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Practice Makes Imperfect

The previous chapter discussed the central role of reciprocity in WTO agreements. Indeed, the assumption that the members have all made reciprocal concessions is basic to the mechanisms used to obtain agreement and resolve disputes. This paradigm, like many myths, plays an important role in revealing some central truths and in guiding actions. As with other myths, however, it glosses over other important considerations, which may lead to implementation problems, with results that may deviate from the system's essential principles.

As noted in the previous chapter, when a member is found to have nullified an agreement and fails to comply, absent suitable compensation, the injured parties are entitled to retaliate. In response to violations subject to the provisions in the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), countermeasures taken by suspending concessions must be "equivalent to the level of nullification and impairment." This, according to legal authority Petros Mavroidis (2000), "makes it plain that there is no room for punitive damages in the WTO context." Nullification is in turn understood to reflect the amount of lost trade.

Perceptions

In practice, however, the WTO has allowed this provision to become a mechanism for inflicting harm. One reason is that the parties think they should be inflicting harm. Despite the care with which the WTO

agreement has been worded and tightened, there is a widespread view that the WTO system allows for punitive sanctions. Parties rarely use the phrase "suspension of concessions" and, more commonly, belligerently refer to such actions as "sanctions" or "retaliation." Indeed, Steve Charnovitz (2001) has marshaled an impressive list of trade experts and officials, including WTO arbitrators, who refer to these measures as sanctions, supporting his claim of widespread perceptions that these provisions are meant to force compliance. Remarkably, in its official publication, the WTO states: "Even once the case has been decided, there is more to do before trade *sanctions (the conventional form of penalty)* are imposed"[1] (emphasis added).

Circumstances

A second reason for the nullification clause to be used punitively is that the withdrawal of concessions comes in the aftermath of a violation finding compounded by a failure to implement a remedy. Under these circumstances, it is natural for injured participants in particular to believe that the violator should be punished. Simply rebalancing concessions certainly does not bring much satisfaction to those who have been denied market access. For example, the ability to retaliate against the European Union in response to prohibitions on US beef imports might restore the United States to a balanced position, but it does nothing to compensate US beef exporters for their lost sales in Europe. It is of little comfort to the National Cattlemen's Beef Association that the United States can use the violation to help other industries that have had difficulties competing in international trade. They may take greater comfort, however, if there is at least *some* evidence that the Europeans are being punished for their violations. Accordingly, retaliating members are naturally belligerent and angry when announcing measures and are served by being able to portray them as sanctions. In addition, plaintiffs will naturally adopt a belligerent attitude to persuade the other party to comply. The WTO paradigm treats WTO members as unitary actors. In reality, members represent domestic actors who have differing interests and are not indifferent about concessions in different products, even if they have equal dollar values.

Discretion

When it comes to selecting the sectors in which rebalancing will occur, parties typically design their strategies to maximize the incentives for

1. See Trading Into the Future: The Introduction to the WTO at www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

eventual compliance (although they may also use the opportunity to favor and protect domestic firms).[2] The approach followed in retaliations for beef, bananas, and the foreign sales corporation (FSC) is to select a number of import categories whose values sum to the total allowed and then subject them to 100 percent (or even prohibitive) tariffs.[3] The idea is to completely eliminate trade in the chosen sectors to fully utilize the value of retaliation allowed.

Thus the perceptions of penalties are not entirely mistaken. In principle, members are simply rebalancing concessions, but WTO procedures allow parties to retaliate in whatever way they choose, as long as the total value of trade involved is equal to the value of trade involved in the violation. These procedures give injured parties considerable flexibility, both in the method that will be used to determine the value of trade lost and in the products that will be singled out for retaliation.[4] There appear to be no customary or official analytical guidelines for DSU Article 22:6 (Compensation and Suspension of Concessions) calculations. Disputants submit their respective methodologies to arbitrators, who have full discretion on how to incorporate (if at all) those techniques into the final calculation. In most of the cases that have been brought so far, the arbitrators relied heavily on the methodologies submitted by the parties. The onus has been on the defendant to prove that the plaintiff's approach is inappropriate.[5]

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2. If they were simply maximizing their aggregate national welfare, countries would presumably try to impose optimal tariffs. See Krugman and Obstfeld (2003, 223–24). They would select products in which the tariff's incidence would fall mostly on foreigners since domestic demand was relatively elastic and foreign supply was inelastic. But this is not what they appear to do in practice, suggesting that political considerations play a more important role in the selection process.

