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### Remedies and Compliance

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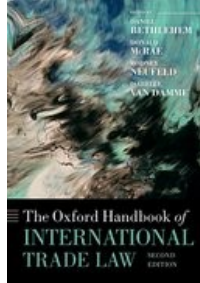
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CHAPTER

## 37 Remedies and Compliance

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### Abstract

This chapter examines the remedies that prevail in international trade adjudication, often known as ‘prospective’, ‘forward-looking’ or ‘compliance-oriented’. These terms are justified by the lack of awards for reparation for injury in this field, where remedies have evolved to focus not on past injury but on re-establishing conduct that complies with substantive obligations. The primary remedy available to trade adjudicators is an impartial determination of breach, coupled with an instruction for its cessation. These primary remedies are usually accompanied by the possibility of follow-up adjudication on compliance with them, and potentially by the threat of an authorization of retaliation in case of non-cessation of the violation. The authorization to apply regulated retaliation may be considered as a remedy in its own right, available in case the primary remedies prove insufficient to induce compliance. However, authorized retaliation should not be confused with awards for damages or analysed as a functional equivalent to monetary compensation. The practice shows that complainants in trade disputes do not request adjudication seeking retaliation and seldom implement it when authorized to do so. The right to retaliate is not perceived as a benefit in itself, but as an instrument whose threat can be used to induce performance of obligations or a settlement satisfactory to the complainant.

**Keywords:** [remedies](#), [compliance](#), [retaliation](#), [suspension of concessions](#), [recommendations](#)

**Subject:** [International Law](#), [Law](#)

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## I. Introduction

TRADITIONALLY in international law, the topics of ‘remedies’ and ‘compliance’ appear as fundamentally separate. Remedies—usefully defined as ‘anything a court can do for a litigant who has been wronged or is about to be wronged’<sup>1</sup>—are often only sketched in the instruments that establish international courts and tribunals, and therefore are largely left for adjudicators to determine in their own decisions.<sup>2</sup> Compliance, on the other hand, is often considered a matter for States and political bodies rather than adjudicators.<sup>3</sup> In case of non-compliance with a judgment of the ICJ, for example, the Charter of the United Nations directs aggrieved parties to the Security Council, which may (or may not) ‘make recommendations or decide upon measures to be taken to give effect to the judgment’.<sup>4</sup> The European Convention of Human Rights similarly entrusts a political body—the Committee of Ministers—with monitoring the execution of judgments of the European Court of Human Rights.<sup>5</sup> In her monograph on compliance with ICJ judgments, Constanze Schulte finds that compliance, in fact, belongs in a ‘post-adjudicative’ phase, whose ‘efficacy ... will not be determined by another judicial examination, but by immediate political action’.<sup>6</sup>

In international trade law, by contrast, adjudication and compliance are fundamentally intertwined. Addressing questions of compliance—and providing remedies for non-compliance—is perceived as a natural extension of the adjudicator’s function. As regards WTO dispute settlement, an assessment of the DSU informed by the practice of WTO Members over the years leads to the conclusion expressed by Piet Eeckhout in the first edition of this handbook: ‘the basic function of [WTO] dispute settlement must be inducing compliance’.<sup>7</sup> The key outcome of a successful WTO claim is not an award of damages for breach but a determination that measures found to be WTO-inconsistent must be brought into conformity with WTO rules.<sup>8</sup> And, rather than putting an end to the adjudication process, a ruling of WTO-inconsistency opens a new stage in the dispute—the compliance stage—focused on settling disputes over compliance and establishing consequences in case of non-compliance.

This system of remedies is found in the vast majority of agreements governing international trade relations. The same overall objective pursued under WTO dispute settlement—substantive performance of obligations—guides the dispute settlement mechanisms set up by all RTAs of an intergovernmental character, including the North American Free Trade Agreement (NAFTA)<sup>9</sup> and its successor, the United States–Mexico–Canada Agreement (USMCA),<sup>10</sup> the EU–Canada Comprehensive Economic and Trade Agreement (CETA),<sup>11</sup> the Regional Comprehensive Economic Partnership (RCEP),<sup>12</sup> the agreements underpinning the Common Market of the South (MERCOSUR)<sup>13</sup> and the African Continental Free Trade Agreement (AfCFTA).<sup>14</sup> With respect to trade obligations (chapters on sustainable development or investment often feature different provisions and different logics), the dispute settlement provisions of all of these agreements feature this system of remedies, which may be termed ‘prospective’, ‘forward-looking’ or ‘compliance-oriented’.<sup>15</sup>

Thus, it is possible to speak of a law of remedies in international trade adjudication, not in the sense that interpretations developed within one treaty system can or should be automatically transposed to a different treaty system but in the sense that a common logic underpins these systems. On the one hand, these systems of remedies focus on securing future performance over providing redress for past injury; on the other, in case of non-compliance with the original ruling, they provide for an authorized and controlled use of the threat of trade-restrictive and other otherwise agreement-inconsistent measures as a means of securing compliance with adjudicatory decisions. This common logic leads to the striking similarity observable among the systems of remedies that exist within the various trade agreements, while also making the compliance-oriented system of remedies difficult to replicate outside of trade agreements.

Following this introduction, this chapter examines how compliance-oriented remedies differ from the remedies usually provided by international courts and tribunals (Section II). It then discusses how these remedies operate and have been used in practice (Section III). Finally, it explores why remedies in international trade law differ from those that prevail in other fields of international law. Rather than aiming at the correction of past injustices, judicial remedies in international trade agreements seek to provide parties to a dispute with an objective basis on which to renegotiate their relations in case of a violation. Their ultimate objective is not to restore the *status quo* that existed before violations but to prevent trade

## II. International adjudicators and compliance-oriented remedies

### A. Judicial remedies under international law

In international law, third-party adjudication always depends on the consent of states. As a result, the scope of judicial remedies available to international courts and tribunals is closely related to the text of each adjudicator's constitutive instrument and applicable law.<sup>16</sup> Where constitutive instruments and the applicable procedural rules provide little or no guidance, courts and tribunals have inferred their own powers from a combination of skeletal provisions, vague references to general international law, legal principles inferred from domestic legal systems, and shared lawyerly intuition. It was this combination that the PCIJ invoked in *Chorzów Factory* to infer from its jurisdiction over a dispute a consequential power to 'lay down the conditions for the re-establishment of the treaty rights affected'.<sup>17</sup> In *LaGrand*, the ICJ provided even thinner grounds for its finding of a seemingly unqualified judicial freedom to determine remedies. 'Where jurisdiction exists over a dispute on a particular matter', the ICJ stated, 'no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation'.<sup>18</sup>

The absence of regularity in providing remedies has not prevented courts and tribunals from rationalizing and classifying the remedies they did grant. This rationalization has now been codified to an extent by the ILC in its work on State responsibility. An entire section of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility) is devoted to the legal consequences of State responsibility.<sup>19</sup> While the ILC Articles do not use the term 'remedies', the term is employed interchangeably with 'consequences of internationally wrongful acts' in the official commentary to the ILC Articles on State Responsibility<sup>20</sup> and has been used in the same manner in subsequent jurisprudence<sup>21</sup> and scholarship.<sup>22</sup> While not a comprehensive code of remedies,<sup>23</sup> the classification laid down in the ILC Articles on State Responsibility usefully describes the different remedies issued by international courts and tribunals, providing a convenient starting point for a discussion of potentially available remedies and helping to explain the specific character of the remedies available to trade adjudicators.

Judicial remedies awarded as consequences of findings of breach may fall into two broad categories. First are 'forward-looking' or prospective remedies, which concern the prospect that the conduct found to be a violation will continue in the future or be repeated. The main prospective remedy is a judicial determination that the illegal conduct must cease, sometimes accompanied by instructions regarding specific acts that a wrongdoer must perform (or refrain from performing) or legal instruments that it must repeal to achieve cessation.<sup>24</sup> Additionally, courts sometimes add to the remedy of cessation statements that aim to give effect to the duty of States to provide 'guarantees of non-repetition' of the unlawful conduct.<sup>25</sup>

'Retrospective' remedies address not the wrongful conduct but the injury caused by this conduct, aiming to secure reparation for injured parties and determining its appropriate form and level. The PCIJ affirmed the general principle in *Chorzów Factory*: reparation must as far as possible 'wipe out all the consequences of the illegal act'.<sup>26</sup> This translates into the three possible forms of reparation: restitution, compensation, and satisfaction.<sup>27</sup> A court that opts for restitution may require the wrongdoing State to return assets seized unlawfully or release persons imprisoned illegally.<sup>28</sup> Awards for compensation usually cover financial or non-financial losses incurred due to the illegal conduct, seeking to offset material damage and make injured individuals whole.<sup>29</sup> Satisfaction is often presented as a self-executing remedy: by recording and publicizing the unlawful act, the adjudicator is directly providing reparation for moral injury caused by the illegality.<sup>30</sup>

The overall purpose of what can be called the 'remedy toolbox' of international law remains the one expressed by the PCIJ in *Chorzów Factory*: to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.<sup>31</sup> As Dionisio Anzilotti, the first great systematizer of the law of responsibility, put it, 'every act carried out by a subject that is contrary to the rule creates as its consequence the obligation to re-establish, in some form, the legal order troubled by such act'.<sup>32</sup> Under general international law, for this legal order to be re-established, the wrongdoer must both cease the unlawful conduct and offset, through restitution, compensation, or satisfaction, the material and moral injury its conduct has caused to others.

