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THE LIMITS OF WTO ADJUDICATION: IS COMPLIANCE THE PROBLEM?

Juscelino F. Colares^{*}

ABSTRACT

Mainstream international trade law scholars have commented positively on the work of World Trade Organization (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. Since that is the case, this article investigates the extent to which current levels of non-compliance 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.

I. INTRODUCTION

Mainstream international trade law scholars characterize the World Trade Organization (WTO) dispute settlement system’s handling of cases as one of the most striking successes of the post-Uruguay Round legacy.¹ To them,

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¹ See Steven P. Croley and John H. Jackson, ‘WTO Dispute Procedures, Standard of Review, and Deference to National Governments’, 90 *American Journal of International Law* 193 (1996).

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.² Specifically, Complainants win between 80 and 90 percent of the disputes, regardless of the significant range of variation in subject matter and litigants involved. 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

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 the Dispute Settlement Body (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 non-compliance 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

² See, e.g. John Maton and Carolyn Maton, 'Independence under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement', 10 *Journal of International Economic Law* 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 *Vanderbilt Journal of Transnational Law* 383 (2009), at 439 (faulting the DSB system for embracing an expansive form of judicial lawmaking that 'consistently construes WTO law against Respondents' in substantive adjudication).

³ Colares, above n 2, at 429.

⁴ See William J. Davey, 'Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?', in Yasuhei Taniguchi et al. (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (Cambridge, NY: Cambridge University Press, 2007), at 98; Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach', 94 *American Journal of International Law* 335 (2000).

⁵ See *USDA: Brazil Seeks GSM 102 Changes To At Least Match Doha Draft Text*, Inside U.S. Trade World Trade Online (30 April 2010), available at www.insidetrade.com (visited 17 June 2010)

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, non-compliance 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 General Agreement on Tariffs and Trade (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.

Section II 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. Since neither case, litigant or product-specific differences in disputes can account for the disparity in 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. Section III 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. Section IV investigates the extent to which non-compliance might constitute a threat to this regime, as prior literature has suggested, and explains that the current level of non-compliance 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 non-compliance 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

(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 John H. Jackson et al., (eds), *Legal Problems of International Economic Relations: Cases, Materials and Text*, 5th edn. (St Paul, MN: Thompson/West, 2008), at 321 (stating that 'WTO members may be tempted to use the dispute settlement system to try to achieve what has eluded them in negotiations').

broader perspective that transcends narrow legalistic views of the trade regime and accounts for the multifaceted interests of, and differences among, WTO members.

II. THE STRUCTURE AND OPERATION OF SUBSTANTIVE ADJUDICATION

A. Background of 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 '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 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 blocked⁹ 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. increased 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

⁶ See Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 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 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), 15 April 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 GATT 1994 at Art. XXIII; DSU at Arts 16(4) and 17(14).

⁸ DSU at Art. 17(14).

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 (visited 6 July 2010).

¹⁰ DSU at Art. 22(2).

effectively remove the veto from the trade system is a question that 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. non-tariff) 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 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

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, 15 April 1994, Marrakesh Agreement Establishing the World Trade 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, 15 April 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].

morals,¹³ measures relating to the 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 decisions¹⁶

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 did he attempt to provide an explanation for the high Complainant win rate, except when he discussed anti-dumping (AD) and countervailing duty (CVD) cases.

Specifically, Hudec posited 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 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 continued to diverge over time, when the positive theory of litigation suggests they should converge at some point,²⁰ apparently has not prompted much reflection beyond the

¹³ GATT 1994 at Art. XX(a).

¹⁴ *Ibid.*, at Art. XX(g).

¹⁵ *Ibid.*, at Arts V, XII.

¹⁶ Unfortunately, all prior empirical studies of WTO litigation (except that of 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 III, will not be considered here.

¹⁷ See Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem: Butterworth Legal Publishers, 1993), at 273.

¹⁸ *Ibid.*, at 353.

