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FIGHTING FIRE WITH FIRE: A REPEAT VIOLATOR POLICY FOR THE WTO

Abstract

The Trump presidency and other reactionary conservative governments present an immensely powerful danger to the World Trade Organization ("WTO"). The WTO is largely built on Members' willingness to comply with its rules, and the current Dispute Settlement Understanding ("DSU") is too weak to deter an avowed enemy of the WTO such as President Trump. This poor enforcement system particularly hurts developing countries, which lack the power under the DSU to effectively deter economic giants like the United States.

The recent Doha Round was supposed to create a more effective enforcement mechanism under the DSU, but it fell apart before any such changes were made. The most prominent alternatives raised in the Doha Round are ultimately problematic either because they do not address the weakness of retaliation under the DSU or because they are unlikely to be approved by the WTO Membership. A new, more plausible suggestion would be the creation of a repeat violator policy, which would provide for much stronger retaliation against those Members who repeatedly disregard the WTO Agreement. Such a policy would be especially aimed at serious threats to the WTO, such as the Trump administration, and could likely be achieved without going through the formal amendment process, making it the most viable measure for countering these new threats to the WTO.

Annotasiya

Trump və digər mürtəce konservativ hakimiyyətlər Ümumdünya Ticarət Təşkilatı (ÜTT) üçün böyük təhlükə mənbəyidir. Üzvlərinin könüllü olaraq öz qaydalarına uyma iradəsi üzərində qurulan ÜTT-nin Mübahisələrin Həlli Mexanizmi (MHM) Prezident Trump kimilərinin qarşısını almaq üçün çox zəifdir. Bu cür zəif icra mexanizmi, əsasən, inkişaf etməkdə olan ölkələrə təsir edir, hansılar ki, MHM nəzdində ABŞ kimi böyük ekonomik "dev"lərin qarşısını almaqda aciz qalırlar.

İndiki Doha Dairəsi MHM nəzdində daha effektiv icra mexanizmi yaratmaq məqsədilə təşkil olunmuşdu, lakin hər hansı bir dəyişiklik edilmədən dayandırıldı. Doha Dairəsində bir çox alternativlər irəli sürüldü, lakin bu alternativlər problematik olması ilə fərqlənirdi. Alternativlər ya MHM nəzdində qisas məsələsinin zəifliyinə toxunmur, ya da ÜTT üzvləri tərəfindən qəbul olunma ehtimalı çox aşağı olması ilə seçilirdi. Yeni və daha ağlabatan üsul təkrar pozucu siyasəti olardı. Bu siyasətə görə ÜTT Müqavilələrini davamlı olaraq pozan üzvlərə qarşı daha güclü təsir üsulları tətbiq olunmalıdır. Bu siyasət, xüsusilə, ÜTT-yə qarşı Trump hakimiyyəti kimi ciddi təhdidləri hədəfləyir və rəsmi düzəliş prosesindən keçmədən qəbul olunması ehtimalı daha çoxdur. Bu da bu siyasəti ÜTT-yə qarşı olan təhdidlərə münasibətdə ən uyğun üsul edir.

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Introduction

Despite the well-established economic wisdom of lowering tariffs and improving access to free trade,[1] in recent years countries have reverted to protectionism.[2] Pundits think developing countries need tariffs to counter rich countries' subsidies, which they cannot afford.[3] Yet it is actually wealthier countries that are leading this tariff trend.[4] In particular, American President Donald J. Trump has been increasing tariffs with alarming alacrity.[5]

Developing countries have been a major focus of the World Trade Organization (WTO), which specifically sought to protect them during the

[1] *See* Arthur S. Guarino, *The Economic Effects of Trade Protectionism*, (2018), https://www.focus-economics.com/blog/effects-of-trade-protectionism-on-economy (last visited Sept. 2, 2019); Paul Krugman, International Economics: Theory & Policy, 25-26 (2012).
[2] *See* World Trade Organization, *Rate of New Trade Restrictions from G20 Economies Doubles Against Previous Period* (2018), https://www.wto.org/english/news_e/news18_e/monit_04jul18_e.htm (last visited Sept. 2, 2019).
[3] Stephen Devadoss, *Why Do Developing Countries Resist Global Trade Agreements?*, 15 J. INT'L TRADE & ECON. DEV. 191, 204-205 (2006).
[4] *Supra* note 2.
[5] Bob Bryan, *Trump's Trade War with China is Intensifying* (2018), https://www.businessinsider.com/trump-tariffs-what-is-a-tariff-meaning-for-prices-consumer-2018-3 (last visited Sept. 2, 2019).

Doha Round.[6] The Doha Declaration was in part based on creating separate, looser liberalized trade standards for developing countries in order for them to achieve their development needs.[7] Despite this focus, these countries are now at greater risk not because of the existing WTO rules, but because larger, wealthier countries will not follow those rules.[8]

Under its Dispute Settlement Understanding ("DSU"), the WTO has a structured system to address any violations of the WTO's founding agreement, the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement").[9] If a Member is found to violate the WTO Agreement and refuses to come into compliance, the complaining Member's only retaliatory weapon is suspending concessions, or imposing tariffs of its own in retaliation.[10]

The retaliation remedy for WTO violations has already been criticized for providing a poor tool for smaller countries[11] and offering less than what a country could gain under public international law.[12] But despite recommendations for the WTO to adopt an alternative mode of punishment for violating countries, including the introduction of financial damages[13] and class actions,[14] retaliation has remained the lone weapon of WTO Members against violations.

