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COMPLIANCE WITH WTO DISPUTE SETTLEMENT DECISIONS: IS THERE A CRISIS?

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Conferences and symposia on the World Trade Organization ("WTO") have been proliferating in connection with the Organization's 10th anniversary, with a particular focus on the WTO dispute settlement system -- how it is working, what difficulties have arisen, how its rules might evolve, *etc*. These events typically feature a certain amount of hand-wringing over the fact that adopted WTO dispute settlement decisions have only a limited, indirect influence on the subsequent behavior of losing defendants, and sometimes are not implemented promptly or at all. Some observers have gone so far as to proclaim the existence of a "compliance crisis," with potentially ruinous consequences for the WTO and the trading system more generally.

This chapter contains observations on the compliance issue in four sections. Section 1 gives an overall perspective on the compliance record. Section 2 discusses factors that may underlie occasional non-compliance. Section 3 argues that non-compliance on the scale and of the type observed so far does not qualify as a "crisis." Section 4 briefly suggests some criteria for how one might expect WTO Members to behave if they conclude in the future that a real compliance crisis has arisen.

1. Overall record of compliance, including U.S. compliance

Several quantitative analyses have been done in this area, and I will not seek to repeat or improve on them here. The story they tell is not calamitous. The adoption rate has of course increased compared to the GATT 1947 system – from wherever it was to 100%. Compliance with adopted decisions, meanwhile, seems to be running roughly at or slightly above the previous rate – that is, it occurs usually but not always.

As with the broader conundrum that most trade is frictionless but commentators focus disproportionately on the trouble spots, so it is true here that while implementation of

decisions adopted by the WTO Dispute Settlement Body (DSB) usually proceeds smoothly, the exceptions attract a lot of attention. EC – Hormones and the Canada/Brazil regional aircraft cases are sometimes cited in this regard, but the favorite "poster child" is a group of cases in which the United States was a losing defendant, and which call for changes requiring action by the U.S. Congress. This group of cases includes, in no particular order:

(a) *"all others"* -- statutory provision governing the calculation of "all others" dumping margins found "as such" to violate WTO Anti-dumping Agreement (sole remaining implementation item from *US - Hot-Rolled Steel*);

(b) *Continued Dumping/Subsidy Offset Act (the "Byrd Amendment")* -- legislation "as such" found to violate limitations in WTO Anti-dumping and SCM Agreements (still on the books);

(c) *1916 Act* -- legislation "as such" found to violate limitations in WTO Anti-dumping Agreement (recently repealed, but long after the reasonable period of time (RPT) had expired);

(d) *Section 211* -- statutory provision involving trademarks and expropriated Cuban property, challenged in connection with a dispute over the "Havana Club" rum trademark (still on the books); and

(e) *Section 110(5)(b)* -- statutory provision involving, inter alia, royalties paid to foreign artists whose music is played in U.S. restaurants (still on the books).

Before addressing these items individually, a brief comment is in order about the overall U.S. compliance record, which despite the five bullets above I regard as quite good.[1] But leaving opinions aside, the facts are these: (1) The U.S. government has *always* announced an intention to bring measures found to be WTO-inconsistent into conformity either immediately or within a reasonable period of time ("RPT").[2] (2) The United States has *almost always* in fact brought measures found to be WTO-inconsistent into conformity on schedule,[3] with the only exceptions being items requiring legislative action. (3) The decisions adverse to the United States have included cases touching on the *most fundamental* sovereign prerogatives – *e.g.*, how to raise money (*US -- FSC*), and how to spend money (*US – Offset Act (Byrd Amendment), US -- Upland Cotton*).

Some other factors that may help put the U.S. compliance record into perspective are discussed in Section II below. Perspective can be an elusive goal where evaluating

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[1] I would actually say this record is *too* good, given that it includes the implementation of some decisions which I felt should have been rejected.

[2] Even in *Upland Cotton*. The *US -- Gambling* case reportedly would have been the first exception, had the appeal turned out differently.

[3] Reasonable periods of time have been consensually extended here and there.

U.S. behavior on the international stage is concerned.[4] It will come as no surprise to learn that the U.S. government also regards its overall compliance record as good.[5]

2. What might underlie occasional delayed compliance or non-compliance?

A meaningful assessment requires considering not only the quantity but also the *nature* of observed non-compliance, including what seems to be causing it and what (if anything) the exceptional cases have in common. It is easy enough to identify factors that might push a losing defendant toward complying: mainly, concerns about the "three Rs" of *reputation* (desire not to be seen as a scofflaw), *retaliation* (authorized by the DSB), and possible *role reversal* (*i.e.*, ability to demand implementation as a victorious complainant in future cases). The more interesting question is how to predict or explain *non*-compliance. Following is a list of four factors potentially relevant to decision-making by any losing defendant, and one additional factor that as far as I know is specific to the United States:

(a) *Attachment to measure*. A losing defendant might prefer to compensate or accept suspension of concessions, given strong attachment to the measure found to be WTO-inconsistent.