¹⁹ *Ibid.*, at 355.

²⁰ George L. Priest and Benjamin Klein, 'The Selection of Disputes for Litigation', 13 *Journal of Legal Studies* 1 (1984), at 19. Specifically, the theory suggests that, absent information and stake asymmetries, parties tend to adjust their taste for litigation based on signals emanating

traditional ‘Respondent *qua* protectionist’ fall back narrative. Indeed, this puzzle remained unaddressed until quite recently.

Some empirical studies have been more ambitious, however, 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 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

from the litigation environment, with stronger cases settling rather than going to full adjudication.

²¹ See Andrew T. Guzman and Beth A. Simmons, ‘To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO’, 31 *Journal of Legal Studies* 205 (2002), at 210–11.

²² *Ibid.*, at 210.

²³ See Marc Busch and Eric Reinhardt, ‘Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes’, 24 *Fordham International Law Journal* 158 (2000), at 162–63.

²⁴ But see Colares, above n 2, at 413–16.

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

However, reliance on such a broad agency capture argument is problematic. For a 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

²⁵ See, e.g. Hudec, above n 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 *Journal of International Economic Law* 17 (2005), at 18 (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 Cesare Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge, NY: Cambridge University Press, 2009), at 322 (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 rules-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* (Int'l Ctr. for Trade & Sustainable Dev. Programme on Dispute Settlement, Issue Paper No. 2, 2008) (theorizing that least developed countries 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* (London: Cameron May, 2003), at 15; Judith Goldstein, 'International Law and Domestic Institutions: Reconciling North American "Unfair" Trade Laws', 50 *International Organization* 541 (1996); John M. Mercury, 'Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?', 15 *Northwestern Journal of International Law and Business* 525 (1995); Arun Venkataraman, 'Note, Binational Panels and Multilateral Negotiations: A Two-Track Approach to Limiting Contingent Protection', 37 *Columbia Journal of Transnational Law* 533 (1999), at 578-79.

²⁷ See, Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford; NY: Oxford University Press, 2005) 148 (proposing that as bound tariffs decline, states have an incentive to cheat 'by inventing . . . nontariff barriers that [are] fiendishly obscure,' thus perpetuating the received view that national agencies are but agents of protectionism).

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 decision making 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 sought to explain Complainants' overall high success rate in WTO adjudication and, for this reason, stand apart. Maton and Maton analyzed all WTO disputes through 2004 and find that Complainants win 81.9 percent of panel rulings.²⁸ They also determined 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 and Maton refuted prior anecdotal studies³⁰ that suggested WTO adjudicators are influenced by extra-legal pressures from more powerful members.³¹ In concluding that their findings demonstrate WTO adjudicators 'are immune from such pressures,'³² the authors, as others before them, passed on the opportunity to further investigate or theorize on their other major finding: the Complainant/Respondent success asymmetry.

²⁸ Maton and Maton, above n 2, at 328.

²⁹ Ibid, at 325–28.

³⁰ Ibid, at 320–21.

³¹ Ibid, at 333.

³² Ibid, at 333.

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 USA, 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 versus 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 did—but also wonder if there is a bias against *all* Respondents. Yet, before one could make an argument for such bias, one should investigate whether other variables, such as case subject matter, differences in standards of review or type of product affected by a measure, might account for the discrepancy in Complainant and Respondent success rates. In fact, if parties' relative success rates are somehow correlated with variations among the agreements invoked, then adjudicators are merely adjusting their decisions in accordance with such variations rather than being biased against Respondents. However, if one finds consistently high Complainant success rates regardless of case type differences, then one might inquire whether adjudicators' adoption of certain interpretive positions varies with respect to the posture of the litigant and the argument it makes. Only when the latter occurs can one consider the presence of bias. Although Maton and Maton did not venture into formulating or rejecting such alternative explanations, they suggested that further research,

³³ See Goldsmith and Posner, above n 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 (visited 25 April 2011).

