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The Limits of WTO Adjudication: Is Compliance the Problem?

Juscelino F. Colares[*]

Mainstream international trade law scholars have commented positively on the work of WTO adjudicators. This favorable view is both echoed and challenged by empirical scholarship that shows a high disparity between Complainant and Respondent success rates (Complainants win between 80 and 90 percent of the disputes). Regardless of how one interprets these results, mainstream theorists, especially legalists, believe more is to be done to strengthen the system, and they point to instances of member recalcitrance to implement rulings as a serious problem. This article posits that such attempts to strengthen compliance are ill-advised. After discussing prior empirical analyses of WTO adjudication involving primary rights and obligations under the WTO agreements (i.e., substantive adjudication), this article expands the empirical study into compliance disputes. It finds that "enforcement" proceedings do protect the pro-free trade interests so overwhelmingly supported in substantive adjudication. Because that is the case, this article investigates the extent to which current levels of noncompliance might constitute a threat to this regime, and theorizes that the observed level is not only acceptable but a necessary feature of the system. I conclude by arguing that compliance-related issues must be viewed in a broader perspective that transcends narrow legalistic views and accounts for the multifaceted interests of, and differences among, WTO members. (JEL: K 33, K 41)

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Introduction[†]

Mainstream international trade law scholars characterize the WTO dispute settlement system's handling of cases as one of the most striking successes of the post-Uruguay Round legacy.[1] To them, judicialization of trade disputes and the "apt" work of WTO adjudicators in handling this caseload have increased the normative strength of the negotiated agreements and furthered the status of international trade as a rules-based regime. This favorable view is both echoed and challenged by empirical scholarship that shows a high disparity between Complainant and Respondent success rates (Complainants win between 80 to 90 percent of the disputes) in WTO litigation.[2] The more recent empirical study eliminated case docket differences (e.g., case subject matter, party status, income level and other litigant-specific characteristics), case selection and other alternative hypotheses as potential explanations for this divergence. It theorized that this discrepancy in success rates is the result of a systematic, one-sided readiness on the part of WTO adjudicators to construe WTO texts as creating obligations against Respondents, often in disregard of members' reserved regulatory competencies and the negotiated standards of review.[3]

[†] The author is grateful to _____and _____ for their helpful suggestions, which greatly assisted the author's research. Melissa Palmer provided excellent research assistance. This article was presented at the ASIL – International Law Group Biennial Conference at the University of Minnesota Law School (November 18-20, 2010).

[1] *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

[2] *See, e.g.*, John Maton & Carolyn Maton, *Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement*, 10 J. INT'L ECON. L. 317 (2007) (praising the DSB system as "independent from Member State influence."); Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 439 (2009) (faulting the DSB system for embracing an expansive form of judicial lawmaking that "consistently construes WTO law against Respondents" in substantive adjudication).

[3] *Id.* at 429.

Still, regardless of how one interprets these results, mainstream theorists believe more is to be done to strengthen the system, and they point to instances of member recalcitrance to implement DSB recommendations as a serious problem.[4] To this end, they propose reforms ranging from allowing for collective sanctions through multilateral enforcement to tightening enforcement deadlines so as to increase the incentives for compliance. This article posits that such attempts to strengthen compliance are ill-advised. First, the case for a compliance problem is weak: suspension of concessions seldom occurs, as Respondents tend to comply after losing the underlying case or following defeat in a compliance case. Furthermore, the rare instances of noncompliance after litigation has run its full course do not deprive successful Complainants of all they can expect to gain from litigating. Beyond allowing for the redress of grievances, litigation can also give Complainants advantages in ongoing trade negotiations.[5] Second, enforcement-enhancing proposals are premised on the notion that giving more power to third-parties charged with resolving disputes and monitoring enforcement will necessarily strengthen the normative obligations already prescribed in the trade agreements. This view naïvely assumes members can be made to comply even when compliance is contrary to their own interests. Finally, less-than-perfect compliance constitutes no threat to the trade regime. Rather, it is an essential escape valve in a system driven by increasing judicialization and adjudicator activism. Viewed in this more flexible perspective, noncompliance appears as a method of last resort, accommodating members' strong political and economic interests as they can no longer count on the diplomatic flexibility of the previous GATT system. Accordingly, instead of threatening the trade system's normativity, such rare deviations allow its continued operation while its rules, as interpreted through bilateral litigation, cannot properly accommodate certain losing parties' strong political economy constraints nor defer to the notable power asymmetries in the multilateral system.

Part I of this article outlines the general features of the WTO dispute settlement system and discusses how prior empirical analyses of adjudication have dealt with the uniform pattern of Complainant success. Because neither case, litigant or product-specific differences in disputes can account for the disparity in

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[4] *See* William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?*, *in* THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA 98 (Yasuhei Taniguchi et al ., 2007); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000).

[5] *See USDA: Brazil Seeks GSM 102 Changes To At Least Match Doha Draft Text*, Inside U.S. Trade World Trade Online (Apr. 30, 2010), available at www.insidetrade.com (last accessed Jun. 17, 2010) (describing how Brazil is currently using its victory in the Cotton dispute and its right to retaliate against the US to either eliminate this WTO-incompatible subsidy program "or at least change it to reflect the latest Doha round agriculture draft modalities text.") *and* LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 321 (John H. Jackson et.al, eds., 5th ed. 2008) (stating that "WTO members may be tempted to use the dispute settlement system to try to achieve what has eluded them in negotiations.").

Complainant/Respondent win rates, I discuss a number of competing theories (e.g., Respondent protectionism, settlement restraint effect, etc.) and explain why, so far, biased rule development seems to provide the most compelling explanation for this discrepancy. Part II expands the empirical analysis into compliance disputes and investigates whether this type of "enforcement" adjudication protects the pro-free trade interests so overwhelmingly supported in substantive adjudication. After detecting that is the case, I surmise that WTO adjudication is self-consistent, even if WTO adjudicators do not exhibit any outright bias in compliance cases, as, at that stage, mere unbiased application of rules will protect prior pro-free trade results. Part III investigates the extent to which noncompliance might constitute a threat to this regime, as prior literature has suggested, and explains the current level of noncompliance is a necessary feature of the international trade system. It also explains why proposals calling for increased WTO enforcement abilities are unlikely to improve compliance and posits that a minimum level of noncompliance affords flexibility to an increasingly judicialized and activist dispute settlement system. The article concludes by arguing that compliance-related issues must be viewed in a broader perspective that transcends narrow legalistic views of the trade regime and accounts for the multifaceted interests of, and differences among, WTO members.

I. The Structure and Operation of Substantive Adjudication

A. Background on the WTO Dispute Resolution System

To enable members to protect their bargained-for trade concessions (e.g., tariff reductions, elimination of non-tariff barriers, market access) against trade-restrictive measures, the WTO agreements provide a mechanism of binding dispute settlement.[6] WTO panels and the Appellate Body deliberate and make rulings on disputes submitted by aggrieved members under the supervision of the Dispute Settlement Body ("DSB"). Specifically, where either a panel or the Appellate Body finds that a challenged member's measure "impairs or nullifies" another member's "benefits accruing" under one of the "covered agreements," the adjudicator prepares a final report, and then submits it to the DSB for formal adoption.[7] Once the DSB meets, it must adopt the report unless, by consensus, it decides against adoption.[8]

This adoption-by-default rule represents a major departure from the former GATT system, which required a positive consensus by all parties, including

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[6] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, arts. 1(1), 7(2), 22(3), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. By the express language of the General Agreement on Tariffs and Trade ("GATT") 1994 Article 1(a), the provisions of GATT remain effective "as rectified, amended or modified by the terms of the" more recent WTO agreements. General Agreement on Tariffs and Trade 1994, art. 1(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

[7] *See id.* at art. XXIII; DSU at arts. 16(4) and 17(14).

[8] *Id.*

Respondents, before adoption of a report. Significantly, because violators can no longer rely on this particular *legal* safeguard to block enforcement, the new WTO regime effectively abolished the formal "veto" in trade disputes. That, to date, no report has been blocked[9] is as much a direct result of the operation of the new reverse consensus rule as it is proof of how the system has become increasingly judicialized, i.e., no longer dependent on final diplomatic negotiations among the affected parties. Suffice it to say that now the losing Respondent must bring its violating measure(s) into conformity with the prior ruling or face the prospect of lawful retaliation by its opponent (e.g., increase tariffs, suspension of intellectual property royalty payments, etc.) by an amount equivalent to the cost of the violation.[10] Whether the end of report blocking and the ensuing judicialization did effectively remove the veto from the trade system is a question I examine later.

B. The Legal Structure of WTO Substantive Disputes

By "substantive disputes," I mean disagreements as to the effective operation of the various substantive norms in the WTO Agreements, as distinguished from disagreements as to whether a defeated Respondent has satisfactorily adopted measures to comply with a prior report or judgment. This distinction is important not because there is intrinsic value in divining any ontological substance/procedure demarcation criterion in WTO law. Rather, it is useful because whether adjudication patterns observed in *substantive* litigation are also observed in *compliance* litigation can help one ascertain whether the WTO adjudicatory system ensures that successful litigants in one stage also carry their victories to the other stage, when compliance is the issue. Therefore, only by looking at *both* types of litigation can one make empirical statements about whether WTO adjudication is outcome-consistent, regardless of party status (i.e., aggrieved party or alleged violator), the posture in which one might appear in a case (i.e., Complainant or Respondent) or the original subject matter of the dispute (i.e., the agreement under which it arose).

Among the substantive norms used to gauge whether a measure amounts to a "nullification" of another member's rights—thus giving rise to a substantive dispute—the most important are the most-favored-nation ("MFN") principle, the national treatment or non-discrimination principle, and the general prohibition against quantitative (i.e., nontariff) measures. These norms generally prohibit discrimination among goods and services imported from or provided by any member and proscribe discrepancies in the treatment of foreign and domestic goods and services. Such broad requirements are subject to qualified exceptions. Specifically, members have retained the GATT-based right to apply offsetting tariffs to "dumped"[11] or

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[9] *See* World Trade Organization, Dispute Settlement: Appellate Body, Appellate Body Reports, http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited July 6, 2010).

