evolving trade issues. We hoped then for a WTO that would be a permanent place for a "permanent round" of global trade rulemaking by the Members of the WTO. Instead, we are engaged now in a new and ninth round of multilateral trade negotiations. This ninth round is, in structure, very much like the previous eight.

I certainly believe that the overriding priority for the world today in trade must be the successful conclusion of the Doha Development Round. I applaud USTR Robert Zoellick for his recent initiative in trying to advance the global negotiations. He has my full support in his efforts to do so. Trade is too important to be a partisan issue, and trade is too important to be postponed until after the next presidential election.

As we work toward a successful conclusion of this round, we must, as I see it, remember our original vision for the WTO, and we must continue to work also for better ways in which all of the Members of the WTO will be able to work together to make and agree on the right rules for trade on a continuing and ongoing basis. We must work, too, for ways in which the WTO can become an ever-better example of democratic and cooperative self-governance among the nations of the world. If we succeed in this, then I am confident that the WTO dispute settlement system will also continue to succeed as an appropriate and effective part of the overall world trading system.

If we open the doors, if we open the windows, and if we open our minds, then I believe we can open the way to building and sustaining a worldwide consensus for more open trade. If we have more open trade, then we can have more open societies, and we can have more of the freedom that open societies make possible. By shining more light *on* the WTO, we can make it possible for more light to shine *from* the WTO - light from the growth, the prosperity, and the freedom that can flow to all the world from the illumination of trade.

6. RECENT DEVELOPMENTS AND SCHOLARSHIP ON WTO ENFORCEMENT REMEDIES

Steve Charnovitz

A country or customs territory joining the World Trade Organization (WTO) becomes bound by the set of rules applying to all Members and by its own singular set of concessions made in the course of WTO multilateral negotiations.[1] Recognizing that WTO Member governments were going to have differences of opinion about the meaning of the rules and their application in particular circumstances, the WTO Agreement includes a dispute settlement understanding, known as the "DSU".[2] Compared to most other mechanisms for dispute settlement and/or compliance in multilateral treaties, the WTO's DSU provides a potent combination of adjudicative procedures and enforcement tools. Under the adjudicative procedures, a WTO Member may lodge a complaint about whether another Member has violated a WTO rule, and this complaint will be examined by an independent panel. The panel's report may be appealed to the Appellate Body. Whatever decision is reached will then be adopted by the WTO Dispute Settlement Body (DSB) unless there is a consensus to discard it. Although the DSU states that "prompt compliance with recommendations or rulings of the DSB is essential . . . ",[3] the drafters recognized that compliance might not occur, and provided other resorts for complaining governments. According to the DSU rules, the "last resort" in the event of continuing non-resolution of a dispute is that the DSB will permit the complaining government to "suspend concessions or other obligations" vis-à-vis the scofflaw government.[4]

That last resort is the topic of this article, which examines the WTO practice of allowing complaining WTO Members to employ the tool of suspension of concessions or other obligations against a defending WTO

[1] See Agreement Establishing the World Trade Organization [WTO Agreement], art. XVI:4.
[2] WTO Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU].
[3] DSU art. 21.1.
[4] DSU arts. 3.7, 22.7.

Member that has failed to comply.[5] During the past decade, much has been written about this practice, its benefits, and its flaws. In this brief article, I want to take note of some of the recent developments in the law and scholarship about how the WTO uses a suspension of concessions.

Building on the work of Robert E. Hudec, John H. Jackson, Petros C. Mavroidis, Joost Pauwelyn, and other scholars, I wrote an article in 2001 entitled "Rethinking WTO Trade Sanctions".[6] My thesis was that the WTO had effected a "transformation of international trade law" in which the suspension of concessions is now viewed differently than it was in the days of the General Agreement on Tariffs and Trade (GATT).[7] In the GATT era (1947 to 1994), a suspension of concessions resulting from a trade dispute was understood as part of a "rebalancing paradigm" in which the complaining country engaged in a "self-satisfying solution" to the commercial problem stemming from the GATT violation.[8] By contrast, in the WTO era, the suspension of concessions by the complaining government has taken on an "externally directed purpose" of inducing compliance by the defendant government.[9] My article sought to demonstrate that this process of suspending WTO concessions in order to change foreign governmental behavior was regularly being termed a trade "sanction," and that this new appellation is apposite even though in WTO law and practice, the suspension of concessions lacks a punitive intent.[10] After detailing the transformation of world trade law, I pointed out several ways in which new WTO sanctions were leading to serious tensions: First, because the DSU did not permit a suspension to be disproportionate or punitive, it will often not be tough enough to induce compliance. Second, this failing will engender political pressure to strengthen the sanctions. Third, suspending concessions or other obligations can undermine both the trade-expanding purpose of the WTO as well as its rule-based approach. Fourth, the availability of trade sanctions in the WTO but not in other international organizations will lead to "sanction envy" and pressure to add new issues to the WTO.[11]