Retaliation was effective as a threat to help lower average tariffs from 40% at the end of World War II to 5% by 2003.[15] However, the WTO system is largely based on willingness to comply and work towards a common goal of lower tariffs on a global scale. The Trump presidency poses a unique and dangerous problem to this structure. President Trump has already threatened to withdraw from the WTO,[16] demonstrating the shakiness of the world's largest economy's commitment to the WTO and its goals. In

[6] World Trade Organization, Ministerial Declaration 20, WTO Doc. WT/MIN(01)/DEC/1, ¶ 2, 3 (2001) (hereinafter Doha Declaration).
[7] *See id.*, ¶ 13.
[8] *See* Mukhisa Kituyi, *A Trade War Will Hit Developing Countries the Hardest* (2018), https://www.japantimes.co.jp/opinion/2018/06/19/commentary/world-commentary/trade-war-will-hit-developing-countries-hardest/#.W6Ka35NKho4 (last visited Sept. 2, 2019).
[9] Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 2. (hereinafter DSU).
[10] *Id.*, art. 22.
[11] Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis* (2004), https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf (last visited Sept. 2, 2019).
[12] *See* Marco Bronckers & Freya Baetens, *Reconsidering Financial Remedies in WTO Dispute Settlement*, 16 J. INT'L ECON. L. 281, 298-99 (2013).
[13] *Id.*, 299-300.
[14] Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY L. REV. 152, 158-59 (2011).
[15] William Davey, The World Trade Organization: A Brief Introduction, in International Trade Law, 87, 89 (Joost H.B. Pauwelyn, 3rd ed. 2016).
[16] Christine Wang, *Trump Threatens to Withdraw from World Trade Organization* (2018), https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html (last visited Sept. 2, 2019).

response to American tariffs on their goods, several countries unilaterally imposed retaliatory tariffs without going through the WTO's dispute resolution system.[17]

Too much of the WTO regime hinges on trust, and without an effective enforcement mechanism, an anti-WTO leader of a large country, such as President Trump, will undermine the entire WTO.[18] This Note will first explain the values and structure of the WTO. It will then discuss the dispute resolution system under the DSU, as well as its advantages and shortcomings. It will then discuss several alternative enforcement methods suggested by WTO Member states and scholars, including TRIPS cross-retaliation and collective retaliation. While each of these methods has potential, there is another solution more specifically designed for Members who repeatedly breach the WTO Agreement: a repeat violator policy. This Note suggests such a repeat violator policy as a solution. It would provide a graduated response by the WTO to increased non-compliance by Member states, imposing much stronger retaliatory measures on consistent violators to strengthen the ability of developing countries to fight WTO non-compliance. This in turn will raise the chances of wealthy countries coming back into compliance with the WTO Agreement.

I. General Principles of the WTO Agreement

The WTO Agreement created the WTO in 1994 with the goal of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services."[19] At the same time, it was "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."[20] The overarching purposes of the WTO Agreement are the "substantial reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international trade relations."[21] The WTO Agreement incorporates the General Agreement

[17] *See* Marc L. Busch, *What Trump's Trade War Could Mean for the WTO and Global Trade* (2018), https://hbr.org/2018/06/what-trumps-trade-war-could-mean-for-the-wto-and-global-trade (last visited Sept. 2, 2019); Doug Palmer, *U.S. Launches 5 WTO Cases Against Retaliatory Tariffs* (2018), https://www.politico.com/story/2018/07/16/us-challenges-retaliatory-tariffs-at-the-wto-1578925 (last visited Sept. 2, 2019).

[18] *See, e.g.*, Jakob Hanke, *Europe Fears Trump Is Out to Kill the World Trade Organization* (2018), https://www.politico.eu/article/wto-donald-trump-protectionism-brussels-fears-trump-wants-the-wto-to-fail/ (last visited Sept. 2, 2019).

[19] Marrakesh Agreement Establishing the World Trade Organization, pmbl. (1994) (hereinafter WTO Agreement).

[20] *Ibid.*

[21] *Ibid.*

on Tariffs and Trade 1994 ("GATT"), the General Agreement on Trade in Services ("GATS"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and associated legal instruments, and binds all WTO Members to them.[22]

In particular, the WTO Agreement carves out protections for developing countries. The preamble of the WTO Agreement stipulated that there is "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[23] They "will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."[24] Under the previous GATT regime, the Members even agreed to make exceptions to the Most Favored Nation requirement,[25] one of the central requirements of the GATT, for developing countries.[26]

II. Dispute Settlement under the WTO

The WTO is relatively rare among international agreements in that it actually has an enforcement mechanism.[27] This fact alone sets the WTO out as a potential example of how to enforce future international agreements.[28] The WTO Agreement establishes a complaint process, panels and an appellate body to administer disputes, and procedures for holding accountable countries that violate the WTO.[29]

All trade disputes between WTO Members are regulated through the DSU, which is itself a part of the WTO Agreement.[30] The WTO's Dispute Settlement Body ("DSB") administers all disputes under the WTO Agreement and is the mechanism to preserve the rights and obligations of WTO Members.[31] In this role, the DSB establishes panels for reviewing disputes, adopts panel and Appellate Body reports on the disputes, maintains surveillance of implementation of rulings and recommendations

[22] *Id.*, art. II(2) (encompassing the WTO Agreement and Annexes 1, 2, and 3). The exception is Annex 4, which contains plurilateral agreements that are binding only on those countries that have accepted them; *Id.*, art. II(3).
[23] *Id.*, pmbl.
[24] *Id.*, art. XI(2).
[25] *Id.*, art. I.
[26] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903 (1979); GATT BISD (26th Supp.) 203-205 (1989) (hereinafter Enabling Clause).
[27] Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 266 (2011).
[28] Matus Stulajter, *Problem of Enforcement of an International Law – Analysis of Law Enforcement Mechanisms of the United Nations and the World Trade Organization*, 33 J. MOD. SCI. 325, 330–332 (2017).
[29] DSU, *supra* note 9.
[30] *Ibid.*
[31] *Id.*, art. 2, 3.

from the panels and Appellate Body, and authorizes the suspension of concessions and other obligations under the WTO Agreement.[32]

In any WTO dispute, the two Members must first consult with each other to try to find a solution before having a panel adjudicate the dispute.[33] Any party to the dispute can request good offices, conciliation, or mediation at any time, and, if the parties agree, can continue to consult while the panel process proceeds.[34] If consultation fails, the complaining party may request a panel to adjudicate the dispute.[35] After receiving arguments from both sides and gathering relevant information, the panel will issue its interim report to the parties for comments.[36] The panel will meet with the parties to discuss any comments and will then circulate its final report to the entire WTO membership.[37] Provided that there is not a consensus among WTO Members to not adopt the panel report, the report will then be referred to the DSB for formal adoption.[38] However, if one of the parties has filed for appeal, the panel report will not be considered for adoption until after the Appellate Body rules on the dispute.[39] After hearing the dispute, the Appellate Body's report will go through the same formal adoption process as a panel report.[40]