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 and Maton's recommendation. He 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 of such pro-Complainant decisional patterns, Colares looked closely at two sets of cases: the first ten AD disputes, where adjudicators would presumably explain their views on the AD

³⁵ Maton and Maton, above n 2, at 333–34.

³⁶ Colares, above n 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, above n 2, at 403.

⁴⁰ *Ibid.*, at 412–22.

⁴¹ *Ibid.*, at 422.

⁴² *Ibid.*

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 Procurement⁴³).⁴⁴ He explained 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 effect 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 identified 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

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

⁴⁴ Colares, above n 2, at 423–24, 429–30.

⁴⁵ Ibid, at 429–30.

⁴⁶ Ibid, at 430–35.

⁴⁷ Ibid, at 436.

⁴⁸ Ibid.

⁴⁹ Ibid (citation omitted).

to a select few WTO adjudicators.⁵⁰ This creation of non-negotiated 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

⁵⁰ Ibid, at 437.

⁵¹ Ibid.

⁵² Ibid, at 397 (citation omitted).

⁵³ The data in this article is current through September 2009 and confirms Colares’ prior results. Compare Colares, above n 2, at 419–422 with Part III.B.3.

⁵⁴ Colares, above n 2, at 412–13, 416–17 (citation omitted).

⁵⁵ See generally Horlick, above n 26, at 15; Goldstein, above n 26; Mercury, above n 26; Hudec, above n 17; J. Michael Finger and Tracey Murray, ‘Antidumping and Countervailing Duty Enforcement in the United States’ in J. Michael Finger (ed), *Antidumping: How it Works and Who Gets Hurt?* (Ann Arbor: University of Michigan Press, 1993), at 241.

⁵⁶ See, e.g. Colares, above n 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).

true, members would simply not 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 and 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’ win rates 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 reciprocity requirement, thus attenuating any settlement-constraining effect that 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

⁵⁷ See, e.g. *ibid.*, 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 and Simmons, above n 21, at 210 and GATT 1994 at Art. I.

⁵⁹ *Ibid.*, at Art. XXIV.

on its economy.⁶⁰ Because neither of these regression models, nor their individual regressors, were statistically significant (0.05 probability level), Colares refuted the hypothesis that Respondents' concerns over the 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 cannot be the product of Respondents 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 potentially 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. It is plausible that 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

⁶⁰ Colares, above n 2, at 414–15.

⁶¹ See Busch and Reinhardt, above n 23, at 158–59 (stating that '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' methodology. Unlike Busch and 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, above n 2, at 413. As discussed in Part III B.3, this difference is quite important in the discussion regarding case selection.

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 that members struck by negotiating terms intended to safeguard ‘the values and norms 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 non-compliance,⁶⁴ the topic to which I now turn.

III. THE LEGAL STRUCTURE AND ROLE OF COMPLIANCE ADJUDICATION

A. General remarks

As previously explained (see Section II 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

⁶² Dani Rodrik, ‘Feasible Globalizations’, in Michael M. Weinstein (ed), *Globalization: What’s Next?* (New York: Columbia University Press, 2005) 196, at 199.

⁶³ Colares, above n 2, at 435–38.

⁶⁴ See Andrew Guzman, ‘Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms’, 31 *Journal of Legal Studies* 303 (2002), at 307–8.

⁶⁵ DSU at Art. 23(2)(a).

⁶⁶ *Ibid.*, at Art. 22(1).

⁶⁷ See *ibid.*, at Art. 22.

⁶⁸ *Ibid.*, at Art. 21(3)(c).

⁶⁹ See *ibid.*, at Art. 21(5).

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 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 Since 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 so much if one observed no major discrepancies in outcomes between these forms of litigation. Even if that proved to be the case, however, 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 former successful Complainant might appear as 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. over deterrence). Therefore, the potential for significant posture reversals blurs the categories of litigants and disturbs the conventional perception of the interests that litigants represent. As the example illustrates,

⁷⁰ See *ibid*, at Art. 22(2).

