

Article

Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts

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INTRODUCTION	96
I. UNDERSTANDING THE TEMPORARY BREACH PUZZLE OF INTERNATIONAL TRADE LAW.....	101
A. The WTO's Imperfect Remedies: A Loophole for Temporary Breaches.....	101
B. The Relative Lack of Temporary Breaches	107
C. Discrepancies in Use Patterns of the Temporary Breach Loophole Among WTO Members	113
II. WHY NATIONS FOLLOW WTO RULES DESPITE IMPERFECT REMEDIES.....	118
A. Drawing on Conventional Interest-Based Theory and Analyzing Its Limitations.....	121
B. Towards a Revised and Elaborated Theory	124
1. Developing and Least-Developed Countries.....	128
2. Emerging Economies.....	135
3. Small and Medium-Sized Advanced Economies	136
4. Large Advanced Economies	138
C. Assessing the Revised Theory.....	140
III. THE CHALLENGES AHEAD.....	143
A. The Rise of China.....	144
B. Russian Exceptionalism	145
C. The Growth of Trade Among Developing Countries.....	147
CONCLUSION.....	151

FIGURES

Table 1: Total Number of Pages Devoted to Q&A in WTO Trade Policy Reviews (1995-2013).....155

Table 2: Average Number of Pages Devoted to Q&A in an Individual WTO Trade Policy Review (1995-2013).....155

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INTRODUCTION

The World Trade Organization (WTO) is often held to be an exemplar of a legitimate, effectively functioning institution of international law. By one count, the international agreements, concessions, and other rules that comprise the legal code of the WTO's "covered agreements" total more than 27,000 pages. Disputes that arise from these treaties must be resolved by the WTO.² As a testament of confidence in the WTO's judicial arm, countries have filed nearly 500 complaints with the WTO's Dispute Settlement Body (DSB) since 1995. WTO rulings are largely followed,³ and on the few occasions when compliance is not forthcoming, even the most powerful nations agree to pay compensation or accept suspension of trade concessions.⁴ As one scholar has noted, "Presently, the WTO provides the *ideal* global organizational vehicle with the institutional capability to induce countries to participate" in an international treaty regime.⁵

However, a puzzle persists. The conventional wisdom among many scholars is that the WTO, unlike many other international organizations, is effective because it "has teeth."⁶ If a ruling finds that a country is violating a

1. James Bacchus, Chairman, WTO Appellate Body, *Groping Toward Grotius: The WTO and the International Rule of Law*, Address at Harvard Law School 8 (Oct. 1, 2002) (transcript available at <http://www.worldtradelaw.net/articles/bacchusgrotius.pdf>).

2. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

3. See Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?*, 14 J. INT'L ECON. L. 403, 422 (2011) (finding that even among WTO compliance proceedings, over ninety-two percent never reach the final retaliation stage, amounting to a total of nine cases where WTO-sanctioned retaliation was requested because compliance was not forthcoming); William Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 47 (2005) (finding a compliance rate of eighty-three percent for WTO decisions issued in its first ten years).

4. An example is the willingness of the WTO to grant the small island-state of Antigua and Barbuda the right to take action against the United States for its noncompliance with the DSB's ruling in the *US—Gambling* case. See, e.g., Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS285/ARB (Dec. 21, 2007); see also WTO Dispute Settlement Body, Minutes of the Meeting, WT/DSB/M/328 (Mar. 22, 2013) at 18-22 (agreeing to grant Antigua authorization to suspend concessions pursuant to the Arbitrator's report). Another example is the willingness of the United States to pay compensation to Brazil in lieu of compliance with the DSB's ruling in the *US—Upland Cotton* case. See Decision by the Arbitrator, *United States—Subsidies on Upland Cotton: Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1 (Aug. 31, 2009); see also Chana Joffe-Walt, *Why U.S. Taxpayers Are Paying Brazilian Cotton Growers*, NPR (Nov. 9, 2010, 3:05 PM), <http://www.npr.org/blogs/money/2011/01/26/131192182/cotton> (detailing United States subsidies to Brazilian cotton farmers).

5. Christopher J. Kula, *The Advantages of Utilizing the WTO as a Global Forum for Environmental Regulation*, 1 INT'L L. DIG. 97, 116 (2002) (emphasis added).

6. See, e.g., G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 901 (1995) ("[T]he new WTO system will make the imposition of costly trade sanctions on recalcitrant defendants virtually automatic. This power will add new 'bite' to the dispute resolution process and push parties to comply with trade rulings."); see also Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 792 (2001) (noting that "[u]ndoubtedly, putting teeth in the WTO was one of the key achievements of the Uruguay Round . . . and a very significant step in the evolution of international economic law" even if the exact sanctions authorized may undermine the system).

WTO obligation, the violator is given a fixed time period to reform its actions. If it remains in breach after this period has expired, then the WTO may authorize the suspension of trade concessions.⁷ This sanctioning power is often viewed as critical for understanding the WTO's success.

Yet this is only half of the story. Consider instead what happens if a violator brings its actions back in line with the law before the end of this period. Under such circumstances, the dispute simply ends. The breaching party need not pay any compensation. It is not disgorged of any of the economic gains accrued as a result of its illegal breach. Aggrieved states are not made whole. In short, the WTO does not provide for retrospective remedies. Its emphasis is on ensuring post-judgment compliance with the law. The WTO only grows "teeth" if a country ignores its DSB rulings and continues to violate the law. But it has little to no bite if a country, after losing a case, alters its behavior to become lawful once more.

Past scholarship has touched on elements related to this puzzle, but not on the puzzle itself. Most recently, some scholars have written about the dangers of the WTO's "remedy gap" and called for various reforms to limit its impact.⁸ Others have highlighted the inadequacies of WTO remedies and called for a broadening of their scope.⁹ Another line of scholarship has focused on the question of an "efficient breach" of WTO law—that is, whether it may be worthwhile for a country to pay compensation or endure countermeasures in order to maintain a violation of WTO law.¹⁰

Yet a more basic and fundamental question lies unanswered: why do countries bother to adhere to their WTO treaty commitments so strictly in the first place? If the system lacks retrospective remedies, why don't countries take advantage of the system's imperfect remedies to engage more frequently in *temporary* breaches of WTO law?

By breach, I mean an incidence where a country engages in an outright violation of its WTO treaty commitment. When referring to a temporary breach, I therefore mean a breach that is remedied before the system allows for the authorization of any trade sanctions (i.e., before the expiration of the "reasonable period of time" in WTO parlance). Note the contrast with the

7. DSU art. 22.2.

8. See, e.g., Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2011); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000).

9. See, e.g., Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, in DEVELOPMENT, TRADE, AND THE WTO 81 (Bernard Hoekman et al. eds., 2002); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335 (2000).

10. See, e.g., Alan O. Sykes, *The Dispute Settlement Mechanism: Ensuring Compliance?*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 560, 568-82 (Amrita Narlikar et al. eds., 2012); Mostafa Beshkar, *Optimal Remedies in International Trade Agreements*, 54 EUR. ECON. REV. 455 (2010); Krzysztof J. Pelc, *Eluding Efficiency: Why Do We Not See More Efficient Breach at the WTO?* 9 WORLD TRADE REV. 629-42 (2010); Warren Schwartz & Alan Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002); Giovanni Maggi & Robert W. Staiger, *Breach, Remedies, and Dispute Settlement in Trade Agreements* (Nat'l Bureau of Econ. Research, Working Paper No. 15460, 2009).

existing literature on efficient breach in WTO law, which is largely concerned with breaches that persist beyond this period and for which a country must pay a price through compensation or suspension of trade concessions. What I am concerned with are instances where the breach is terminated, and therefore no price is required as far as legal damages are concerned.

In short, the puzzle is the following: because the WTO system lacks retrospective remedies, the WTO allows countries to violate WTO treaty commitments for a temporary period without fear of sanctions. This temporary period is not short. It may range anywhere from three years to upwards of six or more years, depending on how long it takes its trading partners to discover the breach, prepare a case, and litigate. Some observers have described this as a “free pass” granted to WTO members for temporary deviations from their WTO treaty obligations.¹¹ For a limited period of time, countries can breach with impunity. Why don’t they do so more frequently?

That is not to say that such breaches do not happen. Both developed and developing countries do take advantage of this loophole. To the extent that a breach is detected and a WTO case is launched, temporary breaches appear to be more commonly employed by developed countries—namely, the United States and those in the European Union. But there are variances. Japan, for example, does not employ this tactic nearly as commonly as do other developed countries. On the other hand, as I will discuss in this Article, China is increasingly exploiting this loophole. But this is not necessarily the case with the other emerging economies.

If a country can get away without penalties or sanctions for breach temporarily, one might expect that it would do so on a fairly regular basis, at least whenever a temporary breach serves a country’s economic interests or a government’s political interests. And if countries did so with regularity, the reliability of trade treaty commitments might fall apart. Yet this does not happen. Despite the absence of systemic remedies for temporary breach, the legal system manages to hold. This begs the question of why we do not see more temporary violations of trade law.

Understanding the answer to this puzzle is vital for understanding what makes the WTO work. The answer cannot simply be that the system is effective because the WTO has “teeth.” After all, any country can “defang” the system by making its breach only temporary. Therefore, considerations other than WTO-authorized sanctions must play a role in explaining why countries adhere so strongly to their WTO treaty commitments.

Existing theories attempt to explain treaty compliance through resort to norms, capacity, liberalism, etc.¹² However, I argue that a close examination of WTO law and the patterns of temporary breach does not lend strong support to

11. E.g., Rachel Brewster, *Shadow Unilateralism: Enforcing International Trade Law at the WTO*, 40 U. PA. J. INT’L L. 1133, 1144 (2009); Note, *(In)efficient Breach of International Trade Law: The State of the “Free Pass” After China’s Rare Earths Export Embargo*, 125 HARV. L. REV. 602 (2011).

12. See *infra* Section I.C.

any of these explanations. Another stream of scholarship has focused on states' interests. Some scholars have emphasized the importance of retaliation,¹³ while others have emphasized gains from coordination among subsets of states.¹⁴ While I embrace this analytical framework, I suggest that even their explanation is incomplete. What is lacking is an understanding of the exact mechanics for how states exert their interests in this treaty regime and how these behaviors, in turn, hold the system together in spite of incomplete remedies.

In this Article, I set forth an answer to this puzzle. I build on the interest-based theories, but offer a more nuanced and elaborate explanation of the exact mechanisms at work. Two elements, I suggest, play a key role in explaining why the WTO system functions effectively in spite of its incomplete remedies: first, the legal system developed and operates in the face of power asymmetries, and second, by nature, the WTO agreements are incomplete. As I will elaborate in this Article, these elements give rise to a dynamic in which powerful states have a collective interest in ensuring that the WTO rules are followed and can exert sufficient leverage over smaller and/or weaker states to bring forth their compliance. I discuss several ways in which they do so, including trade preference programs, free trade agreements, and other non-trade-related instruments. Consequently, states largely do adhere to their WTO treaty commitments, even when the system provides for no legal penalty for a short-term temporary breach.

If this answer to the puzzle is correct, then it offers several interesting insights into the WTO and international law: while the WTO is held out to be a shining example of powerful states ceding control over sovereign economic and regulatory decisions to international law, the system's success is still due, in part, to a willingness of powerful states to exert power, albeit within the confines of an international legal regime. Power still matters, and possibly more than we think.

This puzzle, I argue, is more than simply an academic exercise of abstract relevance. At present, the future of the WTO as the central institution for global trade governance remains very much open to debate. While the rules may be widely followed, they are in need of updating. Some point to the growing trend of preferential trade agreements (PTAs) among the major economies (e.g., the Trans-Pacific Partnership and the Trans-Atlantic Trade and Investment Partnership) as a sign that the WTO's efficacy is being eroded.¹⁵ In this

13. See KYLE BAGWELL & ROBERT STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 95-103 (2004); see generally *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* (Chad P. Bown & Joost Pauwelyn eds., 2014) (discussing how the WTO allows its members to retaliate in cases of continued noncompliance).

14. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 87-88 (2005).

15. See, e.g., Paul Blustein, *Trade Pacts Run Amok*, *WORLD POL'Y J.*, Summer 2008, at 13; Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System*, 19 *EUR. J. INT'L L.* 277, 291 (2008); Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 *CHI. J. INT'L L.* 597 (2011).

narrative, the rise of emerging powers has made consensus in the multilateral regime difficult, and as a result, the established powers instead are working outside the WTO system to shape new norms of trade governance.¹⁶ Others contend that despite the rise of PTAs, the WTO remains very much relevant. Those subscribing to this narrative point to the WTO DSB's role as the "crown jewel" of a still effective system for which no alternative has developed outside of the WTO.¹⁷ In other words, the optimists believe that even if negotiations stall, the WTO will continue to thrive because of its effective judicial arm, while the pessimists are sounding the alarms. The resolution of the puzzle at hand sheds important light on the debate about the future direction of the trade regime.

This Article suggests that we are at a key inflection point for WTO. While the WTO system has functioned relatively effectively in its first two decades, its continued success is not assured. Instead, this Article argues that the WTO's success is contingent on the ability of the system to adapt to evolving patterns of power that present new challenges to the regime. Geopolitical shifts pose a threat not only to multilateral trade negotiations, but also to the underlying stability of the overarching WTO legal regime. I utilize the temporary breach puzzle as a device to highlight the nature of potential emerging threats that will challenge systemic stability. These potential flash points, I suggest, are not system-wide, but instead limited to a few specific scenarios. Nevertheless, they may prove potent because, by allowing countries to exploit the temporary breach loophole, they threaten to expose the faults of what is often considered to be the WTO's strong suit—its judicial role in resolving global trade disputes.

This Article is organized as follows: Part I explains the underlying elements of the puzzle. It offers some hypotheses for why those that negotiated the WTO treaties chose to leave in place the incomplete remedies from the previous General Agreement on Tariffs and Trade (GATT) era and also addresses doubts over whether the dilemma, as I have framed it, actually exists. It also suggests that several standard explanations for treaty compliance are inapposite for resolving this puzzle. Part II then presents my theory for why countries adhere so strongly to WTO law and do not utilize its loophole for temporary breaches more frequently. The theory builds on standard interest-based explanations, but provides a more detailed account of the mechanisms at work in securing compliance. Finally, Part III discusses the implications that the theory presents for future trade disputes, with an emphasis on emergent

16. See, e.g., Marc Venhaus, *The Transatlantic Trade and Investment Partnership as a New Strategy to Marginalize Emerging Power: A Divided Free Trade Order in the Making?*, in *THE TRANSATLANTIC COLOSSUS: GLOBAL CONTRIBUTIONS TO BROADEN THE DEBATE ON THE EU-US FREE TRADE AGREEMENT* 59, 61 (Daniel Cardoso et al. eds., 2014); James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421, 441-43 (2011).

17. See, e.g., Elizabeth Trujillo, *From Here to Beijing: Public/Private Overlaps in Trade and Their Effects on U.S. Law*, 40 LOY. U. CHI. L.J. 691, 704 (2009) ("[T]he WTO is not dead; rather, it is very much alive through its own dispute settlement bodies and the regional tribunals that look to WTO adjudication for guidance and legitimacy.").

trends that have the potential to alter the relative stability that the WTO system has experienced to date.

This Article seeks to make four contributions. First, the literature does not provide a satisfactory explanation for why the imperfection of WTO remedies has not been more exploited to date. Why is it that countries have not taken advantage of the legal loopholes that they explicitly negotiated in this regard, when they have done so with other provisions? The core focus of this Article is to offer an answer to this puzzle. Second, this Article seeks to add to the larger body of scholarship examining compliance in the absence, or prior to the imposition, of sanctions in public law systems writ large.¹⁸ To the extent that the literature has engaged with international law, it has not focused on international economic law. This Article represents a step to fill that gap. Third, why is it that the WTO only provides for prospective remedies? Why are countries so resistant to providing for retrospective remedies in WTO law? While the problems of the WTO remedies have been examined extensively by several legal scholars, the literature surprisingly does not provide an account for why states did not correct for imperfections in remedies when reforming dispute settlement during the Uruguay Round. Nor does it explain why states remain so wedded to imperfect remedies. Although such questions are not the primary focus of this Article, I advance several hypotheses that may be helpful for future work focused on WTO remedies reform. Finally, in examining the implications of my answer to the temporary breach puzzle, I draw attention in Part III to potential tension points that lie ahead for the WTO system. The hope is that this Article will not only advance our theoretical understanding of the WTO system as it currently functions, but also inform our views as to where the trade regime may be heading in light of the shifting patterns of trade.

I. UNDERSTANDING THE TEMPORARY BREACH PUZZLE OF INTERNATIONAL TRADE LAW

A. *The WTO's Imperfect Remedies: A Loophole for Temporary Breaches*

While the WTO regime is presumed to have “teeth,” its available remedies are actually quite limited. The WTO judiciary does not possess the power to issue backward-looking remedies; it cannot address past harms arising from violations of treaty law. Why was the system created as such? After all, some systems within international law do provide for retrospective damages. For example, the international investment regime functions according to the essential principle that “reparation must, as far as possible, wipe out all of the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.”¹⁹ Statements by

18. See, e.g., Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

19. Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages, and Valuation*, in THE OXFORD HANDBOOK ON INTERNATIONAL INVESTMENT LAW 1049, 1056-57 (Peter Muchlinski et al.

the United Nations and the statute of its judicial arm, the International Court of Justice, also reflect this principle.²⁰

The WTO's practices reflect those of its predecessor, the General Agreement on Tariffs and Trade (GATT). The GATT operated under a positive consensus rule, meaning its entire membership needed to agree before the body could take action. In effect, any state could exercise a veto over a GATT action. This veto had a potentially crippling effect on the efficacy of dispute settlement in the GATT era (1947-1994). An accused party could use its veto to block the establishment of an ad hoc GATT panel to hear the dispute. Even if it did not, it could later use its veto to block the adoption of an adverse ruling. What is surprising is that the system managed to function as well as it did for as long as it did before it threatened to break down in the 1980s.²¹

In the shadow of this veto threat, not surprisingly, the GATT provided for rather weak remedies. The GATT's main emphasis was forward-looking, i.e., to ensure that the illegal trade act would stop.²² In most instances, the winning party was not awarded any compensation for past harms or any other forms of retrospective damages. In 1979, the GATT codified this approach to remedies when it adopted the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, which stated:

In the absence of a mutually agreed solution, the first objective of the CONTRACTING PARTIES [to the GATT] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement [on Tariffs or Trade, i.e., the GATT]. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement. The last resort . . . is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES of such measures.²³

A handful of GATT panels deviated from this standard approach and did authorize retrospective remedies. Seven panels, all adjudicating trade remedy disputes, required that the violator not only rescind the illegal measure but also

eds., 2008) (quoting the principle as set forth in the 1928 *Chorzów Factory* case before the Permanent Court of International Justice, *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, ¶ 125 (Sept. 13), as the "classic starting point in a damages analysis" in an investment dispute).

20. See, e.g., Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 36, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."); see also Statute of the International Court of Justice art. 36.2(d), June 26, 1945, 59 Stat. 1055 (noting that the competent jurisdiction of the ICJ includes that of deciding "the nature or extent of the reparation to be made for the breach of an international obligation").

21. See Robert E. Hudec, Daniel L. M. Kennedy & Mark Sgarbossa, *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1, 17-25 (1993); see also Hudec, *supra* note 9, at 82-83 (highlighting the consensus decision-making process and the lack of retrospective remedies as central weaknesses of the GATT).