If the panel or Appellate Body finds a Member's trade measure to be inconsistent with the WTO Agreement, it will recommend that the Member conform to the Agreement and may suggest ways in which the Member could implement the recommendations.[41] If the adopted report recognizes a WTO infringement, the infringing Member has a duty to comply with the recommendations and rulings of the DSB to remedy it.[42] Thirty days after the report is adopted, the Member who violated the WTO Agreement will inform the DSB of its intentions regarding the implementation of the recommendations and rulings of the DSB.[43] The recommendations and rulings must be implemented within fifteen months unless the parties extend this time due to exceptional circumstances.[44] The DSB will observe the Member's implementation of the adopted recommendations or rulings and any WTO Member can raise the issue of non-adoption in front of the DSB at any time.[45]

[32] *Id.*, art. 2.
[33] *Id.*, art. 4.
[34] *Id.*, art. 5.
[35] *Id.*, art. 6.
[36] *Id.*, art. 15.
[37] *Ibid.*
[38] *Id.*, art. 16.
[39] *Ibid.*
[40] *Id.*, art. 17.
[41] *Id.*, art. 19.
[42] *Id.*, art. 21.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

If the Member fails to implement the recommendations and rulings within a reasonable time, the DSU authorizes compensation or the suspension of concessions or other obligations under Article 22.[46] The purpose of Article 22 is to induce compliance.[47] First, the parties will discuss adequate compensation for the violating Member's continued noncompliance.[48] If these negotiations fail, the complainant may then request authorization from the DSB to retaliate by temporarily suspending concessions or other obligations under the WTO Agreement to the violating Member.[49] The type of concessions that will be suspended will be influenced by the trade sector under which the panel or Appellate Body found the violation, the broader economic elements related to the suspension of the concession, and the degree of the violation.[50] If the violating Member objects to the suspension of concessions, the retaliation measure will be taken before an arbitrator who will determine if the retaliation is at the right level.[51]

III. Evaluating the Current DSU

A. Advantages of the DSU

While the exact impact of the differences between the 1947 GATT and the 1994 DSU has perhaps been overstated,[52] the changes are undoubtedly important advances.[53] For starters, the WTO is an actual organization, which gives it logistical support, financing, and a structure.[54] The GATT system did not supply any of these things, effectively having a dispute settlement body that was in a holding pattern for nearly fifty years.[55] Naturally the lack of any administrative support severely hampered the day-to-day functioning of GATT panels.[56] The establishment of the WTO Secretariat to perform the

[46] *Id.*, art. 22.1.
[47] *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*, WTO Doc. WT/DS27/ARB/ECU, ¶ 76 (2000) (hereinafter *EC – Bananas* (22.6) (Ecuador)).
[48] DSU, *supra* note 9, art. 22.2.
[49] *Ibid.*
[50] *Id.*, art. 22.3.
[51] *Id.*, art. 22.6.
[52] *See* Marc L. Busch & Eric Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in The Political Economy of International Trade Law: Essays in Honor of Robert Hudec 457, 464 (Daniel M. Kennedy & James D. Southwick, eds., 2002).
[53] *See* World Trade Organization, *Historic Development of the WTO Dispute Settlement System*, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm (last visited Apr. 9, 2019).
[54] *See* Joost H.B. Pauwelyn, International Trade Law, 99-100 (3rd ed. 2016).
[55] *Id.*, 89-90.
[56] *Ibid.*

WTO's administrative duties[57] and a procedure for creating a yearly budget[58] was essential to reforming the dispute resolution system.[59]

The DSU also covers the entire WTO Agreement. While the GATT only covered its namesake agreement, the DSU covers all agreements contained within the WTO Agreement, including the GATS, the TRIPS, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS"), and the Agreement on Technical Barriers to Trade ("TBT").[60] This is vital in actually enforcing the entire WTO Agreement. In addition, the service and intellectual property sectors are substantially more important now than in 1947, vastly increased in size compared to their nascent levels in the middle of the twentieth century.[61] Covering the GATS and the TRIPS was thus vital for operating in the world of twenty-first century trade.[62]

Perhaps most importantly, the WTO Agreement removed the unanimous consent rule for adopting panel decisions.[63] The dispute resolution system under GATT had no formal structure and all reports had to be affirmed by consensus among all WTO Members, which made it nearly impossible for GATT reports to be implemented.[64] Therefore a losing defendant, who was after all a Member itself, could just block the report, stopping it from being approved.[65] The DSU removed the consensus requirement and provided for the adoption of all panel decisions, provided that a majority of WTO Members did not oppose the adoption.[66] This meant that panel decisions would actually be adopted and could not be struck down by the violating member itself.

Finally, the DSU provided for an Appellate Body to review panel decisions, which had not existed under the GATT.[67] The existence of an Appellate Body allows corrections for unfair or ill-considered decisions by the panels.[68] It also allows a permanent body to develop precedent for the future, which guides panels, which are only created for the individual dispute, in adjudicating disputes.[69] Furthermore, the existence of an

[57] WTO Agreement, *supra* note 19, art. VI.
[58] *Id.*, art. VII.
[59] For example, the Secretariat assists in the dispute resolution process by maintaining a list of potential individuals to serve on panels and assisting the panels with research, secretarial, and technical support; DSU, *supra* note 9, art. 8.4, 27.
[60] DSU, *supra* note 9, art. I.
[61] Pauwelyn, *supra* note 54, 90.
[62] *Ibid.*
[63] DSU, *supra* note 9, art. XI.
[64] *Supra* note 54.
[65] *See id.*, 129.
[66] *Supra* note 9.
[67] Pauwelyn, *supra* note 54, 135.
[68] Anne Marie Lofaso, A Practitioner's Guide to Appellate Advocacy, 3 and 4 (2010).
[69] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Doc., WT/DS344/AB/R, ¶ 158 (Apr. 30, 2008) ("It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations

appellate body adds legitimacy to the dispute settlement process and increases the likelihood that WTO Members will respect the final report.[70]