⁷¹ *Ibid*, at Art. 22(6).

⁷² See *ibid*, at Art. 22(7).

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 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 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 Section III 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

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

Table 1. Status of compliance cases

Case status	Number of cases
DSB final rulings	61
Settled	17
Active	4
Total	81

which: (i) the complaining party withdraws the panel or arbitration request; (ii) the DSB defers the establishment of a panel⁷⁴ (usually due to a request by both parties); (iii) the DSB establishes a panel,⁷⁵ but there has been no reported activity in the past three years; (iv) the parties formally request that a panel stop its work⁷⁶ or agree to postpone arbitration and neither panel nor arbitrator engage in deliberations for more than 12 months (lapse of authority); or (v) the parties officially notify the DSB that they have reached an agreed solution in a panel or arbitration 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. Table 1 contains a breakdown of all WTO cases from January 1995 to September 2009.

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. Since 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

⁷⁴ See DSU at Art. 6(1).

⁷⁵ See *ibid.*, at Art. 6.

⁷⁶ See *ibid.*, at Art. 12(12).

⁷⁷ See *ibid.*, 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 Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002), at 457. Another study, focusing on the first 10 years of WTO dispute settlement, reported an 83% compliance rate. See William Davey, ‘Compliance Problems in WTO Dispute Settlement’, 42 *Cornell International Law Journal* 119 (2009).

Table 2. 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

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 a 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.

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 2 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 DSU 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.

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 (Table 3). Clearly, Complainants' success rates

⁷⁹ See, e.g. Davey, above n 78, at 122; Steve Charnovitz, 'The Enforcement of WTO Judgments', 34 *Yale Journal of International Law* 558 (2009), at 562; Jide Nzelibe, 'The Case Against Reforming the WTO Enforcement Mechanism', 2008 *University of Illinois Law Review* 319 (2008), at 323. Part IV will discuss some of these authors' assessments and critical views regarding compliance in the WTO system.

Table 3. 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

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.

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) arbitrations⁸⁰ and in eight of nine Article 22(6) arbitrations.⁸¹ Again, as Table 4 illustrates, erstwhile

⁸⁰ See Award of the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833; Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583; Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS114/13, 18 August 2000, DSR 2002:I, 3; Award of the Arbitrator, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU*, WT/DS207/13, 17 March 2003, DSR 2003:III, 1237.

⁸¹ See Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725; Decision by the Arbitrator, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19; Decision by the Arbitrators, *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517; Decision by the Arbitrators, *United States – Antidumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004, DSR 2004:IX, 4269; Decision by the Arbitrators, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Brazil – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/BRA, 31 August 2004, DSR 2004:IX, 4341; Decision by the Arbitrators, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS222/ARB, 17 February 2003, DSR 2003:III, 1187; Decision by the Arbitrators, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB, 31 August 2009.

Table 4. 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

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 Section II 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.

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 that

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 percent⁸³ of federal civil cases⁸⁴ 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

⁸² See Table 1.

⁸³ Percentage from 2002. See Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts', 1 *Journal of Empirical Legal Studies* 459 (2004), at 461.

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 USA). See *ibid*, 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](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 *Journal of Empirical Legal Studies* 705 (2004), at 729–33 (using data from 2000, including consent judgments, but not cases disposed of through abandonment or default).

settlements might have occurred following substantive adjudication, thus eliminating potential compliance case filings—indeed, 75 out of 117 substantive rulings never led to compliance filings⁸⁶—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 2 demonstrates, the DSB adjudicated disputes concerning the level of suspension of concessions due to non-compliance in nine cases.⁸⁷ It authorized suspension of concessions in six cases.⁸⁸ Of these, actual 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 USA (two cases), failed to comply after compliance litigation had run its

⁸⁶ See Table 1 and accompanying discussion.