[5] Elsewhere I have used the term "SCOO" as shorthand for suspension of concessions or other obligations. Steve Charnovitz, *The WTO's Problematic "Last Resort" Against Noncompliance*, 57 Aussenwirtschaft 409, 412 (2002). I will not use SCOO here because this paper is primarily a review of the scholarship of others who are not using that term. Hereinafter for purposes of brevity, I will sometimes drop "or other obligations" when discussing a suspension of concessions.

[6] See Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 American Journal of International Law 792 (2001).

[7] Id. at 793.

[8] Id. at 802, 804.

[9] Id. at 803.

[10] Id. at 793–94.

[11] Id. at 792.

Having noted these conclusions, I will not elaborate on them here; instead, my purpose is to provide an update of some of the key developments between mid-2001 and April 2004. The remainder of this article is divided into three parts: Part I reports on the latest WTO caselaw. Part II provides an overview of some important new scholarship about the WTO enforcement mechanism. Part III provides my own short commentary.

I. New WTO Caselaw on Enforcement

When a government found to be violating WTO rules fails to bring its offending measure into compliance, the complaining government(s) may seek authorization for suspending concessions.[12] The DSU states that the level of suspension is to be equivalent to the "level of nullification or impairment."[13] If the defending Member disagrees with the level of suspension proposed, it may seek arbitration. In the past three years, there have been three arbitration decisions. Two of those cases involved the Agreement on Subsidies and Countervailing Measures (SCM) which has "special or additional" rules for dispute settlement.[14] For export subsidies prohibited by the SCM Agreement, the rules state that an arbitrator, if requested, will decide "whether the proposed countermeasures are appropriate," in the event that a prohibited export subsidy has not been withdrawn.[15] In chronological order, the most recent arbitration decisions occurred in the following three disputes: (1) United States – Tax Treatment for "Foreign Sales Corporations" [hereinafter "FSC"], a complaint by the European Communities; (2) Canada – Export Credits and Loan Guarantees for Regional Aircraft [hereinafter "Regional Aircraft"], a complaint by Brazil; and (3) United States – Anti-Dumping Act of 1916 [hereinafter "1916 Act"], a complaint by the European Communities and Japan, with suspension requested only by the European Communities.[16]

In the FSC case, the arbitrator approved the imposition of a 100 percent ad valorem duty on $4 billion of U.S. exports to the European

[12] DSU art. 22.2.

[13] DSU art. 22.7.

[14] DSU art. 1.2 & App. II.

[15] Agreement on Subsidies and Countervailing Measures (SCM), arts. 4.7, 4.10.

[16] United States – Tax Treatment for "Foreign Sales Corporations" [FSC Arbitration], Recourse to Arbitration, WT/DS108/ARB (30 Aug. 2002); Canada – Export Credits and Loan Guarantees for Regional Aircraft [Regional Aircraft Arbitration], Recourse to Arbitration, WT/DS222/ARB (17 Feb. 2003); United States – Anti-Dumping Act of 1916 [1916 Act Arbitration], Recourse to Arbitration, WT/DS136/ARB (24 Feb. 2004).