[10] DSU at art. 22(2).

[11] Generally, "dumping" refers to the practice of selling products in the importing market at prices lower than their "normal value" (e.g., home market price, where available). *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade

impermissibly subsidized products that cause material injury to domestic producers.[12] A set of strong public policy exceptions was also preserved from the GATT years. Among these exceptions are measures deemed necessary to protect public morals,[13] measures relating to conservation of natural resources,[14] and emergency trade restrictions that safeguard a member's balance of payments.[15] In sum, this framework of general rules and exceptions form the bulk of substantive norms that constitute the most frequent grounds for bringing and defending against WTO substantive cases, the object of the empirical analyses to which I now turn.

C. Empirical Analyses of Substantive Case Decisions[16]

1. On Avoiding the Elephant in the Room

Scholarship on WTO dispute settlement is as extensive as it is varied in its assessment of the system's overall performance and its methods of inquiry. I focus primarily on empirical studies because they reveal a curious phenomenon: although analyses of case outcomes repeatedly show a high rate of Complainant success (generally ranging from 80 percent to the high 90s), there is very little discussion, much less a developed consensus, on what this might mean. For example, Hudec analyzed GATT dispute outcomes from 1948 to 1989.[17] He found that the GATT dispute settlement procedure, the precursor to the current WTO system, resolved a high percentage of disputes in favor of Complainants (88 percent overall).[18] Nowhere does he attempt to provide an explanation for the high Complainant win rate, except when he discusses antidumping ("AD") and countervailing duty ("CVD") cases.

Specifically, Hudec posits that "the typical arbitrariness of AD/CVD criteria" and "the ascension of AD/CVD measures to a place of importance in national trade policy might . . . be a sign of other, deeper tendencies toward noncompliant

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Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter AD Agreement].

[12] *See* GATT 1994 at art. VI; AD Agreement at art. 3; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 5, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 14, *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter SCM Agreement]

[13] GATT 1994 at art. XX(a).

[14] *Id.* at art. XX(g).

[15] *Id.* at arts. V, XII.

[16] Unfortunately, all prior empirical studies of WTO litigation (except Colares') are based on datasets that do not distinguish between substantive and compliance disputes. Because overall results in all studies are quite similar, this distinction, though important for purposes of Part II, will not be considered here.

[17] *See* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 273 (1993).

[18] *See id.* at 353.

behavior."[19] Unfortunately, other than an expression of his ideological opposition to these types of laws, Hudec's explanation limits itself to a particular set of cases and offers merely a conclusory assertion that Respondents lost because they are protectionists. That GATT & WTO Respondent and Complainant win rates have diverged over time, when the positive theory of litigation suggests they should converge at some point,[20] apparently has not prompted much reflection beyond the traditional "Respondent *qua* protectionist" fall back narrative. Indeed, this puzzle remained unaddressed until quite recently.

Other empirical studies have been more ambitious in that they attempt to test hypotheses about the operation of the WTO dispute settlement system, going beyond mere description of the main variables of litigation. Although not squarely addressing the question of concern here, these studies offer important theoretical explanations about phenomena related to the evolution of the WTO adjudicatory system. For instance, Guzman and Simmons look at settlement activity in WTO litigation and find that transaction costs, such as domestic political economy constraints, members' inability to make deals involving transfers in unrelated areas and members' general reluctance to procure settlement via cash payments, reduce the scope of settlement activity in WTO adjudication.[21] They also raise an important theoretical issue: the operation of the MFN principle might limit members' willingness to enter into settlements because they hesitate to offer concessions that "may have to be granted to every WTO member state."[22] This insight is significant because if, due to some feature of the WTO system's design, members face significant settlement constraints, high Complainant win rates might be attributed to Respondents' inability to settle. Similarly, despite its tremendous significance, this settlement-limitation effect has not received the attention it deserves (I return to this point later).

With a similar focus on settlement activity, Busch and Reinhardt find that Complainants are more likely to obtain better concessions in the consultations (i.e., pre-litigation) stage than later. They posit that the onset of full blown litigation increases domestic pressures in favor of the challenged trade restrictive measure and, thus, reduces the incentives for settlement.[23] Whether the MFN principle does in fact constrain settlement activity or whether the start of actual litigation reduces the size

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[19] *See id.* at 355.

[20] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 19 (1984). Specifically, the theory suggests that, absent information and stake asymmetries, parties tend to adjust their taste for litigation based on signals emanating from the litigation environment, with stronger cases settling rather than going to full adjudication.

[21] *See* Andrew T. Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO,* 31 J. LEGAL STUD. 205, 210-11 (2002).

[22] *See id.* at 210.

[23] *See* Marc Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158, 162-63 (2000).

of settlements, none of these articles say much about how the settlement rate is likely to affect the Complainant and Respondent litigation calculus and likelihood of success.[24]

2. The Dominant Narrative's Blind Spot

As discussed, most empirical analyses of WTO litigation either do not measure or fail to fully address the continuing success disparity between Complainants and Respondents.[25] Despite occasionally noting the empirical regularity in Complainants very high win rate, the empirical literature's remarkable fascination with the increasing judicialization of the WTO system and its casual adoption of received "Respondent-qua-protectionist" narratives contributes to an astonishing lack of reflection on the reasons for such an important asymmetry in the system. As an example, take the rarely questioned received view that a dispute resolution system predicated on free trade exists to correct the potential politically-motivated "tilt" of national agencies in favor of trade restrictive measures that put national trade policy in direct collision with international commitments.[26] Following this view, many commentators surmise, as Hudec and others do, that the high rate of national agency loss at the WTO (reflected in Respondents' very low win rate) is a mere direct result of the WTO adjudicatory system doing what it is supposed to do: reversing the effects of national agency protectionist bias.[27]

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[24] *But see* Colares, *supra* note 2 at 413-16.

[25] *See, e.g.*, HUDEC, *supra* note 17 at 355 (discussing the growth in the use of the WTO dispute settlement mechanism by all parties); William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 18 (2005)(focusing solely on the success of the "major users" of the WTO dispute settlement system when they appear as Complainants); Jeffrey L. Dunoff, *Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 322 (Cesare Romano ed., 2009) (arguing that, as a Complainant, the US "has been successful in virtually all of the cases it has pursued seriously," and explaining that the US generally complies when it loses because the DSB and the WTO rule-based system maximize US economic interests); *and* Marc L. Busch et al., *Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO* 1 (Int'l Ctr. for Trade & Sustainable Dev. Programme on Dispute Settlement, Issue Paper No. 2, 2008) (theorizing that LDCs are less likely to bring claims at the WTO due to a weaker legal capacity).

[26] *See, e.g.,* GARY HORLICK, WTO & NAFTA RULES AND DISPUTE RESOLUTION: SELECTED ESSAYS ON ANTIDUMPING, SUBSIDIES & OTHER MEASURES 15 (2003); Judith Goldstein, *International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws*, 50 INT'L ORG. 541 (1996); John M. Mercury, *Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?*, 15 NW. J. INT'L L. & BUS. 525 (1995); Arun Venkataraman, Note, *Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection*, 37 COLUM. J. TRANSNAT'L L. 533, 578-79 (1999).

[27] *See,* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 148 (Oxford Univ. Press 2005) (proposing that as bound tariffs decline, states have an

However, reliance on such a broad agency capture argument is problematic. For while agency capture might result from domestic producers' political mobilization to obtain trade protection, the same argument can be used to demonstrate that it is at least equally plausible that foreign producers, in alliance with import-consuming industries, are also able to engage in similar rent-seeking efforts, since the costs that duties imposed on them may exceed the benefits that domestic producers might derive from them. In fact, many US administrative proceedings, especially in the AD/CVD area, involve at least as concentrated downstream US consuming industries as they involve US producers seeking trade barriers (e.g., softwood lumber, steel, wheat, pork, etc.). As members of highly integrated industries in vertical production chains, foreign producers and domestic importing interests may actually present better candidates for collective action. Although not all agencies behave alike, at a minimum, one must view agency action as reflecting more than just domestic producers' rent-seeking efforts.

While the broader empirical question of whether national agencies have been faithful to the intent of the WTO agreements when applying national law lies outside the scope of this article, one must acknowledge that high Complainant success rates and their corollary, high rates of agency loss, are hardly direct evidence of bias correction, much less a confirmation that national trade restricting measures are protectionist. The empirical literature's tendency to look favorably at WTO litigation is at least partly attributable to its reliance on half-thought, outdated narratives that view this adjudicatory system as merely engaged in bias correction; a view that has not received the reflection it deserves. Indeed, regardless of one's subjective views on the national agency bias question, whether WTO adjudication's high rate of Complainant success and agency loss is a response to captured agency decisionmaking should be openly investigated and discussed, not assumed away as commentators rush to look at other presumably more testable hypotheses.

3. Complainant and Respondent Success Rate Asymmetry: The Search for an Answer

Two studies have sought to explain Complainants' overall high success rate in WTO adjudication and, for this reason, stand apart. Maton & Maton analyze all WTO disputes through 2004 and find that Complainants win 81.9 percent of panel rulings.[28] They also determine that neither Complainants' economic power, previous use of the DSB, nor the presence of third-party litigants can account for Complainants' win rate.[29] In light of these results, Maton & Maton refute prior anecdotal studies[30] that suggested WTO adjudicators are influenced by extra-legal pressures from more powerful members.[31] In concluding that their findings

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incentive to cheat "by inventing . . . nontariff barriers that [are] fiendishly obscure," thus perpetuating the received view that national agencies are but agents of protectionism).

[28] Maton & Maton, *supra* note 2 at 328.

[29] *Id.* at 325-28.

[30] *Id.* at 320-21.