B. Problems with the DSU

While the DSU is certainly an improvement on the old GATT dispute settlement system, it still has several weaknesses. Potential improvements to the DSU have been considered practically since the signing of the WTO Agreement, and have featured prominently in the Doha Round.[71]

Like the GATT, the DSU is largely premised on political willingness for compliance. The current WTO system does not work unless countries are inclined to cooperate.[72] This is in part due to the weakness of the DSU sanction system. With sanctions limited to retaliation, the DSU does not have serious enough teeth to cow a determined and powerful country from breaching the WTO.[73] This is a particular problem now, given the reluctance of prominent world leaders to follow the WTO.[74] Even back in 2014, before Trump became U.S. President, countries only complied with dispute settlement rulings ninety percent of the time.[75] Between 1995 and 2005, the rate of full compliance was much lower, only amounting to nine percent.[76] The current retaliation regime has been criticized as ineffective and even counter-productive to the goal of the WTO Agreement.[77]

One worry is that wealthier countries could just price out of WTO compliance.[78] If the compensation or retaliation endured for the WTO violation is lower than the profit gained from non-compliance, countries would be tempted to simply pay the price of violation, even if this choice decreased overall wealth for the world.[79] This price-out system benefits wealthier developed countries that can afford to eat the costs of non-compliance while forcing poorer developing countries to simply endure the

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and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.").

[70] Claus-Dieter Ehlermann & Donald M. McRae, *Reflections on the Appellate Body of the World Trade Organization (WTO)*, 97 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 77, 80 (2003).

[71] Thomas A. Zimmermann, Negotiating the Review of the WTO Dispute Settlement Understanding, 93 (2006).

[72] SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM: WHO'S ON FIRST?, 238 (1997).

[73] *See* Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis*, EUI WORKING PAPERS, 31 (2017).

[74] *See, e.g.*, Edward Helmore, *Trump: US Will Quit World Trade Organization Unless It "Shapes Up*" (2018), https://www.theguardian.com/us-news/2018/aug/30/trump-world-trade-organization-tariffs-stock-market (last visited Sept. 2, 2019).

[75] *WTO Dispute Settlement: Resolving Trade Disputes Between WTO Member* (2014), https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf (last visited Sept. 2, 2019).

[76] Gary Horlick & Judith Coleman, A Comment on Compliance with WTO Decisions, The WTO: Governance, Dispute Settlement and Developing Countries, 773 (Merit E. Janow et al. eds., 2008).

[77] *See* Sarah R. Wasserman Rajec, *The Intellectual Property Hostage in Trade Retaliation*, 76 MD. L. REV. 169, 184–186 (2016).

[78] *See* Peter B. Rosendorff, *Stability and Rigidity – The Dispute Settlement Procedure of the WTO*, 99 AM. POL. SCI. REV. 389, 390-391 (2005).

[79] *Ibid.*

violations.[80] In fact, large democratic states are far less likely to comply with the WTO Agreement than economically smaller states.[81] Litigation costs are a further impediment to developing countries pursuing WTO dispute resolution.[82]

The current dispute settlement enforcement methods of compensation and retaliation do not benefit developing countries very much. Even if developing countries could eventually be granted compensation or allowed to retaliate through the DSB, compensation depends on the violator's willingness to negotiate and smaller countries do not have the economic clout to force an economic powerhouse like the United States or China to comply.[83] Furthermore, there is a backlash associated with retaliation. Besides hurting the violating Member, the further curbing of trade will hurt the complainant's own economy, including individual economic actors, in that country.[84] By reducing imports, the country is hurting their own production market, which in turn will negatively impact its competitiveness in the global economy.[85]

The impact of retaliation backlash will be particularly disparate for smaller developing countries. Imposing tariffs on their chief importers would be potentially ruinous to their economy, especially if the measure blocked the importation of food or essential component parts such as screws.[86] This situation was demonstrated in *EC – Bananas*, where Ecuador had little power to influence the European Union to change its WTO non-compliant policies and in fact could have fared much worse.[87]

IV. Strategies for Greater Compliance

The Doha Ministerial Conference was charged with revising the WTO dispute settlement procedure in line with earlier discussions leading up to and following the Seattle Ministerial Conference in 1999.[88] While the Doha Round raised a variety of suggestions for improvements, including greater

[80] *See* James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. INT'L POL. ECON. 542, 547 (2004).
[81] *See* Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation (1948-1998)*, https://www.iatp.org/sites/default/files/Aggressive_Multilateralism_The_Determinants_of.pdf.
[82] Henrik Horn, Hakan Nordström, & Petros C. Mavroidis, *Is the Use of the WTO Dispute Settlement System Biased?* (1999), http://econ-law.se/Papers/Disputes000117.PDF (last visited Sept. 2, 2019).
[83] Asim Imdad Ali, *Non-Compliance and Ultimate Remedies Under the Dispute Settlement System*, 14 J. PUB. & INT'L AFF. 15 (2003) ("The threat and economic impact arising when a developing country raises barriers against a large industrial economy is generally not significant").
[84] Zimmermann, *supra* note 71, 156-157.
[85] *Id.*, 157.
[86] *See, e.g.*, Chad P. Brown, Euijin Jung and Eva (Yiwen) Zhang, *Trump's Steel Tariffs Have Hit Smaller and Poorer Countries the Hardest* (2018), https://piie.com/blogs/trade-investment-policy-watch/trumps-steel-tariffs-have-hit-smaller-and-poorer-countries (last visited Sept. 2, 2019).
[87] *See* Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (1997) [hereinafter *EC – Bananas*].
[88] *See generally* Zimmermann, *supra* note 71, 93-111.