22. General Agreement on Tariffs and Trade art. XXIII(2), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

23. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980).

refund the duty already collected. Of these seven cases, four were blocked through a veto.²⁴ Three were adopted, but in only one case (*New Zealand—Electrical Transformers*) did the losing party not object to portion of the panel ruling authorizing a retrospective remedy.²⁵ Notably, it was the major trading powers—the United States, the European Communities, and Canada—that led the opposition to extend the scope of GATT remedies.²⁶ All exercised their veto to block panel reports seeking to impose retrospective remedies.

In the 1980s, the United States grew frustrated with vetoes of GATT panel rulings. It threatened unilateral action to enforce trade laws, much to the dismay of its key trading partners. A new round of trade negotiations, known as the Uruguay Round, began in 1986 aiming to overcome this and other problems. It led to the creation of the WTO and a complete overhaul of dispute settlement rules, governed by a new treaty, the WTO Dispute Settlement Understanding (DSU). To render the WTO's dispute settlement process much more effective than the GATT's, states agreed to a number of important changes. First, the "positive consensus" rule was eliminated. Second, the DSU provided for the formation of a standing, seven-member Appellate Body to review panel decisions. The DSU also added procedural details and timelines for each stage of adjudication.

Another innovation was the decision to limit the amount of time that a losing party had to comply with the ruling. The so-called "reasonable period of time" is to be decided by the parties or through binding arbitration.²⁷ In the event of continued noncompliance after this period expires, the aggrieved party is then entitled to seek "compensation and the suspension of concessions or other obligations" but only on a temporary basis while compliance is not forthcoming.²⁸ In other words, the so-called sanctions are not designed to compensate for past harms, but only to exert pressure to comply with the court ruling. So long as the violator brings its actions back in line within the "reasonable period of time," then the victorious complainant is not entitled to any further remedy.

24. These cases are: Report of the Panel, *Canada—Countervailing Duty on Boneless Manufacturing Beef*, SCM/85 (Oct. 13, 1987); Report of the Panel, *United States—Antidumping Duty on Stainless Steel Pipes and Tubes from Sweden*, ADP/47 (Aug. 20, 1990); Report of the Panel, *United States—Antidumping Duty on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82 (July 7, 1992); and Report of the Panel, *European Communities—Antidumping Duties on Audio Tapes in Cassettes Originating from Japan*, ADP/136 (Apr. 28, 1995).

25. The three cases are: Report of the Panel, *New Zealand—Imports of Electrical Transformers from Finland*, L/5814 (July 18, 1985), GATT B.I.S.D. (32nd Supp.) at 55-70 (1986); Report of the Panel, *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R (July 11, 1991), GATT B.I.S.D. (38th Supp.) at 30-47 (1992); and Report of the Panel, *United States—Measures Affecting the Import of Softwood Lumber from Canada*, SCM/162 (Oct. 27, 1993), GATT B.I.S.D. (40th Supp.) at 358-517 (1995). For information about how the United States reserved its position on the merits of the Panel ruling in the latter two cases, see Hudec, *supra* note 9, at 91 n.9.

26. See *supra* note 24 (listing the respondents that subsequently vetoed the adoption of the Panel ruling).

27. DSU art. 21.3(a)-(b).

28. *Id.* art. 22.1.

Therefore, the emphasis of WTO dispute settlement remains the same as that of the GATT—ensuring that a violator eliminate the illegal act and bring its trade policy back in line with its WTO treaty obligations. Once this is done, there is no further punishment. Moreover, remedies are only available temporarily in the face of noncompliance; they disappear as soon as a party complies. The system is not designed to provide restitution or compensatory damages.

This gives rise to a “free pass” associated with a temporary breach of WTO law. No action can be taken against a country so long as it corrects its illegal trade measure at any point prior to the expiration of the “reasonable period of time” following the final WTO judgment. Article 22 of the DSU makes clear that the force of sanctions associated with WTO law—compensation or suspension of trade concessions—can only be brought to bear once a WTO member remains in breach after the end of the “reasonable period of time.” So long as a violating party eliminates its breach at any point in the interim, it can escape punishment.

Just how unusual is this decision to provide the WTO’s judicial arm with limited and incomplete remedies? Consider the analogy with domestic constitutional law. If a state violates the Dormant Commerce Clause, the Supreme Court has the power to order the state to alter its law to conform to the Constitution.²⁹ It does not have the power to specify the exact course of action that the state should take nor order the payment of retrospective damages to those who may have suffered harm from the illegal state law.³⁰ Given that states are reluctant to grant remedial powers to a federal constitutional court, it may not seem that unusual for sovereign nations to refuse to grant similar powers to the WTO Dispute Settlement Body.

However, there is one important distinction. In the domestic context, a strong federal government exists that can exert pressure on states to not engage in temporary breaches to exploit the remedies loophole. No such overarching sovereign exists in the international context.

Why did the Uruguay Round negotiators leave this loophole for temporary breaches in place? Certainly, it was not on account of lack of awareness of alternatives. A handful of GATT panels did attempt to impose retrospective remedies. The negotiations occurred while the GATT debated

29. See, e.g., *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that New York and Michigan’s laws permitting in-state wineries to ship directly to consumers but prohibiting out-of-state wineries from doing so violated the Dormant Commerce Clause).

30. Just as is the case under WTO law, a state whose law violates the Dormant Commerce Clause has several choices as to how to change its law to bring it back into conformity. For example, following *Granholm v. Heald*, New York changed its laws to allow out-of-state wineries to ship directly to consumers, but limited all wineries to only thirty-six cases per year. Michigan, on the other hand, banned all wineries, including in-state ones, from shipping directly to consumers. See William C. Green, *Creating a Common Market for Wine: Boutique Wines, Direct Shipment, and State Alcohol Regulation*, 39 OHIO N.U. L. REV. 13, 39-42 (2012); Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 512-13 (2008); Daniel Duggan, *Shipping Ban Pours Grief Over Many Wine Retailers*, CRAIN’S DETROIT BUS., Jan. 18, 2009, <http://www.crainsdetroit.com/article/20090118/SUB01/901190340/shipping-ban-pours-grief-over-many-wine-retailers>.

these controversial cases. Furthermore, on other dimensions of dispute settlement, the Uruguay Round negotiators were not hesitant to enact radical reforms. Why then did negotiators not overhaul remedies as well?

So far, the academic literature has not provided an answer to this question.³¹ Below, I posit several potential explanations.³² First, international treaty negotiators are constrained by what domestic legislatures will accept during ratification.³³ Uruguay Round negotiators may have adroitly recognized that their domestic legislatures would react harshly to the possibility that their government might be forced to make payments from its treasury to other foreign governments as a result of a WTO ruling.³⁴ Rather than jeopardize passage of the entire body of Uruguay Round agreements over this provision, they instead chose to limit the scope of remedies to only prospective damages. While such a move may cut against their collective interest of strengthening the WTO's enforcement mechanism, it was necessary in order to ensure ratification of the package of treaty agreements.

Second, negotiators may have also calculated that this design would help maintain long-term domestic support for the new legal regime. Instances where an international tribunal has ordered a government to pay retrospective damages have been met with public controversy; examples abound in the investment regime.³⁵ In the most extreme instances, a few states have chosen to exit from the international legal system altogether following a loss.³⁶ In deciding to not provide for retrospective damages, trade negotiators may have been exercising plain caution so as to avoid the ratification fights and post-ratification legitimacy challenges that have plagued other attempts to establish international dispute settlement mechanisms.³⁷

31. Two books on the history of the Uruguay Round were written shortly after the conclusion of the Round, but they do not provide an account of this question. See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1995); THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terrence P. Stewart ed., 1993). Archival work remains difficult at present because many documents remain classified.

32. These explanations are not necessarily mutually exclusive. Furthermore, they are only hypotheses, as the lack of archival access currently makes them difficult to test. I leave it to future legal historians to assess their relative explanatory power.

33. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 435-36 (1988).

34. Furthermore, consider why even in countries that would stand to gain overall from a retrospective remedies rule, individual legislators may be opposed. The gains from retrospective damages are concentrated in a handful of citizens who may not be within a legislator's district or constitute only a small minority within the district. On the other hand, if the payment of retrospective damages is to be paid out from the general treasury, then the losses are widely shared among the general populace. Therefore, those who stand to lose from the adoption of retrospective damages in any given legislator's district will vastly outnumber those who stand to gain, even if the country as a whole gains.

35. See SERGEY RIPINSKY & KEVIN WILLIAMS, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* 55-56 (2008).

36. Among those that have withdrawn from the ICSID Convention are Venezuela, Bolivia, and Ecuador.

37. This is especially because the largest share of trade disputes litigated concerns allegedly illegal anti-dumping duties. Few states have granted their governments the legal authority to refund duties collected in such instances. A government therefore would have to seek authority from the legislature to pay out the retrospective damages, unless the controls on government spending allowed it to exercise discretion to spend in such a manner. Both a government's reluctance to seek such

Third, with any institutional reform effort, only so much can be tackled at once. Countries require a period to adjust to the newly reformed system before they are willing to make further changes.³⁸ The negotiating outcome may have been a reflection of the negotiators' view that other reforms (such as the elimination of the veto) took higher priority. Negotiators may have decided to simply leave the question of expanding available remedies for a future negotiating round.

Finally, the outcome may also be a reflection of power politics. In the Uruguay Round, the key players involved in negotiating the actual rules were the so-called Quad countries (the United States, the European Union, Japan, and Canada). For various reasons, each had a desire to strengthen the dispute settlement process. Yet each correctly anticipated that it likely would be sued more frequently in WTO dispute settlement than it would sue. Consequently, they had a collective interest in adopting relatively weak remedies so as to minimize the negative consequences of their eventual losses.

Following the Uruguay Round, WTO jurists could have decided to challenge the lack of retrospective remedies through judicial practice as GATT panels once did. They have not. No WTO panel has ever ordered the payment of retrospective remedies as part of its initial ruling. In one case, *Australia—Automotive Leather II*, a panel did so as part of a compliance ruling.³⁹ Interestingly, the panel acknowledged that the complainant sought only a prospective remedy and argued against the legality of retrospective remedy. Nevertheless, after undertaking an object-and-purpose analysis of the SCM Agreement, the panel decided otherwise.⁴⁰ The panel added a caveat that it was not taking a position as to whether retrospective remedies were generally permissible under the DSU and acknowledged that they may not be.⁴¹ Before the panel's actions could be examined by the Appellate Body, the two sides settled.⁴²

The *Australia—Automotive Leather II* decision remains a clear outlier. At the DSB meeting adopting the panel decision, several countries expressed concern over the panel's action.⁴³ Academics followed suit, criticizing the

authorization because of its political costs as well as the possibility of the legislature denying such a request increase the likelihood of noncompliance.

38. See Robert Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in *THE URUGUAY ROUND AND BEYOND* 101, 119-20 (Jagdish Bhagwati & Mathias Hirsch eds., 1998).

39. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 10.3, WT/DS126/R (May 25, 1999) [hereinafter *Australia—Automotive Leather II*].

40. *Id.* ¶¶ 6.33-38, 6.48.

41. *Id.* ¶ 6.42.

42. Notification of Mutually Agreed Solution, *Australia—Subsidies Provided to the Producers and Exporters of Automotive Leather*, WT/DS126/11 (July 31, 2000).

43. In addition to Australia, the United States, Canada, Brazil, Japan, the European Communities, and Malaysia all expressed concerns over the systemic implications of the Panel's approach. Only Hong Kong expressed unequivocal support of the Panel's use of retrospective remedies. See Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 11 February 2000*, 5-9, WT/DSB/M/75 (Mar. 7, 2000).

panel ruling as not grounded in treaty text or past practice.⁴⁴ In subsequent litigation, parties have made clear that they do not seek retrospective remedies.⁴⁵ Though the Appellate Body has never pronounced on the question of retrospective remedies, WTO jurisprudence and past practice support the prevailing view that the system only provides for prospective remedies.

B. *The Relative Lack of Temporary Breaches*

For all the trumpeting of the WTO as a legal regime with genuine sanctions, the fact is that a giant loophole exists. So long as a country that breaches its WTO treaty obligations decides to cease its breach before the expiration of the “reasonable period of time” following the final judgment, it can escape formal punishment. As discussed above, the framers of the WTO intentionally created a legal system with a “free pass” for temporary breaches—a mechanism for WTO members to escape their treaty obligations temporarily without legal consequence.

One might think that this loophole presents a major challenge for the WTO legal regime. If temporary breaches offer an escape valve from difficult trade liberalization commitments, why would governments not take advantage of this loophole whenever it proved politically expedient? Yet, in spite of this “free pass,” by and large, the conventional wisdom is that states do conform widely to their WTO treaty obligations.⁴⁶ They do not readily engage in temporary breaches.

How do we know this to be true? An alternate state of the world may be that states engage in temporary breaches widely, but few are ever caught and even fewer are punished. In other words, how do we know that WTO rules are not analogous to speed limits—respected as guidelines but frequently breached?

Like automobile speed, a large number of trade obligations are readily observable. For example, exporters are subject to a tariff each time their goods cross borders. Adherence with this commitment is binary; either the actual tariff levied is in line with a country’s WTO commitment or it is not. There is

44. See, e.g., Gavin Goh & Andreas Ziegler, *Retrospective Remedies in the WTO After Automotive Leather*, 6 J. INT’L ECON. L. 545 (2003).

45. See, e.g., Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, ¶¶ 5.47–48, WT/DS70/RW (May 9, 2000) (explicitly noting both parties’ request that the Panel not follow the *Australia—Automotive Leather II* ruling). In *infra* Section ILC, I discuss a number of reasons why WTO members have been opposed to retrospective remedies.

46. See, e.g., Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 284 (2010) (“The easiest way to think about compliance with international trade law is to accept [the] assertion that effectiveness is a good approximation of compliance.”); Joanna Langille, Note, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482, 1483, 1517 (2011) (noting that “[t]he WTO is often held up as a model for how legally binding obligations can be imposed at the global level” and that “it is assumed to have significant ability to make member states comply with its laws.”). However, scholars such as Simmons acknowledge the paucity of data, and therefore accurate knowledge, concerning true compliance rates of states. See Simmons, *supra* at 284 (“We know surprisingly little about actual compliance with international trade law.”).

no indeterminacy or subjectivity involved in assessing compliance with bound tariff rates. The same is true of a commitment to open insurance services to foreign firms. Still another example is the WTO requirement on minimum patent terms.⁴⁷ A country's patent law must be made public, and fixed-term patents are issued routinely. Adherence is again binary; either a foreign producer is granted the minimum term or not. The set of readily-observable obligations is quite large. Each WTO member is asked to declare whether it is making commitments on over 5,000 tariff lines and 1,800 unique sub-classes of services.

Note that not all WTO obligations are easily observable. Observing compliance with some provisions is difficult. For example, this is true if the meaning of the obligation is vague (e.g., if the drafting was left ambiguous intentionally).⁴⁸ Similarly, if the obligation involves a state's behavior toward its own domestic entities that is not made public, observation is also difficult.⁴⁹ The same also can be said of treaty obligations that permit administrative discretion without mandating sufficient transparency.⁵⁰ In other words, some areas of trade law are murky, and compliance is not always clear. However, such obligations constitute only a minority of WTO treaty obligations. Compliance with the vast majority (such as those on tariffs) is readily observable.

Unlike speed limits, easily-observable WTO obligations are also widely monitored. The relative cost of monitoring is low since monitoring is often embedded into the course of everyday transactions with customs and regulatory authorities. Entities that trade then aggregate this information and report it to their governments. This is true even for countries that represent small export markets. So long as the potential lost profits related to the breach of a given obligation outweigh the cost of monitoring that obligation for a given trader, that trader will find it worthwhile to monitor the obligations that affect its business. Thus, even the practices of small export markets are being monitored by those that trade there.

For this universe of readily-observable obligations, we observe very little

47. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 33, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

48. See, e.g., Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 DUKE L.J. 1277 (2003) (offering the example of the national security exception).

49. An example is that of subsidies provided by governments to their domestic industries. In recent years, the United States has complained of WTO members not making this information sufficiently well-known to its trading partners. See Press Release, Office of the U.S. Trade Representative, United States Details China and India Subsidy Programs in Submission to WTO (Oct. 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/united-states-details-china-and-india-subsidy-prog>.

50. See generally Robert Wolfe, *Regulatory Transparency, Developing Countries and the WTO*, 2 WORLD TRADE REV. 157 (2003) (arguing that transparency between countries is easier to regulate than transparency within countries because it is easier to adapt economic regulation than social regulation to international norms). The level of such concerns may vary by country; they have been expressed with greatest alarm with respect to China. See, e.g., Sarah Biddulph, *Through a Glass Darkly: China, Transparency and the WTO*, 3 AUSTRAL. J. ASIAN L. 59 (2001); Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 1 (1998).

reporting of behavior by WTO members that is analogous to that of drivers on a highway. If a country commits to not imposing tariffs above twenty percent, we do not hear of complaints that it has set tariffs at twenty-two percent. If a country commits to providing a minimum patent term of twenty years, we do not hear of complaints that it only grants eighteen years of protection to certain entities. Nor do we hear frequently of discriminatory grants of licenses to foreign providers of a given service if a country has committed to opening up the market for that service unconditionally. Rather, the prevailing view among scholars and practitioners alike is that “the level of compliance with trade commitments is quite high, even if there is no credible threat of sanctions for misbehavior.”⁵¹

The relatively low volume of trade disputes brought before the WTO serves to reinforce this view. Between 1995 and 2013, a total of 469 formal complaints were filed with the WTO. This works out to an average of approximately twenty-five complaints per year, a relatively low figure considering the WTO’s overall membership now stands at 160 countries. On average, a case is brought against a country once every six years.

The number of WTO disputes serves as one proximate indicator of the infrequency of temporary breach. But it is not conclusive. After all, not all trade-related disputes result in WTO cases. Some may be addressed in other venues outside of the WTO.⁵² Moreover, litigation is costly. Some countries may lack the legal or financial capacity to bring forward a case.⁵³ Even those with resources may deem a certain breach to be too trivial to warrant spending funds on litigation. In addition, a country may have a variety of economic and/or political reasons to refrain from bringing a WTO case against a given trading partner.⁵⁴ Furthermore, as I discuss later in this Article, some countries also possess other means to secure compliance outside of filing a case. Therefore, the fact that the volume of WTO cases is low does not, by itself, indicate strong compliance with WTO treaty obligations.

Yet, going beyond the number of disputes to prove that countries strongly adhere to their WTO obligations is harder than one might think. It is difficult to quantify the exact number of WTO commitments made by any given country.

51. Schwartz & Sykes, *supra* note 10, at 200.

52. For example, disputes over an agricultural product regulation might be addressed by the U.N. Food and Agriculture Organization; those over a particular product standard may be addressed by the relevant international standards organization; and those over a particular form of intellectual property might be addressed by the World Intellectual Property Organization.

53. Despite the growing use of WTO dispute settlement by developing countries, an African country has yet to bring a case before the WTO. See *Disputes by Country/Territory*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Dec. 4, 2014) [hereinafter *Disputes by Country/Territory*] (noting that African countries have participated as defendants and third parties but not yet as claimants); see also Amin Alavi, *African Countries and the WTO’s Dispute Settlement Mechanism*, 25 DEV. POL’Y REV. 25 (2007) (explaining the impediments to African participation in WTO dispute settlement).

54. See Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants at the World Trade Organization*, 34 J. LEGAL STUD. 557 (2005) (finding support for the impact of capacity constraints, but no support for the hypothesis that small states exercise self-restraint in bringing cases against powerful states).

