

Marc D. Froese, *Negative Reciprocity: Retaliation in WTO Dispute Settlement and the Extrajudicial Response to the Trump Tariffs of 2018*

15(2) TRADE L. & DEV. 49 (2024)

NEGATIVE RECIPROCITY: RETALIATION IN WTO DISPUTE SETTLEMENT AND THE EXTRAJUDICIAL RESPONSE TO THE TRUMP TARIFFS OF 2018

MARC D. FROESE*

In 2018, the Trump Administration imposed tariffs on solar panels, washing machines, steel, aluminium, and goods from China. Affected states responded with retaliatory tariffs outside the World Trade Organization's (WTO) dispute settlement. Superficially, trade retaliation appears to be a breakdown in reciprocity. However, it is not indicative of the failure of the reciprocity principle. This paper explains how the negative reciprocity norm functions in the multilateral trading order. Drawing from a dataset of 26 disputes, it shows how Members fight battles over compliance using countermeasures designed to exert political pressure. Three historical examples show that members levy targeted retaliatory sanctions for two reasons: to increase the friction that keeps the issue in front of national decision-makers (negative reciprocity) and to create a bargaining position from which to negotiate a path back to cooperation. Lessons learnt at the WTO informed the retaliatory response to the Trump tariffs.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. TRADE RETALIATION IN PRACTICE AND THEORY
 - A. RETALIATION AT THE WTO
 - B. THE EVOLVING LITERATURE ON RETALIATION.
 - 1. RETALIATION AS INCENTIVE TO COMPLY.
 - 2. RETALIATION AS TRADE REBALANCING
 - 3. RETALIATION FOR COMPENSATION AND DETERRENCE
 - C. THE PRIMACY OF COMPLIANCE
- III. EVIDENCE FROM WTO DISPUTE SETTLEMENT
 - A. DISPUTES WHERE RETALIATION DID NOT INDUCE COMPLIANCE

* Professor of Political Science, Director, International Studies Program, Burman University, Alberta, Canada. The author thanks Alice Chesse and Daniel Drache for comments on drafts. The author may be contacted at [mfroese\[at\]burmanu.ca](mailto:mfroese[at]burmanu.ca).

- B. MIXED RESULTS FOR RETALIATION
- C. DISPUTES WHERE RETALIATION WORKED
- D. NEGATIVE RECIPROCITY AND BARGAINING LEVERAGE
- IV. TRADE RETALIATION BEYOND THE WTO
 - A. THE NON-RETALIATION COUNTERFACTUAL
- V. THE FUTURE OF RETALIATION
- VI. APPENDIX: CASES IN WHICH RETALIATION WAS AUTHORISED UNDER ARTICLE 22 OF THE DSU
- VII. BIBLIOGRAPHY

I. INTRODUCTION

This paper examines the retaliatory sanctions that have occurred in the process of dispute settlement at the WTO and compares them to extrajudicial retaliation against the Trump tariffs of 2018. It delineates a broad historical pattern that conforms to the logic of what cognitive scientists call ‘negative reciprocity’.¹

Negative reciprocity is a necessary element of a mercantilist bargaining system because it provides the incentive to return to reciprocal trade relations when adjudication fails to resolve conflict. Retaliation temporarily resets the trading relationship at a lower level for the purpose of climbing back to reciprocity.

In response to the Trump Administration’s imposition of broad tariffs in 2018, Canada, Mexico, the European Union (EU), the United Kingdom (UK), China, India, and Turkey initiated targeted retaliatory tariffs, mirroring the provisions of Articles 21.5, 22.6, and 22.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).² Following the adoption of a panel report and any appeals proceedings, the losing party submits a report detailing the timeline for implementation of the panel’s recommendations. In cases of non-implementation, parties may negotiate compensation. If there is no agreement on compensation, the Dispute Settlement Body (DSB) can authorise retaliation in the same sector, other sectors, or under other agreements, with arbitration being used to determine the limits of retaliation.³

The retaliation against the Trump tariffs that occurred outside the WTO was part of a retaliatory strategy learnt at the WTO.⁴ When the Trump Administration imposed

¹ Alex Shaw et al., *When and Why People Evaluate Negative Reciprocity as More Fair than Positive Reciprocity*, 43(8) COG. SCI. 1 (2019) [hereinafter Shaw].