⁸⁷ See also Appendix A 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 (19 April 1999) & WT/DSB/M/80 (18 May 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 (26 July 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 (12 December 2000), request by Canada in *Brazil – Export Financing Programme for Aircraft*, WT/DS46; *DSB Meeting Minutes*, WT/DSB/M/149 (7 May 2003), request by the EC in *United States – Tax Treatment for Foreign Sales (FSC)*, WT/DS108; *DSB Meeting Minutes*, WT/DSB/M/145 (18 May 2003), request by Brazil in *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222; *DSB Meeting Minutes*, WT/DSB/M/180 (17 December 2004) & WT/DSB/M/178 (26 November 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 11 November 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 *International Trade Reporter (BNA)*, 26 November 2009, 1624. 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 *International Trade Reporter (BNA)*, 6 June 2002, 1007.

course and submitted to retaliation.⁹⁰ After a period of retaliation, the USA eventually complied.⁹¹ In December 2009, the EC reached an agreement with the USA and other interested Latin American countries, who agreed to terminate WTO adjudication in return for a firm commitment from Europe 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

⁹⁰ Sanctions have been imposed in the following cases: Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725 (for more information, see Gary G. Yerkey and Daniel Pruzin, ‘U.S. Issues Final List of European Imports to Be Hit with Higher Duties in Banana Row’, 16 *International Trade Reporter (BNA)* 621, 14 April 1999, and Alberto Alemano, ‘European Court Rejects Damages Claim from Innocent Bystanders in EU-US “Banana War”’, 12 *ASIL Insights* 21 (11 October 2008); Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105 (see Gary G. Yerkey, ‘U.S. Announces Final List of EU Imports Targeted for Higher Duties in Beef Dispute’, 16 *International Trade Reporter (BNA)* 1212, 21 July 1999; Decision by the Arbitrators, *United States – Tax Treatment for Foreign Sales Corporations – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517 (see Alison Bennet and Katherine M. Stimmel, ‘Grassley, Baucus ETI Repeal Legislation Likely to Help Domestic Manufacturers’, 20 *International Trade Reporter (BNA)* 1156, 10 August 2003; Joe Kirwin and Alison Bennett, ‘EU Concerned Over Grandfather Clause in Export Bill; No Decision Yet’, 21 *International Trade Reporter (BNA)* 1714, 21 October 2004; Daniel Pruzin and Alison Bennett, ‘EU Challenges Transition Relief Under New Export Tax Legislation’, 21 *International Trade Reporter (BNA)* 1825, 11 November 2004); Decision by the Arbitrators, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Brazil – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/BRA, 31 August 2004, DSR 2004:IX, 4341 (see Daniel Pruzin, ‘EU Reduces by Half U.S. Imports Targeted for Duties in Byrd Dispute’, 26 *International Trade Reporter (BNA)* 622, 7 May 2009; Rossella Brevetti and Michael O’Boyle, ‘EC, Canada Move to Impose Retaliatory Duties in Byrd Dispute’, 22 *International Trade Reporter (BNA)* 546, 7 April 2005; Michael O’Boyle, ‘Mexico Slaps Punitive Duties on U.S. Goods Due to Noncompliance with WTO Byrd Ruling’, 22 *International Trade Reporter (BNA)* 1386, 25 August 2005; Daniel Pruzin, ‘Remaining Complainants Warn of Intent to Proceed With Byrd Sanctions by July’, 22 *International Trade Reporter (BNA)* 938, 9 June 2005).

⁹¹ See Gary G. Yerkey, ‘Dispute Resolution: Compliance Record of WTO Members in Dispute Settlement Cases “Very Good”’, *WTO Reporter (BNA)*, 5 May 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 *International Trade Reporter (BNA)* 1733, 17 December 2009.