Nor is it always possible to readily observe whether each given commitment is being followed for the reasons discussed above. This makes it nearly impossible to gather information on an exact compliance rate. As Beth Simmons acutely observes, “Systematic research on compliance with international trade law is much more difficult than one would expect. Accumulating a convincing data set on compliance with treaty law in this area would be a mind-boggling endeavor.”⁵⁵

Nevertheless, even in the face of incomplete data, I suggest that it is possible to develop an overall sense of the relative degree to which countries adhere to their WTO commitments. Even without a comprehensive data set, it is possible to develop an estimate of the prevalence of temporary breaches by estimating two figures: (1) the percentage of breaches resulting in WTO litigation, and (2) the total number of WTO treaty commitments in existence. With these two estimates, we can then determine a numerator and denominator for calculating an estimated ratio of WTO treaty obligations being breached.

Using the best-available data, I assume that only five percent of breaches result in the filing of a WTO complaint.⁵⁶ In other words, I assume that nineteen out of every twenty breaches of WTO law either go unobserved or are observed but not deemed worthy of a case filing. Furthermore, pressure may be brought on states not to file cases. In addition, at times, other non-trade interests (e.g., security) may trump, leading a country to turn a blind eye to a trade problem. All this contributes to the relatively low rate of actual case filings. Even so, the assumption that only five percent of all breaches are ever litigated may seem extreme. However, as my intention is to err on the side of overestimating the prevalence of breaches, I adopt this assumption.

In addition, I note that as a lower bound, the WTO has well over 7,000

55. Simmons, *supra* note 46, at 284.

56. See CHRISTINA DAVIS, WHY ADJUDICATE? ENFORCING TRADE RULES IN THE WTO 9 (2012). Note that Davis’s research focused on a subset of problems noted by the United States in the National Trade Estimates Report (NTER) and found that WTO cases were filed in only approximately five percent of such instances. While Davis’s analysis of Japanese trade commitments is not necessarily a representative sample, no other scholar, so far as I am aware, has conducted the detailed work necessary to arrive at an estimate using a broader (and more representative) sample.

Several reasons exist as to why the five percent estimate may be an underestimate. First, Davis notes that not all of the complaints raised in the NTER are violations of WTO commitments; some are trade issues for which it is not clear that Japan is in direct breach. *Id.* This suggests that the denominator should be smaller than the one used by Davis, leading to a higher case-filing rate. Second, the United States and Japan may share certain strategic and policy preferences, leading the United States to not bring a case for a given breach that it otherwise would against another country. Third, the United States and Japan have a long-standing partnership. Some have suggested that Japan prefers to settle trade disputes informally, thereby leading to fewer cases being filed against Japan. See Ji Li, Note, *From “See You in Court!” to “See You in Geneva!”: An Empirical Study of the Role of Social Norms in International Trade Dispute*, 32 YALE J. INT’L L. 485, 495-97, 503 (2007). Counteracting these forces, however, is the fact that the case-filing rate may be lower for an economy less important than Japan’s.

Note that the case-filing rate is used to calculate the numerator in determining the overall noncompliance rate. If, for the reasons discussed above, the five percent rate is an underestimate, then this will lead to a smaller numerator and a lower overall noncompliance rate. This further reinforces the overall point that the vast majority of WTO commitments are being complied with by WTO members. On the other hand, if this assumption is an overestimate, then this will mean a higher noncompliance rate. However, as discussed below, it would have to be off by a large order of magnitude to defeat the overall point. This is unlikely to be the case.

unique policy items for which it requires countries to either make a binding treaty commitment or to indicate that it is opting out of doing so.⁵⁷ This may seem low, but again my intention is to err on the side of overestimating noncompliance. I assume that the rate of opting out of making treaty commitments varies by type of country, with opt-out rates being much higher for developing countries than developed countries and highest for least-developed countries.⁵⁸ In addition, I assume that somewhere between twenty-five to ninety percent of the binding commitments represent true concessions, with the exact percentage again varying by the type of country.⁵⁹

Using these assumptions, I arrive at an estimated noncompliance rate of approximately 0.6%.⁶⁰ This estimated rate is inexact, but it is based on

57. This lower bound figure is derived as follows: As mentioned, a WTO member makes readily-observable commitments on tariffs at the HS-6 level, for which there are approximately 5,000 unique categories. See *What Is the Harmonized System (HS)?*, WORLD CUSTOMS ORG., <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx> (last visited Dec. 4, 2014). It also makes readily-observable commitments on services using the U.N. Central Product Classification scheme, which is comprised of more than 1,800 unique sub-classes at the 5-digit level. See Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 200, WT/DS285/AB/R (Apr. 7, 2005) (adopted Apr. 20, 2005). While there are more than 200 unique commitments to be found in the other WTO agreements, I use the figure of 7,000 commitments as a lower-bound figure for the denominator.

58. Specifically, I assume that developing countries make only half as many binding commitments as developed countries and that least-developed countries (LDCs) make only twenty-five percent as many commitments as developed countries (and hence, only half as many as other developing countries). In other words, I assume that seventy-five percent of WTO obligations are inapplicable to LDCs, either because they opt out or because of built-in treaty measures that exempt them provisionally.

59. Here I assume that the rate is higher for developing countries and least-developed countries, as they have less bargaining power in the negotiations and would more likely exercise their power to seek an opt-out of making a concession on a given tariff line or services sector. In addition, I assume higher rates for smaller developed countries that were not at the core of the negotiations. The lowest rates are reserved for the core “Green Room” countries that were at the heart of the Uruguay Round negotiations. Finally, I also assume higher concession rates for WTO members that acceded after 1995, as the asymmetries in negotiating power for such countries means that a high percentage of their commitments should represent concessions.

Specifically, in making my calculations, I adopted the following assumptions: For developed countries, I assumed that of the commitments made, only twenty-five percent were true concessions for “Green Room” countries and fifty percent for non-“Green Room” countries. In other words, I assumed that seventy-five percent of a given “Green Room” countries’ commitments and half of all other developed countries’ commitments represented their existing or underlying preference at the time of negotiations. For developing countries and LDCs, recall my earlier assumption that each undertook fewer total binding commitments; I assumed that developing countries undertook only half and LDCs only one-quarter of the number of binding commitments that developed countries undertook. See *supra* note 58. Of the binding commitments undertaken, I assumed that seventy-five percent represented genuine concessions for developing countries and ninety percent for LDCs.

60. I employ as my unit of analysis a country’s action on a given WTO commitment in a given year. I assume that the average length of a given breach is five years. This is likely to be too high, especially if a country relies on measures other than WTO litigation to bring its trading partner’s actions back in line with a WTO commitment, but I nevertheless err toward a higher rate.

To arrive at an estimated noncompliance rate, I do the following: for the numerator, I multiply the total number of cases by the estimated ratio of non-litigated temporary breaches to litigated temporary breaches and by the estimated number of years in which a given breach is presumed to persist. For the denominator, I first calculate an estimate of the total number of commitments undertaken by each type of country (which differs, depending on whether it is advanced, developing, or LDC, and on whether or not it was a “Green Room” country) and then multiply it by the percentage of commitments representing concessions and the number of countries within that subset. I then calculate the total sum across the different subsets and multiply this sum by the total number of years.

reasonable assumptions made in light of best-available information. It suggests that at any given moment, the vast majority of WTO obligations are being observed by most states. Moreover, the important emphasis ought not to be on the exact estimate but the overall point. Already, the assumptions adopted are designed to skew in favor of a higher noncompliance rate. But even if one takes major issue with my assumptions, the overall conclusion still does not change. For example, even if one supposes that my assumptions are off by a factor of twenty-five (e.g., if one supposed that only one out of every 500 temporary breaches is ever litigated), the fact still remains that over eighty-five percent of WTO obligations would be observed.

Therefore, my rough analysis based on the best-available data suggests that states do not readily exploit the “free pass” available in WTO law. The prevailing view that compliance levels with WTO law are high appears likely to be correct. I leave it to future empirical work to further validate this point.

Could the high compliance rate be because WTO members are unaware of the “free pass”? This is highly unlikely. WTO dispute settlement data indicate that governments are aware and factor the “free pass” into their policymaking. The WTO, like other courts, affords the parties an opportunity to reach a negotiated settlement in lieu of a trial. In a standard litigation setting, one expects the “obvious” cases with relatively low legal uncertainty to be settled, thereby causing the plaintiff win rate to be approximately fifty percent.⁶¹ However, in exceptional circumstances where parties have differentiated stakes, the success rate can be much higher for a variety of reasons.⁶² The WTO qualifies as such a setting. Of the WTO cases that proceed to final judgment, approximately nine out of every ten result in a ruling against the respondent.⁶³

One might suppose that the high plaintiff-win rate is due to the intransigence of governments. After all, governments find it politically difficult to modify a policy benefiting a particular constituency. However, in fact, this is not the case. After the judgment is issued, studies find that governments generally reverse course.⁶⁴ Willingness to revise policy to conform to WTO law is high after a judgment is issued, just not beforehand.

What changes? First, the WTO ruling makes reversal less politically costly. Governments can now fall back on the excuse of “the WTO made me do it” to explain policy reversals. Second, and more importantly, until the ruling was issued, the illegal policy was costless so far as legal remedies are concerned. This is an important difference from the standard litigation context

61. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-20 (1984).

62. See *id.* at 20-29 (modeling why differentiated stakes cause outcomes to drift away from the fifty percent rate).

63. See *List of WTO Disputes with Indication of Whether at Least One Violation Was Found*, WORLDTRADELAW.NET, <http://www.worldtradelaw.net/databases/violationlist.php> (last visited Dec. 4, 2014); see also Jennifer Hillman, *An Emerging International Rule of Law?—The WTO Dispute Settlement System's Role in its Evolution*, 42 OTTAWA L. REV. 269, 278 (2010).

64. Colares, *supra* note 3.

where the court has the power to issue retrospective remedies. Even knowing that its policy will be found illegal, a government has no reason to reach a settlement if the benefits of continued breach outweigh the additional marginal costs incurred during the litigation period. Thus, the high pro-plaintiff pattern of WTO rulings is itself indicative of governments' willingness to take advantage of the "free pass" afforded by WTO law once a government has decided to engage in a breach.

Therefore, the puzzle that I posit is not simply an academic one. As Section I.A demonstrated, WTO law provides for an incomplete set of remedies. The lack of retrospective remedies provides violators of WTO law with a "free pass" that lasts for several years. Governments, when they breach, do avail themselves of this feature, as exemplified by the above discussion that more defendants are willing to litigate a losing dispute through to a final ruling than standard litigation theory would suggest. But governments do not do so frequently. Although we do not know the exact noncompliance rate with WTO treaty obligations, based on assumptions made from available data, breaches of most WTO obligations appear to be relatively rare. The puzzle is why, given the "free pass" created by the WTO's incomplete remedies, temporary breaches are not more prevalent.

After all, governments routinely face political pressure from import-competing constituencies. Moreover, even for a government committed to greater economic liberalization, not all its WTO commitments may line up with its economic agenda. Availing itself of the "free pass" prior to and during the litigation proceedings, while complying with the judgment against it afterwards, would appear to be a rational way of paying off a domestic constituency temporarily while still adhering to the letter of the agreement. Yet the analysis suggests that while countries are no doubt aware of the benefits of temporary breach, they do not take advantage of it frequently. The puzzle that requires explanation is why this is the case.

C. Discrepancies in Use Patterns of the Temporary Breach Loophole Among WTO Members

One other set of facts is important to note about this puzzle. Based on the imperfect proxies that we can observe, it appears that exploitation of the temporary breach loophole is highly uneven across states. In general, developed countries tend to utilize the loophole with greater frequency than developing countries. Of course, this is a sweeping generalization, and as discussed below, discrepancies exist within each group. Nevertheless, this may seem surprising, given that the Uruguay Round agreements are described as reflective of terms that favor developed countries' interests. Thus, one might think that the rule-takers rather than the rule-makers would be more prone to breach. But this does not appear to be the case.

One proxy, albeit a highly imperfect one, is the number of disputes brought against a WTO member. Over forty percent of the cases brought before the WTO are against just two members: the United States and the European

Union.⁶⁵ Recently, a third member, China, has also become a frequent target of WTO litigation.⁶⁶ On the other hand, over one hundred countries in the WTO have never had a complaint filed against them.⁶⁷ One might posit size of the economy to be the dominant explanatory factor for this discrepancy. Yet consider the fact that Japan, which is the world's third largest economy, has faced relatively few complaints.⁶⁸ By contrast, the Dominican Republic, Ecuador, Nicaragua, and Trinidad and Tobago have all defended multiple cases,⁶⁹ despite the fact that none feature among the world's top fifty economies. Though the size and importance of the breaching party's economy most certainly factor into a decision as to whether or not to pursue WTO litigation, this is not absolutely determinative. WTO cases are brought against small economies.⁷⁰ Discrepancies in dispute settlement cannot be explained fully by variance in size.⁷¹

As discussed earlier, the number of complaints is a highly imperfect indicator of temporary breach. For various reasons, a country that observes a trading partner's breach may choose not to file a complaint against it. Therefore, we turn to a second proxy indicator that lends further support to the trends noted in the previous paragraph.

Besides litigation, the WTO provides a second mechanism for its members to monitor and raise concerns about one another's practices known as the Trade Policy Review (TPR) mechanism. The WTO notes that "[t]hese 'peer reviews' by other WTO members encourage governments to follow more closely the WTO rules and disciplines and to fulfill their commitments."⁷² As part of the process, WTO members are allowed to submit questions which the country being reviewed must answer. Not all of the questions raised are necessarily concerns over potential breaches, but the TPR does provide an avenue for trading partners to express issues and policies of concern without going so far as filing a complaint. Over the course of time, all WTO members

65. See *Disputes by Country/Territory*, *supra* note 53.

66. China accounts for nearly twenty percent of the most recent 160 cases. See *id.*

67. See *id.*

68. Japan has defended only fifteen cases before the WTO, which is roughly one-tenth of the number of cases faced by the United States. See *id.*

69. *Id.*

70. In 2013 alone, complaints were filed against Pakistan, Ukraine, Colombia, and Peru. Request for Consultations by Indonesia, *Pakistan—Anti-Dumping and Countervailing Duty Investigations on Certain Paper Products from Indonesia*, WT/DS470/1 (Dec. 2, 2013); Request for Consultation by Japan, *Ukraine—Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/1 (Nov. 4, 2013); Request for Consultations by Panama, *Colombia—Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/1 (June 20, 2013); Request for Consultations by Guatemala, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/1 (Apr. 16, 2013); see *Chronological List of Dispute Cases*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 4, 2014).

71. For studies that show that other variables besides GDP are significant in explaining the use of the dispute settlement system, see, for example, Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 WORLD BANK ECON. REV. 287, 305 (2005); and Li, *supra* note 56, at 503, 513.

72. See *Trade Policy Reviews: Ensuring Transparency*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (last visited Dec. 4, 2014).

are subject to review, with reports issued regularly following each TPR.

The stakes with a TPR are much lower. There is no danger of sanctions resulting from a TPR. One simply raises a question, but in doing so, one signals to a trading partner that its policy is being watched. Such action, however, is much less likely to incur another country's wrath, as tens, if not hundreds, of questions are raised at each TPR. No legal fees are incurred, making capacity and cost much less of an issue.

Therefore, the depth of questioning in TPRs serves as an indicator of the level of concern that WTO countries have over their trading partner's potentially-problematic practices and policies. It offers a second proxy for temporary breach, albeit also an imperfect one as countries with more opaque policymaking may trigger more questions. As part of this project, I tabulated the total number of pages spent on the Q&A portion of each country's TPR in the WTO era. Table 1 presents my results. Again, the two leaders are the European Union and the United States. As Table 1 shows, more than three times as many pages have been devoted to questioning European and American trade policies than those of India or Brazil. Not surprisingly, China follows closely behind.

Because the frequency of review varies by country and the length of the TPRs has grown over the years, I also calculate the average number of pages per Q&A session. My results are shown in Table 2. When examined in this manner, China takes the top spot, but again, the European Union and the United States are still among the top three.

Although there is significant overlap between those countries against which cases are most frequently filed and those that undergo the most extensive questioning during their TPR, a few noteworthy differences emerge. Japan has seen relatively few cases filed against it, but as Tables 1 and 2 indicate, its policies have undergone vigorous review during its TPRs. The same is true of Vietnam. Also, as noted earlier, no WTO case has been filed against over ninety countries. Yet, within this group, there are vast differences in terms of the vigor of questioning during TPRs. For example, the last TPR of the Democratic Republic of the Congo resulted in a Q&A that was 2.5 times longer than that of Zambia (a similarly-sized African economy). Also, simply because a case has not been filed against a country does not mean that it is not being rigorously monitored. For example, no WTO case has ever been brought against a member of the East African Community. Yet, the Democratic Republic of the Congo's last TPR resulted in a Q&A session that was nearly as extensive as that of Australia, a country that has defended fifteen cases before the WTO and whose economy is fifteen times larger.⁷³ These figures suggest that the Q&A sessions of TPRs offer a useful proxy for gauging concerns over temporary breach.

73. The combined GDP of the five countries of the EAC was approximately \$100 billion in 2012, whereas that of Australia was \$1.564 trillion. U.N. STATISTICS DIV., GDP AND ITS BREAKDOWN AT CURRENT PRICES IN US DOLLARS (2013).

Still, overall, the analysis of TPRs serves to reinforce the notion that most frequent users of the “free pass” are the advanced economies—and in particular, the United States and European Union. Among developing countries, China stands out. The practices of a handful of other developing countries (e.g., Vietnam, India, Argentina, and Brazil) also raise concern, but not nearly as extensively as those of the two leading advanced economies.

What about the possibility that because of prioritization in allocating monitoring resources, small states simply “fly under the radar”? Are small states breaching frequently but going undetected? The answer is no. Monitoring costs for the majority of tariff and services commitments are so low that even the trade policies of small economies are being monitored with relatively high intensity. Take the example of Belize, which ranks as the 170th largest economy in the world, placing it in the bottom decile of WTO members.⁷⁴ The Q&A session of its last TPR was not particularly rigorous, as no Belizean trade policy was causing much controversy at the time. Even so, thirteen WTO members submitted queries about potential issues.⁷⁵ This subset was not limited to its immediate regional neighbors, but also included major powers such as the United States, the European Union, and Japan, and rising powers such as Brazil, India, and Turkey.⁷⁶ This is despite the fact that exports to Belize amount to less than 0.02% of total exports for all of these powers.⁷⁷ Therefore, the trade actions of even the smallest (and relatively uncontroversial) states are being monitored vigorously. The few that trade there can do so with relatively low cost and then aggregate this information for their governments. Thus, it is incorrect to believe that there is a category of smaller states whose trade policies are not being regularly observed.

This discrepancy in use patterns is interesting because it rules out several potential explanatory factors. First, the frequency of temporary breach does not appear to be related to capacity.⁷⁸ Contrary to what might be expected, low-capacity states do not engage in more temporary breaches than high-capacity states. Furthermore, within each category, there are wide discrepancies—as exemplified by the differences between the United States and Japan or the Democratic Republic of the Congo and Zambia.

Second, whether a country strongly complies or engages in frequent temporary breaches does not appear to be linked to the strength of its

74. *Gross Domestic Product 2013*, WORLD BANK 3 (Sep. 24, 2014), <http://databank.worldbank.org/data/download/GDP.pdf>.

75. World Trade Org. Secretariat, *Report by the Secretariat: Trade Policy Review: Belize*, 10-21, WT/TPR/S/238 (Sept. 29, 2010).

76. *Id.*

77. Author's calculation is based on export data available for 2009 (year prior to the last Trade Policy Review) in the U.N. Comtrade database. U.N. Dep't of Econ. & Soc. Affairs, *UN Comtrade Database*, UNITED NATIONS, <http://comtrade.un.org/data/> (last visited Dec. 4, 2014). For India, Japan, and Turkey, Belize was the destination of approximately 0.001% of their exports.

