RIETI Discussion Paper Series 05-E-013

Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions

William J. DAVEY
University of Illinois College of Law

RIETI
Research Institute of Economy, Trade & Industry, IAA

The Research Institute of Economy, Trade and Industry
http://www.rieti.go.jp/en/

RIETI Discussion Paper Series 05-E-013
March 2005

Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions

William J. DAVEY*

Abstract

To assess the effectiveness of the dispute settlement system of the World Trade Organization (WTO), it is necessary to evaluate whether WTO members promptly take the actions required to bring themselves into compliance with their WTO obligations, as those obligations have been defined or clarified in the dispute settlement reports issued by WTO panels and the Appellate Body. In this paper, the operation of the WTO dispute settlement system is briefly outlined, with particular emphasis on the overall time taken by the various stages. This is followed by an analysis of the implementation record for disputes brought under the WTO – both overall and on a member-by-member and agreement-by-agreement basis, with consideration of the types and disputes that have proved problematic. The conclusion of this paper is as follows: while overall record of implementation is relatively good, there are problem areas. Those problems could be mitigated with the modification of remedies provided for in the WTO dispute settlement so that (i) money payments could be substituted for the right to suspend concessions; (ii) such payments or suspension of concessions could be calculated on a retrospective basis; and (iii) such payments or suspension of concessions could be increased periodically over time in the event of continued non-implementation.

Key words: World Trade Organization, dispute settlement, suspension of concessions

JEL classification: F13, K33

* Edwin M. Adams Professor of Law, University of Illinois College of Law. Professor Davey was Director of the WTO's Legal Affairs Division from 1995-1999. In late 2004, RIETI asked Professor Davey to write this paper as an introduction to the issue of implementation of panel/Appellate Body rulings and recommendations in the WTO dispute settlement mechanism. The Japanese translation of this paper will be included in a volume currently being compiled and edited by RIETI faculty fellow Tsuyoshi Kawase and Co-editor Ichiro Ararki, to be published by Sanseido, Tokyo as part of the RIETI policy analysis series in September 2005.

INTRODUCTION

To assess the effectiveness of the dispute settlement system of the World Trade Organization (WTO), it is necessary to evaluate whether WTO members promptly take the actions required to bring themselves into compliance with their WTO obligations, as those obligations have been defined or clarified in the dispute settlement reports issued by WTO panels and the Appellate Body. In this introduction to this issue of implementation in WTO dispute settlement, I first outline briefly the operation of the WTO dispute settlement system, with particular emphasis on the overall time taken by the various stages. I then consider the implementation record for disputes brought under the WTO – both overall and on a member-by-member and agreement-by-agreement basis, with consideration of the types of disputes that have proved to be problematic. I conclude with some thoughts on how the implementation record might be improved.

I. THE WTO DISPUTE SETTLEMENT SYSTEM

An effective dispute settlement system is critical to the operation of the World Trade Organization. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that function is performed by the Dispute Settlement Understanding (the "DSU"). As stated in Article 3.2 of the DSU, "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". There are four phases to dispute settlement: consultations, the panel process, the appeal and the surveillance of implementation.

Under the procedures of the WTO dispute settlement system, the first step in the process is consultations.[1] A WTO member may ask for consultations with another WTO member if the complaining member believes that the other member has violated a WTO agreement or otherwise nullified or impaired benefits accruing to it. The goal of the consultation stage is to enable the disputing parties to understand better the factual situation and the legal claims in respect of the dispute and to resolve the matter without further proceedings.

If consultations fail to resolve the dispute within 60 days of the request for consultations, the complaining WTO member may request the WTO Dispute Settlement Body,[2] which is composed of all WTO members, to establish a panel to rule on the dispute.[3] Pursuant to the DSU, if requested, the DSB is required to establish a panel no later than the second meeting at which the request for a panel appears on the agenda, unless there is a consensus in the DSB to the contrary.[4] Thus, unless the member requesting the establishment of a panel consents to delay, a panel will be established

[1] DSU, art. 4.
[2] For the operation of the DSB, see DSU, art. 2.
[3] DSU, art. 4.7.
[4] DSU, art. 6.1.

within approximately 90 days of the initial request for consultations. In fact, most complainants do not push their cases forward that quickly.

After the panel is established by the DSB, it is necessary to select the three individuals who will serve as panelists.[5] If the parties cannot agree on the identity of the panelists within 20 days of the panel's establishment, any party to the dispute may request the WTO Director-General to appoint the panel.[6] In fact, this has become the norm over time. Typically, panelists are current or former government trade officials, although academics and practitioners sometimes are selected to serve as panelists. Although an insistent complainant can ensure the composition of a panel within 30 days of its establishment, panel composition takes more time in almost all cases.

Panels normally meet twice with the parties to discuss the substantive issues in the case.[7] Each meeting is preceded by the filing of written submissions. After completing the fact-gathering and argument phase, the panel issues its "interim report", which contains its findings and recommendations. Parties are allowed to, and almost always do, comment on some aspects of the interim report. In light of the comments received, the panel then issues its final report. The DSU provides that a panel's final report is to be circulated to WTO members within nine months of the panel's establishment,[8] although on average panels take 12-13 months, which means that some cases take much longer. The final report is referred to the DSB for formal adoption, which is to take place within 60 days unless there is a consensus not to adopt the report or an appeal of the report to the WTO Appellate Body.[9] This so-called negative consensus rule is a fundamental change from the GATT dispute settlement system where a positive consensus was needed to adopt a panel report, thus permitting a dissatisfied losing party to block any action on the report. Now, as long as one member wants the report adopted, it will be adopted.

The majority of panel reports are in fact appealed. The appeal is to the WTO Appellate Body, which consists of seven individuals, appointed by the DSB for four-year terms.[10] The Appellate Body hears appeals of panel reports in divisions of three, although its rules provide for the division hearing a case to exchange views with the other four Appellate Body members before the division finalizes its report. The Appellate Body is required to issue its report within 60 (at most 90) days from the date of the appeal,[11] and its report is to be adopted automatically by the DSB within 30 days,[12] absent consensus to the contrary. Appellate Body reports have almost always met the 90-day deadline.

