	5	63%	11.8 months (360 days)	12.0 months (364 days)
Third Five Years (2005–2009)	2	8	80%	9.5 months (290 days)	16.0 months (487 days)

⁹⁴ See PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 280 (2005).

⁹⁵ See Mavroidis, *supra* note 64, at 799 (arguing that the DSU system should not allow compliance panels to be appealed).

⁹⁶ The data presented in this Article include only the first compliance panel report and appeal for any dispute. This study excludes compliance “II” reports because these are most often issued after the WTO has authorized retaliation (and thus are not properly counted as part of the remedy gap). The excluded compliance panel disputes include four compliance panels and three appeals: *Brazil — Aircraft II* (panel), *Canada — Milk/Dairy II* (panel and appeal), *United States — FSC II* (panel and appeal), *European Communities — Bananas II* (Ecuador) (panel and appeal). All of these compliance panels were issued after the WTO authorized retaliation except for *Canada — Milk/Dairy*. This study also excludes *European Communities — Bananas* (United States) (panel and appeal) because that compliance panel and appeal occurred after retaliation was authorized and is not properly included in the remedy gap.

If this data were included, the results in Table 2 would not change dramatically. The data for the first five years would not change. The second five years would have ten compliance reports and six appeals (60% appealed). The third five years would have a total of thirteen compliance reports and eleven appeals (85% appealed).

⁹⁷ The data presented here on the average number of days necessary to complete the compliance panel and appeal process are slightly different from the data present in Table 1 and

Table 2 categorizes the compliance panel data based on when the state requested the initial compliance panel, not when the original merits panel was requested. This reflects the idea that governments are learning the strategies of navigating the WTO dispute resolution process through experience.⁹⁸ States can learn from other cases (particularly regarding the use of compliance panels) even after the initial complaint has been filed. For instance, the WTO did not receive a single request for a compliance panel until December 15, 1998, when the EC requested one regarding its dispute with Ecuador over the EC's banana import regime.⁹⁹ This was not for lack of litigation at the young institution: by this time, eighteen panel reports and fifteen Appellate Body reports had already been issued (not including the *European Communities — Bananas* disputes). After the EC made its compliance panel request, however, the DSB had established four additional compliance panels within a year's time.¹⁰⁰

An alternative way to analyze member states' use of compliance panels is to divide the data into five-year time periods starting from the "innovation" of the request by the EC for a compliance panel in the *European Communities — Bananas* (Ecuador) dispute. The idea is that the states only fully understood that compliance panels could be part of the dispute resolution process after the EC made such a request in December 1998. Table 3 presents the data on the use of compliance panels and the rates of appeal for the first five years (1999–2003) and second five years (2004–2009) of DSU dispute resolution.

the figure because the compliance "II" cases have been excluded. For an explanation on the exclusion of these cases, see *supra* note 96.

⁹⁸ There is a rich political science literature on state learning. See generally ROBERT P. JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS 217–87 (1976) (discussing models of learning); JACK SNYDER, MYTHS OF EMPIRE: DOMESTIC POLITICS AND INTERNATIONAL AMBITION (1991) (discussing models of learning of imperial expansion); Jack S. Levy, *Learning and Foreign Policy: Sweeping a Conceptual Minefield*, 48 INT'L ORG. 279 (1994) (reviewing models of state learning and critiquing the literature); Joseph S. Nye, Jr., *Nuclear Learning and U.S.-Soviet Security Regimes*, 41 INT'L ORG. 371, 372–73 (1987) (discussing models of learning in security issues).

⁹⁹ *Dispute Settlement: Dispute DS27*, WORLD TRADE ORG. (Dec. 11, 2008), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm. Ecuador (the complaining state) similarly made a request for a compliance panel three days later, on December 18, 1998. *Id.*

¹⁰⁰ *Time Between Panel Establishment and Adoption of WTO Panel/AB Reports*, *supra* note 82.

Table 3. Compliance Panel Requests and Appeals¹⁰¹

	Compliance Panel Reports (no appeal)	Compliance Panel (with appeal)	Percentage Appealed	Average Time for Compliance Panel (no appeal)	Average Time for Compliance Panel (with appeal)
First Five Years (1999-2003)	3	7	70%	5.1 months (157 days)	10.8 months (329 days)
Second Five Years (2004-2008)	4	8	67%	10.7 months (325 days)	16.0 months (487 days)

In Table 3, the trend toward a greater use of compliance panels and a greater rate of appeals (notable in Table 2) disappears. However, the average amount of time necessary to complete the compliance process continues to trend upward. Viewed in either of the ways presented in Table 2 or Table 3, states' new understanding that compliance panels (and appeals) can be part of the dispute resolution process has expanded the time that cases can potentially stay in dispute settlement. Respondent states can use these procedural maneuvers to delay the threat of WTO-authorized trade sanctions.

Of course, not all complaints end up going through the entire dispute resolution process. Whether or not states actually exercise the option to delay, however, the possibility of delay that is inherent in the regime can influence settlement negotiations. Thus, even when respondent states do not make use of compliance panels, they may still benefit (e.g., by obtaining a more favorable settlement) from the potential delay caused by compliance panels and appeals. Although many governments may be interested in resolving their disputes in good faith and without delay, the possibility of delay may be attractive to many governments that face political demands at home.

In sum, there seems to have been an important learning curve in WTO dispute resolution. States have learned how to delay the adjudicatory phase, before the panel and before the Appellate Body. In addition, states have learned that requesting a compliance panel and appeal after the adjudicatory stage can further extend the dispute resolution process. Both of these innovations create a situation where dispute resolution now takes far longer, particularly when a respondent state appeals both the initial panel report and the compliance panel report. To put this in context, in the last instance where the WTO authorized trade retaliation (the *United States — Subsidies for Upland Cotton* dispute), the total time between the composition of the initial merits panel and the DSB's authorization of trade sanctions was

¹⁰¹ All data is taken from WorldTradeLaw.net's statistics on WTO dispute resolution. *Id.*

six and one half years.¹⁰² What was originally expected to be a relatively small remedy gap has grown significantly as states learn to extend the dispute resolution process.

II. THE REMEDY GAP: NONCOMPLIANCE DURING THE DISPUTE RESOLUTION PROCESS

The remedy gap is not simply a theoretical problem. The inability of complaining states to obtain any remedy from the harms of trade violations for years at a time disrupts the WTO trading system. This Part discusses the problems posed by the remedy gap in more detail. The first Section highlights how the remedy gap creates a large and significant loophole in the trade rules. It effectively provides a de facto escape clause to trade obligations that is more generous than the WTO's de jure escape clause, the Safeguards Agreement. The second Section discusses the remedy gap's effects on settlements. Even where respondent states do not drag out dispute resolution, their ability to do so influences settlement negotiations. States bargain in the shadow of the remedy rule and thus the remedy gap can affect settlements, making a settlement more favorable to respondent states than it would be without the remedy gap. The third Section discusses how the growing remedy gap creates an incentive for complaining states to act outside of the WTO framework. This is potentially a problem for the WTO system because it undermines the system's credibility.

A. *Creating a De Facto Escape Clause*

The most obvious effect of the DSU institutional design is that it creates a de facto escape clause. The WTO remedy rule creates a situation where the respondent state can violate WTO trade rules for as long as dispute resolution continues without facing retaliation. To put this effect in context, it is useful to compare the de facto escape clause created by the remedy gap to the WTO Safeguards Agreement.¹⁰³ International relations scholars and international lawyers often model the Safeguards Agreement as a de jure escape clause, an institutional design element that adds flexibility to the regime's substantive obligations.¹⁰⁴

¹⁰² The initial panel was composed on May 19, 2003. The DSB adopted the Article 22.6 arbitration panel's decision to allow Brazil to retaliate on November 19, 2009.

¹⁰³ See *supra* note 4 and accompanying text.

¹⁰⁴ See generally GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION?: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS 76-104 (1995); Kyle Bagwell & Robert W. Staiger, *Enforcement, Private Political Pressure, and the General Agreement on Tariffs and Trade/World Trade Organization Escape Clause*, 34 J. LEGAL STUD. 471

When the political costs of compliance with an international agreement become too onerous for national leaders, the Safeguards Agreement provides domestic officials with a means of adjusting their international obligations.¹⁰⁵ In designing an escape clause, states want to permit members to violate the agreement when the political consequences of compliance are dire, while otherwise restricting escape.¹⁰⁶ The Safeguards Agreement strikes this balance by permitting governments to raise trade barriers unilaterally when an unforeseen increase in imports threatens to cause serious injury to a domestic industry.¹⁰⁷ When this standard is met, WTO rules allow a government to impose protection for up to four years without the obligation to compensate other parties.¹⁰⁸ For the first three years that a safeguard is in effect, other governments are not entitled to rebalance trade obligations (for instance, by raising their trade barriers against the state that is imposing the safeguard) if there has been an absolute increase in the relevant import.¹⁰⁹ Although the benefits of the safeguard are considerable to the government invoking the safeguard, there are significant restrictions as well.¹¹⁰ First, safeguard requirements are difficult to meet; the government must demonstrate that there is an increase in imports and that this increase is a cause of serious injury (or threatens serious injury) to the domestic industry.¹¹¹ Second, safeguards must be progressively liberalized.¹¹² Finally, safeguards can only be imposed for a four-year period, renewable once for an additional four years,¹¹³ and no additional restrictions are permitted.¹¹⁴

(2005); B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

¹⁰⁵ See Rosendorff & Milner, *supra* note 104, at 829.

¹⁰⁶ Sykes, *supra* note 104, at 278–85.

¹⁰⁷ See LESTER & MERCURIO, *supra* note 74, at 521–23 (discussing several rationales for restricting the importation of fairly traded goods); MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 438–39 (2d ed. 2006) (same).

¹⁰⁸ Safeguards Agreement art. 7.1.

¹⁰⁹ *Id.* art. 8.3. The limit on rebalancing only applies if the safeguard measure is conforming. See LESTER & MERCURIO, *supra* note 74, at 551–52.

¹¹⁰ Bagwell & Staiger, *supra* note 104, at 473–76; Sykes, *supra* note 104, at 286–89.

¹¹¹ Safeguards Agreement arts. 2.1, 4.1.

¹¹² *Id.* art. 7.4; see also LESTER & MERCURIO, *supra* note 74, at 550 (discussing application of safeguards).