78. See, e.g., Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993). According to their theory, there exists “a general propensity of states to comply with international obligations.” *Id.* at 178. Failure to comply results from several managerial factors tied to capacity.

transnational networks and the extent of repeat interactions by its transnational actors in horizontal and vertical legal processes.⁷⁹ In other domains, including specific elements of trade law, strong interactive processes involving a state's transnational actors are believed to exert a strong compliance pull as states internalize international legal norms.⁸⁰ Yet here, the states whose actors are among the most active in such processes are among those that most frequently engage in temporary breaches.⁸¹

Third, temporary breaches also appear to be unrelated to either the political orientation of the government⁸² or the degree to which a country perceives the regime to be "fair" to its interests.⁸³ Although the WTO regime was advanced by liberal states and may be emblematic of a neoliberal vision, unlike other areas of international law, liberal states are not more prone to comply with WTO treaty obligations than non-liberal states.⁸⁴ The parties most frequently alleged to breach WTO obligations are the United States and European Union, the two bedrocks of the trade regime's supposedly liberal order. By contrast, until China's emergence as a trading power in the mid-2000s, very few non-liberal states were ever alleged to violate their WTO obligations. Of the WTO's first 300 cases, only three were brought against states that are classified as anything less than a functioning democracy.⁸⁵ In

79. For work emphasizing the importance of transnational legal processes for international treaty compliance, see Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); and Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

80. For example, the theory helps to explain why certain actors in developing countries pushed for the adoption of anti-dumping laws and more rigorous enforcement of such laws against imports.

81. For example, over the past decade, the three parties most frequently accused of breach are the United States, European Union, and China. They are also among the most active in their participation in WTO Trade Policy Reviews, DSB proceedings as third parties, and WTO committees. See Trade Policy Review Mechanism ¶ C.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480 (noting greater frequency of reviews for WTO members with a greater share of world trade); *Disputes by Country/Territory*, supra note 53 (noting higher participation rates in dispute settlement). Participation in committees can be discerned from publicly-available minutes of each committee.

82. For examples of liberal theories of international law, see, for example, Andrew Moravcsik, *Liberal Theories of International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 83, 84 (Jeffrey Dunoff & Mark Pollock eds., 2012); and Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y OF INT'L L. PROC. 240, 240-42 (2000).

83. See, e.g., THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 433-34 (1995) (suggesting that creation of a rules-based WTO represents a significant "infusion of genuine fairness into the global trading system," which, in turn, makes states less likely to breach).

84. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 532-33 (1995) (suggesting that transnational legal orders created by liberal states are likely to be more stable and effective because similar domestic constraints among liberal states "create the conditions in which States entering into an international agreement have reason to believe that their co-parties are equally constrained" and therefore causing all parties to be more likely to uphold their initial bargain as well as accept the rulings of a neutral supranational tribunal). For an example of such an order and discussion of the elements necessary for its success, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

85. The classification of states for purposes of this figure is based on its ranking in the Polity IV index, which provides an annual rating of a country's regime type. See *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2013*, CENTER FOR SYSTEMIC PEACE, <http://www.systemicpeace.org/polity/polity4x.htm> (last visited Dec. 4, 2014). The three illiberal

addition, those countries that have complained publicly of the international economic order being unfair (such as Venezuela and Bolivia) do not appear to engage in temporary breaches with high frequency.

Finally, this discrepancy in use patterns also suggests that the differences seen in patterns of overall compliance are not the result of social construction.⁸⁶ It is not the case that those countries more frequently accused of breach have had different modes of social interactions within the international regime that would cause them to be more willing to breach WTO treaty obligations temporarily. Their transnational actors are embedded with the same formal structures and belong to the same epistemic communities as those from countries not frequently accused of breach.

What then explains why WTO members strongly comply with their treaty obligations, even if they can get away with breach temporarily for five or more years? Why does the system work if the WTO system's formal sanctions are not what is doing the work? Moreover, while overall noncompliance is low, what explains discrepancies in behavior among certain states?

The literature on compliance within international trade regime has tended to avoid the puzzle at hand.⁸⁷ Instead, scholars have focused on the narrower question of why we see strong compliance with the WTO's adjudicatory decisions.⁸⁸ While we possess a robust body of theoretical scholarship explaining compliance with WTO rulings, we know significantly less about the reasons for why we see strong compliance with WTO treaty obligations generally, especially when the system allows for temporary breaches without payment of compensation. In Part II, I advance a theory to explain why countries, even when given a "free pass" for temporary breach, still largely comply with their WTO obligations.

II. WHY NATIONS FOLLOW WTO RULES DESPITE IMPERFECT REMEDIES

The theory that I offer builds off a standard explanation that states generally comply with international law because of the role played by the so-

countries against which disputes were brought were Egypt, Pakistan, and Peru.

86. See also Andrew Cortell & Susan Peterson, *Synthesizing Rationalist and Constructivist Approaches to International Organizations: Lessons from the WTO and WHO* (2006) (unpublished manuscript), <http://wmpeople.wm.edu/asset/index/smpete/synthesizing> (discussing the behavioral tendencies of the WTO and WHO towards autonomous preference selection); see generally MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996) (exploring the conditions under which international systems impact the behavior of sovereign actors ex ante).

87. To the extent that some scholars have addressed this question, they have done so primarily on general terms related to theories of how international law operates overall. See, e.g., ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008) (emphasizing the importance of the "three Rs" of reputation, retaliation, and reciprocity generally in international law).

88. See, e.g., Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 *YALE J. INT'L L.* 201 (2014); Brendan McGivern, *Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives*, 36 *INT'L L.* 141 (2002); Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 *J. INT'L ECON. L.* 397 (2007).

called “three Rs:” reputation, reciprocity, and retaliation.⁸⁹ Although critics of interest-based theories decry these explanations as overly state-centric,⁹⁰ I suggest that, for this particular puzzle, the state ought to be the key focus of analysis. Under the WTO regime, it is the state alone that ultimately decides whether to breach, and if so, for how long.⁹¹ Analyses of the interests of the states in question go a long way toward enhancing our understanding of why the system has worked to date.

Our understanding of how the “three Rs” come into play in the international trade regime, however, is incomplete. To date, the scholarship has focused primarily on the role of these three factors in securing compliance with WTO judicial rulings. Although scholars have also suggested that the factors help secure compliance with WTO law overall even in the absence of judicial sanctions, the literature has not elaborated on the specific mechanics of compliance. How is it that these factors explain why countries do not exploit the WTO’s remedies loophole and engage in widespread temporary breach? To revert back to the speed limits analogy, why don’t we see countries behaving like drivers on a highway? Why aren’t countries frequently violating WTO rules temporarily and obeying only once they notice a potential enforcer? How is it that they manage to keep each other in check?

What follows in Part II is my attempt to offer a more detailed and robust explanation of why countries comply with WTO rules even in the absence of formal sanctions for a temporary breach. Much more than past scholars, I elaborate on the exact mechanisms through which states, acting out of self-interest, manage to create a system that dissuades their trading partners from engaging in widespread temporary breach. Note that I readily acknowledge that some amount of temporary breach does occur. My theory simply seeks to explain why the phenomenon is not widespread, and why we see the discrepancies in use patterns noted earlier.

Past interest-based scholarship on trade law has not tackled the temporary breach puzzle head on, but has instead examined two sets of closely related questions. The first is why states would bother to structure a dispute settlement regime with the possibility of obtaining no compensation through litigation. Jack Goldsmith and Eric Posner posit that the system provides information about the extent (if any) to which a given action constitutes a violation, “or it can choose an outcome that would serve as a focal point for the coordination of states.”⁹² Their work draws from Giovanni Maggi’s insight that the monitoring and information dissemination effects of multilateral dispute settlement are independently valuable because they can help sustain multilateral

89. See GUZMAN, *supra* note 87.

90. See, e.g., Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455, 464-81 (1996); see also Jeff W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 INT’L SEC. 5 (1999) (discussing these criticisms).

91. This is because WTO law only allows for complaints against states made by other states.

92. GOLDSMITH & POSNER, *supra* note 14, at 153.

cooperation.⁹³ Therefore, even if the legal rules prevent the litigant from acquiring damages for past harms, so long as the litigant seeks sustained cooperation, it will find the dispute settlement process valuable.⁹⁴

A second stream of scholarship has focused on the question of why despite the in-built incentives for breach, states nevertheless refrain from doing so. Kyle Bagwell and Bob Staiger's work has been extremely valuable in this regard. They emphasize the importance of the long-term costs of retaliation and states' desire to avoid incurring such costs as playing a pivotal role in sustaining long-term cooperation.⁹⁵ In addition, they focus on the additional flexibility provided by legal temporary "escape clauses" in the treaties as providing an alternative to short-term breach.⁹⁶

Both streams of scholarship emphasize the role of reciprocity and retaliation. Neither stream, however, directly addresses the puzzle at hand. Although Goldsmith and Posner write a decade after the WTO's Dispute Settlement Understanding has been operationalized, they are careful to limit their analysis to the historical question of why the trade regime operated successfully in the GATT era despite the possibility of losing parties exercising a veto.⁹⁷ They avoid extending their theory to the WTO era to explain why the present system operates successfully despite the continued retention of the GATT's incomplete remedies.⁹⁸ Bagwell and Staiger's theory adopts a presumption that a breach will trigger immediate retaliatory consequences.⁹⁹ However, as already discussed, the WTO system does not empower harmed states to suspend concessions immediately after a breach is discovered. They do not directly address why states do not take advantage of the "free pass" afforded by the system, nor why we should consider the presumption to apply despite the remedies loophole.

Nevertheless, I suggest that the general insights from both streams of scholarship are correct. My explanation builds off the insights of interest-based theorists, but offers a more elaborate explanation of the mechanisms as operationalized within the trade regime. In doing so, I provide an answer to why the WTO has functioned relatively well to date, but suggest that this is conditional on the exercise of power rather than necessarily reflective of the

93. Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999).

94. Goldsmith and Posner suggest a number of other conditions need also apply for continued cooperation. These include: (1) whether the "tribunal makes decisions that consistently divide the surplus rather than favoring one state to the extent that the other state receives higher payoffs by failing to cooperate," and (2) whether "future payoffs and discount factors are high enough." In addition, the benefits of cooperation must be superior to the alternatives of resolving the dispute through diplomatic channels and through the creation of an ad hoc tribunal. GOLDSMITH & POSNER, *supra* note 14, at 153-54.

95. BAGWELL & STAIGER, *supra* note 13, at 101-03.

96. *Id.* at 104-06.

97. GOLDSMITH & POSNER, *supra* note 14, at 152-57.

98. *Id.* at 158-60 (expressing skepticism that the WTO innovations change the overarching dynamic, but noting a lack of conclusive evidence).

99. BAGWELL & STAIGER, *supra* note 13, at 101 ("When the domestic government cheats, however, it triggers a retaliatory phase . . .").

success of international judicialization.

A. *Drawing on Conventional Interest-Based Theory and Analyzing Its Limitations*

I adopt the standard view of interest-based theorists that a state's behavior is determined through a calculation of the relative payoffs of available policy alternatives. Where the costs associated with temporary breach are greater than the benefits, a state will find it in its interests to continue to comply with the particular treaty obligation. In contrast, where the benefits outweigh the costs and the relative payoff is greater than that associated with compliance, states will choose to breach temporarily.¹⁰⁰ Whether a temporary breach transforms into a longer-standing breach extending beyond the "reasonable period of time" turns on a similar analysis that has been discussed extensively in the WTO efficient breach literature.¹⁰¹ Therefore, I confine the analysis to only the first step in the decision process of whether a state should engage in a temporary breach.

As I discuss below, current attempts to explain why the costs associated with temporary breach are greater than the benefits are woefully incomplete. The benefits side of the equation is clear. A temporary breach allows a segment of domestic producers to capture, for a limited time, greater economic gains relative to what it would obtain under conditions of continued compliance. Domestic actors that interact with these domestic producers then capture second-order benefits associated with the first-order gains. For example, if the domestic producers' employment levels are relatively higher than what they would otherwise be, labor groups stand to gain. Similarly, if the domestic producers' purchases of inputs from upstream domestic suppliers are higher than what they would otherwise be, upstream suppliers also gain. This pattern then extends to third-order gains and beyond.

Balanced against these gains are a set of costs. Let us first consider the economic costs. The withdrawal of certain WTO treaty obligations temporarily results in increased costs for domestic consumers of the affected product. A temporary breach of tariff concessions on luxury cars, for example, benefits domestic producers of the product but hurts domestic consumers because it raises the overall domestic market price. Again, the costs extend beyond the immediate consumer. For example, if a temporary breach of tariff concessions on steel results in higher overall prices for steel, this affects not only domestic consumers of steel, but also downstream domestic producers that rely on domestic inputs made of steel.

In addition to the economic costs and benefits are the related political costs and benefits associated with a shift in trade policy. Often, when analyzing

100. This is not to suggest that all states are always able to accurately assess the true costs and benefits associated with breach when making this choice. A state, for example, may miscalculate on account of a misunderstanding, error, or incorrect speculation. States also operate under conditions of uncertainty. In addition, states may also experience unexpected shocks.

101. See *supra* note 10.

the net political effect, standard public choice theory comes into play. This explains why the government may adopt certain policies that are not welfare-maximizing for the country overall, but instead accommodate for protectionist rent-seeking by interest groups.

Were the calculation of interests based solely on the economic and political costs-and-benefits directly associated with the goods or services affected by a temporary breach, then it is unlikely that the equilibrium point reached would be one of thick compliance. A given state would find it to be in its interest to engage in temporary breach of a particular set of trade concessions.¹⁰² The exact composition of temporary breaches would depend on the country's particular resource endowment and its patterns of production, consumption, and trade. However, especially when the prospect of compensation or other forms of retrospective remedies does not exist, a state is likely to find it "efficient" to breach temporarily in a certain number of instances. Thus, the economic and political costs associated with the impacted goods or services alone cannot explain the relative infrequency of temporary breaches of WTO obligations. For the interest-based explanation to work requires consideration of additional costs.

Three sets of additional costs feature prominently in the literature. The first is that of reputation costs.¹⁰³ A state that is known to honor its commitments acquires reputational collateral. Such collateral is valuable because it increases the credibility of a state's promises and makes it easier to achieve cooperation in future negotiations. In addition, a state's reputation directly affects its soft power. In instances where a state chooses to breach its treaty commitment, even if only temporarily, it incurs a cost to its reputation. The exact amount turns on a variety of factors related to the nature of the breach itself and the context in which it occurred.¹⁰⁴

A second set of costs are litigation costs. A state can expect that for a portion of its temporary breaches, its trading partners will initiate a WTO case against it. Defending WTO litigation is costly as most countries rely on external counsel for this task. To not do so, on the other hand, will shorten the time period that one has to benefit from the illegal act. Thus, when calculating the payoffs from a temporary breach and assessing how long such breach should last, states must take into account litigation costs.

A third set of costs are transaction costs. If a state seeks to breach, but only temporarily, then the government has to endure the costs of enacting multiple policy changes at the domestic level—whether done through

102. For example, this might be the case in the luxury car example suggested above. If a state were a major producer of a product for which a set of politically unorganized consumers were its major consumers, and the product did not serve as a key input, then the state would find it to be in its interest to engage in a temporary breach. Another example might be certain insurance or legal services.

103. See, e.g., GOLDSMITH & POSNER, *supra* note 14, at 101-03; GUZMAN, *supra* note 87, at 34-45, 71-117.

104. See Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1861-65 (2002) (highlighting four factors affecting the calculation of the specific reputational cost incurred).

legislation, regulation, or executive order.¹⁰⁵ Such costs vary depending on the institutional structure of the state. In addition, the state also incurs costs at the international level, in terms of diplomatic and bureaucratic resources expended to explain its policy switches.

Costly policy pivots also highlight the potential for costs associated with increased risk. While a government may intend for the WTO-illegal policy to be temporary, there is the possibility that political opposition to pivoting back to a treaty-compliant position will harden, such that the illegal act endures after the expiration of the “reasonable period of time.” Governments face the risk that they may inadvertently trigger the retaliatory sanctions that they had sought to avoid.

All this is to suggest that even if a temporary breach does not lead to a suspension of trade concessions, it is not exactly cost-free. In understanding the rational calculation facing states, these other costs matter. The conventional account is that this tandem of costs is so high that the relative payoff of a temporary breach is lower than that of continued compliance. Therefore, even in the absence of the possibility of the WTO imposing any retaliatory costs for a temporary breach, states self-regulate to ensure strong compliance with their WTO treaty commitments.

Yet, the conventional account fails to offer a convincing explanation for why we see the patterns of temporary breach that we do see. As noted earlier, the United States and the European Union are the two parties against which the most complaints have been filed with the WTO DSB. Yet, it is far from clear that this is what the model would predict. How is it that the relative payoff of temporary breach is greater for such states? Why would they face higher benefits or lower costs for a temporary breach than their trading partners?

Of the cost factors emphasized by the conventional account, the one that would best predict such an outcome is litigation costs. Because of their wealth, the United States and the European Union would find the high litigation costs to be less burdensome than a poorer country would. However, the advent of the Advisory Centre on WTO Law (ACWL), which offers discounted legal services to developing countries, has helped to narrow this difference.¹⁰⁶ Moreover, litigation costs fail to explain why the United States or the European Union are more willing to be sued than other similarly wealthy countries (e.g., Singapore, Switzerland)—a difference that holds true even when adjustments are made for the size of the economies.

The other cost factors lend even less predictive support for such an outcome. When it comes to reputation costs, it is possible to spin a story in

105. For an elaboration of the specific nature of the transaction costs incurred in political markets as applied to a rational choice model, see, for example, Douglass C. North, *A Transaction Cost Theory of Politics*, 2 J. THEORETICAL POL. 355 (1990).

106. See Jan Bohanes & Fernanda Garza, *Going Beyond Stereotypes: Participation of Developing Countries in WTO Dispute Settlement*, 4 TRADE L. & DEV. 45, 72-75 (2012) (discussing how the ACWL provides services at deeply discounted rates and why its rates do not serve as a barrier to a country's willingness to bring a complaint).

which the United States and the European Union may have fewer reasons to care about their reputations. Given the size of their markets, their policymakers might believe that trading partners will be keen to cooperate with them regardless of whether their treaty promises are perceived to be credible. But this narrative does not square with actual facts. In reality, the United States and the European Union both emphasize the importance of soft power and appear to care about their reputations in the global arena.¹⁰⁷ By contrast, other countries that have cultivated a reputation for willingness to defy the system in other realms of the international economic order (e.g., Argentina, Venezuela) have not been keen to exploit the remedies loophole.

Likewise, on the issue of transaction costs, one would expect that such costs are higher in countries with deliberative democracies and complex bureaucracies. Thus, one might expect them to be more hesitant to engage in a temporary breach. Yet, precisely the opposite is true. As noted earlier, the vast majority of temporary breaches are in democracies. One might posit that this is because the higher transaction costs are more than offset by the higher political gains that governments in democracies receive from a particular temporary breach relative to authoritarian governments. Even so, still left unresolved is the question of why among democracies, the United States and the European Union take advantage of the temporary breach loophole much more than other democratic WTO members (such as India or Mexico).

Therefore, the conventional account of the exact mechanics at work leave something more to be desired. When it comes to explaining the temporary breach puzzle, it may well be the case that the WTO system of imperfect remedies is not exploited frequently because the relative payoffs of temporary breach are lower than those associated with continued compliance in most instances. But the account given to date fails to deliver a convincing analysis of precisely how and why this is the case.