² *Id.*

³ Chad P. Bown & Melina Kolb, *Trump’s Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. INT. ECON. (June 1, 2023), <https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide> [hereinafter Bown & Kolb].

⁴ Shaw, *supra* note 1.

a broad range of tariffs in 2018, Canada, Mexico, the European Union (EU), the United Kingdom (UK), China, India, and Turkey responded with targeted retaliatory tariffs modelled on those used in Article 22.6 of the DSU.⁵

The main difference with regard to the American tariffs levied in 2018 is that the strategies first practiced at the WTO were operationalised outside the boundaries of multilateral trade governance because the Trump Administration was crippling the dispute settlement process by refusing to allow new members to be appointed to the Appellate Body (AB).⁶

The fact that leading stakeholders bypassed the WTO and imposed their own brand of retaliation would seem to indicate a trading order in trouble.⁷ Yet, the evidence suggests that extrajudicial retaliation was not a symptom of institutional decline so much as it was a recognition of the political challenges posed by the Trump Administration's 'America First' foreign policy doctrine. In this case, retaliation is more accurately conceptualised as a form of reciprocal mirroring, or what social psychologists call negative reciprocity. In its positive form, reciprocity is based on a "shared moral order," and in its negative form, on the "suspension of the moral order."⁸ At its most basic, negative reciprocity is punishment for bad behaviour – an eye for an eye.⁹ But the negative reciprocity norm in trade governance is not simply tit-for-tat.¹⁰ In a legal order rooted in mercantilist bargaining, negative reciprocal behaviour also creates bilateral leverage with which to negotiate a return to reciprocity.¹¹

⁵ Bown & Kolb, *supra* note 3.

⁶ See Bown & Kolb, *supra* note 3 (South Korea filed WTO cases against the U.S. tariffs on washing machines and solar panels, as did China against tariffs on solar panels. Likewise, the U.S. filed WTO cases against the retaliatory tariffs levied by Canada, Mexico, the E.U., China, and Turkey).

⁷ See Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41(1) MICH. J. INTL. L. 109-194 (2020) (The U.S. blockage of the Appellate Body was only one of two main issues. The other was that the national security justification that the U.S. would likely rely upon at the panel was largely untested in legal action at the WTO). For discussion of US vetoing of AB appointments, see Bradley J. Condon, *Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the U.S.A.*, 52(4) J. WORLD TRADE 535-556 (2018).

⁸ Susana Narotzky & Paz Moreno, *Reciprocity's Dark Side: Negative Reciprocity, Morality and Social Reproduction*, 2(3) ANTHROPOLOGICAL THEORY 281, 281 (2002).

⁹ Paul Eder et al., *Punishing Those Responsible for the Prison Abuses at Abu Ghraib: the Influence of the Negative Reciprocity Norm (NRN)*, 27(6) POL. PSYCH. 807 (2006).

¹⁰ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (Basic Books, 2006).

¹¹ Ernst-Ulrich Petersmann, *The Future of the WTO: From Authoritarian 'Mercantilism' to Multilevel Governance for the Benefit of Citizens*, 6(1) ASIAN J. WTO & INT'L HEALTH L. & POL'Y. 45 (2011).

The paper develops a qualitative empirical analysis of retaliation at the WTO that makes use of descriptive statistics, count data, and a comparative case historical method. The aim is to explain how key stakeholders came to believe that tariff retaliation outside the WTO could be an effective response to the American tariffs. The first section examines the evolution of thinking about retaliation in trade governance.¹² The multilateral trade governance literature views retaliation as an incentive for compliance, as a reciprocal rebalancing of trade relations, as compensatory damages for non-compliance, and as a deterrence mechanism.¹³ To some extent, trade retaliation does all of these. But removing the problem of retaliation from the multilateral context and reframing it as one of bilateral relations offers another perspective: that of a reciprocal political settlement directed towards future reciprocal cooperation.¹⁴