---

[5] On panelists generally, see DSU, art. 8.
[6] DSU, art. 8.7.
[7] On panel procedures, see DSU, arts. 11-12 & Appendix 3.
[8] DSU, art. 12.9.
[9] DSU, art. 16.4.
[10] On the Appellate Body, see DSU, art. 17.
[11] DSU, art. 17.5.
[12] DSU, art. 17.14.

The final phase of the WTO dispute settlement process is the surveillance of implementation stage.[13] This is designed to ensure that DSB recommendations (based on adopted panel/Appellate Body reports) are implemented. If a panel finds that an agreement has been violated, it typically recommends that the defaulting WTO member concerned bring the offending measure into conforming with its WTO obligations.[14] While panels may suggest ways of implementation, they seldom do. In any event, it is ultimately left to the WTO member to determine how to implement.

The DSU expressly provides that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all [WTO] Members".[15] Under the DSB's surveillance function, the defaulting member is required to state its intentions with respect to implementation within 30 days of the adoption of the applicable report(s) by the DSB.[16] While members virtually always express their intention to implement, they typically indicate that immediate implementation is impractical, which means under the DSU that they are to be afforded a reasonable period of time for implementation.[17] Absent agreement, that period of time may be set by arbitration, and the DSU provides that, as a guideline for the arbitrator, the period should not exceed 15 months.[18] Overall, in non-export subsidy cases, the median reasonable period of time has been around 8 to 9 months.

If a party fails to implement the report within the reasonable period of time, the prevailing party may request compensation. If that is not forthcoming within 20 days of the expiration of the reasonable period of time,[19] it may request the DSB, within 30 days of said expiration, to authorize it to suspend concessions owed to the non-implementing party (i.e. take retaliatory action).[20] DSB authorization is automatic, absent consensus to the contrary, subject to arbitration of the level of suspension if requested by the non-implementing member.[21] Suspension of concession is said to be only temporary and is to be applied only until the inconsistency of the measure is removed.[22]

Under the timeframes described above, one would anticipate that a diligent complainant could obtain the removal of an inconsistent measure within about 26 months of its request for consultations.[23] In fact, as noted above, the minimum specified timeframes are typically exceeded, particularly in the consultation, panel establishment and panel report stages. As a consequence, in those cases where the initial reasonable

[13] See generally, DSU, art. 21.
[14] DSU, art. 19.1.
[15] DSU, art. 21.1.
[16] DSU, art. 21.3.
[17] DSU, art. 21.3.
[18] DSU, art. 21.3(c).
[19] See DSU, art. 22.2.
[20] DSU, art. 22.6.
[21] DSU, art. 22.7.
[22] DSU, art. 22.8.
[23] This timeframe is approximate and was constructed as follows: consultations (60 days – 2 months); panel establishment (30 days – 1 month); panel report (9 months); appeal (45 days – 1.5 months); appellate report (90 days – 3 months); adoption (15 days – 0.5 month); and reasonable period of time (9 months), for a total of 26 months, or two years and two months.

period of time for implementation had expired as of December 2004, the median time from the request for consultations to implementation was 34 months (Table 1), or eight months (30%) longer than the period foreseen in the DSU. Of course, the figure of 34 months is only a median time. By definition, half the cases have taken longer, some much longer, to resolve. Given the goal of dispute settlement as set out at the beginning of this part – security and predictability in trading relations – it is obvious that the DSU is failing to ensure that goal is met in too many cases. It is true that some of the delay can be attributed to complainants' failure to prosecute their cases vigorously to the extent allowed by the DSU. Nonetheless, the data in the tables suggests that a significant part of the problem is the failure to ensure prompt implementation. I now turn to the WTO's record in that regard.

II. THE IMPLEMENTATION RECORD IN WTO DISPUTE SETTLEMENT

In order to assess the overall record of implementation in WTO dispute settlement, it is useful to start with the adopted WTO reports where implementation was due as of 31 December 2004 and to consider – on a respondent-by-respondent and on an agreement-by-agreement basis – to what extent (i) the reports were implemented without significant delay in a manner more or less accepted by the complainant; (ii) the reports were implemented only after significant delay; (iii) the issue of implementation was disputed as of 31 December 2004; and (iv) the reports were admittedly not implemented as required as of 31 December 2004. In some situations, as explained below, it is difficult to categorize specific cases, but a tentative classification can be found in Table 2.

One of the most striking features of the information contained in the tables is that only 16 WTO members have been found to have violated WTO rules. Of the 61 cases[24] where implementation was originally due as of 31 December 2005, 23 cases (roughly 38%) involve the United States, with Argentina, Canada and the EU each being involved in 6 cases (about 10% each). The 12 members involved in remaining one-third of the cases are Australia (2 cases), Brazil (1), Chile (2), Egypt (1), Guatemala (1), India (3), Indonesia (1), Japan (3), Korea (3), Mexico (1), Thailand (1) and Turkey (1). I will examine each member's record in turn.

A. The Implementation Record of WTO Members

1. United States

[24] I have counted certain related cases as one case. In three instances there was only one Appellate Body report issued, notwithstanding the issuance of more than one panel report (EC Bananas, EC Hormones, US 1916 Act). In three other instances, I have treated cases with multiple panel reports as one notwithstanding the independence of the panel reports. These instances include the two Mexican challenges to the Guatemalan antidumping duties on cement; the two Brazilian challenges to Canadian aircraft subsidies and the two Canadian cases involving US countervailing duties on lumber. In the tables and footnotes, I have used short names for the cases. I have included in Table 1 the DS number along with each short name, which will enable readers to find easily more information about the case in question on the WTO website. The data in the tables is organized on a country-by-country basis, with the most frequent violators listed first.