¹¹³ Safeguards Agreement art. 7.1, .3. Developing countries can extend a safeguard for an additional two years. *Id.* art. 9.2.

¹¹⁴ *Id.* art. 7.4–5.

By contrast, the remedy gap creates an escape clause that is much broader in scope and sometimes more generous in its benefits. First, the DSU process applies to *nearly all* violations of any WTO agreement.¹¹⁵ Unlike the Safeguards Agreement, the DSU has no causation or serious injury requirement, and thus lacks an *ex ante* filter regarding what conditions need to be satisfied to make use of the escape clause.¹¹⁶ Second, there is no obligation to progressively liberalize the restrictions; governments can effectively maintain the restriction in the same form for as long as dispute resolution continues. Third, there is no set time limit for how long the government can keep the measure in place.¹¹⁷ The Safeguards Agreement establishes a four-year (at most eight-year) limit,¹¹⁸ while DSU design (although formally prohibiting violations of trade rules) effectively permits any state to violate trade rules for as long as the respondent state can drag out the dispute resolution process. Finally, the remedy gap does not permit governments to rebalance concessions, as the Safeguards Agreement does,¹¹⁹ even if the dispute resolution process goes on for longer than three years.

The result is that the structure of the DSU creates the odd situation where member states may be better off avoiding resort to the Safeguards Agreement and relying instead on DSU procedures for safeguard-type actions. States may prefer to refrain from labeling their measure a safeguard because the *de facto* escape clause may be more generous in delaying when complaining states can rebalance. Under the Safeguards Agreement, states can rebalance as soon as the claimed safeguard is found to be nonconforming.¹²⁰ By contrast, the DSU does not permit rebalancing on any nonsafeguard violation until the DSB authorizes the suspension of concessions.¹²¹

The difference is highlighted in two safeguard cases between the EC and the United States. In the first, the *United States — Wheat Gluten* dispute, the EC challenged the United States' use of a safeguard measure to raise tariffs on wheat gluten.¹²² The EC requested consultations in March 1999 and requested the formation of a panel

¹¹⁵ See DSU art. 23.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ Safeguards Agreement art. 7.1–3.

¹¹⁹ *Id.* art. 8.3.

¹²⁰ LESTER & MERCURIO, *supra* note 74, at 551–52.

¹²¹ DSU art. 23.2(c).

¹²² Daniel Pruzin, *WTO Panel Expected to Delay Ruling on U.S. Wheat Gluten Safeguard*, WTO Rep. Online (BNA) (Apr. 20, 2000).

that June.¹²³ The panel issued its report in July 2000, finding that the American use of the safeguard measure was a violation of the Safeguards Agreement.¹²⁴ The United States appealed the ruling and the Appellate Body affirmed the finding of a violation (although it reversed part of the panel's ruling) in January 2001.¹²⁵ Had the United States not defended its measure under the Safeguards Agreement, it could have continued the dispute resolution process by requesting a compliance panel. Even in the absence of a compliance panel, however, the United States had four months to comply (the "reasonable" period of time).¹²⁶ If the United States did not comply within that time, then the EC would have to submit its plans for retaliation to the DSB, and the United States could state its objections and demand an arbitration panel to set the level of retaliation.¹²⁷ Only at the end of the arbitration process could the EC sanction the United States (and then only so long as the United States maintained the policy).¹²⁸

Yet as a safeguard action, the EC was authorized to rebalance its concessions almost immediately.¹²⁹ The Safeguards Agreement permits parties to rebalance concessions for nonconforming safeguards *without resort to the DSU procedures*.¹³⁰ Five days after the DSB adopted the Appellate Body's ruling, the EC applied duties of thirteen million euros on American exports of corn gluten, explicitly in response to the United States' illegal use of the wheat gluten safeguard.¹³¹ The United States filed a complaint against the EC based on this response, but ultimately, the United States did not pursue the

¹²³ See *Dispute Settlement: Dispute DS166*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds166_e.htm (last visited Aug. 2, 2011).

¹²⁴ Panel Report, *United States — Wheat Gluten*, WT/DS166/R (July 31, 2000).

¹²⁵ Appellate Body Report, *United States — Wheat Gluten*, 58–60, WT/DS166/AB/R (Dec. 22, 2000).

¹²⁶ See Gary Clyde Hufbauer & Ben Goodrich, *Next Move in Steel: Revocation or Retaliation?*, INT'L ECON. POL'Y BRIEFS, No. PB03-10, at 5 n.8 (Peterson Inst. for Int'l Econ., Washington, D.C.), Oct. 2003, available at <http://www.iie.com/publications/pb/pb03-10.pdf>.

¹²⁷ Formally, the arbitration panels are simply supposed to review the reasonableness of the retaliating state's proposal. See DSU art. 22.6. In practice, the arbitration panel has almost always submitted an amount (or formula) that sets the maximum annual retaliation permissible. See generally Holger Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, 9 J. INT'L ECON. L. 31 (2006).

¹²⁸ See *supra* Part I.A.

¹²⁹ See Hufbauer & Goodrich, *supra* note 126, at 8.

¹³⁰ Safeguards Agreement art. 8.2–3.

¹³¹ The EC placed a five-euro-per-ton tariff on the first 2.73 million metric tons of corn gluten exports from the United States (totaling 13.65 million euros). See Daniel Pruzin, *U.S. Denounces EU Retaliatory Move against Wheat Gluten Safeguard Measure*, WTO Rep. Online (BNA) (Jan. 22, 2001); see also Hufbauer & Goodrich, *supra* note 126, at 8.

complaint when the parties reached an agreement regarding the original wheat gluten safeguard.¹³²

Although the *United States — Wheat Gluten* episode went largely unnoticed, similar action by the United States did receive significant attention when it imposed steel safeguards in 2002. The United States' action was greeted almost immediately with a request for consultations from the EC and other states.¹³³ In July 2003, the panel requested by the EC circulated its ruling finding that the American safeguard violated WTO rules.¹³⁴ The United States appealed and the Appellate Body upheld that finding in November 2003.¹³⁵ Again, because the United States defended its measures as permissible safeguards, the complaining states could rebalance concessions almost immediately. This permitted the EC to threaten credibly to rebalance concessions before the United States could request that a compliance panel or an arbitration panel consider the level of rebalancing under the DSU procedures. This threat proved effective: the United States ultimately chose to remove the safeguard by December 2003.¹³⁶

The bizarre result in both of these cases is that the United States would have been better off—in the sense that it could have maintained its measure without facing any trade consequences—by simply violating WTO rules and not claiming that its actions were justified under the Safeguards Agreement. Had the United States done so, it could have delayed the EC's credible threat of trade consequences at least for the reasonable period of time for compliance and probably also for as long as necessary to have a compliance panel and an appeal. In addition, the United States could have challenged the level of trade retaliation chosen by the EC via DSU procedures, which the United States was not able to do in the safeguard context.¹³⁷ There may be some reputational costs from taking this approach (which I

¹³² See Hufbauer & Goodrich, *supra* note 126, at 8.

¹³³ See Edmund L. Andrews, *Angry Europeans to Challenge U.S. Steel Tariffs at W.T.O.*, N.Y. TIMES, Mar. 6, 2002, at C12.

¹³⁴ Panel Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R (July 11, 2003).

¹³⁵ Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 513(e), WT/DS248/AB/R (Nov. 10, 2003).

¹³⁶ The United States government stated that the economic circumstances had changed and that the steel safeguards were no longer needed, although it also noted that a trade war was averted by withdrawing the safeguards. See David Sanger, *A Blink From the Bush Administration: Backing Down on Steel Tariffs, U.S. Strengthens Trade Group*, N.Y. TIMES, Dec. 5, 2003, at A28; Corbett B. Daly, *Bush Relents, Scraps Steel Tariffs*, MARKETWATCH (Dec. 4, 2003, 5:35 PM), <http://www.marketwatch.com/story/bush-relents-scraps-steel-tariffs>.

¹³⁷ DSU art. 22.6.

discuss in greater detail in the next Section), but it is unclear what additional harm the United States would have incurred by taking this approach. In *United States — Steel Safeguards*, the international community widely rejected the United States' claim that its protection of the steel industry was covered by the Safeguard Agreement,¹³⁸ so any additional reputational cost may have been slight.

In short, the remedy gap creates a significant loophole in trade obligations. Member states understand that they can violate WTO rules without facing any trade consequences so long as they withdraw the measure at the end of the adjudication process.¹³⁹ Even when the member state does not simply intend to withdraw the measure once the issue is litigated, the remedy gap produces odd incentives. Trade retaliation, once applied, is only prospective. As a result, a respondent state has an incentive to drag out dispute resolution for as long as possible to lower the overall sanctions it will bear from a breach. The next two Sections discuss two effects of having such a broad de facto escape clause: the influence on settlement negotiations and the incentives for states to act outside of the DSU framework.

B. *Pretrial Settlement Negotiations*

The effects of the remedy gap extend to settlement negotiations. Just as with domestic civil actions, the settlement of a claim depends on the remedies available at the end of dispute resolution.¹⁴⁰ As this Section discusses, the remedies at the WTO effectively give the respondent state an option to maintain its challenged policy until the end of a long dispute resolution period. Settlement is still possible, but the respondent state will most likely have to be compensated (e.g., through side payments or a more favorable settlement) for not exercising this option.

In domestic civil litigation, we expect parties to want to settle their disputes before trial. The trial itself is costly because of attorneys' fees, so the conventional account is that the parties will settle for the expected value of the judgment (the probability of winning multiplied by the expected damages award, minus some proportion of

¹³⁸ Andrews, *supra* note 133 (discussing general international rejection of the American justification for the steel safeguards).

¹³⁹ The respondent state may face some reputational harms or informal sanctions. This Article discusses these possibilities and whether this solves the enforcement problem created by the remedy gap in Part III.