The second section examines twenty-six disputes in which the WTO authorised retaliation. This empirical study shows that the issue of compliance has increasingly become one of inducing American compliance, a contextual factor that has substantially shaped strategies developed by complainants such as the EU and Canada. Three case studies show the complex outcomes of retaliation. Retaliation does not end trade wars, but it does offer counterparties a leveraged position from which to pursue a political solution. At the WTO, members have learnt not only how to navigate the international economic law of trade but also how to use the negative reciprocity norm when the law fails to induce compliance.¹⁵

The third section returns to the Trump tariffs to compare the lessons learnt at the WTO with the political resolutions negotiated by Canada, Mexico, the EU, Japan, and South Korea. We can see that once again, the dual-reciprocity method was used to move towards a negotiated settlement. The first four of this group used a retaliatory strategy. South Korea negotiated to avoid American tariffs and got a worse deal than its partners, who retaliated first and negotiated a settlement second. The limits of dispute settlement at the WTO taught members that in the face of intransigence, the wronged party needs leverage with which to bargain, and sanctions are the primary way to create the material basis for future negotiation.

¹² THOMAS O. BAYARD & KIMBERLY ANN ELLIOT, PETERSON INSTITUTE FOR INT'L ECONOMICS, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY (Columbia Univ. Press 1994).

¹³ THE LAW, ECONOMICS, AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT (Chad P. Bown & Joost Pauwelyn eds., 1st ed. 2010) [hereinafter Bown & Pauwelyn].

¹⁴ Gregory C. Shaffer & Daniel Ganin, *Extrapolating purpose from practice: rebalancing or inducing compliance*, in Bown & Pauwelyn, *supra* note 13, at 71 [hereinafter Shaffer & Ganin].

¹⁵ Jorge A. Huerta-Goldman, *Is Retaliation Sseful? Observations and Analysis of Mexico's Experience*, in Bown & Pauwelyn, *supra* note 13, at 281.

This research contributes to the literature on trade wars and compliance with international courts and tribunals. It also contributes to the policy-oriented literature on WTO reform because it re-emphasises the ways that trade retaliation is both a legally sanctioned practice and a political response to the failure of the institutional process.¹⁶ Finally, this research offers the beginning of an answer to the larger question of how states will manage multilateral trade governance in a fragmenting and increasingly multipolar system.¹⁷ We may expect to see further recourse to the negative reciprocity norm in the medium term because it is now a proven tool for addressing trade unilateralism and the problem of treaty compliance.

II. TRADE RETALIATION IN PRACTICE AND THEORY

In January 2018, the Trump Administration approved global safeguard tariffs on USD 8.5 billion in imports of solar panels and USD 1.8 billion in imports of washing machines, a rare flexing of presidential authority that ignored established mechanisms for levying countervailing duties.¹⁸ In March, global tariffs of 25% on steel and 10% on aluminium were announced for all United States (US) trading partners. These tariffs would hit the biggest suppliers the hardest, including Canada, Mexico, the EU, and South Korea.

The Administration initially exempted Canada, Mexico, the EU, South Korea, Brazil, Argentina, and Australia, suggesting that the tariffs might only be directed at China, even though China was already sending less steel and aluminium to the US due to the prior imposition of anti-dumping duties.¹⁹ China was the first country to retaliate, levying duties on US products worth USD 2.4 billion. At the end of March, South Korea received a permanent exemption on steel tariffs in exchange for quantitative restrictions in the form of a tariff rate quota.

By June, the US had ended the tariff exemptions for Canada, Mexico, and the EU. The EU quickly retaliated with tariffs on well-known American products, including

¹⁶ Laurence Herman, *On the Persistence of Trade Sanctions*, C. D. HOWE INSTITUTE (Oct. 25, 2021), <https://www.cdhowe.org/intelligence-memos/lawrence-herman-persistence-trade-sanctions>; *See also*, Mary J. Lovely & Jeffrey J. Schott, *Can China Blunt the Impact of New Economic Sanctions*, Policy Brief 21-13, PETERSON INSTITUTE INTL. ECO. (June 2021), <https://www.piie.com/publications/policy-briefs/can-china-blunt-impact-new-us-economic-sanctions>.