The United States has been the prime target of cases pursued through the panel process in the WTO. Although it is not the focus of this introduction, it is interesting to speculate why this is so. There would seem to be one easy explanation. The US is a frequent user of safeguard and trade remedy measures and US administrations are not easily able to negotiate the removal of or changes in such measures. Of the 23 cases involving the US, 17 of them are safeguard or trade remedy cases. Of the remaining six cases, four of them involve the EC – one relating to the Bananas dispute and three that might be viewed as EC payback for the Bananas and Hormones disputes.[25]

As indicated in Table 2, the US implemented 12 of the 23 cases without significant delay. It is worth noting, however, that seven of those twelve cases involved safeguard measures and in four of them, the US simply allowed the measure to expire.[26] Of the other five cases that the US implemented promptly, one involved an expired measure, one involved the US regulations on import of shrimp and three involved trade remedy cases.[27]

Of the eleven cases where the US has not promptly implemented, they can usefully be divided into three categories – those where implementation has occurred but only after some delay; those where implementation is currently disputed and those that are admittedly not implemented. There are three cases where implementation was delayed. In Gasoline, one aspect of the regulation was changed within the reasonable period of time, but another aspect remained in effect for about four months after the expiration of the reasonable period of time. In DRAMS, there was a dispute over implementation that was settled 11 months after the expiration of the reasonable period of time, but only after an Article 21.5 proceeding had been started by Korea. In Steel CVD (Germany), implementation occurred within about 14 months, but since no reasonable period of time had been set, it is difficult to regard implementation as timely, since the average reasonable period of time for implementation is eight or nine months.

In four of the eleven cases, implementation appears to be disputed to some degree as of 31 December 2004. Those cases include (i) the EC-12 steel privatization case where the EC has accepted implementation in eight of the included matters, but has initiated an Article 21.5 proceeding in respect of four others; (ii) the FSC case where the EC is challenging a transition provision in an Article 21.5 proceeding (although it

[25] US Certain Products; US FSC; US Copyright; US Section 211.

[26] Three of the cases involved textile safeguards. The measure in Underwear expired one month after the reports were adopted; the measure in Wool Shirts expired before adoption of the reports; and the measure in Cotton Yarn was revoked four days after the reports were adopted. The other four cases involved regular safeguards. The safeguard in Wheat Gluten expired as scheduled, as did the Line Pipe safeguard, although in Line Pipe, the complainant (Korea) received expanded quota access prior to expiration. The Lamb safeguard was in force for 28 months. Only the Steel safeguard was significantly truncated – remaining in force for only nineteen months instead of the original intended three-year period.

[27] US implementation in Shrimp was unsuccessfully challenged by Malaysia in an Article 21.5 action. The measure in Lead CVD had been removed prior to adoption of the reports. There was a significant reduction in the applicable duties in the Stainless AD case, which was essentially accepted by Korea as implementation. India questioned in the DSB whether there had been full implementation in its Steel AD case against the US, but did not pursue the matter. The US Certain Products case involved a measure that had expired prior to adoption of the relevant panel/Appellate Body reports.

otherwise accepts implementation); (iii) the 1916 Antidumping Act case, where Japan has indicated dissatisfaction because the repeal of the law was not made retroactive (although it may ultimately accept implementation); and (iv) the Lumber CVD case where Canada indicated in the December 2004 DSB meeting that it may not accept the implementation announced by the US in mid-December 2004. If the US prevails in these four cases (either in the Article 21.5 proceedings or because the complaining party decides to accept US action as implementation), there would have been timely implementation in the EC-12 and Lumber CVD cases, but not in the other two. In such circumstances, implementation in FSC would have been 49 months and implementation in the 1916 Act case would have been 39 months after the original reasonable period of time had expired.

Of the remaining four cases – where there has not been full implementation – one involves the Byrd Amendment, where the original reasonable period of time expired on 27 December 2003 and where a number of countries have recently been authorized to take retaliatory action against the US.[28] The other three cases are in a somewhat odd position. Implementation did not occur within the reasonable period of time as originally set, but there have been extensions of the reasonable period of time in two cases (Steel AD (Japan) and Section 211) and a compensation arrangement in the other (Copyright). Thus, one could argue that as of the end of 2004, the US was not technically out of compliance in those cases, although the original time set for implementation had long since passed.[29]

Generally speaking, US administrations under Presidents Clinton and Bush have always implemented adverse WTO decisions more or less within the reasonable period of time when they could do so through administrative action. In some cases, questions about US administrative implementation have resulted in Article 21.5 proceedings (Shrimp, DRAMS, EC-12, and potentially Lumber CVD), but ultimately to date there has been implementation found in the 21.5 proceeding or the complaining party has not chosen to challenge implementation. The problems with US implementation have occurred when congressional action has been required. The four cases where implementation is long overdue – Byrd, Section 211, Copyright and Japan Steel – all require statutory changes for implementation. Until the last few months of 2004, the FSC and 1916 Act cases were also in this category. While there are transitional issues in both of those cases, it is a positive development that Congress has for the first time basically implemented adverse WTO decisions.

---

[28] Eight of the complainants in the Byrd case (Brazil, Canada, Chile, EC, India, Japan, Korea and Mexico) have been authorized to suspend concessions. The other three complainants (Australia, Indonesia and Thailand) agreed to extend the reasonable period of time to 27 December 2004.

[29] In Japan Steel the original reasonable period of time expired as of 23 November 2002, but it has been extended, most recently to July 2005. In that case, the US has partially implemented; a change in the relevant statute is required to complete implementation. In Section 211, the original reasonable period of time expired as of 31 December 2002, but it has been extended to 31 December 2004. In Copyright, the original reasonable period of time expired as of 27 July 2001, but it was extended and subsequently there was a settlement under which the US paid compensation to the EC that was viewed as settling the matter through 31 December 2004. Thus, implementation in these three cases, when it does occur, will be long after the expiration of the originally set reasonable period of time.

2. Argentina

Somewhat surprisingly (to me), Argentina has been found to have violated WTO rules more often (along with Canada and the EC) than any country other than the United States. So far, Argentina has implemented the WTO decisions against it, usually within the reasonable period of time. There have been, however, some complaints about Argentine implementation. For example, there was some delay (five months) in implementation of the first case against it (Textiles) and the next case against it (Footwear) involved a safeguard protecting products that were also involved in first case. In addition, the EC has claimed that there has been inadequate implementation of the Hides case, although it has chosen not to pursue the matter it light of its view that implementation is progressing.