## B. Remedies in international trade law: the DSU system

The system of remedies established in the DSU provides the best starting point for an analysis of remedies in international trade adjudication. The DSU establishes a three-stage procedure. An original dispute settlement stage is followed by a compliance stage and, in case of persistent non-compliance, by a retaliation stage. At the original stage, a WTO panel is tasked with making an objective assessment of the facts of the dispute and of the conformity of the challenged measures with a Member's WTO obligations.<sup>33</sup> A panel report can be appealed to the Appellate Body, which can uphold, modify, or reverse the panel's findings.<sup>34</sup> Findings made by the panel (as modified by the Appellate Body) are converted into rulings of the DSB upon adoption,<sup>35</sup> producing full legal effects and requiring compliance.<sup>36</sup> At this original stage, the remedies available to adjudicators are established in Article 19.1 of the DSU, which provides:

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Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.<sup>37</sup>

At the original stage of WTO adjudication, a complainant may thus obtain three types of remedies. First, determinations ('findings', 'rulings' or 'conclusions') that the respondent's measures are WTO-inconsistent. Second, recommendations, compulsory for the adjudicators when they conclude that there are ongoing breaches, for the wrongdoing Member to restore the conformity of its measures with WTO rules.<sup>38</sup> Third, at the discretion of the panel or Appellate Body, suggestions of means by which their recommendations can be implemented.<sup>39</sup> No other remedy—in particular, no remedy of reparation—is provided for.<sup>40</sup> The sole obligation that arises for a party found in breach at this stage is to 'bring the measure into conformity' with its WTO obligations.<sup>41</sup>

The adoption of the original report triggers the second phase of WTO dispute settlement, the compliance stage. The existence of a legally structured compliance stage differentiates WTO adjudication (and trade adjudication more broadly) from most international adjudication procedures, in which a final decision puts an end to the procedure and compliance is perceived as being beyond the scope of the adjudicator's regular functions. In trade adjudication, the compliance stage is part of the core of the dispute settlement procedure. Following a determination that a measure is inconsistent with WTO rules, the wrongdoing Member is accorded a reasonable period of time (RPT) to comply, a period that can be determined by agreement between the parties or by compulsory arbitration.<sup>42</sup>

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Three situations may occur at the end of the RPT. First, all violations found in the adjudicators' reports may have been successfully eliminated, in which case the procedure ends without further legal consequences. Second, the violations may not have been eliminated, either because the Member found in breach has not changed the challenged measures at all or because its changes have been insufficient to achieve full compliance with its obligations. Third, the parties may disagree as to whether the changes made to the measure originally challenged through adjudication have been sufficient to eliminate the breaches found and achieve compliance with the Member's obligations. In the latter case, Article 21.5 of the DSU provides that the parties must ('shall') bring the dispute on compliance before a new panel.<sup>43</sup> Under Article 21.5, the compliance panel determines (in findings that may again be reviewed by the Appellate Body) whether measures taken to comply have been taken at all and, in the affirmative, whether these measures are consistent with the recommendations and rulings made at the original stage.<sup>44</sup> The remedy that a complainant can obtain at this stage is a new DSB ruling, determining that the measures taken to comply were not sufficient to attain compliance.

The third stage of the dispute settlement procedure—the compensation-or-retaliation stage—is opened if, at the end of the reasonable period of time, the wrongdoer has failed to bring its measures into compliance with WTO rules. In this case, Article 22.2 permits complainants to request that the violator enter into negotiations with them to agree on mutually acceptable compensation. If no compensation is agreed on within 20 days, the complainant may request before the DSB an authorization to retaliate, suspending its WTO obligations towards the violator at a level equivalent to the injury ('nullification or impairment') caused by the violation.

This 'suspension of concessions or other obligations'<sup>45</sup> is what is usually referred to as trade retaliation. It consists in the non-fulfilment by an injured Member of its WTO obligations towards the non-complying party. The DSU provides that trade retaliation should, in principle, take place under the same area of the

violation (goods, services, or intellectual property rights).<sup>46</sup> Given that the majority of WTO disputes concern trade in goods, retaliation usually amounts to the complainant suspending tariff concessions, i.e., raising tariffs towards products exported by the wrongdoer. However, if such retaliation is not ‘practicable or effective’ and circumstances are ‘serious enough’, the DSU permits so-called ‘cross-retaliation’, i.e., non-fulfilment of commitments in agreements different from the one originally violated.<sup>47</sup> Additionally, retaliation must be of a ‘level ... equivalent to the level of the nullification or impairment’ caused by the breach.<sup>48</sup>

p. 975 The compliance-oriented character of this system of remedies can be inferred from the fact that both compensation and trade retaliation are intended as ‘temporary’.<sup>49</sup> Compensation aims to secure a degree of relief for an injured Member when, and for as long as, the wrongdoer is unable to implement the recommendation to cease its wrongful measure.<sup>50</sup> Suspension of concessions is described as the ‘last resort’ available under the DSU,<sup>51</sup> not ‘preferred to full implementation’ of the original ruling.<sup>52</sup> It can only be applied for as long as the WTO-inconsistency persists.<sup>53</sup> Retaliation is thus not a solution to the dispute alternative to compliance but the ultimate remedy available within the WTO dispute settlement process to induce compliance, in cases in which a wrongdoer (i) fails to comply with the original rulings and recommendations within a reasonable period of time and (ii) fails to provide the complainant with acceptable compensation. Once retaliation is authorized, the complainant may apply it, within the terms of the DSB’s authorization, until the wrongdoer either implements the rulings and recommendations or reaches a mutually satisfactory solution with the complainant.<sup>54</sup>

### C. Compliance-oriented remedies in context: from reciprocal agreements to mega-regionals

The structure of prospective remedies codified in the DSU can be found, with minor changes, in virtually every inter-state trade agreement in force. Modern trade agreements descend from the agreements signed by the United States following the enactment of the 1934 Reciprocal Trade Agreement Act (RTAA).<sup>55</sup> The RTAA sought to lower barriers applied to United States exports by other States, by offering to its trade partners the reciprocal elimination of barriers by the United States, with the corollary that imposition of new barriers by either side could lead the other party to respond—unilaterally—by re-imposing some of the lowered barriers. The 1938 Anglo-American Trade Agreement, for example, listed a number of circumstances under which a party was permitted, following a mere notification to the other party, ‘to terminate the Agreement in its entirety’, ‘to withdraw or to modify any concessions’ or ‘to impose quantitative regulations on the importation’ of certain goods.<sup>56</sup> The agreement also established a broad duty of parties to seek to respond to each other’s representations with a view to achieving a ‘mutually satisfactory adjustment’.

p. 976 The GATT 1947, which superseded these reciprocal agreements, featured a novel element: remedies were to be administered by the GATT Contracting Parties acting collectively. Article XXIII of the GATT 1947 permitted any contracting party to refer a dispute with another contracting party to the whole of the Contracting Parties, which would ‘investigate’ the matter and make ‘appropriate recommendations’ or ‘give a ruling’. Under ‘serious enough’ circumstances, the Contracting Parties could authorize the suspension of GATT concessions vis-à-vis a wrongdoing party.<sup>57</sup> This arrangement incorporated the unilateral remedy of retaliation into the system of collectively administered remedies, submitting the adoption of otherwise unilateral measures to the prior pursuit of a multilaterally administered procedure.

It was not the text of the GATT 1947, but the practice of the Contracting Parties in the 1950s and 1960s that developed this set of remedies into a *system* of forward-looking remedies. Rather than employing the authorization to retaliate as a means of reacting to particularly grave breaches, the GATT Contracting Parties (guided by the Chair or by panels) employed rulings as the primary remedy and the authorization to retaliate as a back-up remedy, to be employed solely in case of non-compliance with the original ruling.