[31] *Id.* at 333.

demonstrate WTO adjudicators "are immune from such pressures," [32] the authors, as others before them, pass on the opportunity to further investigate or theorize on their other major finding: the Complainant/Respondent success asymmetry.

a. Why Immunity from Member Influence Matters

Admittedly, Maton & Maton's finding that WTO adjudicators are not sensitive to Complainants' economic power is relevant as far as the win rate asymmetry is concerned: it eliminates one major source of bias from consideration. Yet, the absence of favoritism toward great economic powers, such as the US, EU and Japan, cannot prove that WTO adjudication is "immune" from *every* source of bias. Because WTO adjudication is essentially a "bilateral means" of solving trade disputes in a multilateral system,[33] observing a few major countries' success rates as Complainants could hardly provide the ultimate test for detecting all sources of bias. Arguably, any eventual tilt in the system is much more likely to express itself in the triumph of one version of multilateralism over another (e.g., adopting an activist liberal view of trade vs. adopting a jurisprudence that balances free trade against legitimate trade restrictions) rather than in the adoption of one or a few members' unilateral preferences. Indeed, powerful member influence, though undeniable, is significantly diluted in an organization with 153 members (as of July 2008).[34]

Thus, besides coding for winners and losers, to find any bias in the WTO adjudicatory system, one would have to look beyond the identity of the litigant (i.e., Country A or Country B) to the posture in which a litigant is appearing (i.e., Complainant or Respondent), and the arguments each is making under WTO law. For example, if it turns out that the *same* countries exhibiting high rates of success as Complainants also have low rates of success as Respondents, then one might be justified not only to discard bias for or against such countries—as Maton & Maton do—but also wonder if there is a bias against *all* Respondents. Yet, before one could make an argument for bias, one should investigate whether other variables, such as case subject matter, differences in standards of review or type of product involved, might explain such discrepancy. For it is possible that the same multilateral concerns that gave rise to differences among agreements might account for such disparities. Should that be the case, rather than being biased against Respondents, adjudicators might merely be adjusting their decisions to account for such agreement-based variations. Finally, if one finds that none of these variables can account for the consistently high Complainant success rate, then one might verify whether adjudicators' adoption of certain interpretive positions varies with respect to the posture of the litigant and the argument it makes. Only in the latter case can an argument for bias be made. Although Maton & Maton do not venture into formulating or rejecting such alternative explanations, they suggest that further

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[32] *Id.* at 333.

[33] *See* GOLDSMITH & POSNER, *supra* note 27 at 135.

[34] *See Understanding the WTO: Members and Observers*, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

research, incorporating a wider range of variables, would be necessary to more fully understand WTO adjudication.[35]

b. The Case for Biased Rule Development

Colares accepted Maton & Maton's suggestion, used a more comprehensive database that both included more recent cases (through September 2007) and coded for the usual variables (e.g., Income Level, Third-Party Involvement, etc.) as well as a number of additional variables (e.g., Case Type, Party Identity, Product Type, etc.).[36] One illustration: when considering the agreements under which disputes arose (coded under the "Case Type" variable), Colares hypothesized that the specific, more agency-deferential standard of review in the AD Agreement should lead to lower Complainant success rates in AD cases than the general, less deferential "objective assessment" standard of review applicable to disputes arising under other agreements.[37] He found that despite the agency-friendly, *Chevron*-like level of deference under the AD agreement,[38] Respondent win rates were actually lower (9 percent) in AD cases than in any other type of dispute.[39]

After finding that Complainants' success rates remained high (i.e., 80 percent and above) regardless of differences in categories of cases and litigants considered, Colares discussed why *none* of the alternative empirical explanations, such as case selection, stake and information asymmetries and the potential MFN settlement-constraint effect, could account for Complainants' stellar litigation performance.[40] In fact, because neither case-specific distinctions, litigant-based variations nor alternative explanations could explain Complainant success and the *same* countries exhibiting high rates of success as Complainants also had low rates of success as Respondents, Colares pondered the possibility of a bias against *all* Respondents.[41] This bias, defined as "the result of a process of authoritative normative evolution . . . that expresse[s] itself with a tilt favoring Complainants,"[42] if detected in WTO decision patterns, could explain Complainants' pervasive success in every type of WTO substantive dispute.

To verify the existence such pro-Complainant decisional patterns, Colares looked closely at two sets of cases: the first ten AD disputes, where adjudicators

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[35] Maton & Maton, *supra* note 2 at 333-34.

[36] Colares, *supra* note 2 at 402-12.

[37] DSU at art. 11.

[38] *See* AD Agreement at art. 17(6) (stating that a national measure will be in conformity with the Agreement if it rests upon a permissible interpretation of law and that agencies' fact findings will not be disturbed, even when "the panel might have reached a different conclusion," so long as they are "unbiased and objective").

[39] Colares, *supra* note 2 at 403.

[40] *Id.* at 412-22.

[41] *Id.* at 422.

[42] *Id.*

would presumably explain their views on the AD Agreement's more agency deferential standard of review; and disputes involving the use of declarations arising under different agreements (e.g., AD, GATT, SCM and the Agreement on Government Procurement[43]).[44] He explains the choice of these cases on two separate grounds. First, the AD cases not only have important precedential value as early cases, but also contain the WTO adjudicators' earliest and most considered justification for striking down agencies' decisions under the most pro-agency standard.[45] Indeed, in light of the high rate of agency reversal in these disputes, this would be the ideal setting in which to verify the occurrence of bias. Second, the cases involving declarations span different areas under WTO law, thus providing a broader context in which to detect bias. Moreover, in these cases, Respondents and Complainants argued for and against giving binding effect to declarations, and WTO adjudicators made seemingly irreconcilable rulings, sometimes construing declarations as binding, other times construing them as merely aspirational.[46] Should decisions to give declarations one effect or the other vary with respect to the *posture* in which a litigant appears, one would not only reconcile these rulings, but argue bias is at least a plausible explanation, since declarations embody the intent of negotiators during the same round of negotiations, employ similar language and, thus, presumably deserve the same treatment.

In both sets of cases, Colares identifies two central tendencies: *hollowing out Respondents' rights under the agreements* (e.g., by conflating the AD and DSU standards of review into an amorphous de novo standard, by giving no effect to declarations that favor Respondents, etc.) and *expanding the scope of Respondents' obligations beyond the negotiated agreements* (e.g., by creating extraneous, ad hoc tests to gauge Respondents' conduct during investigations, by finding an obligation to engage in multilateral negotiations before implementing regulations where none previously existed, etc.).[47] He argues that, combined, these decisions have promoted trade liberalization at the expense of the reservations members made during negotiations, effectively reducing Respondents' regulatory discretion.[48] While, legally, the result is a jurisprudence that "clarifies the existing provisions of the agreements consistently in one direction"[49] (i.e., in favor of Complainants), politically, the practical consequence is the continuous "transfer of decisional power" away from members to a select few WTO adjudicators.[50] This creation of

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[43] Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter GPA].

[44] Colares, *supra* note 2 at 423-24, 429-30.

[45] *Id.* at429-30.

[46] *Id.* at 430-35.

[47] *Id.* at 436.

[48] *Id.*

[49] *Id.* (citation omitted).

[50] *Id.* at 437.

nonnegotiated obligations under the guise of interpreting the negotiated agreements, Colares argues, goes beyond the scope of the original authorization to act as neutral third parties in disputes involving endogenously incomplete contracts.[51] In sum, Colares faults WTO adjudicators *not* for completing the "optimally incomplete" WTO agreements, but for completing them *consistently* against Respondents.[52]

That WTO adjudicators' interpretive positions across a broad range of disputes vary with respect to the posture and argument of the litigant explains why focusing on the identity of particular winners and losers would not reveal the tangible bias in the system. Yet, case-transcending trends do exist, can account for the systematic pro-Complainant win rate and, more importantly, can explain the puzzling lack of convergence in Complainant and Respondent success rates, even after a decade and a half of operation.[53]

c. Challenges to Biased Rule Development

If case selection, information asymmetry and stake asymmetry cannot account for the sustained pattern of Complainant success, as Colares claims,[54] then bias is a serious contender among theories that would explain why WTO adjudication outcomes deviate from the positive theory of litigation's prediction that Complainants and Respondents must experience a roughly equivalent share of litigation success. One still has to consider the potential explanatory power of a few additional theoretical rivals: the familiar "Respondent qua protectionist" argument, the "settlement-restraint" effect and the "low volume of filings" paradox.

i. The Respondent *qua* Protectionist Argument

As the most commonly advanced explanation for the sustained pattern of Complainant success in dispute resolution,[55] the protectionist argument is overbroad in its assumption that Respondents are always motivated by protectionist pressures, never acting to vindicate legitimate, WTO-compliant regulatory policy. Remarkably, protectionism alone cannot fully explain why WTO adjudicators would develop an AD jurisprudence that disregards the more deferential AD standard of review if they are merely reacting against cheating.[56] If that were true, members would simply not

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[51] *Id.*

[52] *Id.* at 397 (citation omitted).

[53] The data in this article is current through September 2009 and confirms Colares' prior results. *Compare id.* at 419-422 *with infra* Part II.B.3.

[54] Colares, *supra* note 2 at 412-13, 416-17 (citation omitted).

[55] *See generally* HORLICK, *supra* note 26 at 15; Goldstein, *supra* note 26; Mercury, *supra* note 26; HUDEC, *supra* note 17; J. Michael Finger & Tracey Murray, *Antidumping and Countervailing Duty Enforcement in the United States in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT?, 241 (J. Michael Finger ed., 1993).