3. In the proposed EU retaliation for US steel tariffs, the European Union has mirrored US tariffs of 30 and 15 percent. (See "European Commission Proposes Two Steel Retaliation Lists Against US," *Inside U.S. Trade,* April 26, 2002.)

4. DSU Article 22 requires that the complaining party should first seek to suspend concessions in the same sector as that in which the violations have been found. But it also states that if the complaining party "considers that it is not practicable or effective" to suspend concessions or other obligations with respect to the same sector, "it may seek to suspend concessions or other obligations in other sectors under the same agreement or under another covered agreement."

5. According to the arbitrator in *EC-Bananas*, this practice reflects the presumption that "WTO members, as sovereign entities, can be presumed to act in conformity with their WTO obligations." The act at issue is the US proposal to suspend concessions. Since the European Commission is challenging its conformity, the onus is on the commission to prove it is inconsistent with the DSU (WTO document WT/DSU/ARB/ECU, page 8). However, as described later, in *Canada-Aircraft II* the arbitrators rejected the Brazilian proposal and provided an alternative.

Measurement Problems

It is often difficult to be precise about how much trade would be affected by a violation. Conceptually, as noted above, to measure the impact of a trade barrier such as a tariff requires an estimate of (a) the volume of trade subject to the tariff, (b) the size of the tariff, and (c) the behavioral responses that are likely to result from such reductions. In the case of a tariff, the size of the tariff will be known, but there could be considerable uncertainty associated with the other parameters. In particular, if a tariff is prohibitive, the volume of imports could be zero. In such cases another method is necessary to estimate counterfactual sales. In addition, behavioral responses have to be estimated using econometrics, and different specifications, samples, and estimation techniques could yield different results. In principle, results could also be very different depending on the competitive structure of the market. Finally, as Mavroidis (2000) points out, what the country actually "loses" is domestic value-added. In products containing imported inputs, therefore, the aggregate trade measure is an overstatement of the loss.

Added complications arise when the violations involve violations of rules. The paradigm of reciprocity makes sense when referring to border barriers such as tariffs and quotas in which there is at least, in principle, a relatively straightforward relationship to some amount of trade. To be sure, as long as no precise measure is required, it is possible to sustain the myth of reciprocity when it comes to agreements—"country A gave up its right to apply nonscientific regulations in return for country B giving up its right not to protect intellectual property." But serious problems arise when precision is required for the purposes of providing trade equivalents to be authorized for retaliatory purposes. The European ban on hormone-treated beef did not provide insurmountable obstacles since it simply banned trade that had previously existed. But suppose Europe decides not to allow imports of agricultural products containing genetically modified organisms (GMOs). Suppose the WTO declares this to be a violation of the rules. Deciding on the appropriate value of trade could be extremely difficult.

Divergent Opportunity Cost

As noted, simply requiring that suspension and violation be of equal dollar value does not ensure in practice that the violating country will be indifferent between them. Economic theory points to the importance of the opportunity cost of such losses. The WTO paradigm treats trade flows with equal value as commensurate. In reality, however, the dollar value of trade may give little guidance as to the welfare benefits and opportunity cost associated with any particular transaction. For example,

denying access to the US market for a standardized product, say oil, from one country, say Nigeria, may have almost no impact on the revenue Nigeria can earn from its exports. Since oil is highly fungible, in response to such a barrier Nigeria could simply sell the oil to other markets and displace producers who would then make up the shortfall in the United States. All told, the world price of oil is likely to be unaffected. By contrast, if the United States were to deny access to beer that was produced in Canada especially for the American market, Canadian producers could find their earnings seriously reduced. Given the leeway to exploit these considerations, countries could use sanctions on sectors with a high opportunity cost to retaliate against violations with a low opportunity cost. Although this might preserve the appearance of equivalence, the reality could be very different.