Early on, in *US – Dairy*, the Contracting Parties found that the United States was in breach of its GATT commitments, but counselled the complainants to afford to the United States a ‘reasonable period of time ... to rectify the situation’.<sup>58</sup> Only after the United States had failed to comply with the original ruling was a complainant (the Netherlands) authorized to retaliate by imposing quantitative restrictions on US imports.<sup>59</sup> In *Uruguayan Recourse to Article XXIII*, after finding that the defendants were violating a number of GATT provisions, the panel established what it called a ‘two-stage procedure’, under which it issued a recommendation for the removal of the GATT-inconsistent measures. The recommendation was

accompanied by a statement that it could be followed by 'the possibility of further action, in case of non-fulfilment'. Failing compliance within a reasonable period of time, Uruguay would 'be entitled immediately to ask for the authorization of suspension of concessions or obligations'.<sup>60</sup>

p. 977 This two-stage procedure came to dominate international trade adjudication. Despite retaliation never having been authorized again during the GATT years,<sup>61</sup> this system was consolidated in Notes drafted by the GATT Secretariat,<sup>62</sup> codified in the 1979 Tokyo Round Understanding on Dispute Settlement,<sup>63</sup> and finally transformed into the three-stage procedure now found in the DSU. It appears in virtually every modern RTA. The 1988 Canada-United States Free Trade Agreement (CUSFTA),<sup>64</sup> in a system largely reproduced in NAFTA and USMCA, as well as in the dispute settlement protocols of MERCOSUR,<sup>65</sup> adopted the two-stage procedure, merging adjudication on compliance and on retaliation. Trade agreements of the 2000s, such as the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), maintained it.<sup>66</sup> The same procedure appears in recent RTAs, sometimes called 'mega-regionals' for their wide and cross-continental membership, such as CETA, the 11-party Agreement for Comprehensive and Progressive Trans-Pacific Partnership (CPTPP),<sup>67</sup> RCEP,<sup>68</sup> and the EU-Southern African Development Community (SADC) Economic Partnership Agreement.<sup>69</sup>

The systems of remedies established by these agreements all follow the same, compliance-oriented logic. Adjudicators may be called upon, first, to determine whether a party is violating its obligations. In the affirmative, the party is granted a reasonable period of time to implement the ruling. In case of non-compliance, the wronged party is authorized to adopt trade retaliation against the non-complying party, subject to an assessment by the adjudicator of whether this retaliation is proportional and appropriate under the rules of the agreement. A violator is not required to remedy the injury caused by its wrongful conduct but merely to put an end to the violation, i.e., to change its conduct to conform to the relevant rules as interpreted by the adjudicator. All legal consequences of the violations, and in particular the entitlement to apply retaliation, cease once compliance with the original rulings is achieved, which justifies the term 'prospective'.

p. 978 Minor variations to the DSU procedure exist, especially to address the perceived excessive length afforded to wrongdoers in WTO law before retaliation is authorized. Most RTAs feature periods for compliance far shorter than the standard 15 months afforded to wrongdoers under the DSU. In many RTAs, a complainant may apply retaliation measures at the end of the period allotted for compliance based on its unilateral assessment of non-compliance. It is then up to the party originally found in breach to initiate proceedings to claim that the retaliation being applied is excessive (including, presumably, because subsequent compliance with the original ruling led to the expiry of the entitlement to retaliate).<sup>70</sup> Such a post-retaliation procedure was pursued in the Mercosur dispute on *Remoulded Tyres*, leading the Mercosur Permanent Review Court to issue an award concerning the proportionality of Uruguay's retaliation against Argentina. The Court stated that retaliation should be 'sufficiently persuasive for the recalcitrant state, in order to induce it to adjust its conduct to the Mercosur legal order'.<sup>71</sup> This award was followed by an award on compliance, in which the Court confirmed that the original ruling (rather than an assessment *ex novo*) should provide the benchmark for subsequent compliance assessments.<sup>72</sup>

Of course, nothing prevents parties to a trade agreement from devising different systems of remedies, either for the agreement as a whole or for specific obligations within it. In RTAs, chapters on investment and on sustainable development often feature chapter-specific remedies systems. In CETA, the Investment Chapter provides that arbitral tribunals may only award monetary remedies or restitution of property; in the latter case, the wrongdoing party may choose to pay damages instead.<sup>73</sup> The Chapters featuring labour and environmental obligations provide that a panel's findings of violation give way to bilateral 'discussions' among the parties, which are to 'take into account' the panel's determinations, and do not provide for regulated retaliation.<sup>74</sup>

Among trade agreements, those that do not feature a compliance-oriented system of remedies for any obligations are generally those that go beyond the inter-state paradigm and establish a community. In these cases, community institutions can often hear complaints from private parties and make determinations that prevail over those of domestic institutions. These communitarian agreements include the treaties of the European Union and European Free Trade Association, the Andean Community, and the East African Community, for example. In these cases, enforcement is expected to be largely carried out directly by domestic institutions without governmental implementation, obviating (in theory) the need for the kind of targeted pressure for compliance that an authorization to retaliate permits.

#### A. Usage of dispute settlement and compliance

Judging by the number of disputes, WTO adjudication was highly successful for as long as it operated as intended. Between 1995 and 2019, the vast majority of inter-State trade litigation took place before WTO panels. During this time, the WTO dispute settlement system issued 205 original reports, 38 compliance reports, and 16 arbitration awards on retaliation. By contrast, RTA adjudication was very limited. In the 1990s and early 2000s, there was some significant litigation<sup>75</sup> within CUSFTA (8 reports) then NAFTA (3 reports) as well as within Mercosur (10 disputes under the original 1991 dispute settlement protocol, plus two disputes under its 2002 version), as well as episodic litigation under regional agreements in Latin America.<sup>76</sup> But between 2007 and 2016, while the number of RTAs almost doubled,<sup>77</sup> RTA dispute settlement systems recorded very little new activity. Two disputes were brought under CAFTA-DR, one by Costa Rica against El Salvador,<sup>78</sup> another by the United States against Guatemala concerning labour rights.<sup>79</sup> The United States also filed one request for consultations under the US–Bahrein FTA.<sup>80</sup> All other disputes, including between parties to regional blocs such as NAFTA and MERCOSUR, were taken to the WTO.

This pattern appears to have changed more recently. On the one hand, uncertainty surrounding the operation of WTO dispute settlement following the phasing out of the Appellate Body in late 2019 has brought uncertainty to procedures at the WTO. On the other hand, the multiplication of RTAs has led to a number of new disputes under RTAs, especially in areas such as environmental conservation and protection of labour rights. Besides the US–Guatemala dispute under CAFTA–DR,<sup>81</sup> over the past few years, 4 disputes were announced under the US–Peru<sup>82</sup> and US–Korea FTAs,<sup>83</sup> the EU–Ukraine DCFTA,<sup>84</sup> the EU–SADC EPA,<sup>85</sup> the EU–Korea FTA,<sup>86</sup> and NAFTA itself.<sup>87</sup> While it may be soon to claim that RTA adjudication has become the new norm, it has certainly taken off once more as an avenue for dispute settlement.

The past two years notwithstanding, the overall numbers relating to WTO adjudication under the DSU are far higher and indicate success in settling disputes. By the end of 2019, out of 535 requests for consultation filed, 205 had led to original panel reports being issued, meaning that more than half of the disputes initiated were settled at the consultations stage or during the panel stage prior to the report being issued.<sup>88</sup> Compliance adjudication was proportionately more limited and had only led to panel reports in 34 disputes (some disputes led to more than one round of compliance adjudication). Only 14 disputes had reached the stage of arbitration on retaliation. Given that every dispute in which there is non-compliance can in principle be taken to the stage of arbitration on retaliation by a dissatisfied complainant,<sup>89</sup> the small number of such arbitrations—fewer than 10 per cent of original panel reports and fewer than 5 per cent of requests for consultations—suggests that the remedies provided at the original stage led to a satisfactory resolution of the dispute, through compliance or a settlement, in over 90 per cent of cases.

#### B. Employing retaliation: compliance, settlement, stalemate

Despite the effectiveness of the primary remedies, it is sometimes considered that the *real* remedy offered by trade agreements is the back-up possibility of retaliation in case of non-compliance.<sup>90</sup> In the summaries of disputes drafted for the WTO website, the WTO Secretariat itself labels the section on the authorization to retaliate ‘Proceedings under Article 22 of the DSU (remedies)’.<sup>91</sup> Prior to the inquiry on whether this terminology is conceptually accurate (see Section 4 below), this section reviews the uses that have been made of the authorization to retaliate.

Since the establishment of the WTO until June 2022, the DSB has issued authorizations to retaliate in 16 disputes, always preceded by an arbitration on the level and scope of the authorization.<sup>92</sup> Table 1 summarizes key aspects of these arbitrations.

