

## THE COMPLIANCE PROBLEMS OF THE WTO

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### A. Forms of Non-Compliance

Every day, governments around the world comply with the WTO, and the GATT before it, tens of thousands of times, and probably even more often. WTO-limited (“bound”) customs tariffs are charged at or below the agreed limits, valuation practices follow the WTO Customs Valuation Agreement, food crosses borders regulated in accordance with the SPS (Sanitary and Phytosanitary Measures) Agreement, and so on. On the rarer occasions when national governments decide, instead, not to comply, the WTO has proven to be a weak reed. This non-compliance has tended to take three forms (at least): (1) prior non-compliance, (2) delay, and (3) non-compliance, open and disguised.

#### 1. Prior Non-Compliance

To judge just from the very limited sample offered by cases brought to WTO dispute settlement, virtually every major trading Member of the WTO has taken action knowing it was inconsistent with the WTO, apparently on the basis that at worst it would be challenged in the WTO dispute settlement process, and then dragged out in litigation for three to four years before having to comply with the rules to which it had agreed. This is done not just by the big players—the United States, the EU, Japan, Canada, Brazil, India—but also Argentina, Australia, Chile, China, Egypt, and so on (for the sake of politeness, individual cases are not named here, but a quick look at the list of requests for consultations will identify them for the reader). In effect, the WTO has been re-written by those Members to claim that none of the obligations applies for a three- to four-year period. And these are only the most blatant cases. The same phenomena are probably reflected in the very leisurely way in which WTO Members adapt to fairly definitive rulings by the Appellate Body in cases involving other Members. The most obvious example is the case of India against the EC on “zeroing,” decided in India’s favor by the Appellate Body in 2001.<sup>1</sup> The ruling was sufficiently clear to guide other Members. But very few complied (in the sense of adapting their own national systems) with any speed, and some have made it clear

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1. Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001).

they will not comply until fully stretching out (for six years and counting) dispute resolution in additional cases brought directly against them. It will be interesting to observe over time whether empirical data confirms the suspicion that this could become discriminatory, as countries better able to afford the internal or external cost of defending themselves in WTO dispute resolution cases are in a better position to undertake this behavior than poorer countries.

## 2. Delay

Even assuming, charitably, that all WTO Members act in good faith to fulfill their obligations, and that they only discover they are in violation after an Appellate Body ruling, there are numerous cases where the post-Appellate Body process stretches on for years. Again, this is not just one or two Members—it is obvious that numerous governments are deciding to “game the system” and string out non-compliance for as long as possible. (And this ignores the numerous delays in litigation before the Appellate Body rulings—it is fascinating to hear lawyers for Members state openly that they are taking every delay they can.)

## 3. Non-Compliance, Open and Disguised

There is an increasing number of decisions where Members have openly decided not to comply and instead risk retaliation, starting with the 1998 *EC – Hormones* case<sup>2</sup> (where even full retaliation did not lead to compliance, and where the retaliation did not and could not compensate the exporters injured by the measure found to be WTO-inconsistent). Other non-compliance may not be so open. For example, the WTO website lists the case of *U.S. – Lead and Bismuth II*<sup>3</sup> as a success—the Appellate Body ruled and the defending country complied. It nowhere records that obtaining the compliance required a side payment to a competing company of many millions of dollars. Perhaps the losing Member would have eventually complied without the side payments, but the apparent lack of retrospectivity in the WTO Dispute Settlement Understanding (DSU) means that exporters would continue to pay duty deposits *after* the duties were found WTO-inconsistent without those duties being refunded—so the DSU seems to encourage non-transparent side payments.

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2. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

3. Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000).

## **B. The Data**

We have made a preliminary attempt to categorize how member countries have responded to WTO decisions, in the hope that people will be able to correct or amend these findings on the basis of better information that is perhaps not readily available to the public. We have attached our list, based on our quick survey.

Here are some quick statistics:

- Of the 98 final decisions since 1996, the panel or appellate body found violations in 85 cases (85.8%). That is to say, there was no violation found in 13 of the cases.
- Of those 85 cases where violations were found, the compliance period is still running on 6 of them, and the compliance status of 2 is unclear, leaving 77 cases for our analysis.
- Of those 77 cases, 53 (68.8%) ended in what we have (catchily) called **Apparent More-or-Less Full Compliance**, which includes compliance after threats of retaliation, compliance after decisions handed down by Article 21.5 panels, and especially long drawn-out compliance.
- In 19 cases (24.6%), the violating country has made gestures at compliance: **Partial Compliance** in 8 cases (where some but not all measures are revised), **Debatable Compliance** in 6 cases (where one country claims to have complied but other countries raise an eyebrow), **Sleazy Settlements** in 5 cases (of which 4 are related to the pending U.S.-Canada *Softwood Lumber* dispute).
- Six of the cases (6.1%) have resulted in **Unabashed Non-Compliance**. That non-compliance has been tolerated, however grudgingly, by the complainants—except in one case, *EC – Hormones*.