B. *Towards a Revised and Elaborated Theory*

I argue that two important elements that underlie the WTO legal system are missing from the conventional account. First, power asymmetries play an important role in determining both the substance of the law and the nature of relationships among the actors within the system. Second, the WTO agreements are not static treaties. Rather, the WTO system has an in-built dynamic for the continued evolution of trade concessions among dyads or a limited subset of its members. The interactions between these two elements

107. See Michael Smith, *Between Two Worlds? The European Union, the United States and World Order*, 41 INT'L POL. 95, 106 (2004) (characterizing "the approach of the Europeans to world order issues" as one in which most EU member states have "an addiction to 'soft power'"); Ernest J. Wilson III, *Hard Power, Soft Power, Smart Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 111 (2008) ("As we look toward the future, soft power calculations should figure far more prominently in the design of American national security and foreign policies."); see generally Joseph S. Nye, Jr., *Soft Power and European-American Affairs*, in *HARD POWER, SOFT POWER AND THE FUTURE OF TRANSATLANTIC RELATIONS* 25, 25-34 (Thomas L. Ilgen ed., 2006) (contrasting European and American soft power).

work to create additional costs associated with a temporary breach that have been overlooked in the conventional account. The nature of these costs, however, differs depending on the type of state concerned. Below, I first explain the overall interaction between these two elements. I then elaborate on the specific costs faced by different categories of states.

Let us first briefly discuss the element of power. Within interest-based approaches to analyzing treaty compliance, power consistently has played an important role.¹⁰⁸ My argument here is that the WTO context is no different. At first glance, it may appear the WTO agreements (specifically, Article 23 of the DSU) require countries to sign away their right to resort to raw power to enforce trade treaties in favor of judicial recourse through the WTO DSB.¹⁰⁹ Article 23 also requires that WTO members refrain from retaliation through the suspension of trade concessions unless WTO judicial proceedings have concluded and the DSB has granted authorization. Nevertheless, despite these limitations, power—and more specifically, power asymmetries among WTO members—continues to play a key role in the enforcement of WTO law.

What do I mean by power? Power takes on a variety of forms.¹¹⁰ Here, I am concerned primarily with economic power, and specifically that associated with a state's market power. To a more limited extent, military power may also factor into the equation. Within the membership body of the WTO, economic power has been, and continues to be, dispersed asymmetrically. The same is true also of military power.

To understand why power asymmetries continue to matter requires that I draw in the second element of the WTO law that has been frequently overlooked by general international law scholars when discussing the WTO regime. Much attention has been devoted to the general exceptions of GATT Article XX and GATS Article XIV.¹¹¹ However, considerably less attention has been paid to the exceptions of GATT Article XXIV and GATS Article V or the Enabling Clause.¹¹² These provisions are equally important, for they highlight that the WTO agreements do more than set reciprocal trade concessions among

108. The importance of power in contemporary debates dates back to Hans Morgenthau who wrote that international law should “be seen within the sociological context of economic interests, social tensions, and aspirations for power, which are the motivating forces in the international field” Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260, 269 (1940). For more recent discussions, see, for example, Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64 (2006); and William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. J. INT’L L. (forthcoming 2015), <http://ssrn.com/abstract=2378912>.

109. DSU art. 23.2.

110. See generally JOSEPH NYE, *THE FUTURE OF POWER* (2012) (describing military, economic, and soft power and their importance for continued American geopolitical influence in the twenty-first century).

111. GATT, *supra* note 22, art. XX; General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 (1995) [hereinafter GATS].

112. GATT, *supra* note 22, art. XXIV; GATS, *supra* note 111, art. V; Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980).

states. The treaties also provide a framework for gradual continued trade liberalization. In other words, the WTO regime is not static, but dynamic and evolving. Or as economists would characterize it, trade agreements are incomplete and endogenous.¹¹³ While the current multilateral treaty may fix the terms of trade between multiple *pairs* of trading partners, it also allows for the terms of trade for a given pair to evolve toward expanded trade liberalization—without requiring necessarily that the expanded terms be granted to other trading partners.

More specifically, the WTO legal system should be conceptualized as consisting of three different forms of legal obligations:

At its core are a set of reciprocal concessions that must be extended to all WTO members according to a most-favored-nation (MFN) principle. Such concessions are negotiated at the multilateral level. They can be updated over successive negotiating rounds, but only very limited updating has occurred since the Uruguay Round concluded in 1994.

In addition, the system permits WTO members to make additional reciprocal concessions with trading partners that liberalize trade beyond what is required at the multilateral level. These concessions often take the form of PTAs, of which more than 400 have been concluded and which vary in terms of their level of integration.¹¹⁴ GATT Article XXIV and GATS Article V establish a set of requirements that must be fulfilled in order for an agreement between two or more WTO members to qualify as a PTA. The most significant among these is a requirement that the PTA must result in liberalization of “substantially all” trade.¹¹⁵ With the impasse in the Doha Round, at present, PTAs are the main focus of ongoing trade negotiations by the major countries.

Finally, the system also permits WTO members to make additional unilateral concessions in favor of liberalization for certain trading partners that are developing countries. These concessions do not necessarily take the form of treaties; they may instead be captured in administrative decrees and/or domestic legislation. Today, several countries grant such concessions, most commonly through a Generalized System of Preferences (GSP) program. A WTO member is allowed to set the breadth of its GSP program, both in terms of the scope of the covered products to which preferences are given and the scope of countries. However, this cannot be done arbitrarily. In *EC—Tariff Preferences*, the Appellate Body established that any difference in the level of preference given to similarly-situated developing countries must be done on the basis of “objective criteria.”¹¹⁶

113. See Henrik Horn, Giovanni Maggi & Robert Staiger, *Trade Agreements as Endogenously Incomplete Contracts*, 100 AM. ECON. REV. 394 (2010).

114. They may also take the form of plurilateral agreements concluded under the auspices of the WTO (e.g., Information Technology Agreement) or outside of the WTO (the ongoing Trade in Services Agreement).

115. GATT, *supra* note 22, art. XXIV. The corresponding obligation in the GATS is that “substantially all discrimination” must be eliminated for those sectors specified in an agreement with “substantial sector coverage.” GATS, *supra* note 111, art. V.

116. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff*

One can conceive of the first form of obligations as a general MFN obligation binding upon all WTO members, for which the second and third forms serve as optional exceptions to the MFN rule. In other words, states have a choice as to whether they wish to engage in PTAs or unilateral trade concessions. Only the first form of legal obligations is required; the other two are optional.

Now, let us bring these elements together. In a regime where treaty terms are not fixed but can evolve, power asymmetries matter greatly. To understand why, consider each of the three forms of WTO legal obligations once more.

First, the substance of the core MFN provisions is reflective of the power asymmetries existent at the time the WTO agreements were drafted.¹¹⁷ As Richard Steinberg has observed, “GATT/WTO decision-making rules have allowed adherence to both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality. Trade rounds may be launched by law-based bargaining, but powerful states have dominated agenda setting, and rounds have been concluded in the shadow of power.”¹¹⁸ Even with a consensus decision-making rule, the legal substance of WTO law is reflective of the dominant interests of the powerful states in the Uruguay Round—specifically, the United States and the European Communities.¹¹⁹

Power asymmetries also come into play when considering the second form of reciprocal concessions, PTAs. When it comes to potential PTA partners, not all countries are equal. A PTA concluded with a country with a large internal market and sizeable consumer base for one’s exports is much more valuable than a PTA with a smaller, poorer country. Powerful states are therefore in a stronger position to decide with whom they wish to engage in additional non-MFN trade liberalization and on what terms.

Finally, with respect to the additional unilateral trade concessions, these are essentially one-sided preferences granted by a more powerful state (i.e., generally a developed country) to less powerful ones (i.e., developing countries and/or Least Developed Countries (LDCs)). Powerful states are again placed in a stronger position because each singularly sets the criteria that it will employ to decide which of its trading partners qualify for the additional trade

Preferences to Developing Countries, ¶183, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC—Tariff Preferences AB Report*].

117. Power asymmetries may also indirectly affect the substance of WTO law through interpretation of treaty provisions. While the DSU does not formally specify the composition of the Appellate Body, in practice, major trading powers have tended to secure seats for their nominees. Whether this result, in turn, affects interpretation of particular provisions in favor of the interests of established powers is debatable. However, as this element is not critical to my theory, I do not elaborate upon it in this Article.

118. Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT’L ORG. 339, 365 (2002) (citing James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943 (1998)).

119. See *id.* at 342, 346-49, 365-66 (describing how the GATT/WTO operates under an “invisible weighting” of power and concluding that the GATT/WTO’s consensus decision-making process is “organized hypocrisy in the procedural context”). Note that the European Communities is the predecessor to the European Union which was in existence at the time of the Uruguay Round’s conclusion in 1994.

concessions.¹²⁰ If a less powerful state wishes to obtain trading terms that are more favorable than the MFN terms, it again is subject to the grace of the more powerful state.

Therefore, power asymmetries affect not only the substance of existing WTO law but also the ongoing interactions between trading partners. A state's obligations are consistently evolving in light of developments in multilateral negotiations, PTA negotiations, and unilateral trade preferences—all of which take place in the shadow of power.

In this context, my argument is that different types of states run the risk of incurring different forms of additional costs when they engage in a temporary breach. For explication purposes, I identify four categories of WTO members: (1) typical developing and LDCs; (2) emerging powers in the developing world; (3) small and medium-sized advanced economies; and (4) large advanced economies. Understanding the nature of these additional costs for each category of states, I suggest, is the key to resolving the temporary breach puzzle of WTO law.

1. *Developing and Least-Developed Countries*

The vast majority of the WTO's member states are developing countries. I group all but the large emerging powers together into a single category. While I recognize the heterogeneity of the group, I do so because coercive power is at the heart of understanding why all these countries do not abuse the WTO "free pass" to engage in temporary breaches.

Coercive power is derived from raw power asymmetries. The asymmetry here stems from the fact that countries in this category find it much more important to gain access to the markets of certain key developed economies than vice versa. For example, Cambodia finds trade with the United States or Japan to be much more critical than vice versa. Importantly, in this context, the optional nature of the MFN exceptions provides large advanced economies with much greater leverage, or coercive power, over most developing countries.

How exactly does coercive power come into play with respect to a temporary breach? Doesn't the DSU level the playing field by requiring that all states—big and small—turn to the WTO to adjudicate an allegation of breach? Specifically, Article 23.2 of the DSU requires states to refrain from suspending trade concessions or other obligations until after it succeeds in WTO litigation and the respondent has shown itself unwilling to comply with the judgment within a "reasonable period of time." In light of this provision, aren't all WTO members obliged to allow each other to take advantage of the "free pass"? How is it that power politics remains relevant?

120. As noted earlier, such criteria cannot be set arbitrarily. The Appellate Body has decreed that "preference-granting countries are required, by virtue of the term 'non-discriminatory,' to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial, and trade needs' to which the treatment in question is intended to respond." *EC—Tariff Preferences* AB Report, *supra* note 116, ¶ 173.

If one examines closely the language of Article 23 of the DSU, the limitation on suspension of concessions or other obligations applies only to those “under the covered agreements.”¹²¹ In other words, the restriction is only with respect to the withdrawal of MFN obligations provided through the multilateral agreements (i.e., the first type of legal obligations discussed earlier). It does not extend to concessions or other obligations that arise outside of this context (i.e., the other two types of legal obligations discussed earlier). Therefore, despite the apparent limitations of Article 23 of the DSU, advanced economies have several means to retaliate against a developing country that engages in a temporary breach without first bringing a case before the WTO.

Consider first a scenario whereby the developing country is the beneficiary of preferential trade concessions through a GSP program. At present, 127 countries are beneficiaries of the various European GSP programs.¹²² The last incarnation of the U.S. GSP program similarly covered 129 countries.¹²³ Other countries that offer trade preference programs for developing countries include Japan, Canada, Australia, and Switzerland. If the beneficiary of such a program engages in a temporary breach that negatively impacts producers of a country that grants preferences, its trading partner can retaliate immediately by suspending the preferential trade concessions. It need not wait until the conclusion of WTO litigation to do so.

Therefore, for the vast majority of developing countries that benefit from a GSP or other trade preference program, there is no true “free pass.” A breach, even if temporary and remedied before the end of the “reasonable period of time,” can result in the suspension of trade concessions, albeit only of a preferential, and not MFN, form.

Do countries go so far as to actually cut off trade preferences for developing countries? The answer is yes, albeit not all that often. For example, in June 2013, the United States suspended GSP preferences for Bangladesh.¹²⁴ The European Union similarly withdrew GSP preferences for Sri Lanka in February 2010¹²⁵ and Belarus in June 2007.¹²⁶ What is interesting about all of

121. DSU art. 23.

122. EUROPEAN COMM’N, *THE EU’S NEW GENERALISED SCHEME OF PREFERENCES 13-14* (2013) (identifying 111 beneficiaries of the general arrangement and 16 beneficiaries of the GSP+ arrangement).

123. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP) GUIDEBOOK 17-19* (2012). Note that the U.S. program currently has not been reauthorized by Congress, but in the past, when this situation has arisen, Congressional reauthorization has been made retroactive.

124. Stephanie Clifford, *Obama to Suspend Trade Privileges with Bangladesh*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html>.

125. Implementing Regulation No. 143/2010, of the Council of 15 February 2010 Temporarily Withdrawing the Special Incentive Arrangement for Sustainable Development and Good Governance Provided For Under Regulation (EC) No 732/2008 with Respect to the Democratic Socialist Republic of Sri Lanka, 2010 O.J. (L 45) 1.

126. Press Release, European Commission, *EU Will Withdraw GSP Trade Preferences from Belarus over Workers’ Rights Violations* (June 18, 2007), http://europa.eu/rapid/press-release_IP-07-844_en.htm. For a more comprehensive discussion of EU withdrawal of GSP benefits, see CLARA PORTELA, *EUROPEAN UNION SANCTIONS AND FOREIGN POLICY: WHEN AND WHY DO THEY WORK* 148-

these cases is that the trigger events were trade-related but did not amount to a clear violation of WTO law. The fact that large powers are willing to take this dramatic step, even when WTO law is not directly violated, provides an important signal to trading partners of its resolve to use such preferences as leverage to advance trade interests.

When it comes to explicit violations of WTO law, an advanced economy usually has not had to go so far as to actually suspend preferential concessions. More often the path employed is simply to threaten to cut off such preferences in order to induce a change in behavior. For example, in 1999, the United States raised a number of concerns with Moldova over whether its intellectual property laws were in line with its WTO commitments, in response to an industry petition to revoke Moldova's GSP benefits.¹²⁷ Faced with this threat, Moldova addressed the issues of concern within months, leaving American industry officials satisfied that any potential breach was corrected.¹²⁸

The Moldova example above is not unique. To name a few other examples, the United States has also used GSP as leverage to induce Ukraine to strengthen its enforcement against intellectual property piracy, the Philippines to provide access to American pork products, and several countries to improve workers' rights.¹²⁹ These represent those instances where a country has chosen to make its threat public. More often than not, the threatened cut-off of preferential concessions is made in private between diplomats. By keeping the nature of the threats private, government officials on both sides retain greater flexibility when explaining their actions to affected domestic constituents, while minimizing the cost to bilateral relations.

In all, just the possibility of a revocation of preferential benefits in response to a breach produces a powerful chilling effect on the behavior of developing countries. Developing countries that are reliant on GSP to gain preferential access to key export markets must act carefully so as to not upset those trading partners, lest they find their preferences eliminated.

Consider now a second scenario in which a developing country gains preferential trade concessions through a PTA rather than a GSP program. Again, should this country engage in a temporary breach, the existence of additional non-MFN trade preferences provides its trading partner with a means

61 (2010).

127. Letter from Eric Smith, President, Int'l Intellectual Prop. Alliance, to GSP Subcommittee, Office of the U.S. Trade Rep. (June 16, 1999), http://www.iipa.com/gsp/1999_Jun16_cmts_moldova.html.

128. Letter from Eric Schwartz, Counsel, Int'l Intellectual Prop. Alliance, to Jon Rosenbaum, Office of the U.S. Trade Rep. (Oct. 23, 2000), http://www.iipa.com/gsp/2000_Oct23_GSP_Moldova.pdf.

129. For other examples and a more in-depth discussion of U.S. GSP conditionality, see, for example, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-R09, U.S. TRADE PREFERENCE PROGRAMS: AN OVERVIEW OF USE BY BENEFICIARIES AND U.S. ADMINISTRATIVE REVIEWS (2007); and Emily Blanchard & Shushanik Hakobyan, *The U.S. Generalized System of Preferences in Principle and Practice* (Lewen Ctr. for Global Governance Studies Working Paper No. 102, Dec. 2013), http://faculty.tuck.dartmouth.edu/images/uploads/faculty/emily-blanchard/Principle_v_Practice_Paper.v13.pdf.

to retaliate immediately in line with WTO rules. If the PTA has not yet been ratified, the affected country can threaten to withhold ratification in light of the temporary breach. If it has already been ratified, the affected country still has several options. The most extreme would be to threaten withdrawal from the PTA altogether. If the PTA calls for subsequent negotiations of the tariff reduction schedule, then a less extreme option would be to hold up such negotiations in light of the breach. Depending on the terms of the PTA and a country's willingness to violate PTA (but not WTO) terms, it might also consider withdrawing certain PTA trade preferences. Again, a country may not have to even go this far. A threat, so long as it is credible, may induce the necessary chilling effect.

Even if a large developed country does not have a PTA with the violating country, it can use the prospect of a future PTA as a point of leverage. The large advanced economy simply signals to a country that is considering engaging in a temporary breach that such behavior will impair its chances of being invited to negotiate a future PTA. Such signaling is likely to produce a chilling effect on the behavior of any developing country hoping to benefit from a PTA with a large developed country. Interestingly, this type of effect is likely to have the greatest impact on wealthier developing countries, which may have graduated from GSP programs and are now engaged in a competition with one another to conclude PTAs with the large developed countries that are their key export markets. This is particularly true if their exports are facing pressure from lower-wage competitors in China and elsewhere.

Large developed countries have not hesitated to use PTAs as points of leverage with developing countries. Before even agreeing to enter into negotiations, the United States will often require that a potential PTA partner adopt programs designed to address U.S. trade concerns. For example, prior to beginning PTA negotiations with Thailand in 2004, the United States required that Thailand establish a joint work program to address intellectual property, regulatory issues affecting investment, and technology policies.¹³⁰ More recently, the United States has asked the same of Vietnam, before agreeing to its inclusion in the Trans-Pacific Partnership negotiations. The scope of issues to be addressed in the joint U.S.-Vietnam work program is even broader; besides intellectual property and investment, it also includes technical regulations, services, food standards, and labor rights.¹³¹

Both the United States and the European Union have made clear that behavior deemed problematic can slow down the tempo of PTA negotiations, and in some instances, even lead to their suspension. For example, the EU-India negotiations made tremendous headway in 2012, but ground to a halt in

130. Trade and Investment Framework Agreement Between the United States of America and the Kingdom of Thailand, U.S.-Thai., Annex, Oct. 23, 2002, <http://www.ustr.gov/sites/default/files/US--Thailand%20TIFA.pdf>.

131. Trade and Investment Framework Agreement Between the Government of the United States of America and the Government of the Socialist Republic of Vietnam, U.S.-Viet., Annex, June 21, 2007, http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file81_12935.pdf.

2013 as differences emerged in intellectual property, and in particular, India's use of compulsory licenses and patent revocations against European drugs.¹³² Similarly, the U.S.-Thailand negotiations were halted in 2006, ostensibly in response to the Thai military coup.¹³³ However, bilateral tensions over Thailand's intellectual property policies also played a key role.¹³⁴ Again, the American and European actions were taken in response to trade policies that did not amount to an overt violation of WTO law. The fact that they acted under less dramatic instances signaled credible resolve of their willingness to use PTAs against temporary breaches that harm their interests.