**Table 1** DSB Authorizations to Retaliate and their Use<sup>a</sup>

DS#	Short Title	Requesting Member	Award Date	Level authorized (millions/year)	Applied?
437	US-Countervailing Measures (China)	China	26 Jan 2022	US\$645.121 m/y	
353	US - Large Civil Aircraft (2 <sup>nd</sup> complaint)	EC	13 Oct 2020	USD 3,993.2 m/y	Yes
471	US - Anti-Dumping Methodologies (China)	China	1 Nov 2019	USD 3,579.1 m/y	No
316	EC - Aircraft	US	2 Oct 2019	USD7, 496.6 m/y	Yes
464	US - Washing Machines	Korea	8 Feb 2019	USD84.81 m/y + formula	No
381	US - Tuna II (Mexico)	Mexico	25 Apr 2017	USD163.23 m/y	No
384	US - COOL	Canada	7 Dec 2015	CAD1,054.7 m/y	No
386		Mexico		USD 227.8 m/y	
267	US - Cotton Subsidies	Brazil	31 Aug 2009	USD147.4 m/y (for FY 2006) + US\$147.3 m/y	No
285	US - Gambling Services	Antigua	21 Dec 2007	USD21 m/y	No
217, 234	US - Byrd Amendment	Brazil, Chile, Canada, EC, India, Japan, Korea, Mexico	31 Aug 2004	Disbursements Multiplied by Coefficient	Yes
136	US - 1916 Act	EC	24 Feb 2004	Amount of Final Judgments and Settlement Awards	No
222	Canada - Commercial Aircraft	Brazil	17 Feb 2003	USD 247.7 m	No
108	US - FSC	EC	30 Aug 2002	USD 4,043 m/y	Yes
46	Brazil - Aircraft	Canada	28 Aug 2000	CAD 344.2 m/y	No
27	EC - Bananas	Ecuador	24 Mar 2000	USD 201.6 m/y	Yes
		US	9 Apr 1999	USD191.4 m/y	
46	EC - Hormones	Canada	12 Jul 1999	CAD11.3 m/y	Yes

- a Sources: relevant arbitral awards; G. Shaffer and D. Ganin, 'Extrapolating Purpose from Practice: Rebalancing or Inducing Compliance' in C. P. Bown and J. Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (New York: Cambridge University Press, 2010), at 73–91; M. Limentia, *WTO Retaliation: Effectiveness and Purposes* (Oxford: Hart, 2017); and assessment by the author.

From this summary, a few patterns emerge. First, with a few exceptions (Antigua, Ecuador, and Chile), the only Members whose disputes have reached the retaliation stage are the economically largest ones, which are members of the G20 group of largest economies. Second, other than for the disputes between Brazil and Canada over subsidies to aircraft manufacturers, the only Members against whom retaliation has been authorized were the United States and the European Union. Third, while a variety of Members have obtained authorization to retaliate against the United States, in every dispute in which retaliation was authorized against the European Union, the United States was a complainant. Fourth, in more than 70 per cent of disputes in which retaliation was authorized, it was not applied. The only Member that consistently applies retaliation when authorized to do so is the United States.

Without making a full assessment of the facts of each dispute, it is useful to consider the different scenarios that have taken place. Some authorizations led to a change in conduct accepted by the complainant as compliance. This change took place prior to the application of retaliation in *US – COOL*, *US – Tuna II (Mexico)* and *US – 1916 Act*, and following this application in *US – FSC*, *US – Byrd Amendment*, and *EC – Bananas*. Other authorizations led to settlements alternative to compliance, before application in *US – Cotton* and after (a long period of) application in *EC – Hormones*. In *US – Gambling*, no change of conduct ensued, and no retaliation was applied, while in *US – Washing* ↴

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*Machines*, the 'as applied' measure was removed, but the 'as such' change of conduct did not take place.<sup>93</sup> In *US – Anti-Dumping Methodologies (China)* and *US – Countervailing Duties (China)*, the authorizations to retaliate intervened within the context of the reciprocal raising of tariffs between the United States and China that made them of little practical value. Finally, in the aircraft subsidies disputes, Brazil and Canada reached an implicit truce after both were authorized to retaliate against each other (in *Brazil – Aircraft* and *Canada – Commercial Aircraft*). By contrast, the application of retaliation by the United States in *EC – Large Civil Aircraft* was not met with compliance, but resulted in the European Union imposing its own retaliation measures once this was authorized in *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*.

This suggests that the authorization to retaliate is of real if limited use for complainants in obtaining compliance or an alternative settlement. At the same time, to the extent that the authorization to retaliate can be called a remedy, this authorization does not perform, even potentially, the retrospective portion of the function of remedies, that is, 'wip[ing] out all the consequences of the illegal act' or 'reestablish[ing] the situation which would, in all probability, have existed if that act had not been committed'.<sup>94</sup> After all, retaliation does not involve a transfer of funds or assets to the affected industries but the imposition of measures that are harmful both to the party suffering them and to the party imposing them. This has been referred to as 'shooting yourself in the foot' to hit the other party.<sup>95</sup> Likewise, WTO compensation is not aimed at making the injured party whole. While it carries the same name as compensation under the ILC Articles on State Responsibility, it does not require compensating the injured party by offsetting the injury it suffered. Rather, WTO compensation amounts to any form of settlement that the disputing parties agree to. The very label of 'compensation' is justified only by the presumption that, for the complainant to tolerate continued non-compliance, the wrongdoing Member will have to provide it with something in return. However, this compensation may benefit sectors and industries entirely unaffected by the WTO-inconsistent measure. Both retaliation and compensation are 'temporary measures' that cease as soon as compliance is achieved.

Additionally, an assessment of the practice surrounding the disputes indicates that no WTO Member initiating a WTO dispute considers the authorization to retaliate to be the purpose of bringing a dispute.

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Complainant Members, and the private parties whose ↴ interests they are defending, seek performance by other Members of their obligations.<sup>96</sup> Rather than seeking to obtain the authorization to retaliate as quickly as the rules allow, complainants agree to all forms of delays in the process that could lead to an

authorization to retaliate. They provide wrongdoers with multiple opportunities to negotiate even after being awarded an authorization to retaliate. And, when they do apply retaliation, it is not to increase revenues, which could best be done by raising a variety of tariffs slightly and seeking a stable 'rebalancing of obligations'. Rather, retaliating states seek to maximize the compliance-inducing effect of their retaliation, targeting with quasi-prohibitive additional tariffs the wrongdoer's most symbolic and politically powerful industries and those which it expects will most effectively exert pressure domestically for the wrongdoer to comply.

Therefore, both conceptually and empirically, few commonalities exist between an authorization to retaliate and an award for damages. While it is true that the authorization to retaliate and the remedy of monetary compensation are calculated to be commensurate with the harm caused by the breach, and may (in the case of retaliation, only if applied) cause harm to the wrongdoer's interests, this is where the analogy stops. The function of these two types of remedies is entirely different. There is little sense in seeking to apply directly to the field of international trade law theories with respect to the function of remedies developed within the domestic legal context and having in mind judicial awards for damages.

## IV. Remedies in international (trade) agreements: compliance, transaction, retaliation

### A. Three forms of remedies: unilateral, bilateral, judicial

p. 985 One way to understand the function of judicial remedies in international law in general, and international trade law in particular, is to place them within the broader framework of a tripartition of remedies: unilateral remedies (self-help); bilateral remedies (compensation and transactions more broadly); and judicial remedies (third-party adjudication).<sup>97</sup> These three remedies are alternative courses of action available to a State that believes that another State has breached or is breaching its international obligations. They are remedies in that they are means to induce a wrongdoer to provide voluntarily ↵ the solution that the aggrieved State is ultimately seeking—usually, performance of the original obligation.

Within this framework, resort to adjudication appears as a means of obtaining performance of breached obligations. It is a means alternative to what would, in its absence, be the sole options available to an aggrieved State: purely bilateral negotiations with the wrongdoer and, in its absence or as a means to incentivize it, a unilateral determination that commitments have been violated and unilateral adoption of remedial (self-help) measures.

Permissible unilateral remedies under international law range from retortions (which are unfriendly but lawful acts taken in response to a breach)<sup>98</sup> to countermeasures (which consists of reciprocal non-performance of certain obligations to induce cessation and retaliation)<sup>99</sup> to its extreme form: self-defence in response to an armed attack.<sup>100</sup> Recent trade agreements have reincorporated unilateral remedies as an authorized means of response. The entirety of the US-China 'Phase One' Agreement is to be enforced via diplomatic escalation of disputes to higher authorities and, where this fails, through unilateral retaliation.<sup>101</sup> In the Trade and Cooperation Agreement between the European Union and the United Kingdom, parties may unilaterally adopt 'rebalancing measures' as a response to significant divergences from the other party with respect to labour and social protection, environmental or climate protection, and subsidy control.<sup>102</sup> These developments amount to a significant deviation from the rule in international trade agreements that requires parties to resort to adjudication before proceeding to retaliate, suggesting the continued appeal of unilateral remedies, which can be delivered immediately by a party that feels aggrieved by another party's conduct.<sup>103</sup>

p. 986 Unilateral remedies are problematic in at least three ways. First, in adopting such measures, the aggrieved State almost invariably causes harm to a plurality of actors. Increased tariffs, which are the most common form of retaliation, are famously disruptive for the State adopting them, harming either its consumers or its industries as the retaliating State 'shoots itself in the foot' in order to harm the wrongdoer.<sup>104</sup> And, ↵ while some have sought to devise wealth-enhancing retaliation, especially to increase the ability of developing countries to retaliate (for example, through the suspension of intellectual property obligations),<sup>105</sup> these attempts have had limited success in inducing WTO compliance. Besides practical issues, like the aggrieved State's ability to implement such a measure,<sup>106</sup> these proposals ignore the fact that imposing costs on the

sanctioning party is not a defect of sanctions but a feature. In adopting such measures, a State is signalling to the violator that it feels sufficiently aggrieved by its breach that it will adopt costly measures to respond to it and demand redress.<sup>107</sup>