3. Canada

Canada has been the subject of six adverse panel reports. In four of the cases, it implemented the reports within the reasonable period of time.[30] In one case – Dairy – its initial implementation was challenged successfully in an Article 21.5 proceeding, following which Canada took action that was acceptable to the complaints (the United States and New Zealand). The settlement occurred 28 months after expiration of the reasonable period of time. The sixth case – involving a Brazilian challenge to Canada's subsidization of its regional aircraft industry – has not been implemented. It is closely related to a Canadian challenge of Brazilian subsidies to the same industry that has also not been implemented. Both sides have been authorized to take retaliatory action, although neither has done so to date. Press reports indicate that negotiations to resolve that matter are occasionally held, but have not succeeded to date.

4. European Communities

The EC has been on the losing end of six cases.[31] In three cases, it implemented the reports more or less within the applicable reasonable period of time.[32] In two cases, the EC implemented the reports (or agreed to do so) only after Article 21.5 proceedings. Those cases include Bananas – in which the initial EC implementation was found to be defective and in respect of which the EC has agreed to implement a new system in 2006 – and Bed Linen.[33] In the sixth case – Hormones – implementation was originally due 13 May 1999. The EC claims that it implemented as 14 October 2003 and has challenged in

[30] Periodicals, Patents, Autos, Patent Term.

[31] The EC also settled two cases after issuance of interim reports that were reportedly unfavorable to its position – Scallops and Butter.

[32] In two of the cases – Poultry and Malleable Tubes – the complainant (Brazil) indicated concerns about implementation in DSB meetings, but it did not pursue those concerns in either case. Implementation was accepted in the third case, which involved sardine labeling.

[33] In Bananas, the settlement occurred in April 2001, 28 months after expiration of the original period of time, which was set at 31 December 1998. In Bed Linen, the original reasonable period of time expired on 14 August 2001 and implementation occurred on 21 December 2003, when the measure was removed, or 28 months later.

a new dispute proceeding the continued application of retaliatory measures by the US and Canada.[34]

5. Japan

Japan has been required to implement three adverse panel reports. The first report, which involved discriminatory taxes on alcoholic beverages, was implemented for the most part within the reasonable period of time and compensation was provided in respect of the aspect of implementation that was delayed. The other two cases both involved sanitary regulations for fruit. Japan implemented the first case only after some delay. The reasonable period of time for implementation expired as of 31 December 1999, but the matter was settled only as of 23 August 2001, some 20 months later. The second case – the Apples case – is currently in an Article 21.5 proceeding.

6. Others

Australia has lost two cases – Salmon and Automotive Leather. In each case, Australia implemented only after its initial implementation measure was found to be unsatisfactory in an Article 21.5 proceeding. Thus, in Salmon, implementation was due as of 6 July 1998, but did not occur until 16 May 2000. In Automotive Leather, the original reasonable period of time expired as of 14 September 1999, but did not occur until 24 July 2000.

As noted above, **Brazil** lost a case brought by Canada against its regional aircraft subsidies and it has not implemented the decision.

Chile has been on the losing end in two cases – Alcohol Taxes and Price Band. It took action to implement both decisions within the reasonable period of time. Argentina, the complainant in Price Band, has objected to whether that decision was in fact implemented, but it has taken no further action although one year has elapsed since Chile claimed to have implemented the decision.

India has been on the losing end of three cases – Patents, Quantitative Restrictions and Autos. In each case, it has implemented within the reasonable period of time.

Korea has also been required to implement three adverse reports – Alcohol Taxes, Dairy and Beef – and has done so within the reasonable periods of time that were established.

Mexico has lost one case, which involved antidumping duties on high fructose corn syrup. It implemented the decision, but only after an Article 21.5 proceeding. Originally, implementation was due as 22 September 2000, but the duties were not revoked until May 2002.

[34] WT/DS320 & 321.

Turkey lost a case by India challenging its textile quotas, which it had adopted as part of its implementation of the EC-Turkey Customs Union. It implemented the decision to India's satisfaction about four and one-half months after the reasonable period of time expired.

Egypt, Guatemala, Indonesia and **Thailand** have each lost one case and implemented within the relevant reasonable period of time. In the case of Egypt and Thailand, the complainants (Turkey and Poland, respectively) questioned whether there was complete implementation, but neither pursued the matter.

7. Summary of WTO Members' Implementation Records

Overall, roughly 60% of panel reports requiring implementation have been implemented promptly – either within the original reasonable period of time for implementation or shortly thereafter. In addition, another 20% have been implemented, albeit with significant delay (the average delay after the time set for implementation is 13 months, as indicated in Table 3). Of the remaining cases, six of them (10%) involve situations where there is a dispute over implementation. In three of them, there will have been prompt implementation if the respondent prevails in a 21.5 proceeding;[35] while the other three cases will in any event involve significantly delayed implementation even if the most recent measure is found to be WTO consistent.[36] As to the remaining six cases (10%), where non-implementation is admitted, it is unclear when they will be implemented.

As indicated in Table 3, non-implementation is primarily a problem of the United States (four of six cases) and delayed implementation is primarily a problem of the Quad (the US, the EC, Japan and Canada) and Australia (12 of 15 cases).[37] Developing countries have usually implemented within the original reasonable period of time (81%) or within five months thereafter (9%). Only once has a developing country been the subject of an Article 21.5 proceeding (Mexico HFCS) and only in one case is non-implementation by a developing country a long-standing problem (Brazil Air). This means that any solution attempting to address the problems of non-implementation and delayed implementation must deal effectively with foot-dragging by the Quad countries.