While much of the discussion focuses on the value of trade that is subject to retaliation, the height of the tariffs obviously affects the size of their impact. In the cases of beef, bananas, and FSC, countries have employed, or threatened to employ, extremely high tariffs. In essence, the intention is virtually to obliterate an allowed value of trade. Until it reaches prohibitive levels, the social welfare cost of a tariff rises by the square of the rate, so that unless the original violation also took the form of a ban (as it did in beef hormones), this form of retaliation is likely to be far more costly socially than the original violation. Plaintiffs clearly want to make sure that they will get their money's worth. They therefore want to be sure that the reduction in trade will be no less than the assessed value of the violation. They also want to be seen as being effective in imposing the measure, which could lead them to impose tariff increases that are far greater than reductions that could plausibly have been provided as concessions in earlier trade negotiations.

Divergent Political Impact

In addition to the economic impacts, the political effects of singling out particular sectors could be very different. Press reports make clear that these considerations have played an important role in the products selected. According to the *Wall Street Journal*,[6]

> The European Union is making plans to retaliate against President Bush's recent imposition of steel tariffs by hitting the Republican party where it hurts the most: at the ballot box. The EU is preparing a list of U.S. imported products valued at $2.1 billion annually that could be hit with heavy tariffs. Among the items on the list: Harley-Davidson motorcycles, Tropicana orange juice, and

6. See "EU Aims at White House in Retaliation to Steel Tariffs: Product List Targets States Valuable to Republicans in Bid for House Control," *Wall Street Journal*, March 22, 2002, A2.

> textiles and steel products. Many of the targeted industries are concentrated in states such as Florida, Wisconsin, Pennsylvania, and West Virginia, which Mr. Bush battled for in his narrow election victory in 2000. These states figure prominently in the White House's effort to retain control of the House of Representatives in the fall elections. . . .
>
> The Clinton administration retaliated in its banana spat with Europe by slapping high tariffs on a very specific list of high-end items including Louis Vuitton plastic handbags from France, Pecorino cheese from Italy, and cashmere sweaters from Britain. British Prime Minister Tony Blair raised such a fuss over the cashmere that President Clinton later took it off the list. Among the EU's largest targets (in the steel case) is the U.S. textile and apparel industry, overwhelmingly concentrated in the Southeast, particularly the Carolinas. Mr. Bush easily carried most of this region, but it is a battleground in the fall elections for control of Congress.

In practice, therefore, countries often think and talk as if they are inflicting maximum pain rather than simply rebalancing concessions. Since they are given the flexibility to select virtually any product, countries have wiggle room to design their rebalancing actions in a manner that creates the greatest economic and/or political cost and thus exact the maximum retribution allowed.

Legal Interpretations: The Exception that Proves the Rule

Another source of implementation problems is differences in interpretation. One of the achievements of the Uruguay Round was to ensure that disputes regarding almost all WTO rules be subject to the rules and procedures laid out in the DSU. Before this agreement, disputes under the several Tokyo Round codes were subject to different rules than those involving agreements in the GATT. The discussion thus far has concentrated on the DSU, which covers all but a few kinds of infractions. In the Uruguay Round agreement, however, *distinctive provisions* were made for disputes under the Agreement on Subsidies and Countervailing Measures (SCM). Under this agreement, export (and local content) subsidies are expressly prohibited.

Disputes over export subsidies have become particularly controversial. WTO members have actually sought and been granted WTO authorization to retaliate in three cases—a Canadian challenge of Brazilian subsidies for aircraft exports (*Brazil-Aircraft*), the European challenge of the United States–FSC tax provisions (*United States–FSC*), and a Brazilian challenge of Canadian aircraft export subsidies (*Canada-Aircraft II*).

Recall that under the DSU the language limits the suspension of concessions to a value of trade. DSU Article 22:4 states that "the level of suspension of concessions . . . shall be equivalent to the level of the nullification and impairment." This is generally interpreted to mean that

plaintiffs can only take measures that reflect the amount of trade they have lost. However, the SCM provisions relating to export subsidies use different language. Article 4.10 of the SCM allows members to take "appropriate countermeasures" in response to export subsidies. It also notes that these are meant to be proportionate.

This is clearly different from the DSU language that refers to measures that are "equivalent." But what is to be understood by the term "appropriate"? Also, in what sense should the countermeasures be proportionate? Proportionate to the dollar value of the subsidy? Proportionate to the impact of the subsidy on trade? Or proportionate to the gravity of the transgression? Given the very different preconceptions about the WTO system—in particular the contrasting perspectives of those who view WTO violations as contract breaches and those who regard them as violations of obligations to the community—this wording seems designed to cause trouble, and it has.