Communities, an amount of countermeasures that was approximately equal to the budget cost of the U.S. government's prohibited subsidy. The arbitrator explained that the SCM Agreement did not necessarily make the "trade effects" of the subsidy the standard for an appropriate countermeasure because such a standard would entertain "rebalancing," and thus would read away certain fundamental SCM distinctions.[17] Instead, the arbitrator held that SCM countermeasures are "aimed at inducing or securing compliance . . . ," and also noted that such countermeasures cannot be "manifestly punitive."[18] In response to the US request that the arbitrator determine the portion of the budget cost of the U.S. subsidy that reflects exports to Europe rather than to the rest of the world, the arbitrator declined on the grounds that its reasoning for the amount of countermeasures was "inherently applicable" to any WTO Member and that the "issue of allocation" did not arise as the European Communities was the only complaining party in the dispute.[19] The arbitrator further noted its expectation that its decision not to discount the European Communities' entitlement to countermeasures would have the practical effect of facilitating prompt U.S. compliance.[20]

The $4 billion in countermeasures authorized by the FSC arbitration in August 2002 is by far the largest in WTO history. Paradoxically, after such a huge win, the European Communities looked reluctant to use its authority.[21] It delayed seeking final authorization until May 2003. After waiting several more months for U.S. compliance, the European Commission began imposing countermeasures in March 2004 against a list of goods exported from the United States.[22] The initial tariff countermeasures were set at five percent ad valorem with automatic monthly increases of one percentage point until the total reaches 17 percent.[23] This is the first occasion under the WTO in which a government

[17] FSC Arbitration, supra note 16, paras. 5.41, 5.43, 5.61, 6.34.
[18] Id. paras. 5.52, 5.62.
[19] Id. para. 6.28. The arbitrator also explained that the U.S. obligation not to use an export subsidy is owed in its entirety to each and every WTO Member and cannot be allocated across the Membership. Id. para. 6.10.
[20] Id. paras. 6.28, 6.29.
[21] One analyst sagely observed that "Despite having been authorized to impose sanctions at a level many times higher than in any earlier GATT or WTO case, the European Union seems essentially powerless to make the United States comply before some form of norm internalization and change in internal political incentives in the United States has taken place." Naboth van den Broek, *Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports*, 37 Journal of World Trade 127, 148 (2003).
[22] Scott Miller, *EC Trade Sanctions Have Dual Edge*, Wall Street Journal, 26 Feb. 2004, at A3; Edward Alden & Tobias Buck, *"Sad Day" as EU Puts Sanctions on US Goods*, Financial Times, 1 March 2004, at 6.
[23] European Communities, Foreign Sales Corporations (FSC): Questions and Answers, 27 Feb. 2004, available on EC Trade website.

using countermeasures or suspending concessions has done so with tariffs lower than a 100 percent ad valorem rate.

In the Regional Aircraft dispute regarding prohibited subsidies, the arbitrator approved the imposition of $248 million in countermeasures by Brazil against Canada.[24] This was less than 10 percent of the value sought by Brazil, an amount the arbitrator rejected as not being appropriate. Noting that "the logic underpinning countermeasures is that higher countermeasures are more likely to induce compliance than lower countermeasures," the arbitrator pointed out that the SCM requirement that countermeasures be appropriate "precludes reliance on that logic alone."[25] Instead, the arbitrator premised the award of countermeasures on the amount of the prohibited subsidy plus an upward adjustment to further induce compliance.[26] Taking note of Canada's admission to the arbitrator that it did not intend to withdraw the prohibited subsidy, the arbitrator tacked on an additional 20 percent of countermeasure value in order "to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations."[27] So far, Brazil has not imposed any countermeasures.

In the 1916 Act dispute, the European Communities sought approval of its approach for suspending WTO obligations against the United States.[28] The arbitrator rejected the Community's request to mirror the U.S. legislation and rejected the US government's contention that in the absence of trade effects, the level of nullification or impairment was actually zero.[29] Instead, the arbitrator held that because there was a WTO violation, the nullification level has to be higher than zero.[30] The arbitrator then authorized a suspension equal to the cumulative money value of any amounts to be paid by EC business entities pursuant both to final court judgments and settlements under 1916 Act litigation.[31] But the arbitrator rejected going further by counting costs from the "chilling effect" of the 1916 Act or the costs of litigation.[32] In making its award,