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[4] *See* Colin Picker, "Reputational Fallacies in International law: A Comparative Review of United States and Canadian Trade Actions," 30 *Brook J. Int'l L.* 67, 72 n. 14 (2004):

> "Indeed, while it is common to claim that the U.S. behavior within the international system shows that the United States does not respect or comply with international law, the truth is that the United States, through its officials, diplomats, soldiers, citizens and so on, obeys international law thousands of times each day – from customs compliance with international standards to the rules of engagement of soldiers in combat zones. A few high profile examples of non-compliance should not mar the otherwise stellar U.S. record of international law compliance – this despite the fact that world attention will likely focus on the occasional example of U.S. conflict with international law and draw the inaccurate conclusion that the United States is regularly non-compliant."

[5] *See, e.g.*, Statement by the U.S. representative at the meeting of the WTO Dispute Settlement Body (DSB), Geneva, February 17, 2005:

> "I would also like to take this opportunity to comment on the suggestion made by a number of Members this morning that the U.S. compliance record is poor. I would like to make the following points.
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> The United States has been involved in quite a large number of disputes, and our compliance record overall is quite good.
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> No WTO Member has been asked to undertake the changes to its tax system which the United States was called on to make as a result of the FSC/ETI dispute. Yet last year the U.S. Congress repealed ETI.
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> It also repealed the 1916 Act.
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> We have indicated that we will comply in other disputes, and we will.
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> Indeed, as noted earlier, we have already taken most steps necessary to comply in the Hot-Rolled dispute."

(b) *Disagreement with adopted decision*. A losing defendant's senior officials might consider the adverse decision to be poorly reasoned or unpersuasive – particularly if the decision featured "gap-filling" by the WTO panel or Appellate Body.[6]

(c) *Information gap*. The losing defendant's political authorities might lack certain information relevant to a decision on whether to seek to comply – particularly information about the offending measure's trade effects, which could significantly influence a cost-benefit analysis.

(d) *Systemic concerns.* Challenging measures that cannot readily be shown to affect trade is arguably a misuse of the WTO dispute settlement system, even if permitted by DSU rules. A losing defendant may balk at rewarding such behavior, out of concern about encouraging more of it. With a potential retaliation "price tag" of zero, the cost of keeping a WTO-inconsistent measure is mainly reputational, which may not be decisive in a cost-benefit analysis or may be outweighed by the desire to send a message that dispute settlement proceedings should be reserved for matters of fundamental interest with a significant effect on current trade flows.

(e) *U.S. front-loaded compliance system.* Trade agreement implementing bills in the United States typically deny legal effect to the agreements themselves and exclude any judicial role in policing compliance. Instead, the government seeks to ensure compliance by promptly amending, before new international obligations take effect, any laws which violate, or require agencies to violate, those new obligations. An implementing bill represents the collective judgment of the U.S. Executive Branch and Congress concerning what statutory provisions and agency practices, if left unchanged, would put the United States in breach. This "front-loaded" procedure helps to explain why adverse WTO decisions are greeted sceptically. If implementing legislation makes all legitimately required changes -- a condition which both political branches of the government routinely certify is met by the implementing bills they craft, including the Uruguay Round Agreements Act of 1994 -- then by definition the amended laws conform to the new agreement, and any contrary decision must be based on an expansion rather than mere enforcement of the United States' negotiated commitments.

All of these factors are represented among the US legislative cases. Category (a) applies, for example, to the Section 110(5)(b) case, where the attractions of the U.S. measure at issue are apparently viewed as more than justifying the cost of a cash settlement

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[6] In the United States at least, the Appellate Body's view of its gap-filling authority, which it bases on the Vienna Convention of the Law of Treaties and certain cross references thereto in the WTO agreements, has exactly zero public acceptance. The WTO's greatest U.S. champions are unwilling to endorse, cultivate public appreciation of, or *even defend privately* the Appellate Body's view on gap-filling. The absence of gap-filling authority was an important part of the basis on which the U.S. Congress agreed to implement the Uruguay Round Results, and updated assurances on this point were a very important part of the basis on which the Congress (barely) approved the Trade Promotion Authority in effect at present.

acceptable to the EC.[7] Category (b) is involved in several of the pending cases, although cases like *FSC/ETI* and *Privatization* seem to show that even strong disagreement on the merits will not alone prevent implementation indefinitely. Category (e) applies across the whole range of U.S. defensive cases, but especially to those where statutory provisions have been found WTO-inconsistent "as such" even though they were scrutinized during URAA debate in 1994 and deemed by the government's leading trade experts to be WTO-consistent.[8] And I would put the *1916 Act* case, during the lengthy period of U.S. non-implementation, into category (d) (systemic concerns).[9]