¹⁷ DANIEL DRACHE & MARC D. FROESE, *HAS POPULISM WON? THE WAR ON LIBERAL DEMOCRACY* (ECW Press 2022).

¹⁸ Bown & Kolb, *supra* note 3.

¹⁹ *Id.*

Harley-Davidson motorcycles, motorboats, bourbon, and blue jeans.²⁰ A week later, Canada announced its own retaliatory measures worth USD 12.8 billion, including on steel, aluminium, agricultural goods, and consumer products.²¹ Mexico likewise imposed tariffs worth almost USD 3 billion, and Turkey did too with tariffs on goods worth USD 1.8 billion.²² As the Turkish Lira deteriorated and negotiations to end Turkish incursions into Syria failed, the Trump Administration raised its tariffs to 50% on steel and 20% on aluminium, and Turkey responded again by tripling duties on American automobiles, alcohol, nuts, and paper products.²³ The US dutifully filed WTO challenges against all five countries, alleging that its tariffs were legal and the retaliation worth about USD 24 billion was not.

These tariffs did not occur in a vacuum.²⁴ For the past decade, the US had been signalling its dissatisfaction with the WTO's dispute settlement system, which had increasingly insisted that the US modify its system of industrial protection against unfair trading practices known as anti-dumping.²⁵ In this case, the US had begun blocking AB candidates back in 2011, when the Obama Administration blocked the reappointment of Jennifer Hillman.²⁶ The Administration later blocked the appointment of South Korean candidate Seung Wha Chang in May 2016. The Trump Administration then systematically blocked every AB appointment until the final court of appeal could no longer hear cases.²⁷

The countries that responded most forcefully also had significant experience with compliance at the WTO. Canada and the EU had been complainants on some of the subsidies and anti-dumping cases in which retaliation was authorised. The best examples for both parties being high profile are aircraft disputes, such as Canada's

²⁰ Marc L. Busch, *EU tariff retaliation throttles Harley-Davidson*, THE HILL (Apr. 26, 2021), <https://thehill.com/opinion/international/550154-eu-tariff-retaliation-throttles-harley-davidson/>.

²¹ Allison Martell, *Canada to impose tariffs on U.S., challenge at WTO*, REUTERS (June 1, 2018), <https://www.reuters.com/article/us-usa-trade-canada-idUSKCN1IW2SH>.

²² Bown & Kolb, *supra* note 3.

²³ Kevin Breuninger, *Trump halts trade negotiations with Turkey, raises its steel tariffs to 50%*, CNBC (Oct. 14, 2019), <https://www.cnbc.com/2019/10/14/trump-halting-trade-negotiations-with-turkey-raising-its-steel-tariffs-to-50percent.html>.

²⁴ Daniel W. Drezner, *Economic Statecraft in the Age of Trump*, 42(3) WASHINGTON Q., 7 (2019).

²⁵ GREGORY C. SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INT. ECON. L.*, 275 (Cambridge University Press 2021).

²⁶ Kristen Hopewell, *When the Hegemon goes Rogue: Leadership amid the US Assault on the Liberal Trading Order*, 97(4) INTL. AFFAIRS, 1025 (2021).

²⁷ Giuseppe Zaccaria, *You're Fired! International Courts, Re-contracting, and the WTO Appellate Body during the Trump Presidency*, 13(3) GLOB. POL'Y., 315 (2022).

with Brazil and the EU's with the US.²⁸ Most retaliatory tariffs targeted iconic American products and goods, for example, Harley-Davidson motorcycles that are produced in the home state of then-Speaker of the House of Representatives, Paul Ryan, and others produced in the jurisdictions of Republican members of the House and Senate.²⁹ There was pressure on beleaguered American agricultural markets that had already felt the impact of the Trump Administration's trade war with China.³⁰

Targeted tariffs are made possible by up-to-the-minute trade data.³¹ The retaliatory tariffs of 2018 were far more sophisticated than anything imagined by the WTO framers in the early 1990s. What made this retaliation unprecedented was that it took place outside the WTO, as a corollary to the ongoing WTO cases. Yet the way that it took place is strikingly like the DSU Article 22 retaliation that has been a part of the WTO dispute settlement system since 1995.