[24] Daniel Pruzin, *WTO Give Brazil Green Light for Sanctions in Canadian Aircraft Dispute*, BNA Daily Report for Executives, 20 March 2003, at A-4.
[25] Regional Aircraft Arbitration, supra note 16, para. 3.48. The arbitrator also noted that countermeasures must not be disproportionate. Id. at 3.36.
[26] Id. paras. 3.51, 3.91, 3.104, 3.107.
[27] Id. paras. 3.106, 3.119.
[28] Frances Williams, *WTO Allows Trade Sanctions on U.S.*, Financial Times, 25 Feb. 2004, at 8.
[29] 1916 Act Arbitration, supra note 16, paras. 5.32, 5.48.
[30] Id. para. 5.50.
[31] Id. paras. 5.8, 7.11, 8.1, 8.2. The arbitrator further noted that the DSU prohibits punitive sanctions.Id. para. 5.22.
[32] Id. paras.5.69, 5.76.

the arbitrator stated that a fundamental objective of the suspension of obligations "is to seek to induce compliance."[33] So far, no action has been taken either to comply or to impose the suspension.

These new decisions are largely consistent with the earlier arbitral caselaw. In all three cases, the arbitrators agreed that inducing compliance was a central purpose of the suspensions to be authorized. Indeed, in the Regional Aircraft case, the arbitrator tacked on a 20 percent increase after Canada stated that it would not comply. In all three cases, the trade effect of the underlying WTO violation did not seem to be a factor in the calculations. The most surprising aspect of the arbitrations was the decision by the FSC arbitrator not to allocate to the European Communities a proportionate share of the overall size of the US export subsidy. This decision, together with the arbitrator's intimation that new potential complainants against the US law might also be entitled to $4 billion in countermeasures, demonstrates how far the WTO has moved away from the rebalancing paradigm. Another interesting feature of the new arbitrations is that in only one of the three disputes was the countermeasure/suspension used and in that dispute only a small amount was imposed. The evidence is building that governments will hesitate to use WTO-authorized sanctions.

II. Overview of New Scholarship on WTO Enforcement

It would take many times the space available here to review all of the scholarship about WTO enforcement written during the past three years. With that explanation and an apology to omitted authors, I will cover just a few key studies.

1. Schwartz & Sykes

In early 2002, an article by Warren F. Schwartz and Alan O. Sykes was published on the positive political economy of WTO negotiations and dispute resolution.[34] In their view, the WTO Agreement employs a "contract" remedy to respond to a breach of obligations.[35] That remedy is the withdrawal of substantially equivalent concessions by the adversely affected nation. By basing trade remedies on a liability rule, the authors claim, the WTO permits a promisor nation to violate a WTO obligation

[33] Id. para. 5.7.
[34] Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 Journal of Legal Studies S179 (2002).
[35] Id. at S181.

when the cost to the promisor of being compliant exceeds the benefits of compliance to the promisee nation(s). In other words, if a nation violating a WTO rule would do so even when its affected trading partners are permitted to respond by withdrawing equivalent concessions, then the WTO permits such an "efficient" breach to occur.[36] Moreover, the two authors argue that the WTO should permit such breaches in order to promote joint welfare maximization and to facilitate the ability of each WTO Member government to modify its commitments.

Schwartz & Sykes make both economic and legal observations. The economic observation is that if the WTO Agreement is considered to be a contract, then it should allow each Member to breach so long as it is willing to bear the costs of a retaliatory suspension of obligations. The legal observation is that WTO Members are not obliged to comply with dispute resolution decisions that go against them, and thus that ". . . non-compliance may in some cases be acceptable."[37] The fact that the affected nation is permitted only to withdraw substantially equivalent concessions rather than to impose some greater penalty is a demonstration, they assert, that the governments negotiating the WTO did not intend to make compliance mandatory.[38]

Nevertheless, Schwartz & Sykes view suspension of concessions as a sanction. After noting the practical absence of formal sanctions in the GATT system, they explain that the WTO introduced "a meaningful prospect of formal sanctions for violations that are not corrected after a reasonable period of time."[39] Yet in doing so, the WTO negotiators kept in place the GATT-era limits which greatly restrict the benefits of a WTO sanction in inducing compliance. This is as it should be, they argue, because a "buy out" from an obligation could be a better outcome than compliance.[40]

2. Lawrence

The only book-length treatment of the use of "suspension of obligations" in WTO dispute settlement was written by Robert Z. Lawrence and published by the Institute for International Economics in October 2003.[41] Lawrence is a champion of the WTO rebalancing paradigm and seeks to