panel and Appellate Body transparency and increased political control over the adoption of reports, the negotiations largely came to nothing.[89] The General Council did reaffirm its commitment to improving the dispute settlement system,[90] however, this is the longest the WTO Agreement, or its predecessor, the GATT, have gone since being revised by a Ministerial Conference.[91]

A. Specific Reporting Requirements

One suggestion during the Doha Round was instituting specific reporting requirements for the Member in breach.[92] Within six months of adopting the panel or Appellate Body report, the Member would have to submit regular reports on the progress of implementing the recommendations and rulings until the parties agree that the issue has been remedied.[93]

If the breaching party did not cooperate, the compensation or retaliation structures would activate in the same way they already do under the DSU.[94] While reporting requirements would better show whether the country has taken steps to comply with the WTO Agreement, it would not apply any more pressure on Members to actually comply with the WTO Agreement. While transparency in reporting may be helpful for other reasons,[95] it is unlikely to lead to greater compliance. By not adding any stronger punishment, this measure would just encourage more information on violations without giving any greater impetus for compliance. This might make WTO Members aware of non-compliance sooner, but it would not fix the problem of non-compliance itself.

B. Earlier Retaliation

Another idea is moving the determination of the level of nullification and the reciprocal level of retaliation earlier in the dispute settlement process.[96] Such a move would likely shorten the dispute process and may force earlier compromise.[97] The current dispute settlement process takes about three years, effectively creating a three-year "free pass" for countries violating the

[89] *See The Doha Round Finally Dies a Merciful Death* (2015), https://www.ft.com/content/9cb1ab9e-a7e2-11e5-955c-1e1d6de94879 (last visited Sept. 2, 2019).
[90] *See* Decision Adopted by the General Council, WTO Doc. WT/L/579 (2004).
[91] *See* Jacob M. Schlesinger, *How China Swallowed the WTO*, (2017), https://www.wsj.com/articles/how-china-swallowed-the-wto-1509551308 (last visited Sept. 2, 2019).
[92] Special Session of the Dispute Settlement Body, WTO Doc. TN/DS/9 art. 21.6(b) (2003).
[93] *Ibid.*
[94] *Ibid.*
[95] *See, e.g.*, Sijie Chen, *China's Compliance with WTO Transparency Requirement: Institution-Related Impediments*, 4 AMSTERDAM L.F. 25 (2012).
[96] *See, e.g.*, Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes (Mexico), WTO Doc. TN/DS/W/40 (2003); Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding (Ecuador), WTO Doc. TN/DS/W/26 (2002).
[97] Zimmermann, *supra* note 71, 154-55.

WTO.[98] Allowing earlier retaliation would shrink the benefit of the "free pass" period for violating countries.

Such a change, however, could lead to an arms race in retaliation.[99] Moving the retaliation process earlier means that the permission to retaliate may be revoked if the Appellate Body later finds that the defendant actually was in compliance with the WTO Agreement. That Member would then be incentivized to file for retaliation in response to the premature sanctions the initial complainant imposed on it. Earlier retaliation would create the opportunity for messy and needless retaliation battles. In addition, if the retaliation methods themselves are unchanged, even earlier retaliation would probably lead to the same levels compliance as later retaliation. Therefore, earlier retaliation would not be a stronger deterrent; instead, it would just create a messy system of premature retaliation and counter retaliation.

C. Carousel Retaliation

Another suggestion, first raised in 1999, is carousel retaliation.[100] Carousel retaliation would allow a retaliating Member to rotate the list of products subject to retaliation in the hopes that this would pressure Members to comply with the WTO Agreement.[101] The unpredictability of this system was a concern for Members such as the European Union,[102] but this very unpredictability could make retaliation a greater weapon by applying pressure on a wider number of domestic industries in the violating country.

Carousel retaliation's greatest strength is its unpredictability and ability to strike at a variety of different industries. This strategy might apply pressure on several different industries, encouraging more lobbying to force a change in the infringing Member's policy.[103] Industries that have not been affected yet might also agitate for change to avoid the hammer of carousel retaliation striking them next.

While this could apply more pressure on the government to comply with DSB decisions, it also could encourage industries to endure and wait for the retaliation to move to a different article of trade. Similarly, it would also still be limited to a set number of trade articles at a time, increasing the range but not the strength of the retaliation. The unpredictability could also backfire by harming a larger number of consumers and producers in the retaliating

[98] John H. Jackson, *The Case of the World Trade Organization*, 84 INT'L AFF. 437, 452 (2008).
[99] For example, a WTO litigation arms race is already underway over American tariffs and the retaliatory tariffs countries have applied in return outside of the WTO framework. *See*, *e.g.*, David Lawder, *U.S. Launches Five WTO Challenges to Retaliatory Tariffs* (2018), https://www.reuters.com/article/us-usa-trade-wto/u-s-launches-five-wto-challenges-to-retaliatory-tariffs-idUSKBN1K62GT (last visited Sept. 2, 2019).
[100] *Id.*, 159.
[101] *Ibid.*
[102] *Id.*, 160.
[103] *Id.*, 159.

country as well.[104] Furthermore, carousel retaliation has proved a deeply unpopular idea, and has only been wholeheartedly endorsed by the United States.[105]

D. Cross-Retaliation

Several developing countries have suggested the alternative of cross-retaliation, where they get to choose the sector in which they will suspend concessions, as a way to balance the scales for developing countries.[106] The WTO primarily authorizes retaliation under the violated agreement.[107] This means, for example, that a GATT violation would be met with suspension of concessions in goods, not services or intellectual property. This system creates an imbalance between countries. Developing countries are mostly producing goods, which would be covered under the GATT, while larger economic powerhouses such as the United States or the European Union have an increasingly high percentage of their trade in services or intellectual property, covered by the separate GATS and TRIPS.[108] Therefore it is almost impossible for a developing country, with little to no service or intellectual property trade of its own, to retaliate against this rich vein of trade wealth of larger countries.