A. Retaliation at the WTO

The DSU Article 22.6 provides an arbitration framework to guide retaliation should the parties fail to agree on equitable compensation or suspension of concession. Compliance inducement is the stated purpose of retaliation in the WTO's dispute settlement system. In cases where a state refuses to comply with a legal decision, DSU Article 22 provides principles for the suspension of concessions in paragraph 3 (22.3). The DSU provides for same-sector retaliation, and if not same sector, then same agreement, and failing that retaliation under another covered agreement.

Parties may negotiate a non-monetary penalty for non-compliance or a suspension of trade concessions in the form of a retaliatory tariff. Negotiated compensation is difficult and does not happen often because compensation must take the form of a benefit equivalent to the benefit the respondent has nullified or impaired. Monetary payments for non-compliance are not allowed. Most often, complainants seeking to enforce compliance levy a retaliatory tariff equal to the value of the nullified benefit, with small economies retaliating across sectors and covered agreements, seeking leverage against the larger economy.

²⁸Appellate Body Report, *Brazil — Export Financing Programme for Aircraft*, U 19, WTO Doc. WT/DS46/AB/R (adopted Aug. 20, 1999) [hereinafter *AB Report Brazil — Export Financing*].

²⁹ Thiemo Fetzer & Carlo Schwarz, *Tariffs and Politics: Evidence from Trump's Trade Wars*, 131(636) *ECON. J.* 1717 (2021) [hereinafter Fetzer & Schwarz].

³⁰ Jenny Hopkinson, *Profiles and Effects of Retaliatory Tariffs on US Agricultural Exports*, CONG. RSCH. SERV. R45448 (2018).

³¹ Sung Eun Kim & Yotam Margalit, *Tariffs as Electoral Weapons: The Political Geography of the US-China Trade War*, 75(1) *INT'L. ORG.*, 1 (2021).

Retaliation takes place at the end of the compliance process (see Figure 1 below).³² A panel report is adopted by the DSB, and parties usually appeal the panel's interpretation of evidence and treaty obligation at the AB.³³ After the appeal, the losing party submits a report indicating the time to implementation. Disputes over implementation take place under DSU Article 21.5 and are referred to the original panel. If no implementation occurs, parties can negotiate non-monetary compensation, and failing that, the DSB can authorise retaliation under DSU Article 22, with an arbitrator determining the limits of retaliation.