A second issue affecting the enforcement of rules through unilateral remedies is that these remedies are, by their very nature, adopted based solely on the perception of the aggrieved State that there has been a violation and that the violation has caused a certain level of injury. In case the alleged wrongdoer disagrees with this view, it may reject the label of ‘unilateral remedy’ to the measures adopted and interpret them as violations themselves and the allegation of a prior violation, a mere pretext. In response to what it perceives as an original violation rather than a sanction, the purportedly sanctioned state may seek to adopt its own unilateral remedies. The State that saw itself as originally aggrieved may well interpret the new harmful measures as an aggravation of the original violation. This may lead to a new dispute in which, given the two parties’ sovereign equality, the alternatives to a settlement are either the prolongation of the dispute and the persistence of the harmful measures adopted by both parties or the escalation of the dispute into an ever more serious conflict.

The scenario of multiple unilateral and mutually contradictory assessments took place in the 2018–2019 ‘Trade Wars’. A first ‘trade war’ was started when the United States unilaterally adopted what it labelled retaliatory tariffs to respond to measures maintained by China negatively affecting American exporters and investors in China. The United States argued that it was not required to go through WTO adjudication because the alleged measures were not violations of WTO law. A second trade war emerged following the adoption of increased tariffs on steel and aluminium by the United States on the grounds of national security. Many WTO Members responded by retaliating unilaterally, based on their own interpretation that the steel and aluminium tariffs amounted to WTO-inconsistent safeguards. In both cases, unilateral retaliation was met with escalation by the party retaliated against and, in the case of the US–China dispute, with further rounds of escalation. The various rounds of escalation and additional tariffs meant that when, in *US – Anti-Dumping Methodologies (China)*, arbitrators calculated that China should be authorized to adopt retaliation against the United States over USD 3.5 billion of trade – the third largest award on authorized retaliation in WTO history – this amount constituted a small fraction of the hundreds of billions of dollars of trade affected by the bilateral tariffs.

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Third, the evidence from unilateral remedies in practice suggests that they are most effective at the threat stage. When threatened, retaliation may be effective in leading economic and political actors to press decision-makers either to withdraw the harmful measure or to reach an agreement with the affected party. If the dispute reaches the stage where a party applies retaliation, however, this means that the political and economic system of the wrongdoing party has concluded that retaliation is an acceptable price to pay to maintain the harmful measure. Additionally, political actors seen to be modifying their conduct not as part of a negotiation but owing to unilateral demands and retaliation by others are likely to be perceived not as reasonable but as weak, which creates a disincentive for them to agree to remove the harmful measure. Evidence from WTO retaliation, political negotiations outside of adjudication systems, and regional trade agreements in which institutionalized dispute settlement was replaced with retaliation-based dispute settlement all suggest that retaliation is at its most effective when it is credibly threatened, not when it is applied.<sup>108</sup>

These considerations shed light on an important function of the prohibition of unilateral retaliation under Article 23 of the DSU. Article 23(1) requires WTO Members to have recourse to DSU procedures whenever they ‘seek the redress of a violation of obligations or other nullification or impairment of benefits’ under WTO law. Article 23(2) specifies that this obligation precludes Members from making unilateral determinations of violation as well as from adopting unilateral responses as remedies.<sup>109</sup> As a result, Members must seek judicial remedies before WTO adjudicators and follow the three-stage procedure in the DSU prior to adopting retaliatory remedies.<sup>110</sup> While ordinarily a credible threat of retaliation would require the threatening party to at least go some way towards imposing actual retaliation, the Article 23 prohibition allows WTO Members to credibly threaten retaliation while claiming that the reason they do not apply it for the time being is that, as law-abiding WTO Members, they are pursuing authorization from the DSB. In other words, Article 23 allows Members to benefit from the *threat* of retaliation without having to pay the cost of *actual* retaliation. Article 23 in fact allows smaller Members, which would not ordinarily be able (economically or politically) to adopt actual retaliation measures, to employ the threat strategy nonetheless.

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↳ It also creates a period of negotiation in which no retaliation is being applied, allowing Members to reach a mutual understanding without any of them having to concede to being bowing to retaliation.<sup>111</sup> Although

Article 23 is unique in its explicit prohibition of unilateral retaliation, other adjudicators in the field of trade have similarly connected the availability of judicial remedies within an institutional setting with the impermissibility of adopting unilateral remedies.<sup>112</sup>

It should be noted that WTO law also imposes limits on the bilateral remedies available to the parties. Although the DSU suggests that a mutually agreed solution is 'to be preferred' over a solution determined by adjudication, it also requires such a mutually agreed solution to be consistent with WTO rules.<sup>113</sup> And, while Article 22.8 establishes that a mutually satisfactory solution puts an end to the dispute as well as to an aggrieved party's entitlement to maintain unilateral retaliation, in *Canada/US – Continued Suspension* the Appellate Body suggested that the conditions in Article 22.8 are met only when there is 'substantive resolution of the inconsistency found by the DSB'.<sup>114</sup> A bilateral settlement could thus be set aside within WTO adjudication if it is found to be inconsistent with WTO law. Although the Member-driven structure of the WTO dispute settlement system offers significant negotiating space for governments, as a matter of law, the DSU subjects (or seeks to subject) both unilateral and bilateral remedies to multilateral adjudication, judicial remedies, and the requirement of WTO-consistency.

## B. Three functions of judicial remedies

Judicial remedies intervene within the array of remedies otherwise available to States to enforce international obligations on three levels. First, they allow a State to respond to perceived unlawful conduct through a means beyond day-to-day negotiations and protests by launching a formal dispute. Second, they provide an impartial assessment of the relevant obligations and the conduct of the alleged wrongdoer in light of these obligations. Third, they permit a controlled and authorized use of unilateral remedies, whose legitimacy is not disputed by the parties due to it being based on their previous consent to the system as well as on the determination made by the adjudicator.

p. 989 On the first level, dispute initiation is typically viewed by WTO Members and the public more broadly as a form of news-worthy escalation of bilateral discussions. When a Member raises a trade tension in a WTO committee other than the DSB, such as the Trade Policy Review Body or the TBT or SPS Committee, it does not expect this to make the news. Its action results in increased pressure on the wrongdoer through the WTO membership but not necessarily the public. Launching a dispute mounts further pressure still since it does make the news.<sup>115</sup> At the same time, bringing a dispute remains a relatively low-cost option compared to using unilateral remedies both economically, since it does not involve disrupting industries, threatening livelihoods or harming consumers, and politically, since it remains within the scope of friendly relations among trade partners. The fact that half of the requests for consultations at the WTO do not reach the stage of a panel report indicates significant bargaining at the pre-adjudication stage, which in turn makes initiating a dispute itself a remedy in the broadest sense.

On the second level, judicial findings, conclusions, and recommendations secure for the complainant an objective assessment of the dispute by a disinterested third party. While it may be that a Member whose conduct allegedly violates its WTO obligations adopts this conduct in the knowledge that it is a violation, there is often genuine disagreement with respect both to the interpretation of obligations and to whether the conduct constitutes a violation. This disagreement may not only exist between Members but within the Member adopting the conduct. A Member's agency or body may adopt a stance on the basis of an interpretation of its WTO obligations that is not shared by its own legislators, for example. Third-party adjudication allows the complaining Member to re-enter into bilateral talks with the wrongdoer to re-discuss the issue, having an impartial body's assessment that a violation has occurred, and the overall expectation among Members that it is required to comply with this assessment. Within the Member found in breach, political and other actors could have difficulties facing up to domestic constituencies based on their own assessment of what the rules require. Once it becomes widely known that a foreign government has taken up the issue at the highest level and that the adjudicator has sided with the complainant, complying becomes politically more acceptable.<sup>116</sup>

Moreover, a WTO panel's findings are not limited to a binary assessment of whether there has been a violation. These findings identify the specific aspects of the measure that contravene WTO obligations as well as the nature of the violation. This aspect may be more relevant than the answer to the binary question of whether there has been a violation. Arguably, this is where the intervention of the Appellate Body has been most relevant. In disputes such as *US – Shrimp*, *Brazil – Tyres*, and *EC – Seals*, the Appellate Body has made sure to clearly distinguish its conclusion regarding the permissibility of the broad policy in question

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from the conclusion that the measure had been applied in a discriminatory manner. As a result, the conduct expected from the party found in breach was not the elimination of the challenged legitimate policy or measure but the elimination of its unjustifiable discriminatory aspects. This nuanced outcome would not necessarily have resulted from a purely bilateral negotiation in which one party seeks to protect its national policies while the other protests against lost economic opportunities for its nationals.