As was true of the GSP examples, just the possibility that a breach would impact the potential for a PTA produces a powerful chilling effect on the behavior of those developing countries interested in a PTA. Even if temporary breaches avoid formal sanctions, they still come with the cost of foregoing potential PTA-related benefits.

For developing countries, the MFN exceptions within the WTO regime operate as a double-edged sword. On the one hand, they provide a legal means for developing countries to secure unilateral trade preferences from developed countries. On the other hand, because developed countries can attach trade-related criteria to these preferences, they also provide developed countries with greater retaliatory power against temporary breaches committed by developing countries.

Beyond the points of leverage provided by the MFN exceptions in the WTO regime itself, power asymmetries between developed and developing countries also exist in other realms. Developed countries can also attempt to link such elements (e.g., foreign aid, security, technical assistance, etc.) if necessary in order to further bolster their coercive power. In short, developed countries have sufficient means to declare credibly to developing countries: follow your treaty commitments, and we will reward you; breach, and we will punish you.

Therefore, for the vast majority of the WTO's 160 members that are developing countries, temporary breaches are not worthwhile even if the system does not provide for retrospective damages. But this is not necessarily due to concerns over reputation, litigation, or transaction costs. At the heart of the equation is still the issue of retaliatory costs. For most developing countries, certain developed countries hold sufficient leverage over them. They can raise, legally, the costs of a temporary breach such that the costs outweigh the

132. For a discussion of how intellectual property protection and access to generic medicines is a key issue in the ongoing PTA negotiations, see Jan Wouters et al., *Some Critical Issues in EU-India Free Trade Agreement Negotiations* 10-12 (Leuven Ctr. for Global Governance Studies Working Paper No. 102, Feb. 2013), http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp101-110/wp102-wouters-goddeeris-natens.pdf.

133. See EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL32593, THAILAND: BACKGROUND AND U.S. RELATIONS 13-14 (2008).

134. See Jerome Reichman, Comment, *Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options*, 37 J.L. MED. & ETHICS 247, 258-59 (2009) (noting the extent of U.S. reprisals against Thailand). Note that PTA negotiations did not resume even after democracy was restored in 2007, nor after the party originally spearheading the PTA was returned to power in 2011.

benefits. Moreover, because they can do so immediately, the growing time required for WTO dispute settlement is immaterial to their decision. Consequently, the rational behavior for this set of countries is to engage in thick cooperation rather than try to take advantage of the WTO's imperfect remedies.

The theory above is designed to explain why developing countries do not attempt to take advantage of the WTO's incomplete remedy *most* of the time. I do not mean to suggest that coercive power ensures that developing countries will never breach. Under certain conditions, governments facing domestic protectionist pressures will acquiesce, preferring to rely on WTO litigation or an explicit demonstration of coercive force by a foreign power to force a policy change rather than expending political capital to overcome domestic opposition.

Nor do I mean to suggest that developed countries will always seek to resort to power to dissuade or end a temporary breach, even if they have the means and leverage to do so. Instead, at times, they may choose to file a WTO case instead. This begs the related question of what work the WTO DSB is doing if the key enforcement device is power. Why do powerful countries bother with the DSB? Put differently, what difference would it make if the DSB disappeared tomorrow?

Even for powerful states vis-à-vis developing countries, the DSB serves a valuable role. It enhances the set of options available for securing compliance with ongoing law. A powerful country always has the option of resorting to power, whether through GSP, PTAs, or other mechanisms. But the presence of the DSB offers it another alternative. It can willfully choose to accept the additional harms of a temporary breach for a fixed period in exchange for sanctioning pressure that arises from a judicial process rather than a crude threat. Under some circumstances, a powerful country may consider this trade-off worthwhile; at other times, it may not. The key point is that the DSB provides the powerful with more options, which, I suggest, is itself valuable.

When might developed countries prefer to use WTO litigation to compel change rather than turn to more blunt forms of coercive power? One example is when a trade dispute arises between two countries with sensitive bilateral relations. For example, if the breaching country is a key ally, one might be hesitant to apply direct coercive power out of fear that it would antagonize one's friends. Similarly, if the dispute is between two countries seeking rapprochement, there may be a fear that a deployment of coercive force would destroy any carefully crafted forward momentum. The option of resorting to WTO litigation therefore offers a means to compartmentalize the dispute through judicialization without jeopardizing the other elements of the relationship.

Another example is when the breach arises due to domestic tensions between pro-protectionist and pro-liberalization political factions. The explicit threat of coercive force by a foreign power may strengthen the hand of the protectionists, who will appeal to nationalism to rally the populace to remain firm. Coercive force therefore could weaken pro-liberalization reformers,

whose long-term success the developed power hopes to cultivate. Wishing to avoid such a dynamic, the developed power may decide again that it is better to resort to litigation, even if it means bearing the short-term cost of the temporary breach. In other words, a country may choose to litigate if it increases the odds that power within the domestic political economy will shift toward those more favorable toward its interests.

Therefore, we see several new WTO cases each year by developed countries against developing countries. Even if power can be effectively deployed to end a breach, it does not necessarily suggest that coercive force is necessarily always the first-best option. The DSB provides an additional alternative that developed countries may find to be more attractive to exercise under certain circumstances, albeit with the cost of enduring a longer temporary breach.

The proposed theory therefore helps to explain the disparity in the frequency of temporary breach between developed and developing countries. It also resolves the larger question of why, when facing WTO laws viewed as disadvantageous to their economies, developing countries simply do not ignore these laws until a WTO ruling compels them to do so. Although they could reap temporary gains from breach because the system does not impose retrospective remedies, the threat of coercive power provides for the possibility that such gains will be less than the costs to be paid through the loss of preferential tariffs, the possibility of a PTA, or other non-trade benefits. Thus, governments in developing countries self-regulate to keep temporary breaches in check, even when WTO law does not formally ensure a remedy for such breaches.

Two quick caveats. First, the explanation that I have sketched out above emphasizes power asymmetries and the greater coercive power to which developing countries are subject. I stress these elements because their role in explaining the puzzle of why the WTO dispute settlement process functions effectively despite imperfect remedies has been underappreciated in the literature. Nevertheless, I fully recognize that there may be a domestic political economy story that complements this explanation. Some governments, especially in developing countries, have used WTO commitments as a means to enact domestic economic reforms through external treaty lock-in. Such governments would have an additional incentive to not undertake temporary breaches for this would undercut their own domestic agenda, at least in the early stages when this agenda is just taking hold. This domestic political economy rationale may be much more important than external coercion in *some* instances. But because it does not hold true across the board, we need a more comprehensive explanation for why we see thick cooperation in developing countries of all forms.

Second, and relatedly, I do not mean to suggest that other forces are not at work. It is possible that a particular developing country may have certain interests in preserving the WTO as a stable legal system. After all, the DSB is

one of the few international legal systems offering weaker states recourse against more powerful states that fail to comply with a judgment.¹³⁵ I am contending that the mechanisms associated with power asymmetries are the strongest force at work in explaining the temporary breach puzzle for developing countries. But it is not necessarily the only one, because countries respond to various kinds of incentives as well.

2. *Emerging Economies*

What about the largest of the developing countries? Does the narrative above hold true for the major emerging economies—the so-called BRICS (i.e., Brazil, Russia, India, China, and South Africa) as well as the other large developing countries (e.g., Indonesia, Turkey, Mexico)? Or does their size render them immune to attempts by the established trading powers to coerce them to comply with their WTO obligations and refrain from temporary breaches? The answer is that it simply depends on the country.

Despite their size, a number of these countries remain beholden to the trade preferences granted by advanced economies. For example, Brazil, India, Indonesia, Russia, South Africa, and Turkey all qualify for the U.S. GSP program.¹³⁶ China is the lone exception. Until 2014, all these major emerging economies qualified for some form of European trade preference.¹³⁷ For some countries, the value of GSP is significant. For example, the European Union represents India's largest export market and the third-largest export market for Indonesia.¹³⁸ According to EU estimates, more than half of India's exports are to the European Union and nearly thirty percent of Indonesia's exports benefit from preferential tariff rates.¹³⁹ South Africa has been a primary beneficiary of U.S. preferences granted under the African Growth and Opportunity Act.¹⁴⁰ The situation for this set of countries is not that different than that of other developing countries. The large advanced economies retain significant leverage over these countries through their trade preference programs.

Turkey and Mexico fall into their own unique category. Each country has

135. See DSU arts. 21-22.

136. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 123, at 18.

137. See Regulation No. 978/2012 of the European Parliament and of the Council of 25 October 2012 Applying a Scheme of Generalised Tariff Preferences and Repealing Council Regulation (EC) No. 732/2008, 2012 O.J. (L303). Under the newly-revised European program, Brazil no longer qualifies for GSP benefits, and several preferences for China have been eliminated.

138. Author's calculations based on information available in U.N. Comtrade database for 2012. See Dep't of Econ. & Soc. Affairs, *supra* note 77.

139. *Commission Staff Working Document Impact Assessment Annexes Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Applying a Scheme of Generalised Trade Preferences*, at 13, COM (2011) 241 final, SEC (2011) 537 final (May 10, 2011) [hereinafter *Commission Staff Working Document*].

140. Stephen Hayes, *What We Know and Don't Know About Trade with Africa*, U.S. NEWS & WORLD REP., Nov. 18, 2013, <http://www.usnews.com/opinion/blogs/world-report/2013/11/18/a-new-report-could-give-a-clearer-picture-of-us-trade-with-africa>; see also *Written Response of the Minister of International Relations and Cooperation to Question Paper No. 7-2013*, DEP'T OF INT'L RELATIONS & COOPERATION (Aug. 21, 2011), <http://www.dfa.gov.za/docs/2013pq/pq232.html> (highlighting that without AGOA, South Africa would run a large trade deficit with the United States).

a shared border and an asymmetrical power relationship with its major trading partner.¹⁴¹ Maintaining a PTA with this partner is critical to its economy. This dynamic allows its partner and its allies to maintain leverage over both Turkey and Mexico to dissuade temporary breaches, albeit through a different mechanism than that of a GSP program.

This leaves China, Russia, and Brazil. Although all three countries still benefit from a trade preference program, these benefits are not significant. Nor do any hold realistic aspirations of entering into a PTA anytime soon with the United States or European Union. As I will elaborate upon in Part III, both China and Russia therefore pose certain challenges, at least with respect to temporary breaches of WTO obligations. For the moment, this is not the case with Brazil, for reasons less to do with power than with reputation. Brazil campaigned hard and successfully for its former WTO Ambassador, Roberto Azevedo, to become the Director-General of the WTO. With a Brazilian currently heading the WTO, for the time being at least, Brazil is likely to refrain from taking steps that would undermine the organization's, and its own, reputations.

Therefore, there is no singular answer for why emerging powers do not engage in temporary breaches of WTO law more frequently. The group is relatively heterogeneous when it comes to the costs and benefits that each country faces. However, for the moment, several of the large emerging economies continue to face an additional set of economic costs related to their continued asymmetrical power relationship vis-à-vis developed countries. Like the costs faced by their smaller developing country counterparts, such costs serve to rein in any temptation to breach temporarily. But as I will discuss in Part III, this may no longer be true of China or Russia.

3. *Small and Medium-Sized Advanced Economies*

What about developed countries? If they benefit from asymmetries in economic power, why do they not take advantage of the remedies loophole to engage in temporary breaches with impunity?

For a subset of small developed countries (e.g., New Zealand, Singapore), their economies are heavily dependent on trade with others. Although they do not benefit from GSP and other preferences for developing countries, they partake actively in a PTA-oriented strategy in order to secure preferential tariffs in key markets. Moreover, they are disproportionately likely to depend on other developed countries in other non-trade areas (e.g., security). Thus, the coercive power explanation discussed above also applies to this subset.

A similar dynamic holds true for several of the medium-sized advanced economies. For example, consider the case of South Korea. Its economy grew

141. The Turkey-EU Customs Union and the North American Free Trade Agreement illustrate this dynamic. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Union, 1996 O.J. (L 35) (implementing the Turkey-EU Customs Union).

spectacularly in the 1980s, during a time when, as a developing country, it still qualified for GSP programs in key export markets. In 1989, the United States decided to withdraw GSP benefits. The formal reason given was South Korea's rapid economic growth, but others have noted that U.S. frustration with policies restricting access for American producers may have also played a role.¹⁴² For a period in the 1990s, South Korea, without GSP, found itself less inclined to restrain temporary breaches simply to preserve preferential trade benefits.¹⁴³ But as Korean firms moved up the global production value chain, South Korea then shifted to a strategy of seeking PTAs with its key export markets.¹⁴⁴ By lowering tariffs, PTAs afford Korean exporters an important cost advantage over their competitors (e.g., Japanese and Taiwanese firms). A coercive power dynamic then reemerged. Even as it has grown wealthy and become a member of the OECD, South Korea still needs to cultivate favorable economic relations with the major advanced trading powers with whom it seeks PTAs. Hence, it has followed its WTO commitments squarely; only one complaint has been raised by a developed country against Korea since 2002, which was eventually settled.¹⁴⁵

Therefore, for most small and medium-sized advanced economies, power asymmetries—on account of a desire for PTAs and/or linkages to other issues (e.g., security)—continue to explain why such countries have not exploited the remedies loopholes in WTO law. If such a country did exploit the loopholes, its more powerful trading partners have sufficient leverage to generate costly consequences, even prior to the conclusion of WTO litigation. Again, a true “free pass” does not exist.

In addition, the caveats noted above for developing countries continue to apply for this group. I am simply suggesting that the costs associated with power asymmetries—particularly when exercised with PTAs—are the strongest force in play for this group. But this is not to rule out the possibility of other systemic interests or domestic political factors at work. In other words, I am arguing that the mechanisms described above play a key role in explaining why we do not observe frequent temporary breaches from this group of states,

142. Jay S. Newman, *Korea and the American Generalized System of Preferences: Was Graduation a Proper Response?*, 11 U. PA. J. INT'L BUS. L. 687, 696-98 (1990).

143. This coincides with a period in which several WTO cases were brought against South Korea. *Chronological List of Disputes Cases*, *supra* note 70.

144. See, e.g., Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, EU-S. Kor., May 14, 2011, *reprinted in*, 2011 O.J. (L 127) 6; Free Trade Agreement Between the United States of America and the Republic of Korea, U.S.-S. Kor., June 30, 2007, *modified*, Feb. 10, 2011, <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; see also *South Korea*, EUR. COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea> (last visited Dec. 4, 2014) (describing the EU-Korea trade relationship);

145. See Request for Consultations by Canada, *Korea—Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WT/DS391/1 (Apr. 15, 2009); Notification of a Mutually-Agreed Solution, *Korea—Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WT/DS391/9 (June 21, 2012). Prior to that case, the last complaint was *Korea—Commercial Vessels*, filed by the European Communities in October 2002. See Request for Consultations by the European Communities, *Korea—Measures Affecting Trade in Commercial Vessels*, WT/DS273/1 (Oct. 24, 2002).

but I am not suggesting that power is the only factor at work.

4. *Large Advanced Economies*

This leaves a small group of developed countries with large economies (e.g., the United States, the European Union, and Japan). Their incentives for not abusing the WTO's incomplete remedies to engage in frequent temporary breaches are quite different than those of other countries. I suggest that the WTO legal rules, as they currently stand, serve their collective interest. This creates incentives for the group to work together to ensure that such interests are not undermined.

As mentioned earlier, this set of advanced countries—sometimes described as the “Quad” or the old “Green Room” countries—dominated the agenda during the Uruguay Round negotiations. While these powers each made major concessions, they also sought and obtained several subsequent carve-outs in the law to safeguard their domestic political economy interests. For example, agricultural subsidies are treated differently than subsidies for other tradable goods.¹⁴⁶ Moreover, they added new legal disciplines, such as those on intellectual property, which stood to benefit their shifting trade interests.¹⁴⁷ In addition, the WTO regime preserved and further formalized the GATT-era flexibility to enact trade remedies, such as anti-dumping duties, that serve as a critical “escape valve” for developed countries facing imports from abroad.¹⁴⁸ Finally, as noted in Part I, one might even speculate that the DSU rules were designed to serve such interests. The substance of the law was shaped in the “shadow of power.”

Developing countries subsequently expressed their dissatisfaction with the imbalance resulting from the Uruguay Round. They issued a demand that they would only partake in another multilateral round if it addressed development concerns. But after twelve years, the so-called Doha Development Agenda remains stalled.¹⁴⁹ Consequently, the WTO legal rules, as they currently stand, still reflect the Uruguay Round negotiating bargain that advantages these established advanced economies. However, they increasingly fail to deal with newly-emergent issues on the trade agenda.

146. *Compare* Agreement on Agriculture arts. 8-11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410, *with* Agreement on Subsidies and Countervailing Measures art. 3.1 & Annex 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

147. *See generally* TRIPS Agreement, *supra* note 47.

148. *See generally* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279; Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154; SCM Agreement, *supra* note 146.

149. Dan Ikenson, *Lessons from Bali for WTO and Transatlantic Trade Negotiators*, FORBES, Dec. 18, 2013, <http://www.forbes.com/sites/danikenson/2013/12/18/lessons-from-bali-for-wto-and-transatlantic-trade-negotiators> (describing the Doha Round as “hopelessly stalled” even after multilateral negotiations at the 2013 Bali Ministerial forged an agreement on trade facilitation, a “tiny fraction of the Doha Round’s objectives”).

Nevertheless, ensuring the survival and legitimacy of the current WTO legal regime serves this small, but economically powerful, group of countries' interests. Although the lack of retrospective remedies may mean that each could reap short-term gains from a temporary breach, such breaches are not exactly costless. Beyond the series of costs already mentioned (e.g., reputation, litigation, transaction, etc.), two others warrant further attention.

First, such breaches lead to greater uncertainty costs. If one's trading partners frequently engage in temporary breaches, one is less able to rely upon the treaty commitments made by one's partners. This increased uncertainty lowers the value of the commitments. It also raises tension among trading partners, increasing the possibility of relying upon diplomacy to resolve trade issues and the odds of an inadvertent trade war. A key reason that the established powers sought to reform the GATT by replacing it with the WTO was precisely to contain trade disputes among themselves to a judicial realm and avoid such costs.¹⁵⁰ To engage in repeat temporary breaches would undermine the progress made.

Second, repeat temporary breaches exact systemic costs for the legal regime itself. As the WTO regime's existing rules disproportionately favor the established powers, such systemic costs would lessen the gains that each derives from the system. As is true of other systems where a set of players derive disproportionate rents, the collective interest of the group is to ensure the system's continuation rather than seek to undermine each other through actions for short-term advantage that lead to the system's collapse.

Furthermore, as noted earlier, the WTO DSB continues to serve this group's interests. It allows such states to conserve their use of coercive force. Turning to a judicial solution, even with imperfect remedies, may be a more effective strategy when sensitive bilateral relations are at stake or complicated internal political tensions exist. Moreover, the DSB enables the large advanced economies to manage trade tensions among themselves, and therefore, limits negative spillover effects from trade conflicts that might impact their geopolitical alliances. Therefore, even though the large advanced economies can resort to power to advance their economic interests, they have a stake invested in preserving the legitimacy of the WTO system overall.

For the large advanced economies, this collective set of costs makes it unlikely that any would seek to engage in a strategy of repeat temporary breaches to take advantage of the system's imperfect remedies.¹⁵¹ Again, this is not to suggest that such countries will never engage in such breaches. Without the constraints of adverse coercive force, the United States and the European Union indeed do engage in temporary breaches with greater frequency than

150. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 250 (2004).