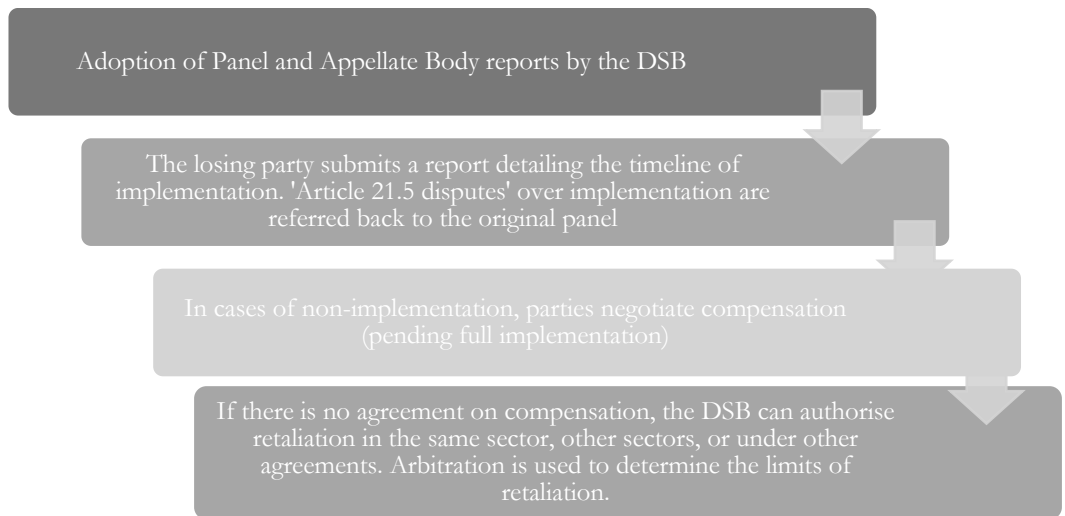


Figure 1. The Compliance Process at the WTO

B. *The Evolving Literature on Retaliation*

For most of the WTO's existence, scholars of trade policy and law have been undecided about the functional effectiveness of retaliation for compliance.³⁴ Little evidence exists to guide retaliating countries towards sanctions that improve the chances of resolving a dispute. With this ambiguity front of mind, the literature explores four goals for retaliatory tariffs. First, retaliation may provide an incentive

³² WORLD TRADE ORG., THE PROCESS — STAGES IN A TYPICAL WTO DISPUTE SETTLEMENT CASE, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm. [hereinafter WTO Dispute Settlement Stages]

³³ Debra P. Steger, *The Founding of the Appellate Body in A History of Law and Lawyers*, in THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM (Gabrielle Marceau ed., 2015).

³⁴ Alan O. Sykes, *Optimal sanctions in the WTO: the case for decoupling (and the uneasy case for the status quo)*, in Bown & Pauwelyn, *supra* note 13, at 339.

to comply with the decision of the panel, just as it is designed to. Second, if compliance fails, retaliation may reset the reciprocal relationship at a lower level – the so-called trade rebalancing thesis. Finally, retaliation may provide some compensation for non-compliance and may act as a deterrent to other Members.

1. Retaliation as Incentive to Comply

The stated goal of retaliation is compliance, but trade policymakers also know that if dispute settlement fails, retaliatory measures are not a certain return to reciprocity. At best, they are a recognition that beyond international law lies the self-help system. Even so, a state that fails to comply after supervised retaliation may bear reputational costs.

In the most important volume on the subject, Pauwelyn argues that the goal of retaliation has always been unclear in the General Agreement on Tariffs and Trade (GATT)/WTO because it varies according to the complainant's preferences.³⁵ Furthermore, the “murky and confused” nature of the retaliatory system is part of its strength because it allows for flexible strategies for bringing non-compliant states back to their obligations.³⁶ In a response to Pauwelyn, Jackson concludes that “[t]he most important goal of the WTO system is to afford predictability to the international trading system.”³⁷ By pursuing retaliation inside a judicial institution, Members are subordinating it to the processes of law, thereby furthering the larger goals of orderly trade relations and what Petersmann has referred to as ‘rule by law’.³⁸

The literature shows a marked ambivalence about the effectiveness of retaliation because there has been little evidence that retaliatory tariffs can be calibrated to produce a political outcome. However, that has begun to change in the past several years as a result of the Trump tariffs. Fetzer and Schwarz show that tariffs levied by Canada, China, and the EU were politically targeted and that countries engaging in retaliation make a trade-off between accurate targeting and hurting their own economies.³⁹

Kim and Margalit show that China pursued a strategy of tariff retaliation that targeted Republican districts, and they were successful because “voters who were

³⁵ Bown & Pauwelyn, *supra* note 13, at 56.

³⁶ *Id.*, at 64.

³⁷ John H. Jackson, *Comment on Chapter 2*, in Bown & Pauwelyn, *supra* note 13, at 67.

³⁸ Ernst-Ulrich Petersmann, *The Establishment of the GATT Office of Legal Affairs and the Limits of 'Public Reason' in the GATT/WTO Dispute Settlement System*, in *THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM* (Gabrielle Marceau ed., 2015).

³⁹ Fetzer & Schwarz, *supra* note 29, at 1740.

more vulnerable to the tariffs” impact were likelier to learn about the escalating trade war, recognise its adverse impact, and view President Trump and Republican Congress members as responsible for the situation.”⁴⁰ Blanchard, Bown, and Chor show that targeted retaliation accounted for approximately five losses for Republican candidates in the 2018 midterm elections.⁴¹ Targeted retaliatory tariffs cause real political harm and thereby create a measurable incentive to comply with treaty obligations.