[36] Id. at S182.
[37] Id. at S190.
[38] Id. at S191.
[39] Id. at S179, S200.
[40] Id. at S201.
[41] Robert Z. Lawrence, Crimes and Punishments? Retaliation under the WTO (2003).

revive it as the true principle underlying a suspension of concessions, which he calls "retaliation." He reaches his conclusion via a "deconstruction" of WTO remedies.[42]

His analysis begins by clarifying the "WTO paradigm" that guides the covered agreements as well as dispute settlement.[43] That paradigm is reciprocity, or the exchange between governments of "concessions" reflecting "equal trade flows."[44] Concessions is an apt word to describe a government's agreement to reduce its own trade barriers, Lawrence asserts, because doing so exacts "political and economic costs" in a large country and can reduce its welfare.[45] Thus, the benefit that a large country derives from a trade agreement is the reduction in barriers by *another* country. Should that other country breach its obligations, the aggrieved country can withdraw concessions so as to reverse the costs incurred from entering the original agreement.[46] Such retaliation does not make the aggrieved country as well off as it would be had the bargain been kept, but retaliation is more beneficial than not retaliating, and is not tantamount to shooting oneself in the foot.[47] What retaliation accomplishes is to restore the aggrieved country to its ex ante position before the trade agreement.[48]

Lawrence distinguishes his position from that of Schwartz & Sykes.[49] In the efficient breach model of contract theory, the breaching party reimburses the aggrieved party with its "expectation damages," and then neither party is worse off. This analogy does not work for the WTO, Lawrence points out, because the reimbursements are done with trade volumes rather lump sum financial transfers. Because tariff changes can affect resource allocation, the retaliating country may not regain the welfare level it would have enjoyed had the WTO obligation been fulfilled, and thus the prerequisite for an efficient breach does not exist.

Lawrence's analysis yields two major conclusions about DSU remedies. One is that the proper rationale for the suspension of concessions is to rebalance concessions, not to induce compliance. The other related

[42]Id. at 8, 30.
[43]Id. at 19, 22.
[44]Id. at 21-22.
[45]Id. at 17, 20. By contrast, in a small country, Lawrence contends that a reduction in its own tariffs will enhance its welfare. Id. at 20.
[46]Id. at 17, 51.
[47]Id. at 8, 17, 36.
[48]Id. at 9, 18, 31, 38–39, 46, 51. Lawrence further argues that retaliation serves a useful " political function" because the import-competing producers in the retaliating country " can be rewarded." Id. at 43–44.
[49]Id. at 36–39.

conclusion is that the appropriate quantum of remedy should be what is needed to achieve trade rebalance, rather than being set at a coercive or punitive level.

On the rationale for the remedy, Lawrence's analysis is based on the economics of the "WTO paradigm" and on some WTO textual considerations. First, because the remedy under the DSU for a non-violation complaint is the same as for a violation complaint, this shows that the remedy is "not designed to induce compliance."[50] Second, because retaliation is more "tightly constrained" under the DSU than it was under the GATT, this shows the unlikelihood that the DSU drafters intended a greater orientation toward compliance.[51]

On the quantum of remedy, Lawrence's analysis is based on political and economic considerations. If the remedy were set higher or lower than a trade rebalancing level, then governments would be reluctant to enter into liberalizing trade agreements.[52] Therefore, the proper remedy under the DSU is a rebalance not a punitive sanction.[53]

Using his analytical edifice, Lawrence criticizes how WTO remedies are being authorized in both the DSU and the SCM Agreement. In the DSU, he argues that governments have contrived to use suspensions punitively to inflict harm.[54] Such actions are wrong, Lawrence claims, because the retaliating government should only be trying to take back trade concessions equivalent to the amount that it has lost.[55] One important