## **C. Why Worry?**

A 6.1% rate of open non-compliance does not seem very bad. But because it is mostly cumulative (most of the cases do not disappear), that means

an increasing stack of embarrassingly overt non-compliance. It is worth noting that Bob Hudec calculated that the GATT dispute settlement system “worked” 88% of the time, but it was the 12% of cases where GATT did not “work” that reduced the system’s credibility enough to require the major changes in the Uruguay Round.

In that context, the 25% of less-than-full compliance, and the delays in reaching full compliance in other cases, suggests the need for DSU reforms such as some of those suggested by Mexico (repayment of illegally collected duties, disincentives for delay).

**ANNEX:  
WTO DECISIONS AND COMPLIANCE – 98 DECISIONS TOTAL**

**A. Compliance Not Needed (13)**

U.S. – OCTG AD Measures  
 Korea – Commercial Vessels  
 U.S. – Corrosion Resistant Steel Sunset Review  
 EC – Pipe Fittings  
 U.S. – Textiles Rules of Origin  
 EC – Asbestos  
 U.S. – Certain EC Products  
 Korea – Government Procurement  
 U.S. – Section 301  
 EC – Computer Equipment  
 Japan – Film  
 Brazil – Dessicated Coconut  
 U.S. – Section 129

**B. Apparent More-or-Less Full Compliance (53)**

(includes eventual compliance, including agreements not obviously sleazy, and Article 21.5-induced compliance)

Japan – Laver Quotas  
 EC – DRAMS Countervailing Measures  
 EC – Trademarks / GIs  
 Canada – Wheat  
 Mexico – Telecoms  
 Japan – Apples  
 U.S. – Steel Safeguards  
 Argentina – Poultry AD Duties  
 Argentina – Peach Safeguards

U.S. – German Steel CVDs  
EC – Sardines  
Egypt – Rebar  
U.S. – India Steel Plate  
India – Autos  
U.S. – Line Pipe Safeguards  
U.S. – Cotton Yarn  
Argentina – Floor Tiles AD Measures  
U.S. – Export Restraints  
U.S. – Lamb Safeguards  
EC – Bed Linen  
U.S. – Steel Plate from Korea  
U.S. – Wheat Gluten  
Korea – Beef  
Guatemala – Cement  
Canada – Patent Term  
U.S. – DRAMS  
Dominican Republic – Cigarettes  
U.S. – 1916 Act  
Canada – Automotive Industry  
Canada – Pharmaceutical Patents  
U.S. – FSC's  
Argentina – Footwear Safeguards  
Korea – Dairy Safeguards  
Chile – Alcoholic Beverage  
EC – Butter  
Turkey – Textiles  
India – QRs  
U.S. – DRAMs AD  
Japan – Agricultural Products  
Korea – Alcoholic Beverages  
Australia – Salmon  
U.S. – Shrimp  
India – Patents  
Indonesia – Automobiles  
EC – Poultry  
Argentina – Textiles and Apparel  
India – Patents  
Canada – Periodicals  
U.S. – Shirts and Blouses  
U.S. – Cotton Underwear  
Japan – Alcoholic Beverages  
EC – Scallops  
U.S. – Gasoline

**C. Gestures at Compliance (19)**

1. Debatable Compliance (currently questioned by another country) (6)

EC – Sugar Subsidies  
U.S. – Cotton Subsidies  
EC – Tariff Preferences  
EC – Bananas  
U.S. – OCTG Sunset Reviews  
Chile – Agricultural Products

2. Partial / Piecemeal Compliance (8)

Argentina – Bovine Hides  
U.S. – Byrd Amendment  
U.S. – Section 110(5) of Copyright Act  
Mexico – HFCS  
Canada – Milk/Dairy  
Australia – Leather  
U.S. – CVDs on EC Products  
U.S. – Hot Rolled Steel from Japan

3. Sleazy Settlements (5)

U.S. – Lumber (#236, 264, 277, 257)  
U.S. – Lead Bars

**D. Unabashed Non-Compliance (6)**

1. Non-Compliance Apparently Tolerated by Other Countries (5)

U.S. – Havana Club  
Thailand – Steel  
Canada – Aircraft (#222, 70)  
Brazil – Aircraft

2. Non-Compliance Not Tolerated (1)

EC – Hormones

**E. To Be Determined (8)**

1. Unclear (2)

EC – Chicken Classification

EC – Commercial Vessels

2. Compliance Period Still Running or Suspended (6)

Mexico – Soft Drinks

Mexico – Rice AD Measures

Korea – Paper AD Duties

U.S. – Gambling Services

U.S. – DRAMS CVD

U.S. – Zeroing