[56] *See, e.g.*, Colares, *supra* note 2 at 423-29 (demonstrating how the *Egypt-Steel Rebar* panel, in applying the DSU "objective assessment" standard of review (Art. 11) "simultaneously" with the AD standard (Art. 17.6(i)), engaged in a more intrusive review of the agency's fact-finding than the AD standard authorizes).

meet the standard, no matter how leniently or restrictively construed. Similarly, agency protectionism cannot reconcile rulings that give different effect to declarations, shifting their legal status according to the particular interests advanced by Complainants while restraining otherwise legitimate agency action.[57] In sum, the result is a pattern of decisions that systematically favors Complainants not because adjudicators are correcting national agency protectionism, but because adjudicators have adopted a result-driven, teleological version of free trade that requires such interpretive contortions.

ii. The Settlement-Restraint Effect

A more serious competitor to the bias theory would be the existence of structural constraints on Respondents' ability to settle disputes. As discussed earlier, Guzman & Simmons suggest that the MFN principle might constrain settlement activity because offering concessions in one dispute, a prerequisite for any settlement, triggers the obligation to extend similar concessions to all other WTO members.[58] Arguably, in light of the MFN requirement, Respondents would naturally hesitate to offer concessions, opting instead for full adjudication of even weak cases, which, in turn, would explain their higher than expected, non-converging rate of loss. If this argument is well founded, Colares' bias theory would be harder to support, for even in unbiased adjudication, Respondents' win rates could not converge with Complainants' if Respondents are consistently adjudicating weak cases. However, this settlement-restraint effect is theoretically flawed and can be refuted empirically. While theoretically bound by the MFN requirement, WTO members are exempt from extending concessions to all other members when they are already in or enter into Preferential Trade Agreements ("PTAs"), a fundamental exception to the MFN principle.[59] Although one would not argue that members enter into PTAs solely for this particular reason, their existence frees members from the MFN's unconditional multilateral reciprocation requirement, thus attenuating any the settlement-constraining effect the operation of this principle might cause.

The MFN thesis also fails empirically. Colares tested its plausibility by separately regressing Respondents' trade-to-GDP ratios and import-to-GDP ratios against their settlement rates. If the MFN principle has a settlement-constraining effect, Colares hypothesized, this effect will increase as Respondents' trade dependence increases. Specifically, the higher a Respondent's trade-to-GDP or import-to-GDP ratio is, the less likely it is to settle, because any concession granted has a comparatively larger impact on its economy.[60] Because neither of these regression models, nor their individual regressors, were statistically significant (.05 probability level), Colares refuted the hypothesis that Respondents' concerns over the

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[57] *See, e.g., id.* at 430-35 (comparing the interpretation of a pro-Respondent declaration as merely aspirational in *US–Leaded Bar* with the interpretation of a pro-Complainant declaration as effectively binding in *US–Shrimp/Turtle*).

[58] *See* Guzman & Simmons, *supra* note 21 at 210 *and* GATT 1994 at art. I.

[59] *Id.* at art. XXIV.

[60] Colares, *supra* note 2 at 414-15.

potential economic impact of concessions, the MFN effect, depresses the settlement rate. The lack of empirical support for an MFN-based settlement-constraining effect, besides providing indirect support to the idea that there are flexible ways around the MFN principle, also conforms to earlier findings of substantial settlement activity in GATT/WTO litigation.[61] Because the MFN thesis has clear theoretical limitations and is contradicted by empirical evidence, the high rate of Respondent losses is not the product of having to litigate weak cases that cannot be settled. This does not mean that Respondents litigate only strong cases, it merely demonstrates that MFN pressures cannot account for the lack of win rate convergence.

iii. The Low Volume of Filings Paradox

Finally, one may counter that if the high rate of Complainant success is the result of bias, then it would be difficult to explain the paradoxically small number of disputes adjudicated so far (117 adopted reports as of September 2009). That rational Complainants would file cases *seriatim* to maximize utility from biased adjudication is hardly the necessary result, however. In a multilateral system, high success in bilateral litigation will not necessarily lead to more filings if Complainants realize that every trade liberalizing decision creates precedent that further restricts the universe of regulatory choices they may want to adopt in the future. Viewed in this way, appearing before a court that is more than willing to restrain members' ability to regulate trade can produce an interesting form of "winner's curse," and would thus explain why a potential biased adjudicator might not be so attractive, even to the favored litigant. In fact, in this system, the most litigious members have also been the most frequent Respondents and the latter experience might explain their caution to use a system that will further reduce their discretion as sovereign states. Plausibly, their inability to achieve a similar level of success as Complainants when appearing in the opposite posture has apparently served them well.

d. Implications of Biased Rule Development

The bias theory, if correct, would fill a significant gap in the empirical literature on WTO adjudication, a gap that, to date, has not been closed by any serious, overarching explanation for the existence of a strikingly uniform pattern of Complainant success, regardless of case, litigant or product-specific differences in disputes. A pro-Complainant bias would imply that, far from optimally balancing the value of trade liberalization against the interest in regulatory diversity—a balance members struck by negotiating terms intended to safeguard "the values and norms

[61] *See* Busch & Reinhardt, *supra* note 23 at 158-59 (stating that "fully three-fifths of all disputes end *prior* to a panel ruling, and most of these without a request for a panel even being made."). It should be noted that their methodology for counting cases differs from Colares'. Unlike Busch & Reinhardt, who count cases from the moment a request for consultations is made (i.e., including the pre-litigation stage), Colares counts only cases in which a panel is requested. This explains why Colares finds a much lower rate of settlement (about 30 percent). *See* Colares, *supra* note 2 at 413. As discussed *infra* Part II.B.3, this difference is quite important in the discussion regarding case selection.

that shape"[62] their different societies (e.g., GATT, art. XX)—WTO adjudicators have adopted an ambitious judicial philosophy that teleologically advances a liberal view of trade and deviates from the considered original will of the WTO members.

This finding has many other serious implications, some of which Colares discussed (e.g., displacement of members' legitimate policy choices, impact on current trade negotiations, etc.),[63] but, more importantly, it may explain why some powerful members, in the absence of a formal veto, have occasionally delayed compliance or refused to comply with certain DSB judgments. After all, if the involvement of third parties does not lead to consistently neutral verdicts, then dispute resolution is no longer superior to bilateral normal diplomatic channels or, depending on the stakes involved, occasional noncompliance,[64] the topic to which I now turn.

II. The Legal Structure and Role of Compliance Adjudication

A. General Remarks

As previously explained (see Part I.A.), following DSB adoption of a panel or Appellate Body report, the offending country must eliminate the violating measure and bring its practices into compliance with the ruling.[65] Members must comply within a "reasonable time,"[66] as failure to do so triggers the possibility of suspension of concessions (i.e., retaliation) on the part of the prevailing member.[67] When it is impractical for a Member to comply immediately, members may resort to binding arbitration to determine the "reasonable period of time" for compliance ("Article 21(3)(c) Arbitration").[68] Where there is disagreement regarding whether a member has complied with the panel or AB's recommendations, the DSB designates, when possible, the original panel (i.e., the panel that decided the substantive case) to settle such disputes ("Article 21(5) Review").[69] Should the original Complainant also prevail in the latter type of dispute, it may request compensation (e.g., further tariff concessions, increased market access, etc.) in lieu of suspending concessions against the offending member.[70] Finally, when disputes over the level or method of retaliation arise, members shall submit such disputes to arbitration ("Article 22(6) Arbitration"), which shall also "be carried out by the original panel," if these

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[62] Dani Rodrik, *Feasible Globalizations*, *in* GLOBALIZATION: WHAT'S NEW? 196, 199 (Michael M. Weinstein ed. 2005).

[63] Colares, *supra* note 2 at 435-38.

[64] *See* Andrew Guzman, *Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 307-08 (2002).

[65] DSU at art. 23(2)(a).

[66] *Id.* at art. 22(1).

[67] *See id.* at art. 22.

[68] *Id.* at art 21(3)(c).

[69] *See id.* at art 21(5).

[70] *See id. at* art. 22(2).

adjudicators are available.[71] In these cases, the arbitrator's jurisdiction is limited to the amount of nullification or impairment and whether the form of retaliation is allowed under the agreements; the arbitrator may not revisit previously litigated issues.[72] Because the mere possibility of applying such countermeasures provides a substantial incentive for compliance, suspension of WTO obligations against the offending member is generally the exception—members usually comply or offer some form of compensation.

B. An Empirical Analysis of Compliance Decisions

1. A Caveat on the Implications of Posture Reversals

Clearly, compliance disputes involve issues ancillary to, yet not directly involving, adjudication of WTO substantive rules. Remarkably, previous empirical scholarship on WTO adjudication tends not to segregate and compare compliance and substantive adjudication when analyzing the overall operation of the system. Yet, the issues decided under each type of litigation are not the same. Specifically, whereas substantive adjudication considers whether members' conduct conforms to their primary WTO obligations, compliance adjudication considers members' conduct with respect to a duty of a derived or secondary nature: the duty to comply with WTO *rulings*.

This distinction would not matter much if one observed no major discrepancies in outcomes between these forms of litigation. Even if that proved to be the case, having a similar outcome profile does not obviate the need to investigate how each form of litigation might affect Complainants' and Respondents' interests differently. For example, Complainants in substantive disputes may not be Complainants in certain compliance disputes. In Article 22(6) "Level of Suspension" Arbitration, a successful Complainant might appear as a Respondent if the erstwhile Respondent challenges the amount of retaliation the erstwhile Complainant believes it can rightfully impose pursuant to its prior victory. In this particular context, the current Complainant's grievance is the erstwhile Complainant's proposed level of retaliation, which will only be an impermissible trade restriction if it exceeds the level of actual nullification or impairment (i.e., overdeterrence). Therefore, the potential for significant posture reversals blurs the categories of litigants and disturbs the conventional perception of the interests litigants represent. As the example illustrates, traditional perceptions of erstwhile Complainants as favoring trade liberalization and erstwhile Respondents as wishing to restrict trade are no longer accurate and must be abandoned.

Given this possibility, posture reversals might call into question any generalizations about the relative success of Complainants in WTO adjudication that do not account for the different interests that Complainants and Respondents may represent in different litigation contexts. Thus, if WTO adjudication is indeed biased towards a particular version of free trade that produces a systematic pattern of Complainant wins in substantive cases, that bias is not likely to manifest itself in

[71] *Id.* at art. 22(6).