B. The Implementation Record Under the Different WTO Agreements

It appears that the implementation record varies significantly depending on the WTO agreement at issue. As Table 4 indicates, there are no implementation problems with safeguard cases, of which there have been 10. Of course, the time taken to attack a safeguard in the WTO allows it to exist long enough so that it probably serves its purpose before its removal is required. Nonetheless, safeguards have been promptly removed

[35] The three cases are the US EC-12 case, the Japan Apples case and the US Lumber CVD case.
[36] The three cases are EC Hormones (53 months); US FSC (49 months); US 1916 Act (39 months).
[37] I have included the three cases (EC Hormones, US FSC and US 1916 Act) where implementation is now disputed, but where it is clear that implementation occurred only long after the expiration of the reasonable period of time.

when found to be in violation of WTO rules. It is also interesting that GATT cases, of which there have been 18, have also generally not presented implementation problems. As indicated in Table 4, 12 of the 16 GATT cases were promptly implemented and of the four that were not, only EC Bananas was significantly delayed, as the other three cases were implemented within 5 months of the expiration of the reasonable period of time.

In terms of the implementation record under the various WTO agreements, there have been three particular problem areas. Probably the most difficult area has involved subsidies. Of the four cases, two have not been implemented at all (the Canada/Brazil regional aircraft subsidies dispute), one has been implemented prospectively after long delay (US FSC – 49 months after the expiration of the original reasonable period of time) and one was implemented after 10 months' delay (Australia Leather). The one subsidies case under the Agreement on Agriculture – Canada Dairy – also took a long time to implement (28 months after expiration of the reasonable period of time).[38] Thus, of the five subsidies cases, two remain unimplemented and the other three took years, on average, to be implemented.

SPS cases have also proved to be difficult in respect of implementation. As of the end of 2004, two cases are in subsequent panel proceedings (EC Hormones and Japan Apples). Even if found to be WTO-consistent now, EC implementation in Hormones occurred some 59 months after expiration of the reasonable period of time – a period explained in part by the need for it to undertake new scientific studies and in part by the its complex legislative procedures. The two cases where implementation has been accepted took a long time to implement following expiration of the set reasonable period of time (Australia Salmon – 23 months and Japan Agricultural Products – 20 months).

There have also been problems with implementation in the trade remedies area, although to a large extent, the implementation problems in this area mainly concern the United States. In three of the seven cases involving the US, the problem is or was the need for congressional action (1916 Act, Byrd, Steel AD – Japan); and in two of the cases, implementation is only contested and may still be upheld or accepted (EC-12 and Lumber CVD). In the other two US cases, the delay was not all that great (DRAMS and Steel CVD – Germany).[39] It should be underlined, of course, that the total time taken to challenge a national trade remedy measure in WTO dispute settlement – from consultation request to implementation deadline, combined with the fact that implementation may often be accomplished by a revision (as opposed to the elimination) of the challenged measure, means that the WTO dispute settlement system may not provide a particularly effective means of mitigating the trade impact of trade remedy measures.

[38] The other two cases under the Agriculture Agreement were implemented within the reasonable period of time.
[39] The only other case in this category is EC Bed Linen.

Finally, it should be mentioned that the three non-US cases involving the TRIPS Agreement have been implemented promptly,[40] but the two US cases, which require congressional action to revise statutory provisions, have not been implemented.[41]

Based on the foregoing, it would appear that the problem WTO agreements for implementation of dispute settlement results are the Subsidies and SPS Agreements. In the case of subsidies, the problem may be that an industry that is able to obtain governmental subsidies in the first place (whether through political power or by convincing the government that the national interest justify the subsidies) is likely to be able to delay implementation. In the case of the SPS Agreement, it would appear that public concerns over food safety and the impact of those concerns on politicians has been a significant problem that has delayed implementation in SPS cases. In addition, the fact that one of the subsidy cases and all of the SPS cases involve agricultural products – an area that is new to international oversight – may be an additional complicating factor in slowing implementation. In any event, any attempt to improve the implementation record at the WTO must take account of these apparent problem areas. In addition, it is worth mentioning that the overall time taken for safeguards and trade remedy cases may mean that even prompt implementation, typically by removal or revision of the contested measure, will not control improper use of safeguard and trade remedy measures. Thus, other remedies may need to be considered.

III. POSSIBLE REFORMS TO IMPROVE THE WTO IMPLEMENTATION RECORD

A. General Considerations

In considering how to improve the implementation record of the WTO dispute settlement system, it is necessary first to consider the current remedies for non-implementation and how they are structured. I believe that it is probably the case that the overall positive record of implementation in the WTO is due to the good faith desire of its members to see the dispute settlement system work effectively. The more active users of the system are repeat players, and they appear as both complainants and respondents. Accordingly, it is in their overall interests that the system function effectively. However, there will be cases where such good faith cannot be relied upon. When a WTO member faces difficulty in implementation, the issue quickly becomes one of assessing the consequences of non-implementation. That in turn requires a consideration of the nature and structure of the WTO's remedies for non-compliance with DSB rulings and recommendations.

In the event of non-implementation within the reasonable period of time provided, the DSU provides two potential remedies, both of which are said to be temporary ones

[40] Canada Patents, Canada Patent Term and India Patents.

[41] US Copyright and Section 211. As noted above, US Copyright was temporarily settled (until 31 December 2004) by US payment of compensation and the reasonable period of time in Section 211 has been extended by two years to 31 December 2004.

pending implementation.[42] Those remedies are compensation and the suspension of concessions (often simply called "retaliation"). To date, with one exception, compensation has not often been used, except to excuse compliance for a limited period of time.[43] The exception was US Copyright, where the US made a cash payment to the EC to excuse three years or so of non-compliance. The period covered by the compensation ends as of 31 December 2004, and no extension has been announced as of this writing. I will not give further consideration to compensation as a remedy in this introduction. Except for minor matters, the political problems that preclude implementation will probably also prevent reasonable compensation. While the idea of "forced" compensation has been raised,[44] there are obvious implementation problems in dealing with a member that is already not in compliance with its WTO obligations.