Article 4.10 of the SCM, in which the term "appropriate countermeasures" appears, has a footnote (9) that might have clarified the term. But it has in fact increased confusion. The footnote reads: "This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under the provisions are prohibited."[7] The first reaction of most people who read this footnote is "huh?" It is as clear as mud. The trouble comes from the murky relationship between the first and second parts of the sentence. What exactly does it mean? There appear to be at least three entirely different responses.

The first is to assume that the phrase "in light of" is simply an awkward way of saying "despite." This gives rise to an interpretation that would align responses to the SCM with those of the DSU. Indeed, this is how legal scholar Petros Mavroidis appears to read it. Mavroidis (2000) acknowledges greater ambiguity as to the level of countermeasures against illegal subsidies. The term in the SCM is "proportionate" whereas in DSU Article 22 the term is "equivalent." He notes that the footnote states that proportionate is "not disproportionate" and argues that the only reasonable interpretation of the term is that *punitive damages are to be excluded*. There could be "small deviations" but "the benchmark must be the damages suffered." In this interpretation, because it is more difficult to estimate the impact of subsidies on exports, some additional leeway is granted in coming up with the value of suspension to be authorized, but basically it should be commensurate with the impact on trade.

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7. In response to actionable as opposed to prohibited subsidies, according to Article 7.10 of the SCM, the countermeasures should be "commensurate with the degree and nature of the adverse effects determined to exist." It would appear that in this case, although treated separately from the DSU, the responses allowed are similar to those under the DSU in that they are confined to be equivalent to (or commensurate with) the adverse impact on the amount of trade affected (although in this case some might question whether it is only the trade of the plaintiff).

A second approach would be to admit that the footnote is basically unintelligible and ignore it, which is how the arbitrators in *Brazil-Aircraft* reacted. They observe that "it seems difficult to identify how the second part of the sentence, in light of the fact that subsidies dealt with are prohibited, relates to the first part of the sentence," although they are inclined to believe that "the reference to the fact that the subsidies dealt with are prohibited can most probably be considered more as an aggravating factor than as a mitigating factor." They deliberately chose not to draw any conclusions as to the meaning of the footnote.[8]

It is therefore both surprising and startling that to the arbitrators in the *United States–FSC* case the meaning of the footnote is crystal clear: "This footnote effectively clarifies how the term appropriate is to be interpreted."[9] They exemplify a third approach. They emphasize that a proportionate response does not require exact equivalence. They state, "we receive more guidance in the final part of the footnote in the use of the term 'in light of' that the final part of the footnote is a matter that must enter into consideration at all times. It is an element that is to pervade or color the whole assessment." In other words, they claim that the purpose of the footnote is actually to allow responses that are relatively large and certainly not limited to the trade effects. As Joel Trachtman has perceptively pointed out to me, their interpretation would have been virtually the same had the term "not" been dropped from the first part of the footnote![10]

On the basis of this interpretation, the arbitrators in the *United States–FSC* case decided to allow the one plaintiff—the European Union—to suspend concessions equal to the full value of the FSC subsidy, $4 billion. The United States had argued that the European response should be confined to the effect of the subsidy on European trade and claimed that this was equal to about $1 billion.[11] However, the arbitrators rejected the argument that "trade effects" should necessarily guide the response to the violation. They argued that "the unlawful character of the subsidy upsets the balance of rights and obligations irrespective of what

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8. However, "[the footnotes] . . . at least confirm that the term 'appropriate' in Articles 4.10 and 4.11 of the SCM should not be given the same meaning as the term 'equivalent' in Article 22 of the DSU." (Decision of the Arbitrators on Brazil—Export Financing Programme for Aircraft, WTO document, WT/DS46/ARB, August 28, 2000.)

9. Decision of the Arbitrator on United States—Tax Treatment for Foreign Sales Corporations, WTO document, AT/DS108/ARB, August 30, 2002, page 11.