151. Joost Pauwelyn has referred to this set of costs as "community costs," which he notes can serve as the "kicker" for achieving protection, particularly if WTO rules are conceptualized as operating under a property rule. See JOOST PAUWELYN, *OPTIMAL PROTECTION OF INTERNATIONAL LAW* 163-78 (2008).

other WTO members. After all, faced with a given circumstance, a government may decide that such breach makes sense. This is especially the case when a government encounters strong domestic protectionist interests and can reap near-term political gains deemed critical for the government's survival. The analysis above simply seeks to explain why such breaches are not widespread even from powerful states, and why these countries too deem it in their interest to engage in thick cooperation.

* * *

To summarize, the willingness of the established economic powers to exercise coercive power to constrain other countries, as well as their collective self-interest in cooperating to maintain the global trading system, help to explain the puzzle of why countries comply with WTO law despite its lack of retrospective remedies. Although countries can get away with a temporary breach without having to pay any compensation for harm caused, such breaches are not truly costless for any WTO member. But what matters most are not necessarily the set of costs emphasized by the literature to date (litigation costs, transaction costs, reputation costs). Overlooked are a series of costs related to power asymmetries and the legal rules negotiated in the shadow of these asymmetries. They play the key role in explaining why the WTO system, despite its imperfect remedies, has functioned well to date.

C. *Assessing the Revised Theory*

How do we know that the answer given for the puzzle is indeed correct? The lack of a comprehensive database of temporary breaches of WTO and the difficulty in compiling such a database make it impossible at present to test its validity through regression analysis. I therefore offer my theory in conceptual form, with the hopes that, one day, the data will become available for further empirical analysis. Meanwhile, I suggest that the theory's explanatory power can be seen in its ability to clarify two existing trade-related phenomena for which other theories have not yet offered a compelling explanation.

First, recall that one quandary that has confounded other compliance theories is the fact that advanced developed countries appear to commit temporary breaches of WTO law with much greater frequency than developing countries. Together, the United States and the European Union accounted for more than half of the WTO's first 300 disputes. More disputes have been brought against the two than the collective sum levied against all WTO members classified by the World Bank as low-, lower-middle-, and upper-middle-income economies. Almost four times as many disputes have been brought against the United States than against India, the leading respondent among developing countries that have been part of the WTO since its formation.¹⁵²

152. China has defended more cases than India, but it only acceded to the WTO in 2001. See *Disputes by Country/Territory*, *supra* note 53. The implications of China's entry into the WTO regime and its economic rise are discussed further in Part III.

This seems counterintuitive. If the substantive terms of the existing WTO Agreements largely reflect the established powers' interests, one would think that it would be the developing countries—i.e., the “terms takers” upon whom the WTO agreements were foisted as a “take-it-or-leave-it” bargain—that would engage in temporary breaches most frequently. This should especially be the case if the treaty itself states that no compensation is necessary for temporary breaches. Moreover, legal capacity is not a barrier. The concept is simple and straightforward: ignore one's WTO treaty commitment until one loses a WTO case and then right before the expiration of the “reasonable period of time,” bring one's actions back in line with one's commitment.

Legitimacy, transnational legal process, and liberal theorists alike fail to explain why those most invested in shaping the law upon their terms would then be the most likely to abuse its “free pass.” Rational choice theorists, to date, have suggested that the reason may have to do with the larger size and wealth of the two established powers. They are better positioned to afford “efficient breaches” of WTO law, achieved through a rebalancing of concessions via WTO litigation. While in theory this is true, the facts do not bear out this explanation. The vast majority of the breaches of WTO law, including those by the two established powers, are only temporary in-kind and not of the “efficient breach” variety.

My theory suggests that the reason why established powers are more inclined to engage in temporary breaches of WTO law is because of the absence of a strong immediate retaliatory threat to serve as a restraint. Other countries that may be more dissatisfied with the equitable balance of WTO law nevertheless adhere to it more closely because of the threat of coercive force. The established powers face no comparable threat. Yet, they too will not abuse the WTO's remedies loophole excessively. My theory predicts that they will engage in temporary breaches only at a level where it does not undermine the overall stability of the WTO regime altogether nor introduce greater uncertainty in their bilateral trade relations.

The empirical evidence bears this out. Despite the greater ability of the established powers to exploit the WTO's imperfect remedies to reap temporary gains from breach, they have done so at a fairly modest level. On average, only 6.4 complaints are filed against the United States each year. The largest number of disputes against the United States concern anti-dumping duties.¹⁵³ In such cases, the scope of a breach is contained; the breach involves temporary protection of a discrete set of goods rather than an all-encompassing illegal trade policy. Such cases therefore exert a lower systemic cost. What we see are established powers exercising self-restraint. Their optimal strategy is to engage

153. As of November 2014, nearly two-fifths of the cases filed against the United States (47 of 121 complaints) concerned anti-dumping. This is larger than the percentage filed for any other subject matter. Author's computation based on information provided by World Trade Organization on breakdown of disputes by country/territory and by agreement. See *Disputes by Country/Territory*, *supra* note 53; *Disputes by Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (last visited Dec. 4, 2014).

in temporary breaches only to an extent that such breaches do not threaten the system's overall stability or legitimacy—which appears to be exactly what they are aiming to pull off.

A second quandary that the theory addresses is the question of why the WTO's growing "remedy gap" has had little impact on the actual behavior of states. As Rachel Brewster has highlighted, the length of WTO litigation proceedings has almost doubled since the late 1990s.¹⁵⁴ This increases the length of the "free pass," and hence its value. The conventional rational choice account suggests that this development should increase the marginal benefits associated with a temporary breach, and hence, the frequency of such breaches.¹⁵⁵ It is therefore worrisome. Brewster has warned that the WTO system faces three negative consequences from the increasing remedy gap: first, it creates a "de facto escape clause" that is more generous than the WTO's de jure escape clause; second, it generates a "counterproductive influence" on the desire of states to negotiate settlements of trade disputes; and third, it creates an "incentive to subvert the regime by acting outside of the legal framework."¹⁵⁶ Unless reforms are enacted, she warns, the growing remedy gap "undermines the WTO's credibility as an effective adjudicator of trade disputes."¹⁵⁷

Despite the dire warnings, the negative consequences have not come to pass. The numbers of temporary breaches do not appear to be increasing significantly. Nor are more countries necessarily choosing to resolve their disputes outside of the WTO. The question is why not. So far, the literature has not provided a convincing answer for why, despite the failure to adopt reforms to mitigate the growing remedy gap, the WTO legal system has not seen an uptick in treaty noncompliance.

My theory suggests that so long as coercive power is available, any marginal gains from the increased remedy gap can be offset through an upward adjustment of coercive power that increases the marginal cost of a temporary breach. Even where coercive force is not at play, so long as the player's self-interest in upholding the existing regime continues to outweigh the now-higher gains, it will not breach. Consequently, the growing length of time required for WTO litigation has not yet affected WTO dispute settlement materially.

This is not to suggest that the growing remedy gap will have no impact going forward. As I will discuss in Part III, there are a few potential worrisome flashpoints. But it does suggest that the need to reform WTO dispute settlement

154. The average length of a WTO case that is appealed at both the first-instance and compliance stages has grown from twenty-four to forty-one months. The overall systemic impact is even greater, as more cases are appealed and proceed to a compliance hearing as compared to the 1990s. See Brewster, *supra* note 8, at 119-25.

155. This assumes that costs remain static and the additional benefit gain is greater than the original difference between costs and benefits.

156. Brewster, *supra* note 8, at 104.

157. *Id.* Specifically, Brewster has suggested that even if the prospect of retrospective remedies is not possible, the WTO ought to consider implementing preliminary injunctions and revising the timing of Article 22.6 arbitration panels as a means of addressing the remedy gap. *Id.* at 150-58.

rules on account of the growing remedy gap may be less pressing than believed. So long as coercive force is available and can be adjusted, it can act as a means to regulate the negative impact of the growing length of WTO litigation proceedings.

The central importance of power asymmetries to these quandaries should not be altogether surprising. Others have shown it to be a relevant factor to other facets of the WTO legal system.¹⁵⁸ In this Article, I simply demonstrate its relevance to issues of WTO treaty compliance in the face of imperfect remedies. Further verification of this theory will require additional efforts to develop a database for empirical analysis. But for now, I suggest that this theory offers the best explanation for why we observe the existing patterns of temporary breach by WTO members and why the WTO system functions effectively despite its incomplete remedies.

III. THE CHALLENGES AHEAD

If the theory proffered above is correct, then this raises a number of interesting implications for the future of the WTO. What I have suggested is that the stability and reliability of WTO legal commitments has rested on the willingness of established powers to deploy instruments of coercive force to restrain others from taking advantage of the system's built-in loophole for temporary breaches. Although powerful states themselves take advantage of this loophole with greater frequency, they too share a collective interest in monitoring and limiting their use of this loophole, lest it lead to the collapse of a global trading order that furthers their interests.

In Part III, I suggest that this stable ordering will confront a number of challenges in the years ahead. Before elaborating on these challenges, note that if one suspects that this ordering faces danger, one option is to reform WTO law to limit and/or close this remedies loophole. That option, however, appears to be off the table. Calls to reform WTO remedies have fallen largely on deaf ears. While some proposals have been put forward in the WTO Rules Negotiations, none have sought to introduce punitive damages or retrospective remedies. Reform is extremely unlikely. The lack of any meaningful progress in the multilateral negotiations means that the Uruguay Round bargain, and its incomplete remedies, will likely hold for the foreseeable future.

Against this backdrop, several trends are emerging that threaten to upset the relative stability of the WTO order to date. Below I elaborate on each phenomenon. Each raises questions about whether scenarios will emerge with greater frequency in the future in which a given state will choose rationally to engage in a temporary breach. Were temporary breaches of WTO law to

158. See, e.g., Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEGAL STUD. 515 (2005) (discussing trade remedies); Tobias Böhmelt & Gabriele Spilker, *The WTO Dispute Settlement Mechanism—Enforcement, State Power, and Dispute Recurrence* (Swiss Nat'l Ctr. of Competence in Research, NCCR Trade Working Paper No. 2013/071, May 2013), http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp1/Working_Paper_20137.pdf (discussing dispute recurrence).

increase dramatically, this would certainly weaken the WTO system and increase the temptation to operate outside of it. Therefore, how the WTO as an institution—as well as the established economic powers—respond to these potentially disruptive trends will be critical for determining the WTO's continued future success.

A. *The Rise of China*

When the Uruguay Round was concluded in 1994, China was not part of the negotiations. It only acceded to the WTO in 2001. WTO accession provided an impetus to embark on a wide range of economic reforms that laid the foundation for a decade of impressive growth. Today, China is already the world's second-largest economy and forecast to be the world's largest before 2030.¹⁵⁹ The rise of China introduces a complication to the narrative discussed in Part II.

Where China may once have been similar to its developing country counterparts in being vulnerable to leverage exerted through coercive force, this is increasingly no longer the case. Bilateral economic relations between China and other major powers are now one among equals with both sides locked in an interdependent relationship.¹⁶⁰ China's economy is not dependent on preferential market access for its goods. As the largest market for several goods and the world's biggest creditor, China has evolved to a point where its trade policy cannot be shaped through external coercive force.

At the same time, however, China does not share the same strong systemic interests as the other major established powers in safeguarding the WTO's legitimacy. The Uruguay Round bargain does not take into account Chinese interests and domestic constraints to the same extent as it does American, European, or Japanese interests and constraints. The terms of China's accession impose several additional terms on it to which other WTO members are not subject.¹⁶¹

This places China in a category of its own. It is neither vulnerable to coercive force to restrain it from engaging in temporary breaches, nor does it share the same incentives to engage in restraint out of collective self-interest. Moreover, its economy is of a size that its trading partners cannot ignore. Yet, despite this posture, the maintenance of a stable global trading system is important for China. External trade remains vital for China's economic growth. Still, China may calculate that it can afford to engage in temporary breaches at least as frequently as the United States and the European Union have, without

159. *China 'To Overtake US and Dominate Trade by 2030'*, BBC NEWS, Mar. 24, 2011, <http://www.bbc.co.uk/news/business-12848449>.

160. Former Secretary of State Hillary Clinton is reported to have asked, "How do you deal toughly with your banker?" Ewen MacAskill, *WikiLeaks: Hillary Clinton's Question: How Can We Stand up to Beijing?*, GUARDIAN, Dec. 4, 2010, <http://www.theguardian.com/world/2010/dec/04/wikileaks-cables-hillary-clinton-beijing>.

161. For a more elaborate discussion of these additional burdens, see, for example, Julia Ya Qin, *WTO-Plus' Obligations and Their Implications for the WTO Legal System—An Appraisal of the China Accession Protocol*, 37 J. WORLD TRADE 483 (2003).

undermining systemic legitimacy. It may even decide to go further, especially if it calculates that the system can withstand such pressure and other states, because of their greater self-interest in preserving the WTO system, will act to safeguard it.

In future work, I will elaborate further on how China is deploying temporary breaches to its long-term economic advantage. Needless to say, trade with China is already emerging as a challenge for economic policymakers worldwide. From 2009 to 2013, China became the most frequent target of new WTO cases.¹⁶²

For the moment, China stands alone as a maverick challenger to the oligopolistic interests of the established powers. Other economies that have experienced spectacular economic growth since the Uruguay Round, such as South Korea, do not have sufficient scale to match the major powers. They also remain vulnerable to leverage in non-trade areas (e.g., security). Still, the possibility exists that other emerging economies may one day join its ranks. Even if they do not, the theory predicts that the continued rise of China by itself will serve as a growing source of tension to the WTO system.

B. *Russian Exceptionalism*

Among the other so-called “BRICS,” the theory suggests that the other worrying flashpoint is Russia. Like China, Russia was not part of the initial Uruguay Round negotiations. It only acceded to the WTO in August 2012. However, unlike China, Russia has not experienced spectacular economic growth, nor is it expected to become a major economic power. Nevertheless, I suggest that Russia remains a potential concern due to a set of exceptional circumstances.

For several reasons, Russia is not likely to be swayed by coercive force.¹⁶³ First, Russian exports are not dependent on trade preferences. Russia does not qualify for the U.S. GSP program, and less than three percent of its exports to the European Union fall under the European GSP program.¹⁶⁴ Second, Russian exports are concentrated in commodities which its partners depend on for their energy and industrial concerns. In other words, Russia is more likely to use its exports as leverage over its trading partners than vice

162. Author’s computation based on information available at *Chronological List of Disputes Cases*, *supra* note 70. If multiple complaints filed on the same issue are counted as one, then China ranks second, behind the United States.

163. The recent Crimea crisis has highlighted the limited options available for an effective use of coercive force. See, e.g., Steve Chapman, *Sanctions on Russia Won’t Work*, CHI. TRIB., Mar. 9, 2014, <http://articles.chicagotribune.com/2014-03-09/news/ct-russia-sanctions-oped-chapman-0309-20140309>; I_economic-sanctions-grain-embargo-u-s-economic-embargo; Daniel Drezner, *Bringing the Pain*, FOREIGN POL’Y, Mar. 7, 2014, <http://foreignpolicy.com/2014/03/07/bringing-the-pain/>; Kevin Drum, *Chart of the Day: Why US Economic Sanctions on Russia Won’t Have Much Impact*, MOTHER JONES, Mar. 4, 2014, <http://www.motherjones.com/kevin-drum/2014/03/chart-day-why-us-economic-sanctions-russia-wont-have-much-impact/>; Jennifer Rubin, *How’s That Interdependent World Working Out?*, WASH. POST, Mar. 13, 2014, <http://www.washingtonpost.com/blogs/right-turn/wp/2014/03/13/how-s-that-interdependent-world-working-out/>.

164. *Commission Staff Working Document*, *supra* note 139, at 13 n.164.

versa. Third, Russia is not actively seeking PTAs with major trading powers. Instead, its PTA strategy is focused on the creation of a Russia-led customs union with its immediate neighbors, as a means of maintaining its geopolitical influence in its near periphery. Finally, Russia is not dependent on others for security, energy, etc. As a permanent member of the U.N. Security Council, more often than not, others seek its cooperation on international affairs than vice versa.

In addition, unlike China, Russia is not yet heavily invested in preserving the WTO system as-is. Russia's recent economic boom arose out of rising commodity prices, not on account of growing manufacturing or services trade. Despite having acceded to the WTO on his watch, President Putin is widely known to be a WTO skeptic.¹⁶⁵ Rather than bringing immediate benefits, he has warned that moves to comply with WTO rules will bring Russia higher unemployment and budget revenue shortfalls in the near-term.¹⁶⁶ Furthermore, unlike China, Russian manufacturing is not an embedded part of the global supply chain. Therefore, Russia has relatively little at stake in terms of the success of the WTO system as a whole. The main benefit of WTO membership for Russia is the ability to escape from discriminatory tariff treatment such as the U.S. Jackson-Vanik Trade Act. But WTO accession is not seen as a means of promoting domestic economic reform or furthering trade growth, as was true for China in the early 2000s. As Fredrik Erikson, a director of Europe's leading trade think tank, has put it, Russia entered the WTO "without a clear idea of why it wants to belong to this club and it has no intention of participating."¹⁶⁷

Therefore, the theory predicts that Russia is also likely to take advantage of the WTO's lack of retrospective remedies to engage in temporary breaches. This will allow Russia to backtrack on its WTO commitments. Indeed, we are already witnessing signs that this is the case. The EU trade commissioner accused Russia of renegeing on its WTO commitments only three months after it joined.¹⁶⁸ The European Union and Japan brought forward cases against Russia less than a year after its accession.¹⁶⁹ The following year, they filed three more complaints, none of which have been settled.¹⁷⁰ By comparison, the first complaint against China was filed over two years after its accession and

165. Andrew Kramer, *In Outburst, Putin Says W.T.O. Rules Don't Apply*, N.Y. TIMES, Apr. 9, 2011, <http://www.nytimes.com/2011/04/09/business/global/09wto.html>.

166. Gleb Bryanski, *Putin Says Russia's Economy to Suffer from WTO Entry*, REUTERS, Nov. 21, 2012, <http://www.reuters.com/article/2012/11/21/us-russia-putin-wto-idUSBRE8AK14W20121121>.

167. Joshua Chaffin, *Europe Cools on Russia's WTO Accession*, FIN. TIMES, Dec. 5, 2012, <http://www.ft.com/intl/cms/s/0/ff524424-3eff-11e2-9214-00144feabdc0.html>.

168. *Id.*

169. Request for Consultation by Japan, *Russian Federation—Recycling Fee on Motor Vehicles*, WT/DS463/1 (July 26, 2013); Request for Consultation by the European Union, *Russian Federation—Recycling Fee on Motor Vehicles*, WT/DS462/1 (July 11, 2013).

170. Request for Consultation by the European Union, *Russia—Tariff Treatment on Certain Agricultural and Manufacturing Products*, WT/DS485/1 (Nov. 4, 2014); Request for Consultation by the European Union, *Russian Federation—Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/1 (May 26, 2014); Request for Consultation by the European Union, *Russian Federation—Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/1 (Apr. 14, 2014).

quickly settled.¹⁷¹ Russia has also not hesitated to deploy trade-related threats against its neighbors for geopolitical purposes.¹⁷² In short, Russia is also likely to become another source of tension within the WTO system, albeit for reasons very different than China.