Finally, the system of remedies set up by trade agreements permits controlled resort to the type of measure that could be expected to emerge in a bilateral context in case of fruitless negotiations: trade retaliation. This retaliation can take the form of any non-performance of trade obligations. Retaliation has in some cases been authorized to take the form of suspension of protection of intellectual property rights and of commitments in services, but so far it has only been concretely applied in the field of goods, i.e., through the imposition of vastly increased tariffs on imports from the wrongdoing party.

Judicial remedies legitimize retaliation. While still implemented solely by the complaining party, authorized trade retaliation is no longer unilateral in the sense of being based on one party's individual perception that its rights are being violated. Instead, it is based on the assessment, by an institution entrusted with making this assessment impartially, that a violation has taken place. This legitimation by the institution, and at the same time by the rules agreed upon by all parties, reduces the likelihood that parties will challenge the permissibility of the retaliation. In the case of the WTO, the very act of imposing retaliation is preceded by the possibility of an adjudicator's assessment that the form of retaliation chosen is warranted and proportionate to the level of injury ('nullification or impairment') caused by the violation, as well as by a multilateral decision by a collective political body (the DSB) authorizing the application of retaliation.

This judicialization of the remedy of retaliation, often perceived as a burden on an injured complainant, becomes useful for two reasons. First, the retaliation itself is legitimized and can be applied with reduced scope for legitimate counter-retaliation. Second, the very series of perceived 'delays' within the WTO dispute settlement procedure provides opportunities for compliance to occur without retaliation, allowing the complainant to attain its objectives while avoiding having to apply costly retaliation. In fact, a significant and underrated bonus of the multi-stage procedure that precedes WTO retaliation is that it allows Members to credibly threaten to retaliate, without being required to act and pay the costs of retaliation, on the credible grounds that they are waiting until retaliation becomes permissible. Given the low record of retaliation as a compliance-inducing tool once it becomes permissible, is authorized, and is applied, the ability to threaten it allows complainants to engage in a threat strategy, which is often successful, without having to incur the costs of a retaliation strategy, which is less often so.

## V. Conclusion

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Uniquely, remedies in international trade agreements are aimed at securing performance by States of their obligations rather than at the provision of reparation for injury caused by breach. In pursuit of this goal, trade agreements leave aside the remedy of reparation and entrust adjudicators merely with establishing whether and why commitments have been violated. The first focus of judicial remedies in trade is producing an impartial assessment of the dispute, with a final determination of the scope and content of obligations and a clear identification of violations. If breaches are identified, the focus of remedies shifts to mobilizing political and economic resources to induce compliance by the party found in breach with its obligations. These resources include political pressure in collective organs, mandatory periodic surveillance over cases in which breaches are found, proceedings to determine compliance with earlier determinations, and the possibility for an aggrieved party to employ, as a remedy of last resort, regulated trade retaliation.

This complex system of compliance-oriented remedies seeks to address what is often perceived as a deficiency of international adjudication: its inability to produce, against the will of a party, the outcome required by treaty commitments as interpreted by the adjudicator. While problematic from the viewpoint of the implementation of commitments, this perceived deficiency is what defines international adjudication and the international legal system more broadly. If non-compliance with obligations were met with an overwhelming response, the question would be whether the system within which this response operates remains international in the sense we understand it. An international system permits States to retain the ultimate power to determine their own policies (which one might call their sovereignty) while still preserving the legal character of the commitments each state makes to its counterparts. While this system of remedies may not always secure compliance as desired by complainants, a relatively low degree of

enforceability can also be thought of as the mirror image of the freedom of States to remain the ultimate decision-makers within their own jurisdiction. Within an international adjudication system, a well-designed system of remedies may facilitate the pursuit of compliance and constitute an instrument to induce compliance, but it is unable to replace the determination of States with respect to how and when to achieve it.

Judicial remedies constitute the least costly means of seeking compliance among the available ones. The recent rise in interest in unilateral remedies, perceived as a more efficient approach than resort to adjudication, may be due in part to a failure to consider in-depth the implications of the different courses of action available to an aggrieved State in international relations. States are permanently adjusting their reciprocal conduct to match the state of their relations, whether visibly (for example, by loudly announced trade retaliation) or invisibly (for example, by suspending cooperation in ostensibly unrelated fields or by failing to process otherwise simple requests from another State or its nationals). Rather than being a creation of the DSU or international trade agreements, unilateral remedies are structurally embedded in the international legal regime, where they always constitute the last resort States have against violations of commitments by other States. What the DSU and other international trade agreements create is thus not the right to retaliate but the right to seek judicial remedies, and with it, the ability to press for compliance without employing the economically disruptive and politically hazardous instrument of unilateral retaliation.

## Further reading

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Bown, C. and J. Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2010)

[Google Scholar](#) [Google Preview](#) [WorldCat](#) [COPAC](#)

Brewster, R., 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement' 80 *George Washington Law Review* (2011) 102–158

[Google Scholar](#) [WorldCat](#)

Bronckers, M. and F. Baetens, 'Reconsidering Financial Remedies in WTO Dispute Settlement' 16 *Journal of International Economic Law* (2013) 281–311

[Google Scholar](#) [WorldCat](#)

Charnovitz, S., 'The WTO's Problematic "Last Resort" Against Noncompliance' 57 *Aussenwirtschaft* (2002) 407–440

[Google Scholar](#) [WorldCat](#)

Hudec, R.E., 'Broadening the Scope of Remedies in WTO Dispute Settlement' in F. Weiss and J. Wiers (eds), *Improving WTO Dispute Settlement Procedures* (London: Cameron May 2000) 345–376

[Google Scholar](#) [Google Preview](#) [WorldCat](#) [COPAC](#)

Mavroidis, P.C., 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' 11 *European Journal of International Law* (2000) 763–813

[Google Scholar](#) [WorldCat](#)

Schwartz, W.F. and A.O. Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' 31 *The Journal of Legal Studies* (2002) S179

[Google Scholar](#) [WorldCat](#)

Soprano, R., *WTO Trade Remedies in International Law—Their Role and Place in a Fragmented Legal System* (Abingdon, UK / New York, NY: Routledge 2018)

[Google Scholar](#) [Google Preview](#) [WorldCat](#) [COPAC](#)

Vidigal, G., 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' 16 *Journal of International Economic Law* (2013) 505–534

[Google Scholar](#) [WorldCat](#)

Zimmermann, C.D., 'Toleration of Temporary Non-Compliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited' 3 *Trade, Law and Development* (2011) 382–406

[Google Scholar](#) [WorldCat](#)