The suspension of concessions is typically thought of as the basic remedy for non-implementation of WTO dispute settlement results. In fact, however, it has not often been used. The GATT Contracting Parties authorized it only once[45] and it was supposedly never actually implemented. In the WTO to date, suspension of concessions has been authorized and used only four times: by the US in EC Bananas and EC Hormones, by Canada in EC Hormones, and by the EC in US FSC. It has been authorized, but not yet used by Ecuador in EC Bananas, by Canada in Brazil Aircraft, and by Brazil in Canada Aircraft. The level of suspension was arbitrated in US 1916 Act, but the EC never sought authority to suspend concessions. Finally, in late 2004, eight members were authorized to suspend concessions in US Byrd, although they had not actually done so as of this writing.[46]

To understand the impact of an authorization to suspend concessions, it is important to recall that WTO remedies are prospective. The level of suspension is calculated from the end of the reasonable period of time. In addition, it is important to consider the two principal aims of suspension – to restore the balance of concessions that was upset when one member violated its obligations (a temporary aim since compliance is the preferred result); and to give that member an incentive to comply.[47] The current problem with achieving the first aim – rebalancing – is that if retaliation is authorized, rebalancing takes place at a lower level of trade liberalization that had been agreed to. It would be desirable if a remedy could be devised that would not lead to less liberalization overall. Moreover, retaliation harms the Member imposing the higher tariffs as well as the target of the retaliation.

---

[42] DSU, art. 3.7.
[43] For example, this was the case in Japan Alcohol Taxes and US Line Pipe.
[44] Joost Pauwelyn, Enforcement and Countermeasures in the WTO, 94 American Journal of International Law 335 (2000).
[45] William J. Davey, Dispute Settlement in GATT, 11 Fordham International Law Journal 51, 99 (1987).
[46] An DSU Article 25 arbitration determined the level of compensation paid by the US in the Copyright case mentioned in the preceding paragraph.
[47] DSU Article 22.1. European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6, WT/DS27/ARB, para. 6.3 (9 April 1999).

In respect of the second aim – incentive to comply – there are two issues – timing and level of compensation or retaliation. At present, because remedies are prospective, there is an incentive initially to delay the time at which point they might be implemented, such as by seeking a long reasonable period of time for compliance and then forcing the complainant to go through an Article 21.5 panel (and Appellate Body) proceeding. Moreover, if the threat of retaliation does not work, it is possible that the actual existence of retaliation will become viewed as the status quo and a long-term solution, even though the WTO rules in theory require compliance. This is a real possibility given that under the DSU the level of retaliation is to be equivalent to (i.e., is not to exceed) the level of nullification or impairment.[48] In other words, the offending member is not to be penalized for its non-implementation.

There is a more general problem with suspension of concessions. While it seems to work when threatened by a large country against a smaller one, and has worked when implemented by one major power against another, it may not be an effective remedy for a small country (even if it can target sensitive large country sectors such as copyright holders). Moreover, the EC Bananas and EC Hormones cases show that it is not always effective, at least not immediately, between major powers. It should be noted, however, that retaliation by the EC against the US seemed to have a political effect in the FSC case that led to US implementation, even if the significance of the economic impact of the retaliation was not clear. In addition, the EC and others' threat of retaliation seemed to work in the US Steel Safeguards case. Nonetheless, occasional inefficacy of suspension of concessions and the unfavorable position in which it leaves developing countries may soon combine to create a serious credibility problem for the system that must be confronted.[49]

These considerations lead to the obvious question of whether there are other remedies beyond compensation and retaliation that might be more effective in the WTO context. One obvious possibility would be the payment of fines or damages. One obvious problem would be the disparity in fine-paying ability among WTO members. The system would have to be designed to avoid the possibility that rich members could effectively buy their way out of obligations in a way not available to the poor members. That might be accomplished by tying the amount of fines to the size of the member's economy, or otherwise provide for a sliding scale that would minimize "discrimination" against poor members. While a system of fines or damages has not been discussed in much detail in the past, such provisions have been included in free trade agreements recently negotiated by the United States.[50] For example, under their provisions, after the level of suspension of concessions had been set, the non-complying country would have the option of paying an amount equal to one-half level of suspension in lieu of having the concessions suspended. These provisions may suggest that the traditional government unwillingness to submit to the possibility of fines may be changing.

---

[48] DSU, art. 22.4.

[49] See William J. Davey, Dispute Settlement in GATT, 11 Fordham Intl. L.J. 51, 99-103 (1987). For a general analysis of the effectiveness of economic sanctions, see Gary Clyde Hufbauer, Jeffrey J. Schott & Kimberly Ann Elliot, Economic Sanctions Reconsidered (2d ed. 1990).

[50] See, e.g., Chile-US FTA, art. 22.15(5); Singapore-US FTA, art. 20.6(5).

B. Specific Proposals

In light of the above-described general considerations, what practical improvements might be suggested to improve implementation of WTO dispute settlement decisions. I believe that several changes should be given serious consideration. In particular, I think that the WTO remedies for non-implementation should incorporate (i) the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions; (ii) some degree of retroactivity, so as to encourage compliance within the reasonable period of time; and (iii) some adjustment mechanism to increase the sanctions over time, so as to preclude non-compliance from becoming an acceptable status quo position. I discuss each in turn.

1. Money Payments

Because suspension of concessions has yet to be used as a remedy by any other than members of the Quad, I think it is evident that another remedy more meaningful to the typical WTO member is needed. The obvious possibility is to allow a prevailing party to choose between suspension of concessions and receipt of a periodic monetary payment. While there may be enforcement problems in that it may difficult to ensure the payment is made, the right to receive a payment will still be more valuable than the never-used and probably unusable right to suspend concessions. As noted above, there are some signs that payments of fines or damages may be gaining in acceptability, as demonstrated by their inclusion in US free trade agreements. Moreover, the US Congress recently authorized around $50 million for the US to use to pay "damages" in trade cases. However, to date, it has only appropriated about $3 million for this purpose (for use in the US Copyright case).

Perhaps the greatest downside of relying on money payments is enforceability. One way to solve the enforceability problem would be to require WTO members to create funds from which damages could be paid without specific legislative approval. This should not be all that controversial as it is the way I believe that civil judgments against governments are typically paid. In any event, if a payment is not made when due, there would always be the fallback of suspension of concessions.