[72] *See id.* at art. 22(7).

favor of Complainants when they no longer defend the pro-free trade argument at the compliance stage. This caveat leads to two insights: the first somewhat trivial, the second a bit more surprising. First, because a bias in favor of a particular version of free trade expresses itself in the vindication of that interest, not in the success of the litigant who may have originally spoken for it, compliance outcomes need not be as systematically pro-Complainant as substantive outcomes. A "litigant reversal" effect, the result of possible shifts in Complainant and Respondent interests at the compliance stage will disturb the systematic pattern of high Complainant wins in substantive adjudication. Second, since mere unbiased application of compliance rules is enough to protect the prior extremely pro-free trade results achieved in substantive litigation, WTO adjudicators need not exhibit any bias in compliance litigation: ensuring the enforcement of prior judgments is all that it takes. If these two trends are observed, one should be able to conclude that WTO adjudication is unsurprisingly self-consistent, even if biased.

2. Data and Methods

a. Defining a Compliance Case

For purposes of this study, a "compliance case" is a dispute in which a WTO member challenges another member's conduct in light of its duty to comply with, or its rights under, a prior WTO ruling. These disputes occur some time after the DSB adoption of a panel or Appellate Body report and are primarily concerned with enforcement. Compliance adjudication involves the three major disputes defined in Part II.A., i.e., Article 21(3)(c) "Reasonable Time" Arbitration; Article 21(5) "Conformity" Review; and Article 22(6) "Level of Suspension" Arbitration. As usual, data on such adjudication was collected from the WTO case database.[73]

b. Determining Compliance Case Outcomes

A compliance case is deemed "final" when the DSB either adopts panel or Appellate Body reports following Article 21(5) Reviews or approves the results from Article 21(3)(c) and Article 22(6) Arbitrations. A "settled" compliance case is any case in which: (1) the complaining party withdraws the panel or arbitration request; (2) the DSB defers the establishment of a panel[74] (usually to due to a request by both parties); (3) the DSB establishes a panel,[75] but there has been no reported activity in the past three years; (4) the parties formally request that a panel stop its work[76] or agree to postpone arbitration and neither panel nor arbitrator engage in deliberations for more than twelve months (lapse of authority); or (5) the parties officially notify the DSB that they have reached an agreed solution in a panel or arbitration

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[73] *See* World Trade Organization, Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm (last visited July 7, 2010).

[74] *See* DSU at art. 6(1).

[75] *See id.* at art. 6.

[76] *See id.* at art. 12(12).

proceeding.[77] Finally, a compliance case is considered "active" when a panel or arbitration request has been made and the panel, Appellate Body or arbitrator is currently working toward a formal disposition of the case or the parties have been engaged in negotiations for 12 months or less. The following table contains a breakdown of all WTO cases from January1995 through September 2009:

TABLE A: STATUS OF COMPLIANCE CASES

Case Status	Number of Cases
DSB Final Rulings	61
Settled	17
Active	4
Total	81

These 61 final compliance rulings arose out of 42 original substantive disputes. Given that, to date, a total of 117 DSB substantive reports have been adopted, this indicates that outright compliance occurred about 64 percent of the time (75 out 117 cases),[78] with the remaining decisions (42 cases) eventually leading to some kind of compliance dispute.

Before providing a more detailed analysis of compliance litigation outcomes, a few methodological points are in order. First, litigants' success rates are calculated from the universe of final rulings (settled and active cases are not considered). Second, as usual, a Complainant is the party that initially files a request for a compliance proceeding. Because Article 22.6 arbitrations are mostly filed by erstwhile Respondents seeking lower levels of retaliation (i.e., less trade restriction) on its exports, the reader should abandon traditional characterizations of litigants and focus instead on the interests they are likely to represent. Third, a Complainant wins a case any time it prevails in its major claim, regardless of Respondent's occasional success in one or more secondary claims. Eliminating the possibility of "mixed" cases in this manner simplifies the description and analysis of the results without compromising accuracy.

[77] *See id.* at art. 3(6).

[78] Busch and Reinhardt found that the compliance rate increased from 40 percent under GATT to 66 percent under the WTO. *See* Marc L. Busch and Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC, 457 (Daniel L. M. Kennedy and James D. Southwick, eds., 2002). Another study, focusing on the first ten years of WTO dispute settlement, reported an 83% compliance rate. *See* William Davey, *Compliance Problems in WTO Dispute Settlement,* 42 CORNELL INT'L L.J. 119 (2009).

3. Results

A mode of dispute settlement essentially concerned with enforcement, compliance adjudication focuses on timing to comply, whether compliance has occurred and whether the proposed level of retaliation correctly reflects the level of trade impaired. Table B.1 illustrates the distribution of compliance cases. It shows that the vast majority of compliance adjudications (52 cases or 85.25 percent) never reach the retaliation stage, as members may only retaliate after obtaining authorization, which requires filing for arbitration under Article 22(6). Considering that only nine disputes out of 117 cases (7.69 percent) came to this final stage, one can conclude, as others have,[79] that the WTO dispute settlement system has an admirable record of compliance. That offending members may at times abuse the system to gain a temporary trade advantage—first, violating a rule; second, litigating a potentially meritless case; third, resisting compliance by exploiting procedural tactics at the compliance stage only to finally comply (or not)—does not belittle this record. From ad hoc diplomacy to stronger sanctions authorized by third-party adjudicators, alternative methods of dispute settlement, with varying structures of incentives, simply cannot ensure countries will act with good faith in all international economic relations.

TABLE B.1: COMPLIANCE CASES

Compliance Case Types	Number of Compliance Cases
Article 21(3)(c) Arbitration	26
Article 21(5) Review	26
Article 22(6) Arbitration	9
Total	61

Although one should be cautious when interpreting results based on a limited number of cases, a look at how litigants have performed across compliance case categories reveals that Complainant Success Rates vary between 56 percent and 92 percent (see Table B.2). Clearly, Complainants' success rates are no longer uniformly high, as in substantive adjudication. This wide variation in litigants' success rates might be an early indication that, at least at this stage, adjudication is responsive to the relative strengths and weaknesses of litigants' cases. Yet, the occurrence of litigant reversals in compliance adjudication calls for a closer scrutiny of Complainant win rates.

[79] *See, e.g.*, *id.* at 122; Steve Charnovitz, *The Enforcement of WTO* Judgments, 34 YALE J. INT'L L. 558, 562 (2009); Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319, 323 (2008). Part III will discuss some of these authors' assessments and critical views regarding compliance in the WTO system.

TABLE B.2: COMPLAINANT WIN RATES IN COMPLIANCE CASES

Compliance Case Type	Complainant Success Rate
Article 21(3)(c) Arbitration	76.92%
Article 21(5) Review	92.31%
Article 22(6) Arbitration	55.56%

To examine the potential impact of a litigant reversal effect, I looked at erstwhile Complainants' performance in compliance adjudication. This required accounting for all instances in which the Complainant in the underlying WTO dispute became the Respondent in the compliance proceeding. This happened in four of 26 Article 21(3)(c) arbitrations[80] and in eight of nine Article 22(6) arbitrations.[81] Again, as Table B.3 illustrates, erstwhile Complainants' success rates vary widely and differ significantly from the results observed in substantive adjudication. Yet, more striking is the sharp separation between what they can accomplish as litigants in Article 21(3)(c) and 21(5) proceedings versus Article 22(6) arbitrations. As expected, this breakdown of erstwhile Complainants' systematic pattern of wins tracks the shift in the nature of interests they represent in "level of suspension" arbitrations. At this stage, due to the nature of WTO remedies (generally retaliation against the recalcitrant member's exports), erstwhile Complainants are pursuing trade restrictions. They are now on the opposite side, facing an adjudicatory system that favors a liberal version of free trade (see Part I discussion on substantive adjudication) and is invested in ensuring timely and full compliance with prior rulings (as are erstwhile Complainants), but is clearly weary of approving new trade restrictions at the level erstwhile Complainants desire.

[80] *See* Arbitration Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15 (May 29, 1998); Arbitration Report, *Chile–Taxes on Alcoholic Beverages*, WT/DS87/15 (May 23, 2000); Arbitration Report, *Canada–Patent Protection of Pharmaceutical Products*, WT/DS114/13 (Aug. 18, 2000); Arbitration Report, *Chile–Price Brand System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/13 (Mar. 17, 2003).

[81] *See* Arbitration Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB (July 7, 2009); Arbitration Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (Apr. 9, 1999); Arbitration Report, *Brazil–Export Financing Programme forAircraft*, WT/DS46/ARB (Aug. 28, 2000); Arbitration Report, *United States–Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/ARB (Aug. 30, 2002); Arbitration Report, *United States–Antidumping Act of 1916*, WT/DS136/ARB (Feb. 24, 2004); Arbitration Report, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/ARB (Aug. 31, 2004); Arbitration Report, *Canada–Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB (Feb. 17, 2003); Arbitration Report, *United States–Subsidies on Upland Cotton*, WT/DS267/ARB (Aug. 31, 2009).

TABLE B.3: ERSTWHILE COMPLAINANT WIN RATES IN COMPLIANCE CASES

Compliance Case Type	Erstwhile Complainant Success Rate
Article 21(3)(c) Arbitration	92.31%
Article 21(5) Review	92.31%
Article 22(6) Arbitration	33.33%

One also observes litigant reversals in Article 21(3)(c) Arbitrations, yet no decline in erstwhile Complainant success rates. This is easy to explain and further corroborates the earlier expectation that the interest represented, not initial posture, matters. First, erstwhile Complainants actually won all four cases in which they appeared as Respondents. Second, and more importantly, erstwhile Complainants' high success rates in "reasonable time" arbitrations are attributable to their pursuing timely compliance, not trade restrictions. Finally, they do well because their opponents (i.e., erstwhile Respondents) are typically resisting compliance by arguing for a longer interpretation of the reasonable time to comply. Thus, erstwhile Complainants are unlikely to sue prematurely, as doing so undermines cooperation and reduces the likelihood of voluntary compliance. Having won in substantive litigation, a wait-and-see strategy on the part of erstwhile Complainants increases the chances of compliance or success should subsequent litigation prove necessary. Meanwhile, erstwhile Respondents know that they can only play for time and eventually comply or face sanctions.