¹⁴⁰ Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing bargaining and settlement in the divorce context).

attorneys' fees).¹⁴¹ Both parties are better off with a settlement because they collectively save the costs of the trial and divide that gain between themselves.¹⁴²

The same assumptions for settlement are not true for the DSU system. The unique features of the WTO system create incentives that are very different from the domestic (American) litigation context. At the WTO, the violating state is actually worse off settling a case early. If the violating state receives some political benefit from the measure (which is probable given that the measure was enacted), then the respondent state is better off continuing the policy for as long as possible.¹⁴³ Settling the case before the end of dispute resolution deprives the respondent of the value of the policy for the period of dispute resolution, regardless of whether the violating state plans to comply eventually. If the respondent state intends to remove the measure at the end of the dispute resolution process, the expected cost of the judgment is zero (because the complaining state is not authorized to apply any sanctions) and the respondent state gains nothing from settling.¹⁴⁴ If the violating state does not intend to remove the measure at the end of dispute resolution, the state can decrease the overall level of sanctions by delaying the beginning of the sanctions, because the total cost of the sanctions over time is lower if the start date is later.

There is still the issue of attorneys' fees. Litigating at the WTO can be expensive,¹⁴⁵ particularly if the state is hiring outside counsel,¹⁴⁶ and avoiding these costs can provide states with a reason to settle early.¹⁴⁷ Yet attorneys' fees can vary dramatically based on the quality

¹⁴¹ William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 101–02 (1971). See generally John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

¹⁴² See Landes, *supra* note 141, at 101–02.

¹⁴³ See Gregory Shaffer, *Developing Country Use of the WTO Dispute Settlement System: Why It Matters, the Barriers Posed, and Its Impact on Bargaining* (May 16–17, 2005) (unpublished manuscript) (on file with author) (explaining that the WTO system creates incentives to avoid settling).

¹⁴⁴ *Id.*

¹⁴⁵ See Marc L. Busch, Eric Reinhardt & Gregory Shaffer, *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559, 570–71 (2009) (discussing the perception among WTO member governments that WTO litigation is expensive); Shaffer, *supra* note 143, at 21–23 (discussing the costs of private attorneys' fees for WTO litigation).

¹⁴⁶ Shaffer, *supra* note 143, at 21–23 (noting that a WTO case can easily cost a complaining government over half a million dollars in private attorneys' fees).

¹⁴⁷ *Id.*

of the legal argument.¹⁴⁸ If the state is simply looking to delay judgment (and is not concerned about liability), then it will most likely use government lawyers, as the marginal cost of their services is low. In addition, developed states, which keep sophisticated lawyers on staff, will be able to litigate cases, regardless of their legal complexity, at very low marginal costs. Thus, attorneys' fees may offer governments significantly less financial motivation to settle at the WTO than they provide private litigants in domestic cases.

Naturally, settlement may still be possible if states take the remedy rule into account when engaging in settlement negotiations.¹⁴⁹ Here, pretrial settlement discussions should be very different from domestic civil-litigation settlement negotiations. In the case of domestic legal disputes, we expect the responding party to compensate the complaining party for not going to trial by paying the expected value of the judgment. Conversely, at the WTO, settlement may involve the complaining state compensating the respondent state for settling in advance of trial.¹⁵⁰ DSU procedural rules effectively provide the respondent with an option to violate trade obligations until the end of the dispute resolution process.¹⁵¹ To settle the case early, we should expect the complaining state to compensate the responding state for not exercising the option of engaging in a lengthy dispute resolution process.¹⁵² Again, this is true regardless of whether the respondent state plans to remove the offending measure at the end of dispute resolution. If the responding party intends to remove the offending policy should the WTO authorize sanctions, then the respondent state will be motivated to settle only if it is compensated for ending its policy early.¹⁵³ If the respondent state intends to reach a compromise and alter but not entirely remove its measure, then the respondent state

¹⁴⁸ See Bown & Hoekman, *supra* note 92, at 870 (dividing legal fees for WTO cases into low- and high-complexity categories).

¹⁴⁹ Parties can bargain around remedy rules, but these rules will influence the distribution of the settlement. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 5–8 (1960).

¹⁵⁰ See DSU arts. 3, 22, 26.

¹⁵¹ See *id.* arts. 16, 21.

¹⁵² Similar dynamics exist in some areas of intellectual property law. See C. Scott Hemphill, *Paying For Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1557–59, 1576–78 (2006) (discussing “pay-for-delay” agreements and “reverse payments”).

¹⁵³ Analogous situations exist in other areas of international law. See, e.g., Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 753–54 (1999) (discussing how the parties injured by cross-national pollution may compensate the polluter to cease its activities).

will nonetheless expect compensation (perhaps in terms of a more attractive compromise policy) for altering its policy early.

At the same time, the respondent state's demands for compensation will make pretrial settlement politically difficult for the *complaining* government. In practice, it may be very hard for leaders in the complaining state to justify to their domestic political audience a decision to pay a respondent to comply with its trade obligations. It is also politically difficult for the complaining state to settle for only a partial elimination of the trade violation, effectively permitting the continuation of the violation into the future without legal challenge. Domestic leaders may simply prefer to take a hard line and continue to prosecute the case, even where a settlement could theoretically be reached. Domestic leaders might also choose to act outside of the WTO system, an option discussed in the next Section.

The remedy gap also helps explain why complaining states have a roughly eighty-percent win rate in front of the Appellate Body.¹⁵⁴ Several trade scholars maintain that this high rate of success for complaining states demonstrates that the Appellate Body has a pro-free-trade bias beyond that which the WTO agreements require.¹⁵⁵ Relying on the Priest-Klein hypothesis,¹⁵⁶ these scholars maintain that unbiased judicial decisionmaking would result in victory for the plaintiffs roughly fifty percent of the time. Although the Priest-Klein hypothesis is both theoretically and empirically doubtful,¹⁵⁷ the high rate of complaining-state victories may nonetheless seem suspiciously high given that the parties can settle legally clear cases. But the differences

¹⁵⁴ John Maton & Carolyn Maton, *Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT'L ECON. L. 317, 328–29 (2007).

¹⁵⁵ Keisuke Iida, *Why Does the World Trade Organization Appear Neoliberal? The Puzzle of the High Incidence of Guilty Verdicts in WTO Adjudication*, 23 J. PUB. POL'Y 1, 1–2 (2003); see also Colares, *supra* note 16, at 422–38.

¹⁵⁶ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14–16 (1984).

¹⁵⁷ Several scholars have demonstrated that as a theoretical matter, litigation should not necessarily result in a fifty-fifty rate of success for plaintiffs and respondents. See Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 413–14 (1984) (discussing variables affecting the likelihood of litigation proceeding to trial); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493 (1996). The empirical evidence is mixed. See Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996); Katherine Spier, *Litigation*, in 1 HANDBOOK OF LAW AND ECONOMICS 259, 326–28 (A. Mitchell Polinsky & Steven Shavell eds., 2007); Joel Waldfoegel, *Selection of Cases for Trial*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 419 (Peter Newman ed., 1998).

between the domestic legal system and the WTO dispute resolution system cast doubt on this conclusion.

The complications in the settlement process caused by the remedy gap offer an alternative explanation for why plaintiffs have a disproportionate rate of success at the WTO: states fail to settle because of the structure of the remedy regime. The respondent state has little reason to settle early because it faces lower overall sanctions by extending the dispute resolution process. The complaining state, for its part, could compensate the respondent state for foregoing the dispute resolution process but may face high domestic political costs for doing so. As a result, states at the WTO may choose to continue the dispute resolution process at a higher rate than parties in domestic civil litigation do, notwithstanding little uncertainty in the ultimate outcome. The fact that there is an eighty percent rate of victory for complaining states, if anything, suggests that many respondent states are taking advantage of the remedy gap, extending the dispute resolution process as long as possible in situations where the legal issue may be relatively straightforward.¹⁵⁸

C. *The Return of Unilateral Enforcement*

The remedy gap also builds a demand for unilateral action into the dispute settlement system. The structure of the DSU creates a situation where governments that wish to deter the use of the de facto escape option must resort to unilateral action.¹⁵⁹ This result is perverse because the DSU was designed, in part, to quash unilateral state enforcement actions.¹⁶⁰ Yet the remedy gap creates a de facto escape option because the WTO's legal obligations and the remedy regime to enforce those obligations overlap imperfectly. Governments inter-

¹⁵⁸ For instance, the United States continues to litigate its practice of using a "zeroing" methodology in antidumping cases even though the WTO Appellate Body has repeatedly found this practice to be a violation of trade rules. See, e.g., Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Oct. 1, 2008); Panel Report, *United States — Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 30, 2006); Panel Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005).

¹⁵⁹ For a discussion of the importance of reciprocity in informal remedy regimes and how formal remedy regimes can crowd out informal enforcement, see ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF THE LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006).

¹⁶⁰ CROOME, *supra* note 17, at 151, 263; 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 18, at 2760–63, 2777–79.

ested in enforcing WTO rules before the end of the adjudication process are left with no WTO-consistent means of doing so.¹⁶¹

Governments that choose to act outside of the DSU framework are themselves violating trade rules.¹⁶² Here the difference is one between first-order rules as the substantive rules of international trade law and second-order rules as the rules regarding the enforcement of the first-order rules.¹⁶³ The remedy gap is created by the misalignment between first-order rules—the state’s obligations to refrain from taking certain trade actions—and second-order rules—the inability of states to take action to address the original violation.¹⁶⁴ Governments that wish to increase enforcement of first-order rules will thus sometimes violate second-order rules. More specifically, governments may act outside the WTO framework to deter states from making use of the de facto escape option.¹⁶⁵

Interestingly, the WTO system extends the de facto escape clause to these actions as well.¹⁶⁶ Under the DSU, there is no difference between violations of first-order and second-order rules (although the reputational impact might be different).¹⁶⁷ The only legal remedy for the state that is the “victim” of illegal retaliation is the opportunity to file a complaint. This complaint has to go through the same procedures as any other complaint.¹⁶⁸ Thus the remedy gap that exists for the violation of first-order rules (the substantive violation) also appears again when considering the violation of the second-order rule (the unauthorized retaliation).¹⁶⁹ The DSU system, by providing limited, prospective short-term remedies, thereby allows states to violate trade rules and allows other states to (illegally) enforce those rules.

¹⁶¹ See Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 30 U. PA. J. INT’L L. 1133, 1143 (2009).

¹⁶² *Id.* at 1145.

¹⁶³ See Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75, 78 (1998) (discussing first-order and second-order compliance).

¹⁶⁴ The imperfect alignment of first-order rules and second-order remedies is well recognized in other areas of law. See, e.g., John C. Jeffries, Jr., *The Right-Remedies Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

¹⁶⁵ Brewster, *supra* note 161, at 1145–46. Such actions do not necessarily have to be independent violations of first-order rules although often times they will be (e.g., violations of most-favored nation rules). Nonetheless, these actions would still be violations of the second-order trade rules (even if not first-order trade rules) because the action seeks to remedy substantive-rule violations outside of the WTO treaties framework.