This "same category of trade" retaliation, while the main retaliation system, is not the only one. Under the current version of the WTO Agreement, if retaliation in the same trade sector is not effective, countries can resort to cross-retaliation.[109]

More readily allowing cross-retaliation, or retaliation against trade in a different sector, is a potential solution to the imbalance in power between developing and developed countries under the DSU. Several scholars have particularly advocated for cross-retaliation in regards to intellectual property.[110] Intellectual property includes highly lucrative copyrights and patents, which are almost exclusively held by wealthy countries.[111] The ability to nullify these intellectual property rights in the complaining

[104] Lenore Sek, Cong. Research Serv., RS20715, Trade Retaliation: The "Carousel" Approach, 6 (2002).
[105] Bryan Mercurio, Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are There Really Alternatives?, in Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment 397, 440 (James C. Hartigan, ed., 2009).
[106] Dispute Settlement Understanding Proposals: Legal Text (India), WTO Doc. TN/DS/W/47 (2003).
[107] DSU, *supra* note 9, art. 22.3(a).
[108] *See* World Trade Organization, *Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors* (1996), https://www.wto.org/english/tratop_e/devel_e/w15.htm#Footnote9 (last visited Sept. 2, 2019); Edward Gresser, *U.S. Share of World Intellectual Property Revenue – 39 Percent*, (2014), http://www.progressive-economy.org/trade_facts/u-s-share-of-world-intellectual-property-revenue-39-percent/ (last visited Sept. 2, 2019).
[109] DSU, *supra* note 9, art. 22.3(b), (c).
[110] *See* Wasserman Rajec, *supra* note 77, 197–98.
[111] *See*, *e.g.*, WIPO, World Intellectual Property Indicators, 30 (2017) (showing that the largest producers of patents are China, the United States, Japan, Korea, and Europe).

country is more likely to actually affect wealthy countries and to spur the powerful industries that have lucrative copyrights and patents to lobby the government for compliance.[112]

In practice, however, TRIPS cross-retaliation has not proved very effective. For example, it was approved in *EC – Bananas* for Ecuador against the European Union, but Ecuador did not actually use it and settled for the European Union lowering its tariffs twenty years in the future.[113] In *United States – Gambling*, the Appellate Body authorized Antigua to suspend American copyrights, but Antigua has not taken any action and the illegal American trade measure remains in place.[114] In *United States – Cotton*, Brazil received the right to suspend American pharmaceutical patents, but ended up settling for cash rather than pursuing patent suspension.[115] These cases undermine the argument that TRIPS retaliation, at least by itself, will lead to compliance. In fact, it reinforces the notion that wealthy countries will just price out or will not be affected enough to be forced into compliance.

E. Collective Retaliation

The African Group suggested the alternative of collective retaliation as a way to help developing countries have greater economic power in enforcing compliance with the WTO Agreement.[116] Under this method, if a developed Member breached its obligations to a developing Member, all WTO Members would be allowed to retaliate.[117] Related to this suggestion is the idea of a class action, where all countries affected by the measure could retaliate.[118] Both methods would allow the collective power of many developing states to combine and bear down on the violating member.

At first glance, collective retaliation provides a strong alternative to the current retaliation regime. Collective retaliation would undoubtedly provide a stronger deterrent to violating the WTO. It also specifically focuses on empowering less economically powerful countries in the dispute settlement procedures.

Collective retaliation, at least as suggested by the African Group, and class actions would have to be formally adopted as amendments to the WTO Agreement by the WTO Membership. Since the DSU does not have a provision for collective retaliation, it would have to be added to the WTO Agreement through an amendment. Amendments require the high burden

[112] *See* Wasserman Rajec, *supra* note 77, 198.
[113] *Id.*, 201; *EC – Bananas*, *supra* note 87.
[114] Arbitrator Decision, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/ARB (2007).
[115] Arbitrator Decision, United States - Subsidies on Upland Cotton, WTO Doc. WT/DS267/ARB/2 (2009).
[116] Negotiations on the Dispute Settlement Understanding (African Group), WTO Doc. TN/DS/W/15 (2002).
[117] *Ibid.*
[118] Cai, *supra* note 14, 158-59.

of unanimous approval by all WTO Members,[119] which makes collective retaliation, despite its potential promise, highly unlikely. This suggestion provoked staunch opposition and did not make it onto the Doha Round draft.[120] It conjures up images of punitive action rather than the WTO ideals of compliance.[121] So while collective retaliation is a potentially powerful retributory system, it is unlikely to be achieved through amending the WTO Amendment.

F. Injunctions

Mexico has suggested the alternative of instituting an injunction system where the panel could rule that the measure in question should be suspended until the panel issues its final report.[122] Injunctions would have the benefit of stopping the offending behavior immediately instead of suffering through the three-year "free period."[123] This would also go toward the WTO goal of compliance with the WTO Agreement as quickly as possible.

However, the injunction doesn't actually increase the strength of deterrence. It would merely move the current WTO enforcement mechanisms earlier. One potential benefit of an injunction would be that it can be used in tandem with other suggested changes to the WTO dispute settlement system.

Like with collective retaliation, it is unlikely that the WTO Membership would adopt injunctions. The suggestion faced significant pushback and was not adopted in the final text of the Doha Round.[124]

The potential unintended consequences of injunctions would also militate against adopting such a system. The injunction system could encourage more frivolous litigation for the purpose of stopping trade measures or applying pressure on other countries. There would also be the issue of how to compensate countries when an injunction is incorrectly applied. In addition, the implications for further loss of sovereignty beyond what the WTO Members have agreed upon would only acerbate the pre-existing arguments that the WTO infringes on state sovereignty.[125]

[119] WTO Agreement, *supra* note 19, art. X(8).
[120] Zimmermann, *supra* note 71, 161.
[121] M.S. Korotana, *Collective Retaliation and the WTO Dispute Settlement System*, 10 ESTEY CTR. J. INT'L L. AND TRADE POL. 196, 204–05 (2009).
[122] Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding (Mexico), WTO Doc. TN/DS/W/23 (2002).
[123] *See* Jackson, *supra* note 98, 452.
[124] Zimmermann, *supra* note 71, 165.
[125] *See, e.g.*, Kyle Bagwell & Robert Staiger, *National Sovereignty in the World Trading System*, 22 HARV. INT'L R. 54 (2001).