Viewed in this light, erstwhile Complainants' performance across these case categories confirms the sense that judicialization through DSB proceedings is a success, at least as far as compliance adjudication is concerned (of course, substantive litigation is a different story). Indeed, this analysis reveals that compliance proceedings overwhelmingly preserve the results winners obtained in prior adjudication, protecting the interests such litigation vindicated only insofar as they further trade liberalization. One should also recognize that adjudicators are helped by the fact that they face a much clearer set of questions here than in substantive litigation. At this stage, an offending member can either comply within a reasonable period or not; the object of such compliance is no longer some abstract norm, but a prior ruling by usually the same set of panelists; and determination of lawful levels of retaliation in monetary terms, while technical at times, does not necessarily require complex hermeneutic analysis. Arguably, previously sensitized adjudicators, reviewing generally less complex questions, with more available information, can more easily distinguish genuine compliance issues from mere dilatory tactics or cheating behavior. In combination with the effect of shifts in erstwhile Complainant and Respondent interests, these additional features help explain why bias need not be present at this stage to ensure that WTO adjudication is self-consistent.

One could challenge the validity of these findings by arguing that mere investigation of fully adjudicated compliance disputes cannot provide an understanding of the general nature of WTO compliance adjudication, as several disputes are settled after filing and others might be settled with no filing ever taking

place. Arguments for the existence of a case selection effect in the compliance context fail for two reasons. First, post-filing settlement activity has a limited impact in the compliance litigation context, as three-quarters of all cases (61 of 81 cases) in which a panel or arbitrator was requested have been fully adjudicated.[82] This high full-adjudication-to-filings ratio is the exact opposite of patterns observed in US civil litigation, where only 1.8 percent[83] of federal civil cases[84] are fully adjudicated and up to 72 percent of the disputes are terminated due to settlements.[85] Clearly, the low frequency of post-filing settlements in WTO compliance cases undercuts the selection argument, as the subset of fully adjudicated disputes is fairly representative of what takes place in overall litigation. Second, that settlements might have occurred following substantive adjudication, thus eliminating potential compliance case filings—indeed, 75 out of 117 substantive rulings never led to compliance filings[86]—does not produce a selection effect relevant in this context. Because compliance adjudication is only concerned with cases involving *resistance* to compliance, the occurrence of settlements is irrelevant to this form of litigation since parties obviously agreed to comply.

4. The Aftermath of Compliance Litigation

The above analysis of compliance cases reveals an adjudicatory system operating with high consistency, with erstwhile Complainants achieving a high rate of success so long as they maintain pro-free trade positions. Of course, this still leaves the question of whether winners are made whole through the system, meaning when all litigation is done. As Table B.1 demonstrates, the DSB adjudicated disputes concerning the level of suspension of concessions due to noncompliance in nine cases.[87] It authorized suspension of concessions in six cases.[88] Of these, actual

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[82] *See supra* Table A.

[83] Percentage from 2002. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

[84] Note that even in the realm of litigation that often involves high monetary stakes and litigants with substantial resources, such as intellectual property cases, the rate of trials as a percentage of dispositions is very low (2.4% in the US). *See id.* at 463; PRICEWATERHOUSECOOPERS LLP, 2007 PATENT AND TRADEMARK DAMAGES STUDY (2007), *available at* http://www.pwc.com/extweb/service.nsf/docid/3ca24a75615f03948025711e004b69a0/$file/2007_Patent_Study.pdf (reporting that the median award amount for 2005 was $6,000,000).

[85] *See* Gillian Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 729–33 (2004) (using data from 2000, including consent judgments, but not cases disposed of through abandonment or default).

[86] *See supra* Table A and accompanying discussion.

[87] *See also* Appendix containing detailed information about these cases and the level of suspensions authorized.

[88] The suspensions were granted at DSB Meetings based on the requests of the WTO members in the following disputes: *DSB Meeting Minutes*, WT/DSB/M/59 (Apr. 19, 1999) &

retaliation occurred in only *four* instances, as Canada and Brazil chose not to impose largely offsetting sanctions upon each other in the aftermath of their aircraft disputes.[89] Only two of the WTO's most powerful members, the EC (two cases) and the US (two cases), failed to comply after compliance litigation had run its course and submitted to retaliation.[90] After a period of retaliation, the US eventually complied.[91]

WT/DSB/M/80 (May 18, 2000), request by US & Ecuador in *European Communities–Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27; *DSB Meeting Minutes*, WT/DSB/M/65 (July 26, 1999), requests by Canada and US in *European Communities–Measures Concerning Meat and Meat Products (Hormones),*WT/DS48 & WT/DS26; *DSB Meeting Minutes*, WT/DSB/M/94 (Dec. 12, 2000) request by Canada in *Brazil–Export Financing Programme for Aircraft*, WT/DS46; *DSB Meeting Minutes*, WT/DSB/M/149 (May 7, 2003) request by EC in *United States–Tax Treatment for Foreign Sales (FSC)*, WT/DS108; *DSB Meeting Minutes*, WT/DSB/M/145 (May 18, 2003), request by Brazil in *Canada–Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222; *DSB Meeting Minutes*, WT/DSB/M/180 (Dec. 17, 2004) & WT/DSB/M/178 (Nov. 26, 2004), requests by Brazil, EC, India, Japan, Korea, Canada, Mexico and Chile in *United States–Continued Dumping and Subsidy Offset Act (Byrd)*, WT/ DS217 & WT/DS234. On November 11, 2009, the WTO granted Brazil the right to apply sanctions against US products up to $294.7 million annually. Daniel Pruzin, *Brazil Gains WTO OK to Impose Sanctions Over U.S. Cotton Subsidies, Weighs IP Rights*, 26 INT'L TRADE REP. (BNA) 1624 (Nov. 26, 2009). This authorization was not included in this article because I only considered decisions made through September 2009.

[89] *See* Daniel Pruzin, *Brazil, Canada Agree to Postpone Action On Sanctions Request Over Aircraft Subsidy*, 19 INT'L TRADE REP. (BNA) 1007 (June 6, 2002).

[90] Sanctions have been imposed in the following cases: Arbitration Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/ARB (Apr. 9, 1999)(for more information, see Gary G. Yerkey & Daniel Pruzin, *U.S. Issues Final List of European Imports To Be Hit With Higher Duties in Banana Row*, 16 INT'L TRADE REP. (BNA) 621 (Apr. 14, 1999) and Alberto Alemano, *European Court Rejects Damages Claim from Innocent Bystanders in EU-US "Banana War"*, 12 ASIL INSIGHTS 21 (Oct. 11, 2008)); Arbitration Report, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB (July 12, 1999) (see Gary G. Yerkey, U.S. Annouces Final List of EU Imports Targeted for Higher Duties in Beef Dispute, 16 INT'L TRADE REP. (BNA) 1212 (July 21, 1999)); Arbitration Report, *United States–Tax Treatment for Foreign Sales*, WT/DS108/ARB (Aug. 30, 2002) (see Alison Bennet & Katherine M. Stimmel, *Grassley, Baucus ETI Repeal Legislation Likely to Help Domestic Manufacturers*, 20 INT'L TRADE REP. (BNA) 1156 (Aug. 10, 2003) *and* Joe Kirwin & Alison Bennett, *EU Concerned Over Grandfather Clause in Export Bill; No Decision Yet,* 21 INT'L TRADE REP. (BNA) 1714 (Oct. 21, 2004) *and* Daniel Pruzin & Alison Bennett, *EU Challenges Transition Relief Under New Export Tax Legislation*, 21 INT'L TRADE REP. (BNA) 1825 (Nov. 11, 2004)); Arbitration Report, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/ARB (Aug. 31, 2004) (see Daniel Pruzin*, EU Reduces by Half U.S. Imports Targeted for Duties in Byrd Dispute*, 26 INT'L TRADE REP. (BNA) 622 (May 7, 2009) *and* Rossella Brevetti & Michael O'Boyle, *EC, Canada Move to Impose Retaliatory Duties in Byrd Dispute*, 22 INT'L TRADE REP. (BNA) 546 (Apr. 7, 2005) *and* Michael O'Boyle, *Mexico Slaps Punitive Duties on U.S. Goods Due to Noncompliance with WTO Byrd Ruling*, 22 INT'L TRADE REP. (BNA) 1386 (Aug. 25, 2005) *and* Daniel Pruzin, *Remaining Complainants Warn of Intent To Proceed With Byrd Sanctions by July*, 22 INT'L TRADE REP. (BNA) 938 (June 9, 2005)).

In December 2009, the EC reached an agreement with the United States and other interested Latin American countries, who agreed to terminate WTO adjudication in return for Brussels' firm commitment to lower tariffs on banana imports over a period of time.[92] Due to the implications of this settlement on its parallel commitment to African, Caribbean and Pacific ("ACP") banana producing nations, the EC offered ACP nations tariff reductions on other tropical imports, a supposedly WTO-compliant compromise likely to be included in a final Doha Round grand bargain.[93] As of this writing, the EC, citing strong public sentiment against removing restrictions on the importation of hormone-treated beef,[94] has yet to comply with the *Hormones* decision. However, the EC has reached a side-agreement with the US allowing it to maintain current restrictions in exchange for duty-free treatment for hormone-free beef. Under this agreement, the US retains the right to continue suspending concessions, which will be gradually phased out in four years.[95]

Arguably, it would be unfair to characterize EC conduct in these two instances as demonstrative of outright disregard for compliance with international trade law or that its leaders care little about its reputation for keeping promises. Paradoxically, at least in the context of the *Bananas* dispute, EC recalcitrance resulted from caring about their reputation for keeping promises of preferential treatment to bananas from ACP countries pursuant to another agreement. Certainly, this agreement was adjudicated as noncompliant with WTO law, and the EC took some time to comply. Presumably, that was the case because compliance required reconciling two separate, competing reputational concerns, EC's commitments to ACP countries and to other WTO members. Thus, recalcitrance occurred not because of EC outright indifference to compliance with international commitments, but precisely because it valued one more than the other.[96] While, arguably, this disaggregated, contextualized view of the EC's reputational concerns does not account for EC noncompliance in the one remaining case (i.e., *Hormones*), it suggests that one must proceed with caution before making general statements about noncompliance, especially when one views its rare occurrence as a major problem. Either way, one, two, four or six cases of

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[91] *See* Gary G. Yerkey, *Dispute Resolution: Compliance Record of WTO Members in Dispute Settlement Cases 'Very* Good', WTO Reporter (BNA) (May 5, 2008) (stating that the United States Congress passed legislation in 2004-05 to repeal all acts which were inconsistent with WTO rulings).