¹⁶⁶ *Id.* at 1145.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1136, 1145.

¹⁶⁹ *Id.* at 1145.

So far, states have not explicitly imposed sanctions in an attempt to enforce WTO rules without prior authorization from the DSB. But retaliation outside of the DSU framework does not have to be explicit to be effective. States can simply apply “breach-for-breach” measures against perceived violations of trade rules without drawing a specific link to the target state’s particular policy.¹⁷⁰ For instance, when the United States was considering legislation that would impose a carbon tariff on states that had not taken “adequate” steps to limit greenhouse gas emissions, many states objected to this proposal.¹⁷¹ Whether such a tariff would pass muster under WTO law is a matter of much debate,¹⁷² but resort to the dispute settlement process was not the only way in which states could have responded. States also considered enacting their own carbon tariffs targeting American exports.¹⁷³ United States Trade Representative Susan Schwab explicitly warned members of Congress about this possibility, noting that the carbon tariff “could easily backfire,” and that “other countries could well turn to [carbon tariffs] themselves and develop their own import restrictions, based on their own unilateral definitions of what constitutes adequate action by other countries.”¹⁷⁴ States might also adopt less formal measures, such as imposing delays at the border or more health and safety inspections.

The willingness of member states to act within the bounds of the DSU framework is crucial to the WTO’s success as an institution.¹⁷⁵ International relations theorists emphasize that international organizations must be incentive compatible—that is, it must be in the inter-

¹⁷⁰ *Id.* at 1142.

¹⁷¹ See, e.g., Mark Landler, *Meeting Shows U.S.-India Split on Climate*, N.Y. TIMES, July 20, 2009, at A6.

¹⁷² GARY CLYDE HUFBAUER, STEVE CHARNOVITZ & JISUN KIM, PETERSON INST. FOR INT’L ECON., *GLOBAL WARMING AND THE WORLD TRADING SYSTEM* 39–45 (2009); see also Joost Pauwelyn, *U.S. Federal Climate Policy and Competitiveness Concerns: The Limits and Options of International Trade Law* (Nicholas Inst. for Envtl. Policy Solutions, Duke Univ., Working Paper No. 07-02, 2007), available at <http://nicholasinstitute.duke.edu/climate/policydesign/u.s.-federal-climate-policy-and-competitiveness-concerns-the-limits-and-options-of-international-trade-law>.

¹⁷³ Joe Kirwin, *France to Push EU Member States to Embrace Carbon Border Taxes*, 26 Int’l Trade Rep. (BNA) No. 25, at 817 (June 18, 2009) (describing the efforts of French President Nicolas Sarkozy to have the EU implement a carbon tariff on non-Kyoto members).

¹⁷⁴ Letter from Susan Schwab, U.S. Trade Representative, to Joe Barton, Ranking Member of the Energy & Commerce Comm., U.S. House of Representatives (Mar. 4, 2008) (on file with author).

¹⁷⁵ See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 159 (2005) (discussing potential noncompliance with the WTO structural rules for dispute resolution).

ests of member states to abide by the rules of the institution.¹⁷⁶ Much of the concern with unilateralism under the GATT system derived from the unwillingness of the participants, particularly the United States, to use the GATT dispute settlement system exclusively.¹⁷⁷ The United States did not find the GATT dispute resolution system to be in its interests and resorted instead to unilateral use of section 301 sanctions.¹⁷⁸ The WTO now explicitly bans such unilateral action,¹⁷⁹ but the level of state compliance with this ban will depend, at least in part, on the effectiveness of the DSU in providing adequate remedies for trade policy violations.¹⁸⁰

III. IMPLICATIONS FOR WTO DISPUTE RESOLUTION

Many commentators emphasize that there are other mechanisms besides formal trade remedies to address violations.¹⁸¹ The two primary alternative enforcement mechanisms are reputational costs (i.e., a reputation as a bad trade partner) and informal sanctions (i.e., colder diplomatic relations or lower levels of foreign aid). This Part explores both alternatives and questions whether these mechanisms can provide a sufficient level of enforcement of trade rules given the absence of trade remedies during the dispute resolution process.

A. *Reputational Concerns*

Reputational concerns are commonly cited as a key reason that states comply with international law in general¹⁸² and international

¹⁷⁶ Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 768 (2001).

¹⁷⁷ BARTON ET AL., *supra* note 18, at 69; 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 18, at 2760–63.

¹⁷⁸ BARTON ET AL., *supra* note 18, at 69; CROOME, *supra* note 17, at 149; 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY, *supra* note 18, at 2760–61.

¹⁷⁹ DSU art. 23.2 (requiring member states not to make any unilateral determinations of whether there has been a violation, how long a reasonable amount of time for compliance extends, or what the appropriate level of suspension of concession would be).

¹⁸⁰ GOLDSMITH & POSNER, *supra* note 175, at 159 (questioning whether the WTO will be any more successful than the GATT in restraining unilateral retaliation).

¹⁸¹ Joost Pauwelyn, *The Calculation and Design of Trade Retaliation in Context: What is the Goal of Suspending WTO Obligations*, in THE LAW, ECONOMICS, AND POLITICS OF RETALIATION IN WTO DISPUTE RESOLUTION 34, 59 (Chad P. Bown & Joost Pauwelyn eds., 2010); Schwartz & Sykes, *supra* note 1, at S194.

¹⁸² GOLDSMITH & POSNER, *supra* note 175, at 101; ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 100 (2008); MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES 223 (2007); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 609 (2005); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819 (2000).

trade law in particular.¹⁸³ Governments want to maintain a good reputation for complying with international trade law so that they can demonstrate that they are good trade partners.¹⁸⁴ Even if there are few formal consequences for violating international trade rules, reputational concerns may nonetheless lead governments to decide that the costs of violating trade law are greater than the corresponding benefits.¹⁸⁵ Certainly, reputational concerns are a factor in a government's calculus of whether or not to comply with WTO rules. From the perspective of minimizing the remedy gap, however, the crucial question is *how* reputational costs are incurred.¹⁸⁶

Within the WTO process, there are several different stages where a state might incur a reputational cost. The request for the establishment of a panel (or even a request for consultations) could result in reputational harm to the respondent state because this action provides information to other states that the respondent has adopted a controversial policy. This reputational cost is likely to be low, however, because of the uncertainty of the signal; the respondent state might prevail once the merits of the case are considered. The reputational costs are most likely higher if the respondent state is found to be in violation of the WTO Agreements by either a panel or the Appellate Body. Yet even these reputational costs may be moderate. Member states use the DSU in good faith to resolve differences and clarify their trade obligations.¹⁸⁷ If a respondent state subsequently complies with the WTO decision, it may still incur some reputational harm but will generally maintain its status as a good trade partner.¹⁸⁸ The greatest reputational costs are incurred if the respondent state refuses to comply with the WTO decision after the dispute resolution process is complete.¹⁸⁹ Here the potential reputational loss is greatest because the respondent state is continuing to act outside of the WTO legal framework.¹⁹⁰

¹⁸³ Pauwelyn, *supra* note 181, at 59; Schwartz & Sykes, *supra* note 1, at S196–98.

¹⁸⁴ See GUZMAN, *supra* note 182, at 110; Schwartz & Sykes, *supra* note 1, at S196.

¹⁸⁵ See GUZMAN, *supra* note 182, at 75–76.

¹⁸⁶ The question of how reputation functions between governments and across issue areas is surprisingly difficult to answer. See Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 237–38, 243–44 (2009); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S101–02 (2002).

¹⁸⁷ Charnovitz, *supra* note 6.

¹⁸⁸ See Judith Hippler Bello, Editorial Comment, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 417 (1996).

¹⁸⁹ See *id.*

¹⁹⁰ Even in this situation, the reputational harm to the respondent state depends on how the observing state understands the breach. If the observing state has an “efficient breach/com-

In terms of minimizing the effects of the remedy gap, the relevant question is how reputational costs are incurred while the dispute resolution process is continuing (not at the end of the dispute resolution process). As discussed above, reputational costs are modest at this stage. The respondent state may have an adverse decision from a panel or the Appellate Body but is not acting outside of the WTO framework. Indeed, the respondent state can comply at the end of the dispute resolution process (and thus avoid the greatest reputational costs) and yet take full advantage of the remedy gap. Because a state does not have to refuse to comply with the WTO ruling to gain the advantages of delaying the DSU process, reputational costs are unlikely to be particularly helpful in closing the remedy gap.¹⁹¹ There may be some reputational harm from the adverse panel decision or Appellate Body ruling, but this is unlikely to be a significant enough cost to the respondent state to resolve the problems created by the remedy gap.

A respondent state could also develop a poor reputation as a trading partner if other member states believed the respondent state was abusing the dispute resolution process—for example, by systematically delaying proceedings in bad faith. This requires a much more contextual analysis by the observing state than detecting continued noncompliance. If a respondent state refuses to comply with a WTO ruling, this is a fairly transparent act.¹⁹² Questions of abuse of the dispute resolution process are far less transparent; the respondent state may or may not be to blame if the dispute resolution process is delayed or otherwise continues for a long period of time. To determine if there is abuse, the observing state has to have more information about the dispute and the actions of the parties to it.¹⁹³ The lack

pensate” view of WTO dispute settlement—where the respondent state can legitimately refuse to comply with WTO decisions so long as the complaining party is allowed to readjust its concessions—then the reputational harm may be minimal here as well. *See id.* at 416–17; *see also* Sykes, *supra* note 28, at 354–55. *But see* John H. Jackson, Editorial Comment, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 60–61 (1997).

¹⁹¹ *See supra* Part I.A.

¹⁹² *See* Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to International Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 311 (2002) (discussing how international courts can heighten the reputational costs to a state by making its violation more transparent); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276 (1997) (same); Alexander Thompson, *The Rational Enforcement of International Law: Solving the Sanctioners’ Dilemma*, 1 INT’L THEORY 307 (2009) (discussing how international court rulings can decrease the potential reputational costs to a sanctioner by clarifying the initial violation).