2. Retrospective Assessment

As noted above, the prospective nature of WTO remedies currently gives countries no incentive to comply promptly and may even encourage foot-dragging. To minimize this problem and to create incentives for prompt compliance, it should be provided that any remedy (whether retaliation or money payment) will be calculated from a date prior to the date set for implementation (e.g., date of adoption of the relevant report or date of panel establishment or even earlier). Since no remedy would be imposed if implementation occurs within the reasonable period of time, there would be an incentive to meet that deadline for implementation.

3. Increasing Sanctions Over Time

Increasing sanctions over time would also seem to offer some real possibilities for improving implementation. Such a procedure would help to avoid the perception that the payment of fines or damages is simply an alternative to compliance. In a sense, this concept has been used by the EC in the FSC case, where the duty it imposed on a long list of US products started at 5% was increased at a rate of 1% each month. The monthly change focused attention on the case each month and the impending increase, even if small, created an incentive to act so as to forestall it. In US congressional debates on the FSC implementation legislation, at least some members of Congress have made this point. Because of the huge size of the FSC sanctions – $4 billion – a phase-in made practical sense in any event. But the same concept could be used in other cases, so long as it is agreed to allow sanctions to increase over time from the initial amount.

C. Concluding Thoughts

In Part II, the point was made that any solution attempting to address the WTO's implementation problems must deal effectively with (i) the recent US failures to implement and to the occasional foot-dragging by the Quad countries (and Australia) and (ii) with the particular implementation problems in the areas of subsidies, SPS, safeguards and trade remedies.

In terms of US failures to implement, it is, of course, a hopeful sign that the US Congress recently enacted legislation to implement the FSC and 1916 Act decisions. In the latter case, implementation was due to the inclusion by the leadership of a provision to repeal the 1916 Act in a conference report where neither the House nor Senate versions of the bill at issue contained such a provision. This suggests some concern on the part of the US, including the Congress, not to be seen as ignoring WTO obligations. In any event, to the extent that pressure can be effectively put on the US to implement WTO rulings, it would seem to me that the above changes would increase such pressures. The same is true in the case of the other Quad members. In particular, the adoption of questionable implementation measures would be much less likely if a system of retrospective remedies was put in place. Moreover, the provision of increased sanctions that would increase the cost over time of non-implementation would clearly provide an incentive not to delay implementation. In the end, of course, WTO remedies may be insufficient to influence the behavior of major powers, but the proposed changes in the remedy system would seem to be a positive step in the right direction.

The use of retrospective remedies and increased sanctions over time would likely help solve the particular implementation problems that are seen in the subsidy and SPS areas. In each case, the cost of non-compliance would increase and that would help offset the political opposition to implementation. That would not necessarily be the case in respect of safeguards and trade remedies. As outlined above, the assumption of the current system (and the proposed changes thereto) is that compliance within the set reasonable period of time would absolve a country from suffering the application of any remedy. Yet in the area of safeguards and trade remedies that would still allow a country

to impose the safeguard or trade remedy, enjoy its effect and only be compelled to remove it after the WTO dispute settlement procedure had run its course. Thus, questionable safeguards and trade remedies might continue to be imposed and then removed after a couple of years of disrupting trade. It would seem to me that the only way to solve this problem would be to require payment of reparations if the imposition of such measures are found to be WTO-inconsistent. I think that these cases are often too complex to expect that a system of provisional remedies or accelerated timeframes could make much difference. Since these measures often stop trade and may not result in the collection of duties in any event, a rule on refund of duties would also not address the problem in general. Providing for reparations (damages to trade flows) might work. However, while reparations are the standard remedy in international law for violations of a state's obligations, importing such a concept into the WTO would probably be viewed by WTO members as a more drastic and less acceptable change than the adjustments to the current remedies proposed above.

CONCLUSION

This introduction has surveyed the current state of implementation of decisions in WTO dispute settlement. While the overall record of implementation is relatively good, there are problem areas. Those problems could be mitigated with the modification of the remedies provided for in WTO dispute settlement so that (i) money payments could be substituted for the right to suspend concessions, (ii) such payments or suspension of concessions could be calculated on a retrospective basis, and (iii) such payments or suspension of concessions could be increased periodically over time in the event of continued non-implementation.

Table 1 – Overall Timeframes – Country-by-Country

Case	Elapsed Time (as of December 2004 for unimplemented cases)	Country Medians (+ = continuing to increase)	
DS2 - US Gasoline	35 months	**US Overall**	**32 months**
DS24 - US Underwear SG	15 months		
DS33 - US Wool Shirts SG	9 months	**US General**	**36.5**
DS58 - US Shrimp	38 months	**US Trade Remedies**	**34+**
DS99 - US DRAMS AD	32 months	**US Safeguards**	**21**
DS108 - US FSC	85 (contested)	**US TRIPS**	**66.5+**
DS136 - US 1916 AD Act	78 (contested)		
DS138 - US Lead CVD	21 months		
DS160 - US Copyright	72 months (continuing)		
DS165 - US Bananas Retaliation	2 months		
DS166 - US Wheat Gluten SG	27 months		
DS176 - US Section 211	66 months (continuing)		
DS177 - US Lamb Safeguard	28 months		
DS179 - US Stainless AD (K)	26 months		
DS184 - US Steel AD(Japan)	62 months (continuing)		
DS192 - US Cotton Yarn SG	20 months		
DS202 - US Line Pipe	27 months		
DS206 - US Steel AD (India)	28 months		
DS212 - US EC-12 CVD	36 months (contested)		
DS213 - US Steel CVD (Ger)	41 months		
DS217 - US Byrd	49 months (continuing)		
DS248 - US Steel Safeguard	21 months		
DS257 - US Lumber CVD	32 months (contested)		
DS56 - Argentina Textiles	32 months	**Argentina**	**27.5 months**
DS121 - Argentina Footwear	23 months		
DS155 - Argentina Hides	38 months		
DS189 - Argentina Tiles	27 months		
DS238 - Argentina Peaches	28 months		
DS241 - Argentina Poultry	17 months		
DS31 - Canada Periodicals	31 months	**Canada**	**33 months**
DS70/222 - Canada Aircraft	94 months (continuing)		
DS103 - Canada Dairy	68 months		
DS114 - Canada Patents	34 months		
DS139 - Canada Autos	32 months		
DS170 - Canada Patent Term	26 months		
DS26 - EC Hormones	93 months (contested)	**EC**	**46 months**
DS27 - EC Bananas	108 months (settled at 63 months)		
DS69 - EC Poultry	25 months		
DS141 - EC Bed Linen	53 months		
DS219 - EC Malleable Tube	39 months		
DS231 - EC Sardines	27 months		
DS50 - India Patents	34 months	**India**	**44 months**
DS90 - India QR	44 months		
DS146 - India Autos	46 months		
DS8 - Japan Alcohol Taxes	30 months	**Japan**	**30 months**
DS76 - Japan Agricultural Prods	52 months		
DS245 - Japan Apples	28 months (contested)		