[92] Daniel Pruzin, *Agriculture: EU, Latin, U.S. Officials Welcome Beginning of End to WTO Dispute on Banana Imports*, 26 INT'L TRADE REP. (BNA) 1733 (Dec. 17, 2009).

[93] *Id.*

[94] Davey, *supra* note 25 at 33.

[95] Gary G. Yerkey and Daniel Pruzin, *Agriculture: U.S. Farm Group Disappointed with Deal to Expand Hormone-Free Beef Sales to EU*, 26 INT'L TRADE REP. (BNA) 643 (May 14, 2009); Gary G. Yerkey, *Agriculture: U.S., EU Announce Provisional Deal in Long-Running Dispute Over Beef Trade*, 26 INT'L TRADE REP. (BNA) 611 (May 7, 2009).

[96] For a similar argument in support of a nuanced, disaggregated view of reputation and noncompliance, see GOLDSMITH & POSNER, *supra* note 27 at 102-04.

recalcitrance do not negate the overwhelming record of compliance. After all litigation is done, erstwhile Complainants overwhelmingly obtain what they won in substantive adjudication.

III. Reassessing the Role of Noncompliance

A. Legalist and Pragmatist Views on Noncompliance

As in the GATT years, the prospect of occasional noncompliance with dispute settlement decisions has inspired debate about the proper level of sanctions in international trade law. Legalists still interpret noncompliance as threat to the trade system because, presumably, it allows protectionism to go unchecked. They do recognize "the overall good record" of compliance is primarily due "to the good faith desire of WTO members to see the dispute settlement system work effectively."[97] The remedy, they suggest, is more detailed substantive and procedural rules,[98] further strengthening adjudication outcomes by allowing multilateral sanctions,[99] and generally a broader, more diversified array of sanctions.[100]

More pragmatically inclined scholars argue that further judicialization and strengthening sanctions are unlikely to work because enforcement would still depend on the will of states, not third-party adjudicators bereft of autonomous agency powers.[101] Pragmatists believe members themselves might not be so keen on stronger sanctions and multilateral enforcement. Some of them believe harsher enforcement rules might cause members to step back on enforcement because they would want to "retain the flexibility to raise trade barriers when protectionist pressures surge."[102] Others, still within this pragmatist group, might argue that members would stay their hand under harsher rules not because they might engage in protectionism, but because they might want to exercise the discretion they retained under the agreements in the pursuit of *legitimate* trade restrictive measures more suited to their societies, with less fear of exposure to tougher sanctions should the system rule against them.[103]

Furthermore, if members embraced collective sanctions, the proposed reforms would have a perverse result, which legalists may not have fully thought through.

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[97] Davey, *supra* note 78 at 125.

[98] *See* Davey, *supra* note 4 at 117-22.

[99] *See* Pauwelyn, *supra* note 4 at 345.

[100] *See id.* at 344-46; Davey, *supra* note 78 at 122-26; Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place* 11 EUR. J. INT'L L. 763, 795-808 (2000).

[101] *See* GOLDSMITH & POSNER, *supra* note 27 at 161-62.

[102] *See id.* at 162.

[103] Unfortunately, the possibility that members might resort to trade restrictive measures for reasons other than protectionism, as in the pursuit of legitimate policy concerns (e.g., adopting stricter health standards, protecting natural resources, etc.) has not been sufficiently considered in the literature. *But see* Colares, *supra* note 2 at 438 *and* Rodrik, *supra* note 62 at 199.

Under a multilateral sanction regime, third-party state protectionists would be the only group to gain from suspending concessions against the "scofflaw" state, as export groups in enforcing states "would be indifferent to any sanctioning strategy because they would not have been affected by the trade-inconsistent measure."[104] In fact, should third-party states with weak protectionist constituencies choose retaliation as a bargaining strategy to secure trade concessions from the scofflaw state, they would not succeed. Under collective sanctions, any settlement offer would have to be extended to all members (by operation of the MFN principle), whose cost would be no different than the cost of retaliation.[105] Finally, even in the unlikely event that overall transaction and settlement costs did not equal the cost of retaliation, the proliferation of PTAs would itself be an unwelcome result in a multilateral system.

In fairness, legalists do not focus only on instances of noncompliance and how to remedy them. Their reform proposals also target timeliness of compliance as a problem, since delayed implementation can be a viable tactic until (and if) retaliation is authorized. Davey, for instance, proposes speeding up the entire litigation system, especially compliance deadlines, as he perceives them to be excessively generous.[106] He regrets that the prospective nature of WTO remedies provides little incentive for offending members to comply within the fifteen-month maximum "reasonable compliance" period.[107] He proposes not only shortening this to "six or nine months," but also starting the clock for compliance prior to the last day of such period, for example, on the "date of adoption of the relevant report or date of panel establishment or even earlier."[108] Mavroidis even suggests allowing erstwhile Complainants to request suspension of concessions prior to a formal decision on an Article 21(5) Review,[109] which, at present, must be decided before suspension requests can be adjudicated.[110] He argues that combining such requests in one proceeding would go a long way towards reducing offending members' ability to further delay compliance by extending litigation.[111]

While generous deadlines and procedural avenues may be abused, they do exist for particularly instrumental reasons. In the absence of a veto, they give members time and flexibility to adjust their practices while considering alternatives to offending policies, even avoiding noncompliance altogether. Making the WTO system more legalistic in the direction Davey and Mavroidis propose would accelerate the arrival of the retaliation stage and put the system under more stress.

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[104] *See* Nzelibe, *supra* note 79 at 335-36.

[105] *See id.* at 336.

[106] *See* Davey, *supra* note 4 at 117-22.

[107] DSU at art. 21(3)(c).

[108] *See* Davey, *supra* note 4 at 121, 126.

[109] Mavroidis, *supra* note 100 at 795.

[110] *See* DSU, at art. 22(2).

[111] Mavroidis, *supra* note 100 at 795.

With less time for internal deliberations, some powerful offending members might choose to absorb the cost of retaliation and remain noncompliant. Meanwhile, less powerful members would be facing quite asymmetric incentives: as winners, they might hesitate to sanction the powerful; as losers they will have less time to comply or be ready to face sanctions. Moreover, this could further encourage bilateralism and trade displacement by pushing members to negotiate PTAs, as these can replace formerly illegal barriers with WTO-compliant barriers, without improving efficiency. Such developments would severely undermine good faith among members, potentially causing the multilateral system to unravel. In sum, by making the system too brittle, further legalization of international trade risks too much.

In fact, even assuming trade diplomats, succumbing to legal process/constructivist influences,[112] convinced themselves that further judicialization and stricter rules and deadlines would benefit all, it would hardly follow that the states they represent would subsequently abide by these reforms. That trade negotiators might lean toward greater normativity at one point does not imply that they will continue to do so later when domestic interests are directly at stake, as in the end of litigation. In its simplest form, the compliance "problem"—as the original substantive violations that create it in the first place—occurs due to a mismatch between a member's WTO commitments and either prevailing domestic political economic interests or deeply held social values that must be politically tended to. Such mismatches may develop and even intensify overtime. As Trachtman suggests, the prevailing political constituencies backing entry into an agreement at one point may either change with time or, even if they remain in control, might undergo preference shifts as circumstances change.[113] Because compliance seems to depend "on the constellation of domestic political forces in the relevant state,"[114] at a given point in time, the possibility of retaliation and reputational loss, by itself, cannot exact compliance. Thus, it is more likely that the relative influence of trade-restricting and anti-sanction groups, *not* external forces or "internationalist" trade diplomats, determines whether compliance will occur.[115] It is true that harsher enforcement rules give more leverage to the anti-sanction camp, yet they may still not prevail if the losing member is persuaded by the other camp that it cannot compromise on an issue deemed to be of "great national importance."[116]

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[112] *See* Harold Hongju Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 981 (2005) (arguing that, overtime government officials from different states, influenced by their interactions with international institutions and each other, may undergo a switch in preferences that will favor greater norm internalization over their own states' more parochial interests.).

[113] *See* Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law* 1, 11 (Apr. 18, 2010) available at http:// ssrn.com/abstract=1549337.

[114] *See id.* at 21.

[115] Answering this empirical question would be beyond the scope of this article.

[116] *See* Guzman, *supra* note 64 at 321.

B. The Role and Merits of Noncompliance

Legalists believe that increasing the sanctions for breach of WTO obligations would increase the commitment level of WTO members. This generally assumes that the existing sanction (i.e., suspension of concessions following bilateral substantive and compliance litigation) is somehow suboptimal. The discussion above (Part III.A) suggests why that is not the case. Indeed, members, whose actions are often the product of considered calculations reflecting domestic interests, might not be so keen on a more severe enforcement system that would limit the remaining flexibility they have in trade policy, especially in light of the consistent record of Complainant wins in WTO adjudication. In a way, it is as if legalists were arguing from the perspective of a dissatisfied adjudicator, in whose institutional view a few instances of less than full compliance are *ipso facto* proof that compliance incentives are less than adequate. While it would be unfair to characterize legalists as essentially making the same "strengthening the system" arguments WTO adjudicators and Secretariat staff are likely to endorse, it is unquestionable that the reforms they propose would lead to yet more judicialization and transfer of authority from members to adjudicators, with potentially disastrous results.