Arguably of greatest importance to the outstanding U.S. legislative cases, however, is category (c). In the "all others" and Section 211 cases, for example, Congress is contemplating whether to repeal or alter legislation which has not, so far, been shown to cause adverse effects to anyone. The amount of such adverse effects would translate into

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[7] The same is true of the various U.S. measures at issue in the Internet Gambling case – law enforcement measures to which the U.S. government is apparently quite attached. In light of the changes made by the Appellate Body, however, it now seems plausible that the United States will attempt to implement the adopted decision. For another category (a) case, see *EC – Hormones*, where the WTO-inconsistent measures are valued more highly than the export opportunities lost to U.S. and Canadian retaliation.

[8] It is worthwhile to recall, at this remove, who some of those individuals were. They included, for example, Deputy U.S. Trade Representative (now WTO Deputy Director-General) Rufus Yerxa; Senate Finance Committee Chief International Trade Counsel (now USITC Commissioner) Marcia Miller; House Ways & Means Committee Trade Counsel (now WTO Legal Affairs Division Director) Bruce Wilson; House Ways & Means Trade Subcommittee Republican Staff Director (now U.S. Trade & Development Agency Director) Thelma Askey; and dozens of other careful, expert lawyers. Taking as a whole the body of WTO decisions reviewing this group's handiwork, and especially some items that received detailed attention during the URAA debate like zeroing, non-attribution, privatization, 1916 Act, and a few others, one could get the impression that they must have been a "gang that couldn't shoot straight" in 1994. My own view is that they accurately implemented the Uruguay Round Results. Of course, some of the WTO decisions adverse to the United States have involved legislation enacted after the URAA (*e.g.*, CDSOA, Section 211). And the U.S. implementers did voluntarily accept a WTO dispute settlement system authorized to second-guess their handiwork; they would not contend, and neither do I, that they were incapable of making a mistake. But they have been found in error with remarkable frequency, both in absolute terms and as a percentage of the challenges filed.

[9] *See, e.g.,* 2004 Miscellaneous Tariff Bill, House Judiciary Committee Report at 20 (dissenting views):

> "The mere fact that the WTO says the U.S. is in violation of our WTO obligations does not mean that Congress should ignore its duty to gather the facts and do an analysis of the costs and benefits of having {the 1916 Act} on the books. … {T}here are a group of cases involving statutory provisions that not only fall well within any reasonable interpretation of our WTO obligations but, equally important, have no demonstrable negative trade effects on our trade partners. The most recent spate of cases – including challenges to the 1916 act and the Byrd Amendment{}, as well as Canada's challenge to the rules for refunding antidumping and countervailing duties – would seem to be an abuse of the dispute settlement system, and may well further weaken support for the WTO. In our view, our allies have little business dragging the United States through time-consuming proceedings to pursue claims about measures that have little if any effect on actual trade. The dispute settlement system exists to help resolve actual commercial problems. The United States limits its use of the DS system on this basis, but other Members do not."

DSB-authorized retaliation, a key determinant of the potential "cost" of keeping the offending legislation on the books. But Congress has no idea what that cost might be. Perhaps no trade effects have been shown in these particular matters because none *can* be shown. Intuitively, it seems doubtful that trade flows in the next 12 months would differ if the United States had a different statutory provision on "all others" dumping margins, or if the Section 211 trademark provision were not sitting atop a pile of multiply-redundant measures preventing Pernod Ricard from selling Cuban-made Havana Club rum in the United States. But whatever the reason, Congress is being asked to make an important legislative decision using only partial data relevant to a cost-benefit analysis.

With a caveat borrowed from the American comedian Dennis Miller ("I don't want to get off on a rant here, but …"), the WTO dispute settlement system itself is responsible for this data shortage, and bears some responsibility for whatever implementation delays result. Unlike virtually every other system on earth for adjudicating economic rights and remedies, the WTO dispute settlement system allows complaints to go forward without any need to plead, much less prove, damages flowing from an alleged breach. Leaving aside cases filed under Part III of the Subsidies and Countervailing Measures (SCM) Agreement, an actual WTO ruling on the existence and amount of trade effects is available only in the "train wreck" scenario where the DSB adopts an adverse decision, the defendant fails to implement within the RPT, and the complainant requests authorization to suspend concessions at a level disputed by the defendant. This means that essential information can come into existence months or even years after DSB adoption of a decision on the merits -- months and years during which the losing defendant's decision-makers will have been continuously berated for "dragging their heels."