V. Repeat Violator Policy

A. The Policy

A new suggestion to improve compliance with the WTO Agreement is instituting a repeat violator policy into the practices of the DSB. A repeat violator policy would punish the infringing Member more depending on the number of violations during a given period of time. Repeat violator policies are used in a variety of other areas of law to counter the type of problem raised by habitual offenders, which is the danger raised by American President Trump and others.

For example, repeat infringer policies are required under the U.S. Digital Millennium Copyright Act for online third-party platforms to escape liability.[126] These can take the form of either a set number of strikes before being banned from the website[127] or a graduated response of progressively harsher punishments.[128] This approach balances the rights of copyright owners and copyright users, and has been effective at stopping repeat infringers.[129] For example, in *Ventura Content, Ltd. v. Motherless, Inc.*, the website owner, only a small business, had terminated the accounts of over 1,000 repeat infringers.[130] U.S. courts have struck down repeat infringer policies that are too lenient on repeat infringers.[131]

There are also repeat offender laws in U.S. criminal law, including the well-known three-strikes laws.[132] While these criminal repeat offender laws may not be as successful as advocates had hoped, they did increase deterrence to at least a degree and would be improved through meaningful review.[133] There is strong logic behind the principle, even if these laws have been poorly applied in many cases.

A graduated response repeat violator policy could create greater deterrence for the WTO as well. As the DSU currently stands, whether a country violates the WTO Agreement one time or a hundred times, the

[126] 17 U.S.C. § 512(i) (2018).
[127] *See, e.g.*, *Enforcement Actions for Intellectual Property Rights Infringements Claims on Alibaba.com*, https://rule.alibaba.com/rule/detail/2043.htm (last visited Nov. 1, 2018) (laying out a three-strike suspension policy for intellectual property violations).
[128] *Comcast's DMCA Repeat Infringer Policy for Xfinity Internet Service*, COMCAST, https://www.xfinity.com/support/articles/comcast-dmca-compliance-policy (last visited Nov. 3, 2018) (setting out a multi-tier repeat infringer policy going from persistent on-screen notice to suspension and finally to termination).
[129] *See* Katherine Oyama, *Why the Digital Millennium Copyright Act Is Working Just Fine* (2014), https://www.digitalmusicnews.com/2014/04/10/dmcaworkingjustfine/ (last visited Sept. 2, 2019).
[130] Ventura Content, Ltd. v. Motherless, Inc., 885 F.3d 597, 602 (9th Cir. 2018).
[131] BMG Rights Management LLC v. Cox Communications, Inc., 881 F.3d 293, 299 (4th Cir. 2018).
[132] *See* Ian Ayres, Michael Chwe, & Jessica Ladd, *Act-Sampling Bias and the Shrouding of Repeat Offending*, 103 VA. L. REV. ONLINE 94 (2017); *see, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (affirming a three-strike sentence by a California state court).
[133] *See, e.g.*, Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?* (2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello/ (last visited Sept. 2, 2019).

punishment is the exact same, a judgment that may lead to equivalent retaliation. Particularly for wealthier countries that can price out of complying with the WTO Agreement,[134] equal punishment per the crime does not result in deterrence for larger violations.

The WTO Agreement is largely built on Members complying willingly. That is what makes American President Trump's slew of illegal tariffs so damaging. A concerted effort to defy the WTO, at least with the current DSU, would knock the whole WTO structure down.[135] Such a danger needs an equally threatening response.

A WTO repeat violator policy would create gradually stronger responses to repeated WTO non-compliant behavior. For example, if Country X were only found to violate the WTO Agreement once in several years, the DSU system would act as it currently does. However, if Country Y launches several measures that violate the WTO Agreement in a short period of time, this would trigger the repeat violator policy and the Members who are unfairly affected by the illegal measures would be given a wider range of retaliation abilities if compliance were not forthcoming.

This would involve several steps. The first part of this repeat violator policy would be allowing all countries negatively affected by the illegal measure (or measures) to retaliate. The second would be to allow the combined countries to strike at an increasingly large number of the non-compliant Member's trade sectors. The DSB would take sustained violations into account in determining if this is a repeat violator, and if so, how much retaliation is appropriate. In addition, the DSB would take intent into consideration. In the case of President Trump, for instance, his clear intent to damage the WTO[136] would be a consideration in favor of greater retaliation. This repeat violator policy would thus meet the WTO's goal of pressuring Members to comply earlier to avoid larger, more crippling retaliation.

An additional benefit of a repeat violator policy is that it would not block any other suggested innovation from working too. In fact, the repeat violator policy would likely work best in tandem with aspects of carousel retaliation, cross retaliation, and collective retaliation. Therefore, it does not block later improvements to the dispute settlement procedures.

One potential problem would be that developing countries do not file complaints with the WTO as much as wealthy countries. However, while developing countries did not use Article 21.5 complaints for the first nine years of the WTO, they have since been using them with increasing

[134] *See* Rosendorff, *supra* note 78, 390-91.
[135] Martin Hesse, *WTO Faces Existential Threat in Times of Trump* (2018), http://www.spiegel.de/international/world/world-trade-organization-in-trouble-amid-trump-trade-war-a-1215802.html (last visited Sept. 2, 2019).
[136] *See*, *e.g.*, Hanke, *supra* note 18; James Kosur, *Leaked Document Shows Trump Wants to Destroy WTO Relationship* (2018), https://hillreporter.com/leaked-document-shows-trump-wants-to-destroy-wto-relationship-3281 (last visited Sept. 2, 2019).

frequency.[137] Providing developing countries with a vehicle to fight on a more even playing field with wealthy violating countries is also likely to boost their confidence that their actions would actually make a difference. The bandwagon effect is also helpful. When one Member files a compliant, other Members are likely to join in.[138]

Of course, the hope would be that the repeat violator policy would never have to be used. Few WTO disputes lead to retaliation, since usually the Member that is in violation will come into compliance.[139] Retaliation has only been used sparingly in the past: from 1995 to 2013, there were only 36 requests for retaliation for non-compliance.[140] There would be no greater risk under the repeat violator system to WTO-compliant countries than before. The repeat violator policy would strike only at those especially egregious WTO non-compliant Members, such as the Trump White House, whose very actions threaten to undermine the entire WTO.