⁹³ *Ibid.*

⁹⁴ Davey, above n 25, at 33.

has yet to comply with the *Hormones* decision. However, the EC reached a side-agreement with the USA allowing it to maintain current restrictions in exchange for duty-free treatment for hormone-free beef. Under this agreement, the USA retains the right to continue suspending concessions, which will be gradually phased out in four years.⁹⁵ In its similar, more recent agreement with Canada, the latter agreed to discontinue suspension of concessions at once instead of phasing them out.⁹⁶

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 non-compliant 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 the EC's outright indifference to compliance with international commitments, but precisely because it valued one commitment more than the other.⁹⁷ While, arguably, this disaggregated, contextualized view of the EC's reputational concerns does not account for EC non-compliance in the one remaining case (i.e. *Hormones*), it suggests that one must proceed with caution before making general statements about non-compliance, especially when one views its rare occurrence as a major problem. Either way, one, two, four or six cases of recalcitrance do not negate the overwhelming record of compliance. After all litigation is done, erstwhile Complainants overwhelmingly obtain what they won in substantive adjudication.

IV. REASSESSING THE ROLE OF NON-COMPLIANCE

A. Legalist and pragmatist views on non-compliance

As in the GATT years, the prospect of occasional non-compliance with dispute settlement decisions has inspired debate about the proper level of sanctions in international trade law. Legalists still interpret non-compliance as a

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

⁹⁶ Daniel Pruzin, 'Agriculture: EU, Canada Announce Provisional Deal to End Dispute on Hormone-Treated Beef', *WTO Reporter (BNA)* D6, 22 March, 2011.

⁹⁷ For a similar argument in support of a nuanced, disaggregated view of reputation and non-compliance, see Goldsmith and Posner, above n 27, at 102–04.

threat to the trade system because, presumably, it allows protectionism to go unchecked. They do recognize that ‘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’.⁹⁸ The remedy, they suggest, is more detailed substantive and procedural rules,⁹⁹ further strengthening adjudication outcomes by allowing multilateral sanctions,¹⁰⁰ and generally a broader, more diversified array of sanctions.¹⁰¹

More pragmatically inclined scholars argue that further judicialization and strengthening of sanctions are unlikely to work because enforcement would still depend on the will of states, not third-party adjudicators bereft of autonomous agency powers.¹⁰² Pragmatists believe that 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’.¹⁰³ 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.¹⁰⁴

Furthermore, if members embraced collective sanctions, the proposed reforms would have a perverse result, which legalists may not have fully thought through. 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’.¹⁰⁵ 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

⁹⁸ Davey, above n 78, at 125.

⁹⁹ See Davey, above n 4, at 117–22.

¹⁰⁰ See Pauwelyn, above n 4, at 345.

¹⁰¹ See *ibid.*, at 344–46; Davey, above n 78, at 122–26; Petros C. Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’, 11 *European Journal of International Law* 763 (2000), at 795–808.

¹⁰² See Goldsmith and Posner, above n 27, at 161–62.

¹⁰³ See *ibid.*, at 162.

¹⁰⁴ 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, above n 2, at 438 and Rodrik, above n 62, at 199.

¹⁰⁵ See Nzelibe, above n 79, at 335–36.

be extended to all members (by operation of the MFN principle), whose cost would be no different than the cost of retaliation.¹⁰⁶ 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 non-compliance 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.¹⁰⁷ He regrets that the prospective nature of WTO remedies provides little incentive for offending members to comply within the 15-month maximum 'reasonable compliance' period.¹⁰⁸ 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.'¹⁰⁹ Mavroidis even suggests allowing erstwhile Complainants to request suspension of concessions prior to a formal decision on an Article 21(5) Review,¹¹⁰ which, at present, must be decided before suspension requests can be adjudicated.¹¹¹ 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.¹¹²

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 non-compliance 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. With less time for internal deliberations, some powerful offending members might choose to absorb the cost of retaliation and remain non-compliant. 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

¹⁰⁶ See *ibid.*, at 336.

¹⁰⁷ See Davey, above n 4, at 117–22.