The *US – Offset Act (Byrd Amendment)* case was arguably a category (c) case for many months until we learned, late in 2004, what the potential "price tag" would be (roughly 70 percent of certain Continued Dumping and Subsidy Offset Act (CDSOA) outlays). Now, that case fits better into category (a), with Congress seemingly attached to the measure regardless of its WTO inconsistency and convinced that its benefits outweigh the modest level of authorized retaliation. Category (b) (substantive disagreement with adopted decision) is pertinent to the *US – Offset Act (Byrd Amendment)* case as well.[10]

3. Grounds for alarm?

The United States paid money to settle the *Section 110(5)(b)* case, compensating in the crassest possible fashion rather than seeking to comply. More recently, senior officials

[10] The *US - Steel Safeguards* case, regularly cited for a time as an example of scofflaw U.S. behavior, was not a "compliance" case in the sense discussed here. The adverse decision adopted by the DSB was in the nature of a "failure to explain" decision, and the United States did not seek to bring the challenged measure into conformity by providing an improved explanation. But neither did the United States stall beyond the RPT, which would have moved the case into the non-compliance category. Rather, President Bush abruptly lifted the safeguard measure altogether – noting, as he did so, that his action was based on the measure having met its objectives ahead of schedule. As far as the record reveals, this move had nothing to do, one way or the other, with the adverse decision adopted by the DSB.

said the United States would not even *attempt* to comply with an adverse ruling on *Internet Gambling* along the lines laid out by the lower panel. In neither instance did I notice the earth stop spinning. Neither case changes the fact that the United States – despite having many reasons to behave otherwise – always seeks to comply with adverse decisions, and almost always does in fact comply with those decisions. That doesn't sound like a compliance crisis to me. Nor do I see, in the occasional instances of delayed or refused compliance by other Members, anything truly alarming.

Some would say that the very idea of considering the persuasiveness of a WTO decision, and/or its "price tag," as opposed to just cheerfully doing what the DSB says, is destructive of the rule of law. One might as easily say that unpersuasive decisions and challenges of measures with no detectible trade effects are destructive of the rule of law. But there is also a question of which of the fundamental goals identified in Article 3.2 of the DSU – predictability or not expanding obligations – one prefers to emphasize. In the Uruguay Round, negotiators changed the rules governing panel establishment and DSB adoption of decisions, but did not meaningfully change the rules on what happens next (compliance / compensation / retaliation). They left this essentially a bilateral affair between complainant and defendant based on relative economic and political leverage – exercised in the shadow cast by the adopted decision, and informed by an aspirational "preference" for implementation. Compliance – both "whether" and "how" – is up to the defendant, and requires a political decision by officials whose job is to make cost-benefit judgments. One can disagree with the way they value certain costs, including reputational and rule-of-law harms, but one cannot seriously object to the principle that a political decision is involved. And in that context, how can a decision's perceived soundness, and its price tag, be ignored?

4. How will we know if a real compliance crisis arises?

My final reason for remaining calm is that I do not see WTO Members behaving as if they believe a compliance crisis exists. When and if they do perceive a crisis, it is a safe bet that they will begin proposing stronger compliance incentives. Some Members say they want stronger incentives now, but the dispute settlement reform negotiations have seen only a small handful of very narrowly-tailored proposals. Not even proposed, for example, are items like the following:

(a) Direct legal effect. "Members shall provide for decisions adopted by the DSB to have automatic and conclusive effect in domestic legal proceedings of all types, constraining the behavior of administrative/executive agencies to the same extent as would decisions issued by domestic courts."

(b) Retaliation exceeding trade effects. "The authorized suspension of concessions shall be calculated to have twice the commercial effect of the measure(s) found to be WTO-inconsistent."

(c) *Collective security*. "The DSB may/shall authorize suspension of concessions by any and all Members requesting such authorization, each in an amount equal to the adverse trade effects found to be suffered by the complaining Member(s)."

Commentators have discussed (and some have advocated) such reforms, but so far no WTO Member has done so. I suspect this is because stronger compliance incentives are a "double-edged sword," and it would take some courage for any sovereign government to contemplate putting them in place.

In the meanwhile, WTO Members who lose cases -- and in particular the sceptical, slow-moving and much-maligned U.S. Congress -- will do what they will do. I don't think those who posit a compliance "crisis" have carried their burden of persuasion. But I do agree that greater compliance is desirable. Non-compliance based on sheer scepticism could be diminished by improvements that would bolster the WTO dispute settlement system's credibility – open hearings and less reliance on Members' incumbent trade officials as panelists would be a good start. But unfortunately these items are beginning to be overshadowed by one that will be even harder to address -- a storm brewing over gap-filling, the Vienna Convention on the Law of Treaties, and the (much-disputed) relevance of general international law principles in WTO dispute settlement.

If that storm is as rough as now appears possible, we may find out what a real compliance crisis looks like.