- 1 D. Laycock, *Modern American Remedies*, 3rd edition (New York: Aspen, 2002), cited in B.A. Garner et al. (eds), *Black's Law Dictionary*, 9th edition (St. Paul, MN: West, 2004), 1407. Note that this chapter does not deal with the issue of 'trade remedies', a term used to refer collectively to anti-dumping duties, countervailing duties and safeguard measures. See Chapter 21 of this handbook.
- 2 C. Gray, 'Remedies in International Dispute Settlement' in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013) 871, at 896.
- 3 *Northern Cameroons*, (1963) ICJ Rep, p. 15, 37.
- 4 Article 94(2) of the Charter of the United Nations.
- 5 Article 46(2) of the European Convention on Human Rights.
- 6 C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press 2004), at 19.
- 7 P. Eeckhout, 'Remedies and Compliance' in D. Bethlehem, D. McRae, R. Neufeld, and I. Van Damme (eds), *The Oxford Handbook of International Trade Law*, 1st edition (Oxford: Oxford University Press, 2009) 437, at 448.
- 8 Article 19.2 of the DSU.
- 9 Article 2018 of NAFTA, signed 17 December 1992, entered into force 1 January 1994.
- 10 Article 31.19 of USMCA (updated text signed 10 December 2019, not yet entered into force).
- 11 Article 29.12 of CETA (signed 30 October 2016, entered into force provisionally on 21 September 2017).
- 12 Articles 19.15–19.17 of RCEP.
- 13 Articles 27, 29.1 of MERCOSUR Olivos Protocol, signed 18 February 2002, entered into force 1 January 2004.
- 14 Articles 24.7, 25.1 of AfCFTA, Protocol on Rules and Procedures on the Settlement of Disputes.
- 15 See G. Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective' 16 *Journal of International Economic Law* (2013) 505–534, and the literature cited therein.
- 16 On remedies in international law more broadly, see C. Gray, 'Is There and International Law of Remedies?' 56 *British Yearbook of International Law* (1985) 25; C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon, 1987); C. Gray, 'Remedies' in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014), 871–898.
- 17 *Chorzów Factory (Jurisdiction)* (1927) PCIJ Ser. A No 9, p. 25. See, in the same judgment, pp. 22–24, as well as the discussion in Vidigal, above fn 15, at 521.
- 18 *LaGrand*, ICJ Reports 2001, p. 466, 485.
- 19 ILC Articles on State Responsibility, 86 ff.
- 20 *Ibid.*, at 90, 99–100, 105–107, 125, 127, 131.
- 21 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, (2014) ICJ, p. 226, 298.
- 22 J. Crawford, *State Responsibility – The General Part* (Cambridge: Cambridge University Press, 2013), at 506.
- 23 The division codified by the Commission does not always match the names used by courts themselves. The European Court of Human Rights, for one, has interpreted its power to award 'just satisfaction' as a power to award financial damages. See Article 41 of the European Convention on Human Rights. Additionally, the focus on final remedies overlooks an important remedy available to many international courts and tribunals, and usually absent in international trade adjudication: provisional measures.
- 24 Article 30(a) (cessation) of the ILC Articles on State Responsibility.
- 25 Article 30(b) (assurances and guarantees of non-repetition) of the ILC Articles on State Responsibility.
- 26 *Factory at Chorzów (Merits)* (1928) PCIJ Ser. A No. 17, p. 47.
- 27 See Articles 34–37 of the ILC Articles on State Responsibility.
- 28 See, e.g., *Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits (14 August 2015), para 401(H); ECtHR, *Ilașcu v Moldova and Russia* (App No 48787/99) (2004), para 490.
- 29 *Arctic Sunrise Arbitration*, above fn 28, para 401(F); ECtHR, *Ilașcu v Moldova and Russia*, above fn 21), para 494(20–21). To follow the language of the Convention it applies, the ECtHR labels monetary awards 'just satisfaction'.
- 30 *Manouba (France v Italy)* (1913) 11 RIAA 463, 475; *Carthage (France v Italy)* (1913) 11 RIAA 449, 460; *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, paras. 738–741. But see the approach adopted by the Inter-American Court of Human Rights, e.g. in *Mack Chang v Guatemala (Merits, Reparation and Costs)*, 25 November 2003, Ser. C No 101, para 269.
- 31 *Factory at Chorzów (Merits)* (1928) PCIJ Ser. A No. 17, p. 47.
- 32 D. Anzilotti, 'La responsabilité des États à raison des dommages soufferts par des étrangers' 13 *RGDIP* (1906) 5 ('tout acte accompli par un sujet contrairement à la règle entraîne en conséquence l'obligation de rétablir, sous une forme quelconque, l'ordre juridique troublé par lui').
- 33 Article 11 of the DSU.
- 34 Articles 17.6 and 17.13 DSU.
- 35 Adoption takes place by negative consensus, which means a consensus among the Members is required for the DSB not to adopt the report (Articles 16.4 and 17.14, together with footnote 1, of the DSU). Such negative consensus has never taken place. Given that the Appellate Body became non-operational at the end of 2019, a number of appealed panel reports are currently 'in limbo', their recommendations being somewhat authoritative but non-binding.
- 36 Article 21.1 of the DSU.
- 37 Footnotes omitted.
- 38 By the same token, if the WTO-inconsistent measures have expired and there is no prospect for their re-enactment, a finding/ruling is not accompanied by a recommendation. See Appellate Body Report, *China – Raw Materials*, adopted 22

February 2012, paras 263–265, and the discussion in Vidigal, above fn 15, at 527–530.

39 Article 19.1 of the DSU.

40 On the issue of reparation under WTO law, see Vidigal, above fn 15, at 517–523.

41 Ibid.

42 Article 21.3 DSU. The RPT is provided whenever prompt compliance is impracticable (Article 21.1 of the DSU).

43 Pursuant to Article 9.3 of the DSU, ‘wherever possible’ parties should ‘resort to the original panel’, i.e. the same individuals should compose the original panel and the compliance panel.

44 The reports of the compliance panel and Appellate Body must be adopted by the DSB.

45 Article 22 (Compensation and the Suspension of Concessions) of the DSU.

46 Articles 22.3(a) and 22.3(b) DSU. The DSU makes a distinction among ‘sectors’ that is not relevant for trade in goods.

47 Article 22.3(c) of the DSU.

48 Article 22.4 of the DSU.

49 Article 22.1 of the DSU.

50 Article 3.7 of the DSU.

51 Ibid.

52 Article 22.1 of the DSU.

53 Article 22.8 of the DSU.

54 Ibid. See Appellate Body Report, *Canada/US – Continued Suspension*, adopted 14 November 2008, para 374 (noting that the three hypotheses under Article 22.8 are meant to achieve the same result, i.e., substantive compliance).

55 Reciprocal Trade Agreements Act (12 June 1934, 48 Stat. 943, 19 U.S. Code § 1351).

56 Reciprocal Trade Agreement between the United States and the United Kingdom, signed 17 November 1938, entered into force, 25 December 1939, 54 Stat 1897, Articles XVIII–XX.

57 Article XXIII:2 of the GATT 1947.

58 GATT, *United States Import Restrictions on Dairy Products – Resolution*, 26 October 1951 (GATT/CP/130 - BISDII/16), 14–15. See also GATT Panel Report, *French Assistance to Exports of Wheat and Wheat Flour*, adopted 21 November 1958 (L/924, 7S/46), 12.

59 GATT Working Party Report, *Netherlands Action under Article XXIII:2*, 7 November 1952 (L/61), 6–7.

60 GATT Panel Report, *Uruguayan Recourse to Article XXIII*, adopted 16 November 1962 (L/1923 – 11S/95), 19–21.

61 Retaliation was applied without GATT authorization by the United States against the European Economic Communities (EEC) in *EEC – Oilseeds* and was requested by the EEC and Canada, but not authorized, in *US – Superfund*. See *Communication from the United States*, DS28/4 (5 November 1992); *Communication from the European Communities, United States – Taxes on Petroleum and Certain Imported Substances: Follow-Up on the Panel Report*, C/W/540 (14 March 1988); GATT Council of Representatives, *Minutes of Meeting*, C/M/236 (11 October 1989), at 20.

62 See, e.g., Working Party IV on Organization and Functional Questions, *Report of Review*, L/327/Reb.1 (4 April 1955), at 64; Committee on Trade and Development, *Note by the Secretariat: Compensation to Less-Developed Contracting Parties for Loss of Trading Opportunities Resulting From the Application of Residual Restrictions*, COM.TD/5 (2 March 1965), at 8; Decision of 5 April 1966 on Procedures under Article XXIII (BISD 14S/18), paras 9–10.

63 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted 28 November 1979 (L/4907).

64 Article 1807:8-9 of the Free Trade Agreement between Canada and the United States of America, 27 ILM 281 (1988).

65 Prior to the Olivos Protocol, MERCOSUR dispute settlement was governed by the Brasília Protocol, signed 17 December 1994.

66 Article 20.15 Dominican Republic-Central America-United States Free Trade Agreement, signed 5 August 2004, entered into force 1 March 2006.

67 Articles 28.17–28.19 of the CPTPP, signed 8 March 2018, entered into force 30 December 2018. The CPTPP incorporates the text of the Trans-Pacific Partnership (TPP), signed 4 February 2016.

68 Articles 19.15–19.17 of RCEP.

69 Articles 82–88 of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed 10 June 2016, applied since 10 October 2016, OJ 2016 C 250, p. 3.

70 Article 2019(3) of NAFTA, 17 December 1982, 32 ILM 289 (1993), 32 ILM 605 (1993). The time for compliance was increased to 45 days in the USMCA. See Article 31.19 of the USMCA, above fn 10. Article 32(2) Olivos Protocol for the Solution of Controversies in the Mercosur, 18 February 2002, 2251 UNTS 244.

71 Mercosur Court, *Award No 1/2007*, 8 June 2007, p. 9 (my translation).

72 Mercosur Court, *Award No 1/2008*, 25 April 2008, p. 14.

73 Article 8.39(1) of CETA.

74 Articles 23.9–23.11, 24.15–24.16 of the CETA. Note that the absence of regulated retaliation may mean that no retaliation is permissible for violation of these provisions but might also mean that unregulated countermeasures remain permissible. CETA Articles 23.11 and 24.16 suggest the former; the CJEU has suggested the latter. CJEU, *Opinion 2/15*, EU:C:2017:376, para 161.

75 Information on RTA disputes can be found in Porges Law Trade PLLC, *RTA Dispute Infopage*, at < <https://www.porgeslaw.com/rta-disputes> > (last visited 21 February 2020).

76 See A. Porges, *RTA Disputes – Latin America*, at < <https://www.porgeslaw.com/rta-ds-latin-america> > (last visited 21 February 2020).