¹⁹³ *See infra* Part IV.B.

of transparency in this situation means that the observing state will be less certain of its conclusions, which lowers the reputational costs to the respondent. Nonetheless, it remains possible for a respondent state to suffer some reputational loss in this situation.

In short, reputational costs are uncertain in dispute resolution and may not be sufficient to mitigate the effects of the remedy gap. Reputational costs may indeed be an important part of trade law enforcement, but these costs are most effective when a state refuses to comply with a WTO ruling at the end of the dispute resolution process. Yet these “noncompliance” reputational costs will not solve the problems raised by the remedy gap. Respondent states can make use of the delay in the DSU system and still fully comply with the WTO ruling at the end of the day.

B. *Informal Sanctions*

States can enforce trade rules without resorting to formal WTO procedures through informal sanctions. The scope of informal sanctions is wide, ranging from mild actions, such as cooler diplomatic relations, to more severe actions, such as a reduction of foreign aid or a refusal to share security intelligence.¹⁹⁴ Informal sanctions can also resemble a formal sanctioning system, although without the imprimatur of multilateral approval.¹⁹⁵ For example, the United States section 301 sanctioning system, though highly formalized as a matter of American law, was an informal sanctioning system in the realm of international law because it was applied outside of the GATT dispute settlement framework.¹⁹⁶

The use of informal sanctions can serve as an effective trade enforcement regime if the sanctions are sufficiently high.¹⁹⁷ However, the informal sanctions raise two significant concerns. First, the strength of informal sanctions is highly correlated with the power of the complaining state. A threat to restrict market access will generally have far more deterrent power if it comes from a state with a large domestic market than a similar threat coming from a state with a smaller domestic market.¹⁹⁸ Although this difference in sanctioning

¹⁹⁴ See DAVID A. BALDWIN, *ECONOMIC STATECRAFT* 109 (1985).

¹⁹⁵ Multilateral approval of sanctions can be quite important to the success of the sanctioning regime. See Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 *INT'L ORG.* 73, 76, 88 (2000).

¹⁹⁶ See Bhagwati, *supra* note 20, at 2–3.

¹⁹⁷ See Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 *L. & POL'Y INT'L BUS.* 263, 316–17 (1992).

¹⁹⁸ Brewster, *supra* note 23, at 257–58.

power still exists within the WTO system, the DSU performs an important function in setting the appropriate level of sanctions and restricting threats of counter-retaliation.¹⁹⁹ Second, the use of informal sanctions is unconnected to the legal merits of the case. Informal sanctions can be used to deter government policies that are legal under WTO rules or even to deter states from bringing legitimate complaints to the WTO. A robust informal sanctioning regime tilts closer to a power-based dispute resolution system than a rules-based system.²⁰⁰

For these reasons, the current trend in international trade law is to restrict, not encourage, the use of informal sanctions. Indeed, much of the motivation to establish the DSU came from a desire to restrict informal sanctions.²⁰¹ The EC and Japan supported the creation of the DSU as a means of curtailing the United States' use of section 301 sanctions.²⁰² More recently, the Appellate Body has restricted developed states' ability to use the Generalized System of Preferences ("GSP") to sanction developing states (although it adopted a standard that was less restrictive than the standard the panel established).²⁰³ In the *European Communities — Tariff Preferences* case, the Appellate Body required developed states to set "objective criteria" for granting GSP benefits, thereby curtailing a developed state's ability to restrict the GSP benefits of a targeted developing state.²⁰⁴ By curbing the use of informal sanctions, member states and the DSB place increasingly more of the burden of trade law enforcement on the formal sanctioning system. Although some informal means of sanctioning remain, such as lower levels of cooperation on monetary policy or security is-

¹⁹⁹ See *id.* at 258.

²⁰⁰ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109–11 (2d ed. 1997).

²⁰¹ See CROOME, *supra* note 17, at 151.

²⁰² See *supra* Part I.A.

²⁰³ See generally Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004).

²⁰⁴ For discussion of this case, see Lorand Bartels, *Conditionality in GSP Programmes: The Appellate Body Report in European Communities — Conditions for Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 463, 467–68 (Thomas Cottier et al. eds., 2005); Robert Howse, *India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy*, 4 *CHI. J. INT'L L.* 385 (2003); and Gregory C. Shaffer & Yvonne Apea, *Institutional Choice in the General System of Preferences Case: Who Decides the Conditions for Trade Preferences?* *The Law and Politics of Rights*, 39 *J. WORLD TRADE* 977 (2005).

sues, eliminating unilateral trade-related sanctions removes one of the most potent weapons from a state's enforcement arsenal.²⁰⁵

It is hard to judge whether there is sufficient enforcement of trade rules when the DSU system fails to offer a remedy.²⁰⁶ As this Part reviews, it is theoretically possible for states to achieve sufficient enforcement of international trade rules even where formal trade retaliation is not authorized by the WTO, but these conditions are unlikely to exist in most cases. The WTO system has purposefully restricted informal trade sanctions and thereby limited their effectiveness.²⁰⁷ Although reputational costs and informal enforcement tools can be good supplements to the formal WTO dispute resolution regime, it is difficult to rely on either as an adequate replacement for the formal trade retaliation system.

IV. PROPOSALS FOR CLOSING THE REMEDY GAP

The current remedy gap can be addressed in a number of different ways, depending on which institutional players choose to act and what remedies are considered. Naturally the range of possible solutions is broad; the dispute resolution system could be entirely renegotiated if governments so chose. This Part focuses on three possible reforms. The first is to authorize the award of unconditional and retrospective damages—the approach taken by domestic contract law.²⁰⁸ This reform, although a step forward, comes with two significant costs. First, governments may not react to the threat of large damage awards at the end of a litigation process in the way rational individuals or profit-maximizing firms do. Although firms may alter their present behavior to account for a damage award that would materialize many years later, governments often have shorter time horizons. Thus, a government may prefer, quite rationally, to continue to accrue the present benefits of the program if it suspects that a successor government will bear the costs of the retaliation award. Second, a system of unconditional and retrospective damages would allow a complaining state to retaliate even if the respondent state complies with the WTO's ruling. This could have a chilling effect on governments' policy choices, leading governments to forego novel but WTO-consistent

²⁰⁵ See Daniel W. Drezner, *The Hidden Hand of Economic Coercion*, 57 INT'L ORG. 643, 643–45 (2003) (discussing the effectiveness of economic coercion).

²⁰⁶ The very idea of “sufficient enforcement” requires us to know what levels of trade compliance states find optimal.

²⁰⁷ See Howse, *supra* note 204, at 386–87.

²⁰⁸ See *infra* Part IV.A.

policies. This effect is especially problematic in developing countries, where, although innovative government policies could be particularly beneficial, the potential costs of trade retaliation are also quite high.

The second proposal seeks to account for the government's shorter time horizons.²⁰⁹ The proposal allows a complaining government to seek a preliminary injunction at the start of the WTO litigation. If the complaining state is likely to succeed on the merits of the case, the panel hearing the complaint could issue an injunction, ordering the respondent state to suspend its challenged policy until the end of the litigation process. If the respondent state refused to suspend its policy, then the complaining state would be authorized to begin retaliation for the damages it incurs during the litigation process. This proposal permits retaliation before a government's policy has been authoritatively determined to be a violation of the WTO, but it provides a remedy for likely violations of trade rules that are effective against the current government.

The third proposal is the most modest but the easiest to achieve.²¹⁰ This proposal is simply to change the sequencing of when retaliation can be authorized in the WTO litigation process. The WTO text is ambiguous regarding whether retaliation can be authorized before the compliance stage of dispute settlement. The current practice is to wait until the end of the compliance stage, but the Appellate Body could clarify that retaliation can be requested at the end of the merits stage. This would not eliminate the remedy gap but would mitigate some of the gap's negative effects.

A. *Establishing Retrospective and Unconditional Retaliation*

One approach is to alter the WTO's remedy rules to more closely resemble domestic contract law. There are two aspects to the WTO's current remedy system that diverge from that model. First, the trade retaliation is prospective from the end of the dispute resolution process.²¹¹ Second, trade retaliation is conditional, imposed only as long as the respondent state fails to come into compliance with a WTO ruling.²¹² Both of these aspects of the remedy regime create the remedy gap, and only by altering both rules can the remedy gap be closed.

The WTO member states could alter the text of the DSU agreement to include a different set of remedies, vesting the DSB with the

²⁰⁹ See *infra* Part IV.B.

²¹⁰ See *infra* Part IV.C.

²¹¹ See *supra* Part II.B.

²¹² See *supra* Part II.B.

power to authorize retrospective and unconditional retaliation.²¹³ Under this system, successful complaining states could request the authorization to retaliate for all of the damages they have suffered from the violating policy.²¹⁴ Damages would still be limited to the respondent state's losses (as compared to the net economic losses to the world) traceable to the violating policy. This approach would not necessarily deter all breaches of WTO rules, as the violating state may receive a political gain from the violation that exceeds the costs of retaliation.²¹⁵ Nevertheless, this remedy rule should deter states from violating WTO rules more often (or lead them to settle WTO disputes more often) than the current system of prospective and conditional retaliation. All things being equal, the greater the potential penalty for violation, the less often states will find violations to be advantageous.²¹⁶

It is possible that a complaining state would not wish to retaliate once the respondent state has complied with the WTO's ruling. Trade commentators frequently point out that trade retaliation results in a net economic loss for the sanctioning state,²¹⁷ although retaliation in intellectual property contexts may be economically beneficial to the sanctioning state.²¹⁸ Although this is generally true, governments may

²¹³ Currently, the DSU text only permits retaliation only as a last resort when the respondent state has failed to comply with the WTO's ruling. See DSU arts. 22.1, 26.

²¹⁴ Such a policy creates some novel issues, such as the timing of retrospective retaliation. Under the current system, prospective retaliation is authorized on an annual basis—the complaining state can retaliate each year for the damages it is suffering that year. See *supra* note 127. The switch to retrospective damages creates some questions about when the retrospective damages should be permitted. For instance, whether the complaining state should be able to apply retrospective retaliation all in one year, several years, or the same number of years that the violation occurred. None of these issues, however, is particularly daunting.

²¹⁵ The remedy of full compensation to complaining states does deter all “inefficient breaches” of WTO rules. The violating policy may affect many states, resulting in economic (and political) losses in several WTO members, but only states that formally register a complaint at the WTO can request retaliation. If all of these states complained and were authorized by the WTO to retaliate, this could, in theory, deter all but (economically) inefficient breaches. However, many injured states may not complain for a variety of reasons including legal capacity, the costs of litigation, or diplomatic concerns. See *supra* Part II.B.