More plausibly, legalists make these arguments because they overemphasize the adjudicative dimension of the WTO system while underestimating its far more important political dimensions, international and domestic. They generally fail to see that adjudication, as a generally egalitarian mode of interaction, is, in principle, unresponsive to the logic of power and the implications resulting from power asymmetries. True, WTO litigants are equal before the law and play by rules of engagement that, at least as far as courtroom activity is concerned, "do not permit them to deploy all their resources in the conflict, but require that they proceed within the limiting forms" of adjudication.[117] Yet, when the assumption of adjudicative equality clashes (outside the courtroom) with the reality of power as it expresses itself in outright noncompliance or delayed compliance—the US and the EC are the only members to have endured sanctions while not complying—legalists react by proposing reforms that would make the system more like domestic adjudication, where enforcement is presumed optimal.[118] In doing so, they rarely give full consideration to the political and systemic repercussions of their presumably apolitical reforms. Obviously, the DSB system is not merely about adjudication. In fact, a more nuanced *political* view of the DSB's judicial function counsels against not only shifting members' rights and obligations "in a systematic way [that] would contradict the delicate political balancing act that characterizes multilateral trade negotiations,"[119] as has happened in substantive adjudication, but also any further

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[117] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 135 (1974).

[118] Davey recognizes that "most long-term non-compliance has occurred in disputes between developed countries," but does not investigate further why that might be the case. *See* Davey, *supra* note 78 at 123 n. 30.

[119] Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 250 (2004).

restraints on their ability to cope with and adapt to the effects of DSB decisions, as legalists now propose.

Having won the earlier Uruguay Round battle that led to more judicialized proceedings and clearer sanctions over GATT's looser framework, where states could openly negotiate on a case-by-case basis and even block the adoption of decisions,[120] legalists seem to be pressing their case too hard this time. First, in light of the evidence presented in Part II.B.3 & 4, outright noncompliance is rare and mostly reflects situations where powerful nations have faced complex choices as they attempt to balance domestic pressures against important policy considerations (*Hormones*, *FSC and Byrd*) or competing multilateral concerns (*Bananas*). Similarly, rather than abuse of process, instances of delay followed by compliance might be viewed more generously, allowing the possibility of sanctions and the passage of time to work together. Second, as discussed in Part III.A, shorter deadlines and steeper sanctions will not strengthen the system's normativity if third-party adjudicators, lacking the power of agency, have to rely on members' enforcement capabilities, who themselves face asymmetric incentives to comply and punish. Indeed, one (bilateral) version of this harsher enforcement regime might even lead to a hard-to-reverse spiral toward bilateralism, as members scramble to evade sanctions by negotiating PTAs that displace more efficient producers, undermining good faith among members and demoralizing those in favor of multilateralism. A multilateral or collective sanction system would fare no better.

Finally, with the advent of the DSU, members signed away the possibility of blocking enforcement by adopting the reverse consensus rule. A triumph of legalism, no doubt, this implies that, in politically sensitive disputes, members now have fewer options when facing adverse outcomes. In such a system, members' valuation of time undergoes a profound change. Specifically, after a period of violation and subsequent litigation, a protracted return to compliance might become the next best alternative, as the passage of time might be sufficient to appease prevailing trade-restricting constituencies.[121] In fact, time becomes even more important to the non-cynical violator who, genuinely believing no violation was committed, will attempt to mitigate the effects of an adverse decision by either delaying compliance, not complying and submitting to sanctions or proposing concessions in other areas.[122] If one recalls that the veto's abrogation was part and parcel of a move toward increased judicialization of the world trade system, which replaced regular diplomatic negotiations with a permanent Appellate Body and continuously evolving trade jurisprudence, one may plausibly argue that recalcitrance and low levels of

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[120] *See* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 94-96 (1987).

[121] Goldsmith and Posner make a similar argument to explain members' return to compliance. *See* GOLDSMITH & POSNER, *supra* note 27 at 157.

[122] *See, e.g.*, Daniel Pruzin, *U.S. Reaches Agreement with EU at WTO on Compensation for Internet Gambling*, 24 INT'L TRADE REP. (BNA) 1788 (Dec. 20, 2007) (quoting Gretchen Hamel, Spokeswoman for the Office of the US Trade Representative, stating that "the binding commitments will be extended to all WTO members.").

noncompliance might play an inevitable, even necessary "cushioning" role in the system.

Conclusion

International trade law scholars have demonstrably different views on compliance and enforcement of legal obligations. One of the important research questions in the field, a point in which scholars have marked disagreement, pertains to the desirability of further reforms to strengthen compliance. This article considers their different arguments in succession and attempts to integrate into this debate insights derived from prior empirical studies on substantive adjudication, adding a new empirical analysis of compliance adjudication. These analyses show that Complainants' systematic high rates of success in substantive adjudication can be attributed to WTO adjudicators' adoption of a liberal view of free trade that furthers the interests Complainants typically represent at that stage, but that the latter only attain a similar degree of success in compliance litigation when they continue to act on behalf of pro-free trade interests. For example, erstwhile Complainants win only one in three level-of-retaliation disputes; i.e., disputes where they are pursuing trade restrictions as the final punishment for noncompliance.

Viewed in combination, these modes of litigation reveal an adjudicatory system operating with high consistency, yet exhibiting favoritism toward a particular teleological view of free trade, expressed not in favor of the litigant who originally defended it, but in favor of whoever argues for it in any given instance. In light of the way the system has operated, with members' reserved regulatory discretion under continuous attack from a jurisprudence bent on furthering a liberal view of trade, it is remarkable that compliance levels have remained high, despite members' occasional, strong criticism.[123] That few architects of increased legalization "contemplated the possibility that in interpreting WTO agreements, the [AB] would engage in expansive lawmaking"[124]—a view that, in hindsight, seems a bit naïve—should cause scholars to be a bit more cautious when considering yet more rigidifying reforms. In fact, the remaining alternatives for coping with the way the DSB system has operated may be viewed, in a sense, as the new veto. Simply put, reforming the system to make it yet more "legalistic" would be unwarranted, as such proposals would make it too rigid and unaccommodating and might push its more powerful members toward outright bilateralism, eventually causing it to collapse. In fact, compliance is the least of the system's problems.

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[123] *See* Dunoff, *supra* note 25 at 353 (discussing US proposals "to increase party control over the dispute settlement process," and US and Chile's arguments for "the desirability of providing 'additional guidance to WTO adjudicative bodies,' including with respect to the rules of interpretation of the WTO agreements, and ensuring that panel members have appropriate expertise.") (quoting Textual Contribution by Chile and the United States (14 March 2003) TN/DS/W/52.)

[124] Steinberg, *supra* note 119 at 251 n. 27 (citing telephone interview with A. Jane Bradley, former Assistant US Trade Representative for Monitoring and Enforcement and US Representative to the Uruguay Round Dispute Settlement Negotiations).

APPENDIX[125]

Authorized Suspension of Concessions from January 1, 1995 through September 30, 2009

Dispute and Date Initiated	Report of the Arbitrator	Date of DSB Authorization to Suspend Concessions	Level of Suspension
1(a). European Communities – Regime for the Importation, Sale and Distribution of Bananas Jan. 14, 1999	09.04.99 **WT/DS27/ARB**	Pursuant to the US request **(WT/DS27/49)** authorization was granted at the DSB meeting on 19.04.99 **(WT/DSB/M/59)**	Up to $191.4 million per year
1(b). European Communities – Regime for the Importation, Sale and Distribution of Bananas Nov. 8, 1999	24.03.00 **WT/DS27/ARB/ ECU**	Pursuant to Ecuador's request **(WT/DS27/54)** authorization was granted at the DSB meeting on 18.05.00 **(WT/DSB/M/80)**	~
2. European Communities – Measures Concerning Meat and Meat Products (Hormones) May 17, 1999	12.07.99 **WT/DS26/ARB** **WT/DS48/ARB**	Pursuant to the US request **(WT/DS26/21)** and Canada's request **(WT/DS48/19)** authorization was granted at the DSB meeting on 26.07.99 **(WT/DSB/M/65)**	$116.8 million per year
3. Brazil – Export Financing Programme for Aircraft May 10, 2000	28.08.00 **WT/DS46/ARB**	Pursuant to Canada's request **(WT/DS46/25)** authorization was granted at the DSB meeting on 12.12.00 **(WT/DSB/M/94)**	~
4. United States – Tax Treatment for "Foreign Sales Corporations" Nov. 17, 2000	30.08.02 **WT/DS108/ARB**	Pursuant to the EC's request (**WT/DS108/26**) authorization was granted at the DSB meeting on 07.05.03 (**WT/DSB/M/149**)	$4.043 billion per year

[125] *See* World Trade Organization, Dispute Settlement, Annual Overview, Annual Report 2009, *available at* http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28+%40meta%5FSymbol+%28WT%FCDSB%FC%2A%29+and+%40meta%5FTitle+Overview+of+the+state+of+play+of+WTO+disputes+and+not+Draft+Annual+Report%29+&language=1.

Dispute and Date Initiated	Report of the Arbitrator	Date of DSB Authorization to Suspend Concessions	Level of Suspension
5. Canada – Export Credits and Loan Guarantees for Regional Aircraft May 23, 2002	17.02.03 **WT/DS222/ARB**	Pursuant to Brazil's request (**WT/DS222/10**) authorization was granted at the DSB meeting on 18.03.03 (**WT/DSB/M/145**)	
6. United States – Continued Dumping and Subsidy Offset Act of 2000 Jan. 15, 2004	31.08.04 **WT/DS217/ARB/BRA** **WT/DS217/ARB/CHL** **WT/DS217/ARB/EEC** **WT/DS217/ARB/IND** **WT/DS217/ARB/JPN** **WT/DS217/ARB/KOR** **WT/DS234/ARB/CAN** **WT/DS234/ARB/MEX**	Pursuant to the requests by Brazil (**WT/DS217/38**); the EC (**WT/DS217/39**); India (**WT/DS217/40**); Japan (**WT/DS217/41**); Korea (**WT/DS217/42**); Canada (**WT/DS234/31**); Mexico (**WT/DS234/32**), authorization was granted at the DSB meeting on 26.11.04 (**WT/DSB/M/178**) Pursuant to the request by Chile (**WT/DS217/43**) authorization was granted at the DSB meeting on 17.12.04 (**WT/DSB/M/180**)	E.C.: $1.1 million per year Japan: $16.49 million per year