[50]Id. at 36 (referring to DSU art. 26.1).
[51]Id. at 33, 35.
[52]Id. at 18, 44–46, 98.
[53]Id. at 47, 95. Lawrence states that "Despite the care with which the WTO agreement has been worded and tightened, there is a widespread view that the WTO system allows for punitive sanctions." Id. at 49–50. In my view, this assertion is unjustified. I am unaware of any analyst who contends that the WTO system currently allows for punitive sanctions. Lawrence reaches this conclusion because of how he uses the term "sanction"—defining it as "a punitive measure, i.e., a measure or response that inflicts more damage than the measure precipitating the response." Id. at 1 n. 1. Based on this idiosyncratic definition, Lawrence presumes that anyone stating that the DSU authorizes "sanctions" is referring to punitive sanctions. Lawrence does not offer any justification for his definition of a sanction or make any attempt to reconcile it with contemporary practice of economic sanctions in the United Nations or elsewhere. In my view, the economic sanctions used in the post-World War II period were not intended to impose more harm on the perpetrating government than that country had imposed on its own citizens or on other countries. To be sure, no established methodology exists for making inter-country measurements of disutility.
[54]Id. at 9, 49–50, 54.
[55]Id. at 51, 54–55, 95.

implication of this perspective, Lawrence explains, is that "... violations with no trade effects do not lead to trade retaliation, and in principle, violators are not punished."[56] The deviation in WTO practice is even more dangerous under the SCM, he claims, because arbitrators have pursued a "radical departure from the rest of the system" by shifting away from the paradigm of a contract to a paradigm where WTO violations are treated as "crimes."[57] Lawrence insists that the remedy for an uncorrected export subsidy should be sized at the trade lost by the victim country.[58] He is especially critical of the Regional Aircraft Arbitration (where there was a 20 percent add-on to the countermeasures) and asks, "Is this arbitration or arbitrariness?".[59]

3. Jackson

A new article by John H. Jackson makes an important contribution to our understanding of the nature of WTO obligations.[60] This rich article cannot be adequately summarized in the space available here, but I can report its gist. Jackson contends that a government violating a WTO rule has an obligation to comply and cannot merely buy out.[61] He reaches this conclusion through a close analysis of the WTO text and the policy underpinnings of the GATT/WTO. In his view, the trend in dispute settlement has been to move away from the incipient ideas of rebalancing toward the more juridical notions of a rule-based jurisprudence. Jackson states that this trend began in the GATT era, and now "rebalancing has less and less of a role to play in the WTO context."[62] The problem with the contractual analogy of international trade rules, Jackson explains, is that the ultimate beneficiaries are broader than the governmental parties to the contract.[63] A further problem with the rebalancing concept is that as with trade rules now addressing nontariff barriers, it will often be impossible to quantify the effect of a rule breach on future potential trade.

III. Commentary

Jackson and Schwartz & Sykes disagree with each other as to whether there is an obligation to comply with WTO rulings. (Lawrence takes no

[56] Id. at 9.
[57] Id. at 58, 60.
[58] Id. at 12, 55.
[59] Id. at 58.
[60] John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy out"?*, 98 American Journal of International Law 109 (2004).
[61] Id. at 120–21, 123.
[62] Id. at 121.
[63] Id. at 118–22.

position on that legal question.[64]) In my view, Jackson is correct. This obligation can be seen in the text of the WTO as well as in the consistent holdings by WTO arbitrators that the purpose of dispute settlement remedies is to induce compliance. The arbitrators have appreciated the need for enforcement in fructifying a world trade order.

Both Schwartz & Sykes and Lawrence agree that WTO dispute settlement should not seek to induce compliance. Schwartz & Sykes contend that the WTO should not mandate the undoing of an efficient breach, while Lawrence makes a broader claim that the WTO should indulge all breaches so long as the injured country can also act to unravel its commitment to the WTO. Schwartz & Sykes seem to welcome efficient breaches. Lawrence does not welcome breaches, but does not want the WTO to be intolerant of them. Lawrence's criticism of the "inducing compliance" rationale for DSU remedies follows from his unwillingness to recognize the obligation to comply and from his own legal, economic, and political analysis. It is this analysis that I will address below.

Lawrence provides two legal arguments against the "inducing compliance" rationale. First, he offers an illogical syllogism that because (1) the remedies for non-violation and violation complaints are symmetric and (2) non-violation complaints do not seek compliance, then it must be that violation complaints also do not seek compliance.[65] Obviously, non-violation complaints do not seek compliance, but that tells us nothing about violation complaints. Second, Lawrence's claim that retaliation is more tightly constrained under the WTO/DSU than it was under the GATT ignores the fact that only one retaliation was authorized in 47 years of GATT practice, and none could be authorized without approval of the defendant country. In reality, the new WTO dispute settlement system has enabled retaliation and this feature is changing expectations about the outcome of WTO dispute settlement.