²¹⁶ There is abundant literature addressing the idea of using damages to deter undesirable government action. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 571 (1984); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788–89 (1991); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999).

²¹⁷ VAN DEN BOSSCHE, *supra* note 94, at 223 (noting that “[r]etaliation measures are *trade destructive* and the injured party imposing these measures is also negatively affected by these measures”).

²¹⁸ See Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking Inter-*

nonetheless gain *politically* from enacting barriers to trade.²¹⁹ Thus if the government is given the option of offering greater protection for a key national industry, such as steel or agriculture, the authorization to raise barriers to trade can be a valuable political commodity for many governments.²²⁰ If nothing else, the threat to use the right to retaliate can serve as a bargaining chip for the complaining state, increasing the state's ability to gain concessions in trade or other issue areas. For instance, the Brazilian government was able negotiate annual payments of \$147 million in assistance to refrain from applying WTO authorized sanctions.²²¹

This revised remedy system, which could potentially close the remedy gap, has two significant drawbacks. The first is that this system continues to delay the penalty to governments until the litigation is over. While profit-maximizing firms may be indifferent to incurring a penalty earlier or later with the correct rate of interest on the award,²²² governments do not respond to penalties in the same way.²²³ Government leaders may have systematically shorter time horizons than firms, and prefer to push the costs of trade violations onto future governments.²²⁴ Although a state (*qua* state) lives on indefinitely, the government that acts for a state generally expects to lose power sometime in the foreseeable future.²²⁵ This is particularly true with democ-

national Trade and Intellectual Property, 12 CHI. J. INT'L L. 1, 41–45 (2011); see also Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attraction of Suspending TRIPS Obligations*, 11 J. INT'L ECON. L. 313, 336–38 (2008); Arvind Subramanian & Jayashree Watal, *Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?*, 3 J. INT'L ECON. L. 403, 405 (2000).

²¹⁹ See Schwartz & Sykes, *supra* note 1 at S202; see also Sykes, *supra* note 104, at 259–60.

²²⁰ See Sykes, *supra* note 104, at 259–60.

²²¹ Ed Taylor, *Brazil Suspends Sanctions Against U.S. Until 2012 in WTO Cotton Subsidy Dispute*, 27 Int'l Trade Rep. (BNA) No. 25, at 950 (June 24, 2010) (discussing how the Brazilian government agreed to this side payment until the U.S. farm bill was reconsidered by Congress).

²²² In reality, firms are probably not profit maximizing over the long term unless managers' compensation is tied to the firm's long-term performance. See Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 73 (2003); Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: An Overview of the Issues*, 30 J. CORP. L. 647, 664 (2005).

²²³ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–57 (2000) (discussing how governments do not respond as firms do to financial penalties); Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 222–28 (2005) (discussing the effectiveness of WTO sanctions as a political matter).

²²⁴ For a discussion of the importance of time horizons in international relations, see Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 232–33 (1985).

²²⁵ Brewster, *supra* note 186, at 250.

racies, where regular elections bring new coalitions of leaders to power every several years; the current government may accrue the gains from a violation and expect that the penalty will be borne by a successor government.²²⁶ It is less true in nondemocracies, where a leader may expect to maintain power for a decade or more, although these leaders may view their tenure probabilistically and thus significantly discount potential costs that will not materialize for several years.²²⁷

Because governments have shorter time horizons than we would expect from a unitary state, a remedy regime of retrospective and unconditional sanctions may be significantly less effective than expected. Although a firm (or our conception of a unitary state) may internalize the expected costs of future sanctions today, governments will be less likely to do so.²²⁸ The expected costs of retaliation to an incumbent government are not zero, but they are significantly discounted because the government actor making the decision today may expect that they will not be the actor bearing the costs of the sanctions in the future.²²⁹ As a result, governments may continue to have an incentive to maintain their violation of WTO rules and drag out litigation for as long as possible. Indeed, the addition of retrospective damages increases this incentive because governments understand that they can no longer avoid sanctions even if they ultimately comply with the WTO ruling.

This lack of a necessary connection between the government that violates trade rules and the government that will ultimately bear the trade sanctions relates to the second drawback of this approach: a system of unconditional remedies severs the link between trade retaliation and the respondent state's continued noncompliance with WTO rules. Of course, there need not be any link between sanctions and continued noncompliance. If sanctions are the functional equivalent of compensatory damages, then whether the respondent state is continuing to violate WTO rules is irrelevant, except to the extent that the damages may be higher the longer the violation continues.²³⁰ But forging a link between sanctions and continued noncompliance is rele-

²²⁶ See Andrew Moravcsik, *Liberal Intergovernmentalism and Integration: A Rejoinder*, 33 J. COMMON MARKET STUD. 611, 622 (1995); cf. Beth V. Yarbrough & Robert M. Yarbrough, *Reciprocity, Bilateralism, and Economic 'Hostages': Self-Enforcing Agreements in International Trade*, 30 INT'L ST. Q. 7, 17 (1986).

²²⁷ See Brewster, *supra* note 186, at 249–53.

²²⁸ *Id.* at 250.

²²⁹ *Id.* at 250–51.

²³⁰ See Sebastian, *supra* note 28, at 365–67 (discussing the various goals of WTO remedies).

vant if sanctions are viewed as a means of compelling a respondent state to end its violation of WTO rules.²³¹ Seen through this lens, the justification for sanctions is dependent on respondent-state intransigence.²³² The latter approach is the one currently taken by the WTO—sanctions are permitted only as temporary measures and are available only if the rulings and recommendations of the WTO are not implemented by the respondent state²³³—but it is not a necessary element of an international remedy regime.²³⁴

The wisdom of altering the remedies available through the WTO is much debated, but nearly all trade scholars argue that WTO rules should remain conditional on the state's refusal to comply with the WTO's ruling.²³⁵ Trade retaliation is the primary remedy of the system because it is a self-help mechanism—the complaining state can impose the sanction without the respondent state's consent, as compared to a financial remedy, which would require the respondent state's participation²³⁶—but sanctions are disfavored because they

²³¹ See *id.* at 365.

²³² See *id.* at 365–67.

²³³ DSU art. 22.1 (“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.”)

²³⁴ The resolution of this debate depends in large part on what the goal of WTO remedy regime should be, an issue that is also unresolved by the DSU text and contested by international-trade scholars. For a review of various goals for WTO remedies, see Pauwelyn, *supra* note 181; Sebastian, *supra* note 28; and Alan O. Sykes, *Optimal Sanction in the WTO: The Case for Decoupling (and the Uneasy Case for the Status Quo)*, in *THE LAW, ECONOMICS, AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 339 (Chad P. Bown & Joost Pauwelyn eds., 2010).

²³⁵ Scholars have advanced several types of proposals for remedy reforms, all based on the idea that sanction should be conditional. See Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *Auctioning Countermeasures in the WTO*, 73 J. INT'L ECON. 309, 327–31 (2007) (advocating a system where states can trade the authorization to retaliate); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101, 109–11 (2005) (advocating financial compensation remedy regime); Charnovitz, *supra* note 6, at 823–31 (suggesting the WTO end the use of trade sanctions as retaliation); Joost Pauwelyn, Note, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 342–45 (2000) (suggesting that states collectively apply DSB-approved trade sanctions). Not all scholars have supported the idea of reform. See Jide Nzelibe, *The Case Against Reforming the WTO's Enforcement Mechanism*, 2008 U. ILL. L. REV. 319, 349–56 (defending the WTO's bilateral sanctioning approach); Sykes, *supra* note 234, at 350–54 (defending the WTO remedy regime's failure to compensate private parties harmed by trade violations).

²³⁶ States could demand a bond in anticipation of later damages awards, although states would almost certainly have to refill the bond at some point. Nzelibe, *supra* note 235, at 319–21.

raise additional barriers to trade.²³⁷ Although trade sanctions may provide political benefits to the sanctioner, they can impose economic losses on both states and fail to compensate the private actors within the complaining state who are harmed by the violation.²³⁸

The shift to a retrospective and unconditional remedy regime has other costs and benefits. There is a possibility that a compensatory level of sanctions could have a chilling effect on national policies that present novel issues of WTO law.²³⁹ Some governments that are particularly averse to the possibility of sanctions may refrain from adopting national policies that would lead to a WTO complaint (even if the policy would most likely be deemed acceptable under WTO rules) simply to avoid the risk of trade retaliation. This may be true even when the government discounts the value of the future sanctions: the expected level of sanctions (even discounted) may be sufficient to deter national trade policies that are legal under WTO rules. This is particularly the case with developing nations that have less trade surplus with which to bear trade sanctions than do developed states. On the positive side, such a change would prevent member states from violating trade rules without remedy for several years.

Some scholars have advocated maintaining the conditional nature of the WTO remedy regime while shifting from prospective to retrospective damages.²⁴⁰ On first examination, authorizing retrospective damages appears to close the remedy gap by eliminating the incentive to drag out dispute resolution.²⁴¹ As this Section discusses, however, the incentive to delay remains unless *both* the prospective damages rule and the conditionality requirement are altered. The addition of retrospective damages alone may increase compliance, but it does not eliminate the remedy gap. To understand this difference, consider three types of respondent states: one type that plans to end its violation before the DSB authorizes trade retaliation (the compliance type), a second type that plans to continue its violation after the dispute resolution process is complete (the noncompliant type), and a

²³⁷ Bronckers & van den Broek, *supra* note 235, at 121.

²³⁸ Charnovitz, *supra* note 6, at 813–16.

²³⁹ For a discussion on chilling effects as over-deterrence, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685 (1978).

²⁴⁰ Bronckers & van den Broek, *supra* note 235, at 121; William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 125 (2009); 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).

²⁴¹ See Bronckers & van den Broek, *supra* note 235, at 110 (discussing how retrospective damages can decrease the incentive for “foot-dragging” in WTO dispute resolution).

third type whose compliance depends on the level of sanctioning (the cost-benefit type).