¹⁰⁸ DSU at Art. 21(3)(c).

¹⁰⁹ See Davey, above n 4, at 121, 126.

¹¹⁰ Mavroidis, above n 101, at 795.

¹¹¹ See DSU, at Art. 22(2).

¹¹² Mavroidis, above n 100, at 795.

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 that trade diplomats, succumbing to legal process/constructivist influences,¹¹³ 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 over time. 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.¹¹⁴ Because compliance seems to depend ‘on the constellation of domestic political forces in the relevant state,’¹¹⁵ 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.¹¹⁶ 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.’¹¹⁷

B. The role and merits of non-compliance

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.

¹¹³ See Harold Hongju Koh, ‘Internalization through Socialization’, 54 *Duke Law Journal* 975 (2005), at 981 (arguing that, over time, 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).

¹¹⁴ See Joel P. Trachtman, ‘International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law’ 1, 11 (18 April 2010), available at <http://ssrn.com/abstract=1549337> (visited 16 June 2010).

¹¹⁵ See *ibid.*, at 21.

¹¹⁶ Answering this empirical question would be beyond the scope of this article.

¹¹⁷ See Guzman, above n 64, at 321.

The discussion above (Section IV 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 that 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 (both 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.¹¹⁸ Yet, when the assumption of adjudicative equality clashes (outside the courtroom) with the reality of power as it expresses itself in outright non-compliance 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.¹¹⁹ 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,’¹²⁰ as has happened in substantive adjudication, but also placing further restraints on

¹¹⁸ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’, 9 *Law and Society Review* 95 (1974), at 135.

¹¹⁹ 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, above n 78, at 123 n 30.

¹²⁰ Richard H. Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 *American Journal of International Law* 247 (2004), at 250.

members' 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,¹²¹ legalists seem to be pressing their case too hard this time. First, in light of the evidence presented in Section III B.3 and 4, outright non-compliance 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 Section IV 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.¹²² 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.¹²³ If one recalls that the veto's abrogation was part and parcel of a

¹²¹ See William J. Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* 51 (1987), at 94-6.

¹²² Goldsmith and Posner make a similar argument to explain members' return to compliance. See Goldsmith and Posner, above n 27, at 157.

¹²³ See, e.g. Daniel Pruzin, 'U.S. Reaches Agreement with EU at WTO on Compensation for Internet Gambling', 24 *International Trade Reporter (BNA)* 1788, 20 December 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').

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 non-compliance might play an inevitable, even necessary ‘cushioning’ role in the system.

V. 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 non-compliance.

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.¹²⁴ That few architects of increased legalization ‘contemplated the possibility that in interpreting WTO agreements, the [AB] would engage in expansive lawmaking’,¹²⁵—a view that, in hindsight, seems a bit naïve—should cause scholars to be a bit more cautious when considering yet more rigidifying

¹²⁴ See Dunoff, above n 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.)

¹²⁵ Steinberg, above n 120, 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).

reforms. In fact, the remaining alternatives for coping with the way in which 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.

APPENDIX A¹²⁶

Table A1. Authorized Suspension of Concessions from 1 January 1995 through to September 2009

Dispute and date initiated	Report of the arbitrator	Date of DSB Authorization to Suspend Concessions	Level of Suspension
1(a). <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> 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). <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> 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. <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> 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. <i>Brazil – Export Financing Programme for Aircraft</i> 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. <i>United States – Tax Treatment for 'Foreign Sales Corporations'</i> 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
5. <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> 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. <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> Jan. 15, 2004	31.08.04 WT/DS217/ARB/BRA WT/DS217/ARB/CHL WT/DS217/ARB/ECC 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)	EC: \$1.1 million per year Japan: \$16.49 million per year
		Pursuant to the request by Chile (WT/DS217/43) authorization was granted at the DSB meeting on 17.12.04 (WT/DSB/M/180)	

¹²⁶ 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 (visited 25 April 2011).