Lawrence's economic and political analysis of the WTO is based on his WTO paradigm in which countries exchange equal new trading opportunities (or trade flows) with each other.[66] Like many economists writing about international trade, Lawrence scrutinizes the WTO with the same lens once used for the GATT. The problem with this lens is that it does not focus well on the role of the WTO as an international organization and as a set of legal norms. Governmental members of the

[64] Lawrence, supra note 41, at 41.
[65] See id. at 35–36.
[66] Id. at 21–22.

WTO have developed expectations as to duties of WTO Members, and numerous private economic actors look to the WTO to maintain the rule of law in trade relations. Today, the WTO is about more than simply trade reciprocity.

If the WTO were to try to induce compliance, Lawrence argues, then achieving multilateral trade agreements would become harder. That result would surely be true at some level of coerciveness. What I understand Lawrence to be saying, however, is that any remedy more onerous than pure rebalancing would destabilize the WTO.

I do not find that hypothesis convincing. In my view, the remedies available in the WTO Agreement are not onerous enough. Ideally, a non-complying government ought to have to pay damages (in cash) equivalent to the losses suffered by victim countries.[67] When a government breaches WTO rules and then faces nothing more than being placed back in its position before entering into the agreement, Lawrence may consider that an acceptable outcome, but many observers do not. Lawrence's analysis gives short shrift to how uncorrected WTO violations may impede new trade agreements and may discourage other governments from obeying WTO rules.[68]

Withdrawing equivalent concessions is a sufficient response against a WTO violator, according to Lawrence. Thus, he states that "accepting [DSU] retaliation" after a violation is a de facto WTO escape clause analogous to GATT Article XIX.[69] One reference Lawrence cites is an economic analysis by Chad P. Bown who posits that "[c]ountries in need of trade policy flexibility are given the choice of implementing protection illegally or *legally* . . . through GATT/WTO's safeguards provisions."[70] Lawrence and Bown's views rest on the notion that rebalancing is the appropriate response in both situations. In my opinion, however, the opposite inference is more justifiable-. That is, a government violating WTO rules should face sterner action than a government having recourse to a safeguard *pursuant to* WTO rules.

[67] See Petros C. Mavroidis, *Proposals for Reform of Article 22 of the DSU: Reconsidering the Sequencing Issue and Suspension of Concessions*, in Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding 81, 97–98 (Ernst-Ulrich Petersmann, ed., European University Institute, 2002) (discussing retroactive remedies).
[68] Lawrence, supra note 41, at 92 (noting these point briefly).
[69] Id. at 40.
[70] Chad P. Bown, "The Economics of Trade Disputes, the GATT's Article XXIII, and the WTO's Dispute Settlement Understanding," Department of Economics, Brandeis University, Jan. 2002, at 27.

The old GATT lens viewed trade agreements as bilateral, and so utilizing this lens on the WTO can produce a distorted picture. In Lawrence's analysis, the WTO offers parties a "get your money back" guarantee in the sense that if WTO Member A violates a rule and Member B is authorized to retaliate, then those two countries will revert to the status quo before the agreement, and then neither country will be worse off than it was originally.[71] That conclusion may be right for A and B (without counting the costs of domestic adjustment). But the analysis should not end there because Member A's violation may cause negative externalities on WTO Members C, D, E, etc. that A may not consider in deciding whether to breach. Lawrence's model only works if the C, D, and E Members lodge a dispute in the WTO. Yet there might be many reasons why C, D, and E do not, particularly if they are low-income countries that lack resources to prosecute a case.[72] The problem of missing plaintiffs has been a continuing one in WTO dispute settlement. It is interesting to note that in the FSC dispute, the arbitrator took care to explain that the award of $4 billion in countermeasures was *not* an entitlement to the European Communities to act on behalf of Members other than itself.[73] This conclusion is correct, it seems to me, because the Communities cannot be expected to represent whatever interests the remaining 120 WTO Members have in obtaining US compliance.