C. *The Growth of Trade Among Developing Countries*

Another major trend affecting global trade flows is the growth of trade among developing countries, what was once referred to as “South-South trade.” In 1990, the share of developing countries’ exports going to other developing countries was only twenty-nine percent.¹⁷³ By 2010, it had grown to fifty-four percent.¹⁷⁴ Trade among developing countries accounted for twenty-three percent of total global trade in 2010, up from only eleven percent in 1998.¹⁷⁵

Such trade is also subject to different dynamics. When both parties are developing countries, it is less likely that either can exert coercive force over the other. Most developing countries do not provide preferential trade benefits to other developing countries. Even if they do, they are not at a level akin to developed countries’ GSP programs. PTAs between developing countries are much more limited in scope because they are subject to the weaker requirements of the Enabling Clause rather than the more onerous ones of GATT Article XXIV. Furthermore, their smaller markets make trade preferences less valuable. In short, two developing countries have less leverage over each other than would be the case if one of the parties were a major advanced economy. In addition, neither party necessarily has a strong systemic interest in safeguarding the WTO regime.

Consequently, the temptation to engage in a temporary breach is greater in such situations. Nevertheless, such breaches remain infrequent for several reasons. First, much of this trade is in raw materials. Where the importing country is dependent on the good as an input for its industry, it may not gain from stronger protections levied against that good. Second, there may be longer-term gains from strong bilateral cooperation that outweigh the short-term gains of a temporary breach.¹⁷⁶ Third, the system provides for other

171. See Notification of Mutually Agreed Solution, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/8 (Oct. 6, 2005). Request for Consultation by the United States, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/1 (Mar. 23, 2004).

172. Judy Dempsey, *How Russia Bullies the EU’s Eastern Neighbors*, CARNEGIE EUR. (Sept. 9, 2013), <http://carnegieeurope.eu/strategieurope/?fa=52903>; David Herszenhorn, *Russia Putting a Strong Arm on Neighbors*, N.Y. TIMES, Oct. 23, 2013, <http://www.nytimes.com/2013/10/23/world/europe/russia-putting-a-strong-arm-on-neighbors.html>.

173. *Trade and Development*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/coher_e/mdg_e/development_e.htm (last visited Dec. 4, 2014).

174. See U.N. CONFERENCE ON TRADE & DEV., SOUTH-SOUTH TRADE MONITOR NO. 1, at 1 (June 2012), http://unctad.org/en/PublicationsLibrary/webditctab2012d2_en.pdf.

175. *Id.* Such trade is growing at a much faster rate (nineteen percent per annum) than the global average (thirteen percent per annum).

176. For example, this may be the case if the parties are seeking to build up a regional organization that serves both parties’ interests. Or it may be the case that the parties belong to a political grouping (e.g., the G33) that affords both sides greater leverage in international negotiations.

mechanisms for reinstating temporary protection (e.g., anti-dumping or countervailing duties). As trade among developing countries has grown, so too has the use of trade remedies by developing countries against other developing countries.¹⁷⁷ Such instruments, which are legal under WTO law, may serve a preferable substitute to outright breach.

The recent *Dominican Republic—Safeguard Measures* cases offer an example of a situation where the increase in trade among developing countries contributes to the temptation to engage in a temporary breach. Between 2003 and 2009, the Dominican Republic experienced a rapid increase in imports of polypropylene bags and tubular fabrics from four Central American countries, China, and the United States.¹⁷⁸ For Chinese and American producers, the Dominican market represented a tiny share of their overall exports of the products.¹⁷⁹ The same, however, was not true of the Central American countries.¹⁸⁰ Knowing this, the Dominican Republic enacted WTO-illegal safeguards to provide additional protection to its domestic producers. As expected, given the relatively low volume of trade, neither the United States nor China found it worthwhile to employ coercive force to compel the Dominican Republic to abandon its illegal policy. Instead, the task was left to the four Central American countries. They collectively brought WTO disputes against the Dominican Republic and prevailed.¹⁸¹ The Dominican Republic abandoned its illegal safeguards before the “reasonable period of time” expired, but managed to provide its producers with three additional years of protection as a result of the system’s built-in “free pass.”

Had American or Chinese producers had the major share of the Dominican Republic’s market, the threatened deployment of coercive force as potential retaliation likely would have caused Dominican policymakers to think twice about the temporary breach. But because the trade was concentrated instead with Central American countries with little leverage over it, the Dominican Republic went ahead. Temporary breach arises because of the shifting dynamics of trade toward a South-South axis.

The extent to which proliferation of trade among developing countries will increase the prevalence of temporary breach will depend on the specific composition of goods whose trade is increasing. As noted, if this rising trade is concentrated in raw materials and other inputs, temporary breaches are less

177. Chad P. Bown, *The Global Resort to Antidumping, Safeguards, and Other Trade Remedies Amidst the Economic Crisis 2* (World Bank, Policy Research Working Paper No. 5051, Sept. 9, 2009), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2009/09/14/000158349_20090914083619/Rendered/PDF/WPS5051.pdf.

178. Chad P. Bown & Mark Wu, *Safeguards and the Perils of Preferential Trade Agreements: Dominican Republic—Safeguard Measures*, 13 *WORLD TRADE REV.* 179, 191 fig.3 (2014).

179. The Dominican Republic accounted for no more than 0.2% of the total Chinese worldwide exports of two affected products. *Id.* at 198 fig.4.

180. The Dominican Republic accounted for roughly forty percent of the total global exports of the two affected products for Costa Rica, El Salvador, and Honduras and seventeen percent for Guatemala. *Id.*

181. Panel Report, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415-418/R (Jan. 31, 2012).

likely because of harmful downstream effects. On the other hand, if trade rises in manufactured products, such as bags, in which imports crowd out domestic substitutes, and anti-dumping or countervailing duties are unavailable, then governments in developing countries may increasingly resort to temporary breach.

The other factor that will affect the prevalence of temporary breach is the response of powerful states. In the example above, the Dominican Republic acted because it rightly calculated that neither the United States nor China would bother to use coercive force to counter its breach. But had either done so, the response might have chilled future acts of this sort by other developing countries. Instead, the non-response is encouraging other developing countries to also experiment with temporary breach.

For example, Ukraine likely breached its WTO commitments in 2012 when it enacted a safeguard tariff against imports of cars.¹⁸² In this case, the largest exporter of cars into the Ukraine was the European Union, but over twenty-five percent of its car imports come from developing countries such as Russia, Turkey, and India.¹⁸³ Although Ukraine is dependent on the European Union for GSP benefits, it calculated correctly that the European Union would not bring coercive force to bear. This is because the European Union is seeking to entice Ukraine into its Eastern Partnership, as an alternative to Ukraine entering into a customs union with Russia, Kazakhstan, and Belarus.¹⁸⁴ Frustrated with the slow pace of WTO litigation, several trading partners decided to retaliate directly. Turkey retaliated by imposing a tax on Ukrainian walnuts.¹⁸⁵ Russia also decided to impose trade sanctions in response, on Ukrainian chocolate, coal, and glass.¹⁸⁶ Only Japan has decided to proceed down the traditional route of filing a WTO case against Ukraine.¹⁸⁷

This may mark the start of a trend of developing countries increasingly resorting to “self-help” retaliatory mechanisms in order to limit the harm caused to its exporters as a result of a breach of WTO law by another developing country. Unlike the coercive force mechanisms brought to bear by

182. I use the caveat “likely” here because its legality is still pending adjudication by the WTO. However, given the strict “unforeseen development” requirement necessary for enacting a safeguard, it is unlikely that Ukraine’s actions are legal. See Request for Consultations by Japan, *Ukraine—Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/1 (Nov. 4, 2013).

183. Author’s calculation is based on information available in the U.N. Comtrade database for the two HS-6 lines on which safeguards were imposed. See Dep’t of Econ. & Soc. Affairs, *supra* note 77.

184. The Eastern Partnership is a project devised by the European Union to engage with six former Soviet Republics. Its success is viewed as dependent on Ukraine’s participation. See *Playing East Against West*, *ECONOMIST*, Nov. 23, 2013, <http://www.economist.com/news/europe/21590585-success-eastern-partnership-depends-ukraine-playing-east-against-west>.

185. Tom Miles, *Turkish Trade Sanction is Warning Shot in Ukraine Car Tariff Row*, *REUTERS*, June 12, 2013, <http://www.reuters.com/article/2013/06/12/trade-ukraine-cars-idUSL5N0EO32C20130612>.

186. Tom Miles, *Russia Targets Ukrainian Chocolate in Car Trade Spat*, *REUTERS*, July 9, 2013, <http://uk.reuters.com/article/2013/07/09/uk-trade-ukraine-cars-idUKBRE9680LR20130709>.

187. Request for Consultations by Japan, *Ukraine—Definitive Safeguard Measures on Passenger Cars*, WT/DS468/1 (Nov. 4, 2013).

developed countries, which are generally recognized as legal under WTO law, the legality of these forms of direct retaliation is questionable.¹⁸⁸ For example, Russia's decision to ban Ukrainian chocolates, ostensibly on health grounds, may turn out not to comply with its requirements under the WTO's SPS Agreement.¹⁸⁹ A situation in which developing countries increasingly engage in tit-for-tat temporary breaches instead of WTO dispute settlement to resolve trade disputes would certainly prove worrisome to the WTO.

* * *

The WTO, as an institutional actor alone, is ill-equipped to deal with the challenges discussed above. Its main enforcement power is to adjudicate and issue sanctions. But in the case of temporary breach, the strategy on the part of the violators is to avoid ever getting to the stage where institutional powers kick in. Instead, violators seek to reap temporary benefits as allowed by WTO's legal loophole. Countering the challenges described above will require concerted action on the part of the established powers.

To manage China's rise, they will need to see to it that China perceives the WTO system to offer it sufficient gains so that it has an embedded stake in preserving the system. This may require addressing certain elements of the system that China finds to be discriminatory. In addition, China's behavior on temporary breaches, in the near term, will likely mirror that of the United States and the European Union. As a rising power, Chinese officials will perceive that China ought to be entitled to take advantage of this loophole at a level similar to that of other powers. To the extent that the established powers find China's use of temporary breaches to be too excessive, they may need to consider curbing their own use of this WTO loophole in order to spark China to do the same.

In some ways, the challenge is even more difficult with Russia. Again, the task is to convince Russia of the gains that the WTO system offers such that it too has an embedded stake in its preservation. But Russia's trade is much less manufacturing-oriented, and Russian firms are less woven into global supply chains. This makes immediate gains less apparent. The other alternative is to raise the stakes in confronting Russia on trade matters, but the lack of instruments of coercive force makes this also difficult. In the end, the system may have to find ways to live with welcoming a "bad actor" into the family, but make clear that its influence is limited until its behavior improves.

Dealing with the rising use of temporary breaches by developing countries against other developing countries may be the easiest issue to address. Temporary breaches arise because the parties do not think that developed countries will intervene with coercive force in such instances.

188. See Brewster, *supra* note 11, at 1145 (declaring such forms of immediate retaliation outside the DSU to be illegal).

189. See Andrew E. Kramer, *Chocolate Factory, Trade War Victim*, N.Y. TIMES, Oct. 30, 2013, <http://www.nytimes.com/2013/10/30/business/international/ukrainian-chocolates-caught-in-trade-war-between-europe-and-russia.html> (noting that some of Russia's other neighbors have questioned whether Russian restrictions comply with WTO law).

Limiting this behavior will require developed countries to expand the boundaries of when they intervene to include situations where their own stakes are low. In other words, developed countries face a choice. They can devote more resources to global “policing” of trade law. Or they can choose to live in a world where we see more tit-for-tat temporary breaches among developing countries that weakens the WTO system overall.

Again, the recent example of Ukraine’s temporary breach over car tariffs proves instructive. Turkey and Russia likely responded as they did because they did not perceive the likelihood of intervention by developed powers to be high. This was correct, at least with respect to the European Union. Generally speaking, it would have also been a correct assumption to make about Japan. Historically, Japan has been reluctant to adjudicate disputes at the WTO, especially on its own,¹⁹⁰ and the Ukrainian market represented a tiny share (less than 0.6%) of total Japanese car exports.¹⁹¹ But after Russia and Turkey responded with their tit-for-tat actions, Japanese officials saw the choice at hand and stepped up to the challenge of confronting Ukraine. Contrast this response with that of the United States and China following the Dominican Republic’s temporary breach. More willingness to devote resources to intervene even when the stakes are relatively low, along the lines of Japan’s recent actions, is necessary if established powers seek to dissuade future instances of temporary breaches by developing countries.

The decision on the part of the established powers in the Uruguay Round negotiations to preserve the system’s incomplete remedies may have proven to be relatively inconsequential for the WTO’s first two decades. It simply gave rise to an interesting intellectual puzzle concerning how we should think about WTO treaty compliance. But in the coming years, this decision will prove to have much more serious implications. It will force established powers to reevaluate, in response to shifting economic and geopolitical trends, whether they wish to maintain or alter their levels of utilizing temporary breaches, coercive force, and WTO dispute settlement. What they choose in turn will determine the extent to which greater levels of WTO breaches give rise to more contentious trade disputes. At issue then is nothing less than the time-honored question of how power ought to be deployed in the shadow of the law.

CONCLUSION

The WTO has been trumpeted as a triumph of an internationalist legal vision. It personifies the possibility of states voluntarily subsuming sovereign regulatory decision-making to an international rules-based organization in the interests of advancing collective global welfare. As Steve Charnovitz has proclaimed, “To date, the experiment of the WTO has achieved success beyond

190. For an explanation of why this is the case, see DAVIS, *supra* note 56, at 185-243.

191. Author’s calculation based on information available in the U.N. Comtrade database for the two HS-6 lines on which safeguards were imposed. See Dep’t of Econ. & Soc. Affairs, *supra* note 77.

the expectation of many observers. . . . More so perhaps than any other international organization, the WTO is an institution of international law. . . . WTO rules matter because they are enforced in a strong dispute settlement system.”¹⁹²

The success of the WTO as the enforcer and arbiter of global rules is often presumed to rest on systemic elements. The WTO dispute settlement system, the regime’s self-proclaimed “crown jewel,” encompasses features such as compulsory jurisdiction, detailed procedural rules, a formalized appellate review process, and the possibility of sanctions. These features are viewed with envy by other international legal regimes that seek to enhance their own efficacy and legitimacy.

No doubt these systemic elements represent important innovations in the domain of international legal regimes. But this Article raises questions as to whether these elements are truly what underlie the WTO’s success. After all, when devising the WTO legal system, its treaty drafters left a gaping loophole. Countries are permitted to engage in temporary breaches of their treaty obligations without fear of WTO-authorized sanctions, so long as such breaches are time-delimited and are eliminated by the deadline mandated by the WTO judiciary. With minimum legal savvy, a country can manipulate the WTO’s remedies loophole to escape its treaty obligations without fear of punishment for at least three years, and possibly several years longer.

The efficacy of the WTO rests on the question of why countries do not repeatedly exploit this loophole to the point where their behavior substantially weakens the rules-based legal system. This Article suggests that the answer lies not necessarily with the system’s managerial elements, the strength of its underlying norms, its transnational legal processes, or its liberal foundations. Nor is it simply all about reciprocity, reputation, or litigation/transaction costs—although these do play a role. Rather, the WTO has functioned well as an arbiter of global rules on account of perhaps the oldest and crudest instrument for enforcing order in an international system—power. In the desire to hold out the WTO as the paragon of a progressive vision of international legalism, the continuing primacy of power for this legal order has been underemphasized by scholars to date. But we should be careful to describe the WTO as representative of a global order where states willingly turn first to courts to resolve disputes before resorting to power—for this is not necessarily the case.

As this Article has illustrated, the mechanisms in which power helps to sustain and reinforce rules in the global economic order are much more subtle than in the days when states would simply send warships into harbors to secure market access for their goods. Nor is the use of power in the world today even as overt as it was in the 1980s, when the United States turned to unilateral retaliatory mechanisms arbitrated by its administrative state to force its trading

192. Steve Charnovitz, *The World Trade Organization in 2020*, 1 J. INT’L L. & INT’L REL. 167, 167-68, 172 (2005).

partners to abide by their trade treaties.¹⁹³

Instead, power flows through a legal regime that, by design, is dynamic and evolving—thereby creating possibilities for powerful states to exert leverage over weaker states. The incomplete nature of the WTO legal bargain allows for the creation of a set of additional costs associated with temporary breaches for many states, ranging from the potential loss of preferential trade benefits to damaging prospects for future trade preferences. Realizing such costs, however, depends on the willingness of the more powerful states to resort to power asymmetries to enforce the system's rules. Existing economic powers do so, I suggest, because the system's rules reflect their collective self-interest, and hence they share a systemic interest in ensuring that the system remains stable. It is this dynamic—in which power asymmetries interact with an incomplete and evolving legal regime—that answers the puzzling questions of: (a) why states have only exploited the WTO's temporary breach loophole periodically rather than with regularity, and (b) why, when such breaches do arise, they are more frequently undertaken not by pariah states but instead by liberal economic powers.

The success of the WTO as an international court, therefore, should not be seen as offering unmitigated support for the triumph of international rule of law over power diplomacy. Instead, the story is much more nuanced. It is true that under the WTO, the notion that “might makes right” is no longer fully correct. Trade superpowers lose plenty of cases, and they willingly comply with these rulings. But it is also not the case that power no longer matters and that all states are equal. Instead, “might” still shapes the contours of the law as to what is “right.” Equally important, “might” ensures that this law is followed. Thus, it is not the normative appeal of WTO law, but the fact that WTO law has and continues to be effectively coupled with power, that is responsible for the success of WTO dispute settlement in its first two decades. What the WTO demonstrates is that the relationship between power and law is complementary; power is what enables the effective functioning of a rule-of-law regime.

But power, like trade itself, is fluid. As economic power shifts east and trade flows between developing countries grow, scenarios emerge whereby certain countries may find it more appealing to undermine WTO law by engaging in temporary breaches. The WTO's challenge will be to find ways to prevent such scenarios from becoming too commonplace. This will require a commitment on the part of established powers to share and deploy power more broadly than they have in the past. If they do, then the WTO system will continue to thrive, even without reform of its imperfect remedies system. But if they do not, then temporary noncompliance with WTO law may very well grow more rampant.

As the WTO enters its third decade, it stands at a crossroads not only with respect to the Doha Round negotiations but also with its dispute settlement

193. See William R. Cline, *Reciprocity: A New Approach to World Trade Policy?*, in *TRADE POLICY IN THE 1980S* 121, 136 (William R. Cline ed., 1983) (discussing the retaliatory potential of Section 301 of the Trade Act of 1974).

mechanism. Unlike the former, the latter does not face the imminent threat of unraveling or being displaced. But if the WTO DSB is to remain the strong bulwark of international adjudication that it has been, much more than making tweaks to the DSB's rules will be required. Power, writ large, must be rebalanced within the system to accommodate the new geopolitical realities. Otherwise, the system will slowly fragment as its major actors work outside of its confines to tackle emergent issues in international trade.

Table 1: Total Number of Pages Devoted to Q&A in WTO Trade Policy Reviews (1995-2013)

European Union	2,706
United States	2,418
China	1,927
Japan	1,897
India	786
Canada	692
Brazil	689
Korea	667

Source: Author's compilation based on information provided by the WTO on the question and answers provided by WTO members during their Trade Policy Reviews (Document code WT/TPR/M/* and Add*).

Table 2: Average Number of Pages Devoted to Q&A in an Individual WTO Trade Policy Review (1995-2013)

China	481.8
European Union	386.6
United States	302.3
India	262.0
Japan	237.1
Argentina	234.5
Canada	230.7
Vietnam	223.0

Source: Author's compilation based on information provided by the WTO on the question and answers provided by WTO members during their Trade Policy Reviews (Document code WT/TPR/M/* and Add*).