DS75 - Korea Alcohol Taxes	32 months	**Korea 32 months**
DS98 - Korea Dairy	33 months	
DS161 - Korea Beef	31 months	
DS18 - Australia Salmon	55 months	**Australia 50.5 months**
DS126 - Australia Leather	46 months	
DS110 - Chile Alcohol Taxes	39 months	**Chile 39 months**
DS207 - Chile Price Band	39 months	
DS46 - Brazil Air	103 months (continuing)	
DS211 - Egypt Re-Bar	34 months	
DS60/156 - Guatemala Cement	49 months	
DS54 - Indonesia Autos	33 months	
DS132 - Mexico HFCS	57 months	
DS122 - Thailand H-Beams	43 months	
DS34 - Turkey Textiles	64 months	
		OVERALL 34 months

Table 2 – Country-by-Country Implementation

Country	Implemented without significant delay	Implemented with significant delay (over 4 months)	Pending dispute	Not implemented	Total
United States	Underwear SG	Gasoline	Steel CVD 12	Byrd	23
	Wool Shirts SG	DRAMS AD	FSC	Copyright	
	Shrimp	Steel CVD (G)	1916 Act	Steel AD (J)	
	Lead CVD		Lumber CVD	Sec. 211	
	Certain Products				
	Wheat Gluten SG				
	Stainless AD (K)				
	Lamb SG				
	Cotton Yarn SG				
	Line Pipe SG				
	Steel AD (India)				
	Steel Safeguard				
Argentina	Footwear	Textiles			6
	Hides				
	Tiles				
	Peaches				
	Poultry				
Canada	Periodicals	Dairy		Aircraft	6
	Patents				
	Autos				
	Patent Term				
EC	Poultry	Bananas	Hormones		6
	Sardines	Bed Linen			
	Malleable Tube				
India	Patents				3
	QR				
	Autos				
Japan	Alcohol Taxes	Ag Products	Apples		3
Korea	Alcohol Taxes				3
	Dairy				
	Beef				
Australia		Salmon			2
		Auto Leather			
Chile	Alcohol Taxes				2
	Price Band				
Brazil				Aircraft	1
Egypt	Rebar				1
Guatemala	Cement				1
Indonesia	Autos				1
Mexico		HFCS			1
Thailand	H-Beams				1
Turkey		Textiles			1

Table 3 – Summary of Implementation Record by Country

Country	Implemented without significant delay	Implemented with significant delay (average delay)	Pending dispute over imple-mentation	Not imple-mented	Total
The Quad and Australia					
United States	12	3 (7 months)	4	4	23
Canada	4	1 (28 months)	-	1	6
EC	3	2 (28 months)	1	-	6
Japan	1	1 (20 months)	1	-	3
Australia	-	2 (16 months)	-	-	2
	20 (50%)	**9 (14.3 months)**	**6**	**5**	**40**
Developing Countries					
Argentina	5	1 (5 months)	-	-	6
India	3	-	-	-	3
Korea	3	-	-	-	3
Chile	2	-	-	-	2
Brazil	-	-	-	1	1
Egypt	1	-	-	-	1
Guatemala	1	-	-	-	1
Indonesia	1	-	-	-	1
Mexico	-	1 (20 months)	-	-	1
Thailand	1	-	-	-	1
Turkey	-	1 (5 months)	-	-	1
	17 (81%)	**3 (10 months)**	**0**	**1**	**21**
	37 (61%)	**12 (13.3 months)**	**6**	**6**	**61**

Table 4 – Agreement-by-Agreement Implementation

Agreement (Total cases)	Implemented without significant delay	Implemented with significant delay (over 4 months)	Pending dispute	Not implemented
GATT (16)	US Shrimp	US Gasoline		
	US Certain Prods	Argentina Textiles		
	Argentina Hides	EC Bananas		
	Canada Periodicals	Turkey Textiles		
	Canada Autos			
	Chile Alcohol Taxes			
	India QR			
	India Autos			
	Indonesia Autos			
	Japan Alcohol taxes			
	Korea Alcohol Taxes			
	Korea Beef			
Agriculture (3)	EC Poultry	Canada Dairy		
	Chile Price Band			
Subsidies (4)		Australia Leather	US FSC	Brazil Aircraft
				Canada Aircraft
SPS (4)		Australia Salmon	EC Hormones	
		Japan Ag Prods	Japan Apples	
TBT (1)	EC Sardines			
Trade Remedy (18)	US Stainless	US DRAMS	US Steel-12	US Byrd
	US Lead-Bismuth	US Steel (Ger)	US 1916 Act	US Steel (Japan)
	US Steel (India)	EC Bed Linen	US Lumber	
	Argentina Tiles			
	Argentina Poultry			
	EC Malleable Tube			
	Egypt Rebar			
	Guatemala Cement			
	Mexico HFCS			
	Thailand H-Beams			
Safeguard (10)	US Underwear			
	US Wool Shirts			
	US Wheat Gluten			
	US Lamb			
	US Line Pipe			
	US Cotton Yarn			
	US Steel			
	Argentina Footwear			
	Argentina Peaches			
	Korea Dairy			
TRIPS (5)	Canada Patents			US Copyright
	Canada Patent Term			US Sec. 211
	India Patents			