Lawrence's analysis rests heavily on the unquestioned thesis that when the DSU states that the level of suspension "shall be equivalent to the level of the nullification or impairment," that this rule refers to the "trade effects" of the violation.[74] While I agree that some authority exists for that thesis, I wonder whether "nullification or impairment" is a term of old trade jargon now ripe for a more dynamic interpretation. A small interpretive shift is perhaps visible in the 1916 Act Arbitration where the arbitrator found a nullification or impairment without apparent reference to trade effects.[75]

Thus, WTO law is not as clear as Lawrence thinks when he asserts that "violations with no trade effects do not lead to trade retaliation . . . ."[76] If Lawrence were right, then there would be many WTO rules without

[71] Lawrence, supra note 41, at 44.
[72] Chang has suggested that small countries might not lodge disputes because they lack enforcement power. Pao-Li Chang, "The Politics of WTO Enforcement Mechanism" Singapore Management University, Jan. 2004, at 17.
[73] FSC Arbitration, supra note 16, paras. 6.62–6.63.
[74] See DSU art. 22.4; Lawrence, supra note 41, at 25, 47, 49.
[75] See text accompanying supra note 31. Note that this decision was handed down after Lawrence's book was published.
[76] See Lawrence, supra note 41, at 9.

possible remedies. That is a sad state for any legal system. National laws "as such" might technically violate WTO rules, and yet there could be no retaliation until some trade impact is shown. In my view, the WTO dispute system should not interpret "nullification or impairment" so narrowly that only rule infractions causing a quantifiable adverse trade effect will justify a remedial suspension of concessions.[77]

Lawrence does not waver from his trade rebalancing paradigm even for prohibited export subsidies. There the pertinent SCM rule authorizes the special remedy of appropriate "countermeasures," a remedy not found in any other provision of the WTO.[78] Noting that none of those export subsidy arbitrations stated that countermeasures had to be commensurate with the impact on trade, Lawrence argues that the arbitrators could have interpreted appropriate countermeasures to bring it into "conformity" with his "WTO paradigm."[79] Perhaps so, but Lawrence's book would have been better if it had looked more closely for an economic rationale of the DSU jurisprudence taken at face value, rather than measuring the jurisprudence with a procrustean paradigm.

Lawrence would like all of the DSU arbitrators to use his WTO paradigm, but some arbitrators may find it unrealistic. As noted above, Lawrence contends that trade liberalization in large countries can reduce welfare and in small countries will raise welfare.[80] I assume that Lawrence is technically correct (I am not an economist). Yet it could be that the more important distinction (than large versus small) is whether a country has sufficient capacity to adjust to liberalization, and such capacity may differ between high and low-income countries. If low-income countries liberalize without adequate redeployment of human resources, then some of those countries may not gain from trade. On the other hand, high-income countries can easily invest in needed worker and community adjustment programs (although they often fail to do so). Perhaps DSU arbitrators do not agree with Lawrence that trade liberalization in high-income countries is really a "cost" to them. If so, the arbitrators might be trying to push high income nations into compliance.

This essay looks closely at Lawrence's book because its arguments ought to be considered by the international trade community. On many points,

[77] See Jackson, supra note 60, at 121 (noting that often it is virtually impossible to quantify the effect of a breach of a WTO rule on future potential trade).
[78] See SCM Agreement, art. 4.10.
[79] Lawrence, supra note 41, at 59.
[80] Id. at 20.

I am in agreement with him, including his uneasiness with the fact that in instances of non-compliance, the WTO is authorizing "retrogressive protectionist responses."[81] A major irony in international law today is that the trade sanction for enforcement purposes is mostly highly developed within the WTO, in seeming defiance of the WTO's purpose of eliminating trade discrimination and emancipating trade.

[81] Id. at 11. A recent analysis by Showalter contends that the WTO should use fines rat her than trade remedies because "It does not make sense to impose costly inefficiencies in order to remedy inefficiencies." J. Michael Showalter, *A Cruel Trilemma: The Flawed Political Economy of Remedies to WTO Subsidies Disputes*, 37 Vanderbilt Journal of Transnational Law 587, 628 (2004).

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