For the compliance type, the addition of retrospective damages does not change the state's calculus at all. Because of the conditional aspect of the WTO's remedy regime, the compliance type understands that there will be no trade retaliation if the state complies with the ruling of the DSB. The state can comply after the initial adjudication phase or after the compliance phase of the dispute settlement and never face any trade consequences. As a result, the addition of retrospective damages does not alter the compliance type's calculus because the state plans on avoiding trade retaliation altogether; retrospective damages do not interfere with this strategy. The level of retaliation is unimportant in this scenario; for the compliance-type state, the remedy gap continues to exist and it continues to create a de facto escape clause. In addition, the compliance-type state does not have an incentive to settle unless the complaining state offers a side payment to resolve the issue faster.

For the noncompliance-type state, the change in the remedy rule from prospective to retrospective damages does not necessarily change the settlement calculus, but it does remove the remedy gap. The noncompliance type cannot avoid trade retaliation entirely (because the violation will not be withdrawn at the end of dispute resolution) and thus will eventually face higher levels of trade retaliation under this remedy rule. But the noncompliance type does not gain anything by settling the case early. The respondent state has a choice between expediting dispute resolution and facing a lower level of trade retaliation sooner or dragging out dispute resolution and facing a higher level of trade retaliation in future years. Given that the overall levels of trade retaliation remain the same regardless of when they are imposed, the respondent state's decision will likely turn on other factors. Costs associated with dispute resolution, such as attorneys' fees, can be significant.²⁴² If the attorneys' fees for the respondent are high (because it is hiring outside counsel), then there will be a greater incentive to expedite dispute resolution. However, if the marginal costs of the respondent state's attorneys' fees are low (because it is using government lawyers), then such costs are less likely to influence the state's decisionmaking calculus. The government may also prefer delay for political reasons, such as pushing the costs of retaliation onto a successor government. Thus, although the incentives against settle-

²⁴² The issue of attorneys' fees is also relevant for the complaining state. The complaining state may make a more generous settlement offer if their attorneys' fees are high.

ment and in favor of delay remain, the remedy gap is closed for this type because the respondent state cannot delay compliance without trade consequences.

The cost-benefit-type respondent state will base its decision of whether or not to comply with the DSB's ruling on the level of trade retaliation it will face. For instance, the respondent state will comply with the ruling if trade sanctions are greater than some level, say \$100 million in trade retaliation per year. The inclusion of retrospective damages will increase the expected level of trade retaliation in every case, so the probability of compliance will increase as well. The inclusion of retrospective damages thus makes this type of respondent state, on the whole, more likely to comply with DSB rulings at the end of the dispute resolution process. However, it also gives the states an incentive to extend the dispute resolution process for as long as possible (in order to make full use of the free violation period) and, thereby, makes the states more likely to take advantage of the remedy gap.²⁴³

B. Preliminary Injunctions

An alternative approach is to vest dispute resolution panels with the power to issue preliminary injunctions ordering the respondent state to suspend the challenged policy until the end of the litigation process. This remedy regime better addresses the issue of governments' shorter time horizons. Rather than postponing the remedy until the end of the (potentially lengthy) dispute resolution process, the complaining state could request the ability to retaliate immediately if the respondent state refused to comply with the injunction. This alternative would also maintain the link between sanctions and the respondent state's noncompliance with WTO rulings. The respondent state can avoid any liability for potential violations simply by complying with the injunction. This approach also has drawbacks, namely that the procedure might interfere with domestic legislative prerogative prior to a formal finding of violation. On the whole, however, this approach potentially offers the most effective way to improve compliance with WTO rules.

²⁴³ Similarly, altering just the conditions for the trade retaliation rule—that is, keeping prospective damages but making those sanctions unconditional and applicable even when the state complies after the dispute resolution process—does not close the remedy gap. It would allow trade retaliation in cases where the effects of the violation go on after the violation has ended—for instance, a one-time illegal subsidy—but only for the effects that remain after the dispute resolution process is complete. Like the current remedy regime, this formulation does not provide a remedy for damages realized during the dispute resolution process.

Preliminary injunctions are a common aspect of domestic legal systems,²⁴⁴ allowing plaintiffs to request that the court order the defendant to desist from some behavior before the merits of the case are fully adjudicated.²⁴⁵ Generally a court will grant a preliminary injunction when the remedy after the trial is unlikely to make the plaintiff whole.²⁴⁶ This standard is, in turn, based on the likelihood that the plaintiff will succeed on the merits, the “irreparable” nature of the plaintiff’s injury, and the injunction’s potential injury to the defendant.²⁴⁷

A preliminary injunction procedure at the WTO would function in a slightly modified manner. All violations of WTO rules would presumptively result in “irreparable” harm to the complaining state. This presumption is justified, as infringements of trade rules generally do produce irreparable effects on markets. Government policies change the structure of an industry, leading some firms to expand production in one area (i.e., firms may expand into a new product line if they are given a government subsidy) and other firms to invest in other areas (i.e., foreign firms not receiving the subsidy may choose not to compete in that product market even if the firm would otherwise be the low cost producer).²⁴⁸ Firms may even go out of business if they lose access to key foreign markets even temporarily. These effects are not eliminated when the respondent government changes its policy several years later. The now-defunct government program will have resulted in changed market conditions, and nations rarely attempt to claw back the benefits to private firms once distributed. Even if a claw back is attempted, the private firms benefiting from the government program may retain first-mover advantages or other relational advantages with customers or suppliers.²⁴⁹ In addition, the remedy the WTO offers to

²⁴⁴ See generally Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381 (2005); Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); Lea P. Vaughn, *The Need for Clarity: Towards a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839 (1989). The TRIPS Agreement of the WTO requires all members to make preliminary injunctions available as a domestic remedy for infringement of intellectual property. See Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 44, 50, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

²⁴⁵ Leubsdorf, *supra* note 244, at 525.

²⁴⁶ See *id.* at 541.

²⁴⁷ Vaughn, *supra* note 244, at 839.

²⁴⁸ See Warren F. Schwartz & Eugene W. Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 840 (1972).

²⁴⁹ See Dennis C. Mueller, *First Mover Advantages and Path Dependence*, 15 INT’L J. INDUS. ORG. 827, 828 (1997).

the complaining state is not compensatory. If the complaining state succeeds in its suit, then it receives no compensation if the respondent state removes the policy and only the right to retaliate if the respondent state does not. Neither of these outcomes will make the complaining state whole. Thus the complaining state's harm is irreparable even if the state prevails on its claim.

The key issue for the panel to decide would be whether the net harm to the complaining state of bearing the injury (the injury to the complaining state multiplied by the probability of success on the merits) is greater than the net harm to the respondent state of suspending its policy for the duration of the dispute resolution process (the injury to the respondent state multiplied by the probability of success on the merits).²⁵⁰ Were the panel to find that the net harm to the complaining state is greater, it could then order the respondent state to suspend the challenged policy.

In the domestic context, the party requesting the injunction must offer a bond, equal to the respondent's harm, that is payable to the respondent if requesting party fails to succeed on the merits. This minimizes the expected harm to the respondent of bearing an injunction that (in hindsight) should not have been issued. In the WTO context, parties do not offer monetary compensation so a bond requirement would be anomalous with the rest of the remedy regime (even as damages for the initial violation). The closest equivalent to a bond would be to allow the respondent state to suspend trade concessions against the complaining state if the injunction were issued and the complaining state lost on the merits. However, this would also be anomalous with the rest of the remedy regime because suspension of concession would not be conditional on noncompliance with a WTO order. As an alternative, if the complaining state is not successful on the merits it could offer a series of WTO-consistent concessions to the respondent state for a set number of years (say, as long as the injunction was in place). The panel would be free to consider such an offer in its analysis of the potential harms each party could suffer if the injunction issued. As in the domestic context, panels would have discretion not to order a preliminary injunction if equitable reasons existed to deny the injunction. An order for a preliminary injunction would include a finding of how much retaliation would be allowable should the respondent state fail to comply.

²⁵⁰ This would minimize the expected harms of the dispute resolution delay. See *Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986); Vaughn, *supra* note 244, at 839.

A preliminary order would be submitted to the DSB and would require approval by the DSB by a reverse-consensus vote to become effective (like all other rulings from panels or the Appellate Body).²⁵¹ The preliminary injunction would place a legal obligation on the respondent state to suspend the challenged policy (or the parts of the challenged policy likely to be a violation) until the end of the litigation period. If the respondent state failed to follow the WTO ruling, then the complaining state would be authorized to impose prospective (equal to the level of current harm) and conditional (dependent on the respondent state's failure to comply with a WTO ruling) retaliatory measures.²⁵²

A remedy regime that includes a preliminary injunction procedure has several attractive characteristics. First, the remedy regime decreases the ability of states to game WTO dispute settlement procedures. Where a preliminary injunction is imposed, the incentive to delay DSU proceedings is substantially weakened. If the respondent state complies with the injunction, delay would only postpone the resolution of the dispute (and possible legal finding in favor of the respondent state).²⁵³ Should the respondent state refuse to comply with the injunction, the complaining state can begin to rebalance its trade relationship with the respondent state sooner. Moreover, bad faith violations of WTO rules (such as the enactment of obviously WTO-inconsistent measures in an effort to exploit the remedy gap) would be less likely because clear violations would most likely result in a preliminary injunction. In these cases, the respondent state would not be able to abuse the dispute resolution system to maintain its violation for several years without consequence.

Second, a preliminary injunction procedure may be more likely to lead to compliance with trade rules than the current system or a system of retrospective and unconditional retaliation. One significant advantage of the preliminary injunction procedure is that it can influence the *current* government in the respondent state. The current sys-

²⁵¹ The injunction order would be submitted to the DSB before the end of the panel's analysis of the merits. Under this proposal, the order would not be immediately reviewable by the WTO's Appellate Body but this is not an absolute requirement of a preliminary injunction system. If governments became sufficiently concerned regarding the consistency or quality of panel injunctions, then the proposal could be altered to include an immediate appeal of the preliminary order.

²⁵² If a preliminary injunction were granted and the panel subsequently found that the challenged policy was consistent with WTO obligations, the panel could then order a removal of the injunction in its decision.