B. Implementation

Another benefit of introducing a repeat violator policy into the DSU is that it could potentially be implemented without a formal amendment. Amendments are a major stumbling block to innovation in the WTO, since there needs to be consensus among all 164 Members for an amendment to the WTO Agreement to be implemented,[141] which would be enormously difficult. This is a major reason why the alternatives of collective retaliation and injunctions are unlikely to be successful.

The key to avoiding the formal amendment process is ambiguous language in the DSU itself. The DSU Article 22.4 stipulates that the "level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."[142] While this language is constraining, it, and the rest of the DSU, does not actually define equivalence, nor does it say anything about only allowing one area of trade retaliation. In fact, Article 22.4 says it should be "equivalent to the level of the nullification or impairment."[143]

There is no definition of "equivalent" in the DSU or any other part of the WTO Agreement; even context and state practice do not provide any clues to its true meaning.[144] The non-binding, but informative, WTO's Handbook on

[137] Zimmermann, *supra* note 71, 74-75.
[138] *Id.*, 86.
[139] *See generally*, Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397 (2007).
[140] Diego Bonomo, *Hitting Where It Hurts: Retaliation Requests in the WTO* (2014), https://voxeu.org/article/retaliation-wto (last visited Sept. 2, 2019).
[141] WTO Agreement, *supra* note 19, art. X(8).
[142] DSU, *supra* note 9, art. 22.4.
[143] *Ibid.*
[144] *See generally*, Memorandum from Thibault Fresquet, Kai Kan, & Farzan Sabet to the Permanent Mission of Canada, *Retaliation under the WTO system: When does Nullification or Impairment Begin?* (2016), https://georgetown.app.box.com/s/a1edn1ep3ch86tnss53wwvyev2g05p0w (last

the WTO Dispute Settlement System says "equivalent" means "that the complainant's retaliatory response may not go beyond the level of the harm caused by the respondent."[145] Harm is a subjective measure, and it would be nearly impossible to calculate the exact amount of harm flowing from a violation's resulting trade reverberations and economic and political effects.[146] Particularly given the lack of an appellate body for retaliation arbitration panels, there is a multitude of interpretations for what "equivalent" might mean and no singular definition that is mandated.[147] For example, one arbitration panel that directly engaged the meaning of "equivalence" found that it is in reference to the level of WTO-inconsistency, which is nebulous at best.[148]

Therefore, if a Member flagrantly violates the WTO repeatedly with the goal of weakening it, it is arguable that this is an extreme degree of nullification and impairment that warrants an equally extreme response under the language of the DSU. Particularly helpful for developing countries, Article 21.8 notes that the DSU shall also consider the impact of WTO-inconsistent actions on the economy of the developing country.[149]

Furthermore, treaty interpretation standards support allowing repeat violator policy without the need for a formal amendment. Under the Vienna Convention on the Law of Treaties, the terms of a treaty should be interpreted in good faith according to their ordinary meaning and in terms of their context, object, and purpose.[150] The preamble of the WTO Agreement explicitly states that a purpose of the WTO is the "elimination of discriminatory treatment in international trade relations."[151] Furthermore, the preamble recognizes the need to help developing countries share in international trade.[152] These purposes give context surrounding the DSU and support the proposition that it should be interpreted in a way to enforce compliance with the WTO and provide strength to developing countries to protect their WTO trade interests. The repeat violator policy would thus be directly in line with and would further the purposes of the WTO Agreement.

visited Sept. 2, 2019); *see also* Henrik Horn & Petros C. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests* (1999), https://www.iatp.org/sites/default/files/Remedies_in_the_WTO_Dispute_Settlement_System_.htm (last visited Sept. 2, 2019).

[145] WTO, A Handbook on the WTO Dispute Settlement System, 82 (2004).

[146] *See* Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L 383, 423 (2006).

[147] David Jacyk, *The Integration of Article 25 Arbitration in WTO Dispute Settlement: The Past, Present and Future*, 15 AUSTL. INT'L L. J. 253 (2008).

[148] *See EC – Bananas* (22.6)(Ecuador), *supra* note 47, ¶ 159 (limiting the estimation of Ecuador's losses in actual and potential trade and trade opportunities in the relevant goods and service sectors).

[149] DSU, *supra* note 9, art. 21.8.

[150] Vienna Convention on the Law of Treaties, art. 31(1) (1969).

[151] WTO Agreement, *supra* note 19, pmbl.

[152] *Ibid.*

Even if the repeat violator policy must be implemented through the amendment process, passing an amendment might be possible. The current weak WTO dispute settlement system poses serious dangers to the continued vitality of the WTO and change is certainly needed.[153] This impetus for a substantive change to the dispute resolution system could be used to make a stronger push for amending the DSU to include a repeat violator policy. Also, unlike with collective retaliation or injunctions, the repeat violator policy would be limited to only affecting the worst, most flagrant offenders. This would make it more palatable to the WTO membership at large.

Conclusion

The rise of anti-WTO leaders in powerful countries is a new and dangerous phenomenon that needs an innovative solution. The Doha Round fell apart and failed to deliver a substantive change to the DSU. While suggestions such as cross-retaliation or injunctions have their merits, they are not created with a serial WTO violator in mind and would be unlikely to be adopted. A repeat violator policy, on the other hand, is directly calibrated to this risk and could likely be implemented by the DSB directly rather than the difficult formal amendment process. It is true that almost certainly one hundred per cent compliance with the WTO Agreement will remain elusive.[154] However, the DSB needs to use an innovative strategy tailored to today's problems to preserve the WTO in the face of the most serious threat it has encountered since its creation. The repeat violator policy is that strategy.

[153] *See* Reich, *supra* note 73, 31.
[154] *See* Wasserman Rajec, *supra* note 77, 184–85.