77 WTO, *Regional Trade Agreements Database*, at < <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> > (last visited 21 February 2020).

78 Final Report of the Panel, *Costa Rica vs El Salvador – Tratamiento Arancelario a Bienes Originarios de Costa Rica*, 18  
November 2014 (CAFTA-DR/ARB/2014/CR-ES/18).

79 Final Report of the Panel, *Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, 14 June  
2017.

80 Joint Letter from the Acting Secretary of Labor and the US Trade Representative, *request for consultations under the US-  
Bahrein FTA*, 6 May 2013.

81 Ibid.

82 USTR, ‘USTR Requests First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA)’,  
Press Release (1 April 2019).

83 USTR, USTR Requests First-Ever Consultations Under the U.S.-Korea Free Trade Agreement (KORUS), 15 March 2019; USTR,  
‘USTR to Request First-Ever Environment Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) in Effort to  
Combat Illegal Fishing’, Press Release (19 September 2019).

84 European Commission, *Note Verbale* on restrictions applied by Ukraine on exports of certain wood products to the  
European Union, 20 June 2019.

85 European Commission, *Southern African Customs Union – Safeguard measure imposed on frozen bone-in chicken cuts from  
the European Union*, Request for the establishment of an arbitration panel by the European Union, 21 April 2020.

86 European Commission, *Republic of Korea – compliance with obligations under Chapter 13 of the EU-Korea Free Trade  
Agreement*, Panel Request, 4 July 2019.

87 Global Affairs Canada, *Request for Consultations with Respect to the Imposition of a Global Emergency Action (or Safeguard  
Measure) by the United States on Certain Solar Goods*, 23 July 2018.

88 The number 535 corresponds to the amount of requests for consultations filed by 31 December 2017. The difference of  
two years in the counting serves to control for the time it takes between consultations and panel reports. The sole panel  
composed after the end of 2017 that was able to issue its report before the end of 2019 was the panel in *India – Export  
Related Measures* (DS541). The report was under appeal at the time of writing and remains under appeal, now in ‘appeals  
limbo’, in 2022.

89 This claim is more problematic in relation to trade remedies, since they may expire prior to or shortly after being found  
WTO-inconsistent, the question of WTO-inconsistency therefore becoming moot while the measure has achieved its  
purpose. Additionally, the wrongdoing party may initiate a new investigation, including for a different trade remedy, and  
the complainant may believe the new form of WTO-inconsistent measure prevents it from requesting a compliance panel  
and requires a new original complaint.

90 See, e.g., R. Brewster, ‘The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement’ 80 *George  
Washington Law Review* (2011) 102, at 104; W.F. Schwartz and A.O. Sykes, ‘The Economic Structure of Renegotiation and  
Dispute Resolution in the World Trade Organization’ 31 *The Journal of Legal Studies* (2002) S179.

91 See, e.g., the summary of the dispute in *EC and certain member States – Large Civil Aircraft*, at <  
[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds316\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm)> (last visited 25 February 2020). The French and  
Spanish versions employ the terms ‘*mesures correctives*’ and ‘*medidas correctivas*’ respectively. As discussed below, the  
practice of retaliation does not justify using these terms either.

92 The total number of awards is 24, with eight awards having been issued in *US – FSC* and two in *EC – Bananas*, in *EC –  
Hormones*, and *US – Cotton*. A single award was issued in *US – COOL*, assessing permissible retaliation for both Mexico and  
Canada.

93 The question arises whether retaliation can be applied for ‘as such’ WTO-inconsistent conduct when the ‘as applied’  
measure causing nullification or impairment has disappeared. The issue is more complex if there is new conduct whereby  
the ‘as such’ conduct manifests itself in a different applied measure. On non-compliance without nullification or  
impairment, see Vidigal, above fn 15, at 531–533.

94 *Factory at Chorzów (Merits)* (1928) PCIJ Ser. A No. 17, p. 47. See also Arbitral Award in *Lusitania* (1923) 7 RIAA 32, 39; D.  
Shelton, *Remedies in International Human Rights Law*, 2nd edition (Oxford: Oxford University Press, 2005), 10–21.

95 See, e.g., P.C. Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ 11 *European Journal of  
International Law* (2000) 763, 763–764

96 See G. Vidigal, ‘Why Is There So Little Litigation under Free Trade Agreements? Retaliation and Adjudication in  
International Dispute Settlement’ 20 *Journal of International Economic Law* (2017) 927, 945–949; Shaffer and Ganin, above  
fn 93.

97 In the domestic context, this classification dates back to Blackstone. W. Morrison (ed), *Blackstone’s Commentaries on the  
Laws of England* (London: Cavendish, 2013/1765), Vol 3, 4.

98 ILC Articles with Commentary, above fn 19, 128.

99 Articles 49–54 of the ILC Articles on State Responsibility.

100 Article 51 of the Charter of the United Nations.

101 Article 7.4 of the Economic and Trade Agreement between the Government of the United States of America and the  
Government of the People’s Republic of China, signed 15 January 2020.

102 Article 9.4 of the Trade and Cooperation Agreement Between the European Union and the European Atomic Energy  
Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part (EU-UK TCA),  
signed 24 December 2020 entered into force 1 May 2021. Rebalancing measures are subject to a variety of strict  
substantive conditions, must be preceded by a procedure, and can be taken to adjudication by the affected party prior to  
their adoption. In case adjudication takes too long, the complaining party is entitled to adopt the measures while  
adjudication is pending.

103 The WTO Agreements do admit of unilateral measures in the form of trade remedies. Of the three types of trade remedies,

only countervailing measures exist to respond to WTO-inconsistent measures, i.e. prohibited and actionable subsidies, and are thus a 'remedy' in the sense of this chapter. In case of safeguards, the unilateral suspension of equivalent concessions by affected Members under Article 8.3 of the Safeguards Agreement may also be considered a unilateral remedy (against a failure by the Member imposing safeguards to provide adequate compensation for their adverse effects).

- 104 See above fn 87.
- 105 A. Subramanian and J. Watal, 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?' 3 *Journal of International Economic Law* (2000) 403–416.
- 106 Among the developing countries that threatened to suspend intellectual property rights (in particular, Ecuador in *EC – Bananas* and Antigua and Barbuda in *US – Gambling*), the only Member to have used the threat of intellectual property protection successfully was Brazil in *US – Cotton*. See Communication from Brazil, *US – Cotton*, WT/DS267/43 (12 March 2010); Joint Communication from Brazil and the United States, *US – Cotton*, WT/DS267/45 (31 August 2010).
- 107 See D.W. Drezner, *The Sanctions Paradox: Statecraft and Economic International Relations* (Cambridge: Cambridge University Press, 1999).
- 108 Drezner, above fn 108; Vidigal, above fn 97.
- 109 The Panel in *EC – Commercial Vessels* concluded that Article 23 prohibits all unilateral remedies, whether they imply reciprocal non-compliance with existing obligations (countermeasures) or constitute simply unfriendly conduct taken in response to an alleged violation of WTO rules (retorsions). Panel Report, *EC – Commercial Vessels*, adopted 20 June 2005, para 7.207.
- 110 As discussed below, when applied lawfully, WTO retaliation is no longer entirely unilateral. Although its application remains a matter for the state adopting the measure (and therefore depends for effectiveness on its ability and willingness to retaliate meaningfully), WTO retaliation is the implementation of a multilateral determination.
- 111 In *US – Gambling*, the United States was ready to compensate Antigua and Barbuda for losses equivalent to those it suffered from the United States' WTO-inconsistent measures. It was Antigua and Barbuda's insistence that it was entitled to more benefits than those adjudicated by the DSB (i.e., to host online poker servers accessible from the United States) that prevented the renegotiation of benefits, leaving Antigua with an authorization to retaliate that it was never able to use. See Minutes of DSB Meeting of 17 December 2012, WT/DSB/M/327 (4 March 2013), at 28–30.
- 112 *Mercosur Ad Hoc Arbitral Tribunal, Award No IX*, 4 April 2003, 240; Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium*, EU:C:1964/80 *Arbitral Award, Air Service Agreement Arbitration* (1978) 18 RIAA 417, 443.
- 113 Articles 3.5, 3.7 of the DSU.
- 114 Appellate Body Report, *Canada/US – Continued Suspension*, adopted 14 November 2008, para 304.
- 115 H. Horn, P.C. Mavroidis, E.N. Wijkström, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees' 47 *Journal of World Trade* (2013) 729–759.
- 116 It could be added that the adjudicator's decision allows the government and other political actors to deflect towards the international organization the blame for unpopular policies or removal of benefits of specific categories, often at the expense of the rest of society. While this deflective effect is sometimes presented as an advantage of international dispute settlement, it only works in the short term and in low doses. If used extensively, this deflection of blame engenders backlash against the organization, as if the state's obligations originated in the decision of a small group of international civil servants rather than in negotiations between states and the resulting reciprocal commitments.