²⁵³ Unlike a remedy of retrospective and unconditional retaliation, the preliminary injunction would also decrease the incentive for the respondent state to drag out the litigation process.

tem only provides a threat of retaliation in the future if the state does not ultimately comply with the WTO ruling. Such a threat is unlikely to influence the present government's policy options. At the very least, the government will be able to take advantage of a long liability-free period of defection from trade rules. As discussed above, a system of retrospective and unconditional retaliation would eliminate the benefit of trade violations to the *state as a whole*, but would not necessarily target the *current government*. As a consequence, that remedy does not necessarily incentivize the state's present government to remove the violating provision. The more the current government discounts the threat of future retaliation, the less effective a system of retrospective and unconditional sanctions will be in promoting compliance.²⁵⁴

By contrast, a preliminary injunction puts economic and political pressure on the current government to comply in real time. The government may still refuse to comply (or settle) because the benefits of the violation are greater than the costs of the retaliation, but this system most effectively targets the policymakers in the respondent state.²⁵⁵ In addition, a preliminary ruling on the probable outcome of the case may make it easier for governments to settle their disputes. The respondent government may find it is more readily able to convince its own domestic constituencies to reform the challenged program if a panel has already signaled that it will most likely find the program to be in violation of WTO obligations.

Third, a preliminary injunction procedure is unlikely to overdeter violations of WTO rules. The current remedy regime does not overdeter violations of WTO rules,²⁵⁶ but the authorization of retrospective and unconditional damages could. The risk of overdeterrence is highest when a developing state is considering a policy that may very well be consistent with WTO rules but creates novel WTO issues. Here, the threat of retrospective and unconditional retaliation (even discounted) may lead the government to be overly cautious, resulting in reduced policy space.²⁵⁷

A preliminary injunction system limits this risk of overdeterrence by making a case-by-case preliminary analysis of whether a violation exists. If the panel decides that the case is likely to be a violation,

²⁵⁴ See Axelrod & Keohane, *supra* note 224, at 232.

²⁵⁵ See Levinson, *supra* note 223, at 354–57; Nzelibe, *supra* note 223, at 222–28.

²⁵⁶ See Schwartz & Sykes, *supra* note 1, at S183.

²⁵⁷ This concern is greatest for developing countries, which are less able to absorb the costs of trade restrictions than developed countries.

then the government would be provided with the opportunity to suspend but continue to defend the policy without accruing liability for the violation. In such a situation, the respondent state may continue to provide the public good of clarifying WTO rules in an ambiguous area.²⁵⁸ If the panel finds that the policy was most likely acceptable under WTO rules, then the government could maintain the policy without concern about accruing liability. Because retaliation would continue to be conditional on noncompliance with WTO rules, the government could ultimately be found to have violated trade rules and yet avoid retaliation by complying with the final ruling.

The major drawback of this solution is also its greatest strength: a preliminary injunction procedure may subject a respondent state to trade sanctions before a panel makes a final determination on the consistency of the challenged policy with trade law. As a result, the respondent state may face retaliation unless it suspends its national policy, which may ultimately be declared completely acceptable under WTO rules.²⁵⁹ Setting national trade policy is an important government function and restricting this policy power on the basis of a preliminary review is not insignificant. The costs of this approach are limited, however, by the nature of the remedy. The WTO does not have the power to suspend the challenged policy directly. The respondent government ultimately decides whether to maintain or suspend the policy. The major change created by the preliminary injunction system is that the state will have to bear a higher price in terms of trade concessions if it fails to follow the WTO's preliminary injunction order.

In addition, the drawbacks of the preliminary injunction system must be weighed against the advantages of establishing such a system, including minimizing the de facto escape clause. Ultimately, the costs of an erroneous preliminary injunction seem to be smaller than the costs of maintaining the current dispute settlement system, although it is impossible to know with certainty without implementing a new rem-

²⁵⁸ See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 188–92, 204 (1993) (discussing the problem of ambiguity in treaty terms and highlighting the beneficial role of dispute resolution bodies in resolving ambiguity).

²⁵⁹ There is also the possibility of an error in the other direction as well: the WTO may not issue an injunction against a challenged policy that is later determined to be a violation of trade rules. In this case, the complaining state would be without remedy until the litigation process is complete. This is not a cost of shifting from the current system to a preliminary injunction system, however, because this cost already exists under the current system. It would be a cost of choosing the preliminary injunction system over a retrospective and unconditional remedy system.

edy regime. This is an area where the states may be willing to experiment with the institutional design features of the dispute settlement system to fix the remedy gap.

C. *Resolving the Sequencing Issue: Changing the Timing of the Article 22.6 Arbitration Panel*

A more modest reform is to adjust the timing of the Article 21.5 compliance panel and the Article 22.6 remedy arbitration. The text of the DSU is ambiguous about the sequencing of these panels, and the most common practice now is to complete the compliance panel hearing and appeal before moving forward with the remedy arbitration.²⁶⁰ This significantly extends the period of time between the initiation of the complaint and the time when the complaining party could possibly suspend concessions.²⁶¹

One way to mitigate the remedy gap would be to allow the Article 22.6 remedy arbitration to proceed concurrently with (though independently from) the Article 21.5 compliance panel. This approach would have several benefits. It would permit the parties to have full hearings on the merits of the complaint. In addition, it would not prevent the compliance panel from performing its function: the decision from the compliance panel that the respondent state was in compliance with WTO rules would be sufficient to end any retaliation authorized by the Article 22.6 arbitration. The advantage is that this reform would shorten the period of time that a respondent state could breach trade rules without consequence. The compliance phase would continue as before, but the respondent would have less of an incentive to drag the proceedings out as long as possible.²⁶² Although this reform does not eliminate the remedy gap, it quickens the progression from the merits of a dispute to the authorization of sanctions (in the event a violating measure was not removed).

The clearest way to achieve this goal is to have the member states amend the text of the DSU to clarify the sequencing of arbitration and compliance panels, although this is unlikely to occur in the near term.²⁶³ The Appellate Body, however, might fashion a resolution to

²⁶⁰ See Valles & McGivern, *supra* note 65, at 65, 83–84 (noting the ambiguity and discussing different sequencing models).

²⁶¹ See *supra* Part II.

²⁶² See Horlick & Coleman, *supra* note 93, at 141–42 (noting the current resistance among states to comply with Appellate Body rulings).

²⁶³ Member states have been discussing the sequencing issue for over a decade without resolution. See Valles & McGivern, *supra* note 65, at 82–83 (discussing three different and conflicting precedents on the sequencing issue).

the member states' stalemate; it has the institutional competence to interpret ambiguities in the text of the WTO agreements and thus it could provide an interpretation of what procedural sequencing the DSU text requires.

Such an interpretation would not be unprecedented. The Appellate Body recently ruled on a similar sequencing issue in the *United States — Hormone Beef* and *Canada — Hormone Beef* cases.²⁶⁴ The EC brought complaints against the United States and Canada for continuing to suspend concessions against the EC when it issued a new, purportedly compliant measure regarding hormone-injected beef.²⁶⁵ The EC interpreted the DSU agreement to require that states cease trade retaliation when the respondent state withdraws the challenged measure and institutes a new measure.²⁶⁶ In rendering its decision, the Appellate Body was required to interpret the ambiguous DSU text to resolve a delicate and contentious issue of procedural sequencing, the correct timing of a compliance panel on a new measure and whether ongoing trade retaliation should be suspended pending a ruling. The Appellate Body rejected the contention of the EC that the United States and Canada could not maintain their suspensions of concessions while the compliance panel on the new measure was ongoing.²⁶⁷ In doing so, the Appellate Body conclusively resolved this sequencing issue: members can maintain their suspensions of concessions while the compliance panel is ongoing. A similar approach could provide resolution to the sequencing of Article 21.5 compliance panel and Article 22.6 remedy arbitration. States could proceed with the Article 22.6 arbitration concurrently with Article 21.5 compliance panel and thereby significantly shorten the remedy gap.

Other relatively simple reforms are also available, including aiding panels and the Appellate Body to adhere to the deadlines set forth in the DSU. If provided with greater resources, such as greater assistance in reviewing the parties' briefs and evidence, then much of the delay in issuing panel and Appellate Body reports could be reduced.

²⁶⁴ Appellate Body Report, *Canada — Continued Suspension of Obligations in the EC — Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008); Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008).

²⁶⁵ Appellate Body Report, *Canada — Hormones Dispute*, *supra* note 264, ¶ 1; Appellate Body Report, *United States — Hormones Dispute*, *supra* note 264, ¶ 1.

²⁶⁶ See Appellate Body Report, *Canada — Hormones Dispute*, *supra* note 264, ¶¶ 408–09; Appellate Body Report, *United States — Hormones Dispute*, *supra* note 264, ¶¶ 408–09.

²⁶⁷ See Appellate Body Report, *Canada — Hormones Dispute*, *supra* note 264, ¶ 409; Appellate Body Report, *United States — Hormones Dispute*, *supra* note 264, ¶ 409.

Neither of these two reforms (altering the sequencing of the Article 21.5 and Article 22.6 panels, and increasing the resources available to the DSU institutions) is a comprehensive solution, but together these reforms may be the most promising means of at least partially closing the remedy gap without amending the text of the DSU.

CONCLUSION

The WTO Dispute Settlement Understanding was born out of a compromise between states with different goals for the institution. A number of states wanted a system of arbitration that would quickly hear complaints and authorize trade retaliation. Others were less interested in establishing a rigorous adjudicatory system than in fashioning a multilateral settlement system as a means of curbing unilateral adjudication and enforcement of trade rules. The current remedy regime reflects these mixed motives. The DSU provides for retaliation only if the violation is not cured by the end of the dispute resolution process, and then only prospectively. While this design limits trade retaliation, it also creates a de facto escape clause that permits states to violate trade rules.

The remedy gap has significant detrimental effects. Most obviously, it creates a loophole in trade obligations. States can maintain policies that violate trade rules for several years without facing any retaliation. In addition, the remedy gap has a counterproductive effect on settlement negotiations because it gives respondent states an incentive to drag out dispute resolution as long as possible. It can also encourage complaining states to act outside of the WTO framework. States that are dissatisfied with the available remedies may resort to unilateral sanctioning and thereby undermine the authority of the institution. This last issue is of growing importance as the dispute resolution process at the WTO grows progressively longer. States' willingness to continue using the DSU as the exclusive means of dispute resolution in trade law depends on the institution's ability to offer prompt and effective resolution of complaints. The greater the remedy gap becomes, the greater the pressure to act outside the WTO framework. A preliminary injunction is the most suitable remedy for closing this gap because it targets the *current* government in the respondent state and maintains the link between retaliation and government noncompliance with WTO rulings.