10. Personal communication with author.

11. The United States argued that estimates of the trade effect using economic models are unreliable. The United States was therefore prepared to use the $4 billion cost of the FSC as a proxy for the aggregate trade impact. Since Europe accounts for just over a quarter of world trade, the impact on its trade should be placed at about a quarter of the FSC cost.

might be, as a matter of fact, the actual trade effects on the complainant." Indeed, the arbitrators make the very strong claim that "the United States' breach of obligation is . . . an *erga omnes* obligation owed in its entirety to each and every Member. It cannot be considered to be 'allocatable' across the Membership."[12]

Notwithstanding their decision to ignore the footnote, the arbitrators in *Brazil-Aircraft* had actually come to a similar conclusion. They also decided that the "appropriate countermeasures" they were willing to authorize for Canada did not have to be confined to the loss of Canadian aircraft sales that might be attributed to the subsidies. They rejected Brazil's argument that measures in excess of Canada's trade losses due to the subsidies would be "disproportionate." Indeed they too rejected the idea that the retaliation need be commensurate with the level of nullification and impairment.[13] Instead they authorized Canada single-handedly to suspend concessions against Brazilian exports in an amount equal to the full value of the subsidy, voicing concern that a countermeasure based only on the actual level of nullification or impairment might have less or no inducement effects. As a result, "the subsidizing country may not withdraw the measure at issue." Clearly, the view here is that when export subsidies are involved, the purpose of countermeasures is to induce compliance.

The arbitrators in this case claim that "a countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity . . . but also contains an additional element meant to sanction the action of the state."[14] This interpretation of what is punitive provides a fascinating example of a slippery slope: instead of using the value of trade lost as a basis for assessing what is punitive, it implicitly uses the cost of compliance to the plaintiff. Suppose that before it would agree to remove its $4 billion FSC subsidy, the United States would have to be threatened with the loss of $10 billion worth of exports to the European Union. Under this notion, an award to obliterate all such trade would not be considered punitive!

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12. See the Decision of the Arbitrator on United States—Tax Treatment for Foreign Sales Corporations, WT/DS108/ARB, page 21, para 6.10, at www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk9.

13. "We read the provisions of Article 4.11 of the SCM as special or additional rules. In that framework there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment" (WT/DS46/ARB, August 28, 2000, 17).

14. Contrary to Article 3.7 of the DSU, Article 4.7 of the SCM Agreement does not provide for any alternative other than the withdrawal of the measure once it has been found to be a prohibited subsidy. See the Decision of the Arbitrators on Brazil—Export Financing Programme for Aircraft, WT/DS46/ARB, footnote 50, at www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk2.

In *Canada-Aircraft II*, Brazil sought permission to take countermeasures worth $3.36 billion. Brazil based its petition on estimates of all the contracts won by Bombardier, the Canadian aircraft company, in which illegal subsidies had been provided and also on sales of services and parts that might have been expected.[15] However, the arbitrators accepted the Canadian arguments that countermeasures of this magnitude would be disproportionate particularly when compared to the other two cases in which countermeasures were authorized. The arbitrators therefore chose to follow the previous two cases and use the amount of the subsidy as the basis for authorizing countermeasures. They estimated the countermeasures at $206 million. However, they deemed it appropriate to add an additional 20 percent to reach a level of countermeasures that can reasonably contribute to inducing compliance. Accordingly, they authorized suspension of $248 million. The arbitrators decided to adjust the level of countermeasures "by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations." Why 20 and not 40 percent? Is this arbitration or arbitrariness? With considerable understatement, the arbitrators concede "that such adjustments cannot be precisely calibrated." Indeed. While measures such as the trade effects and the value of subsidies are subject to uncertainty, they are at least grounded on an objective basis. If individual panels feel free to arbitrarily add premiums, and their decisions are not subject to appeal, it is only a matter of time before wildly different and inconsistent approaches are adopted.

According to these views, therefore, when it comes to export subsidies, the WTO has implicitly moved away from the paradigm of reciprocity that guides the rest of the agreement. Export subsides are different because there is no reference to their trade effects in the SCM. Individual members may undertake responses in excess of the value of trade they have lost.[16] When export subsidies are involved, violators should not have a mechanism for legal breach. Moreover, the institution *is* apparently allowed to permit individual members, if they choose, to try to compel compliance, either on their own behalf (as in *Canada-Aircraft II*) or on behalf of the members as a whole (*United States–FSC*).

In these cases, there has clearly been a shift away from the paradigm of a contract in which violations are regarded as breaches toward a model in which violations are treated as "crimes." And experience illustrates the dangers in such a change in approach. To be sure, it should meet the

15. Brazil only covered sales after the date on which the subsidy should have been withdrawn.

16. In both cases there was only one plaintiff. What if there had been more than one? Under these circumstances, both arbitration panels indicated they would have been prepared to use trade effects in order to divide the full amount of retaliation among the plaintiffs.

approval of those who would like WTO rules to be more like statutes. It accords with the ideas of those who would like the WTO to play a larger role in inducing compliance. However, it also gives more credence to those who argue that the WTO has established a different and more powerful legal order than GATT and therefore represents a greater threat to national sovereignty. It also highlights inequality among WTO members, with some able to act as enforcers while others cannot, and it creates considerable dangers of authorizations that get out of hand.

The moralistic outrage that the arbitrators expressed in these cases may or may not have a legal foundation—again as an economist I choose not to judge the legal merits of their reasoning. But subjecting export subsidies to this unique treatment basically has little economic merit. Export subsidies can indeed distort trade and affect many third parties, but so can other trade barriers such as tariffs. In fact, Bagwell and Staiger (2002, 11) actually model tariffs and export subsidies as a continuum.[17] It does require some economic modeling to estimate the impact of a subsidy, but the requirements are not necessarily more burdensome or the results less reliable than those for modeling the effects of tariffs.

To be sure, export subsidies are expressly prohibited in the SCM, but WTO rules also expressly prohibit many other forms of trade-distorting behavior. For example, export performance requirements are prohibited in the Agreement on Trade-Related Aspects of Investment Measures (TRIMs). Likewise the most fundamental WTO rule is to provide most favored nation treatment unless otherwise provided for (as in GATT Article XIV). It is hard (or perhaps impossible) to explain why a distortion of the free market due to a performance requirement should result in a response that is radically different in size and purpose from a distortion of the free market by an export subsidy.

Shifting the basis for retaliation in the WTO from rebalancing concessions to "inducing compliance" fundamentally changes its character. This shift should certainly not be made without the members' explicit affirmation. When legal scholars draw such qualitatively different implications from the same language, it is surely an indication that it's time to go back to the negotiating table.

The SCM could certainly be interpreted in a manner that brings it into conformity with the WTO paradigm outlined above (as in the Mavroidis interpretation discussed above). But the arbitrators in all these cases have chosen differently. They have all argued that there is no reason to confine responses to trade effects and that the purpose of retaliation is to force compliance; in *Canada-Aircraft II*, they introduced what would widely

17. They point out that while a tariff liberalization agreement expands the volume of trade, an export subsidy reduction agreement restricts the volume of trade, and they argue that GATT rules against export subsidies "may represent a victory for exporting governments at the expense of importing government—and world—welfare."

be considered a punitive element. These views fundamentally challenge the reciprocity paradigm analyzed in chapter 2.

The United States was a major supporter of a separate agreement for disputes in the case of prohibited export subsidies, which suggests that the United States felt the likelihood that it could fall foul of this provision was small. It is ironic therefore that it could now find itself subject to retaliation that is far larger than would have occurred under the DSU rules.

This development could also be seen as the exception that proves the rule. If the SCM language really does imply a different degree of illegality for infractions involving export subsidies, it could actually support the view that when it comes to other infractions, the contracting view is more tenable, since these other violations are not expressly prohibited.

It is as yet unclear whether the expansive reading by these arbitrators will be emulated. Rulings in individual WTO cases do not establish binding precedents. However, at a minimum, these recent cases reveal an important flaw in the dispute settlement design. The decisions of arbitrators, who are generally the original panelists involved in the case, are final and cannot be appealed, which raises the distinct possibility that cases will not be treated consistently. It also suggests that in the Doha Round, the members should clarify whether they really intended the mechanisms for dealing with export subsidies to be sui generis and whether they agree with the very expansive notion of retaliation that the arbitrators have endorsed.

In sum, the WTO system is not designed to be punitive. In practice, however, elements of punitive behavior clearly exist, for several reasons. First, the dispute settlement system is widely understood to involve penalties. Second, for understandable political reasons, the language associated with rebalancing is often belligerent. Third, in practice, countries have tried to exert the maximum pressure the system allows by seeking to impose the most politically painful forms of retaliation. Fourth, the WTO rules give members considerable discretion in selecting the manner in which they will retaliate. Fifth, there are numerous problems in measuring the trade effects of measures that result in nullification and impairment. Finally, in the case of the SCM, particularly unclear language has allowed the adoption of an expansive interpretation that is a radical departure from the rest of the system.