2. Retaliation as Trade Rebalancing

In the absence of early evidence for effectiveness, some literature argued that even without compliance, retaliation serves a functional purpose because it resets the reciprocal trading relationship at a lower level. Even the WTO refers to this ambiguous goal of trade rebalancing, suggesting, “[t]here is some debate whether the purpose of the suspension of obligations is to enforce recommendations and rulings, or merely to rebalance reciprocal trade benefits (at a new and lower level).”⁴²

Spamann roundly criticised the trade rebalancing thesis, arguing that it has no empirical basis and that WTO members lack a strong conceptual understanding of how their retaliatory moves rebalance the trade relationship. Furthermore, the models used to arbitrate retaliation are flawed.⁴³ Therefore, he suggests that rebalancing is a poor reason to impose retaliatory tariffs when dispute settlement fails. He is correct that retaliation tends to carry a whiff of punishment due to its unilateral nature. The punitive element has been considered a downside to retaliation because it threatens to increase conflict.

3. Retaliation for Compensation and Deterrence

We have discussed retaliation as an incentive for compliance and a mode of trade rebalancing. There are two more functional features of retaliation in the trading system: it can act as a form of compensation for complaining parties, and it can be a form of deterrence for other Members in the future. Schropp notes that “nothing in the text of the Agreement incontrovertibly nails down what the purpose of WTO

⁴⁰ Sung Eun Kim & Yotam Margalit, *Tariffs as Electoral Weapons: The Political Geography of the US-China Trade War*, 75(1) INTL. ORG. 1, 3 (2021).

⁴¹ Emily J. Blanchard et al., *Did Trump’s Trade War Impact the 2018 Election?* (Nat. Bureau of Econ. Rsch., Working Paper No. 26434, 2019).

⁴² WTO Dispute Settlement Stages, *supra* note 32.

⁴³ Holger Spamann, *The Myth of ‘Rebalancing’ Retaliation in WTO Dispute Settlement Practice*, 9(1) J. INTL. ECON. L., 31 (2006).

enforcement really is.”⁴⁴ Nevertheless, what Members expect in terms of compliance or compensation is an adequate stand-in, given the silence of the framers.

Even so, retaliation is a vastly inefficient method for gaining compensation, not least of all because it is counterproductive to the overall goals of the WTO, which are the reduction of trade barriers. However, compensation cannot be dismissed as a goal of retaliation because Members go into dispute settlement believing that the nullification or impairment of expected benefits has materially impacted domestic firms.⁴⁵

This concept of retaliation as a compensatory practice has been discussed in the context of dispute settlement reform, where it has been suggested that the WTO ought to allow monetary payments in lieu of other sanctions because it is less inefficient and counterproductive to the mandate of the WTO than retaliation.⁴⁶ Mercurio disagrees, arguing that using financial compensation in lieu of targeted sanctions would not increase the efficiency of the dispute settlement system, nor would it tighten the relationship between aims and outcomes.⁴⁷ It would not resolve the question of whether retaliation is aimed at compliance or trade rebalancing.

Further, if compliance is the main goal, allowing payments in lieu of compliance does not increase the effectiveness of dispute settlement and might undermine that effectiveness. Hence, regardless of the ambiguities in the current system, retaliation is the counterintuitive devil we know. Even so, as this paper shows, working counter to the stated aims of the WTO may be necessary for achieving the larger purposes of reciprocity.

Finally, there is a basic idea that retaliation may act as a kind of deterrent.⁴⁸ It has not been well developed in the literature, but it is based on the belief that Members engage in dispute settlement to depoliticise trade, and the failure of dispute settlement is an outcome that ought to be avoided. The success of dispute settlement is especially important to developing countries, which lack the market power to retaliate effectively against larger trading partners.⁴⁹ The deterrence rationale is a relic

⁴⁴ Simon Schropp, *The equivalence standard under Article 22.4 of the DSU: A ‘Tariffic’ Misunderstanding?* in Bown & Pauwelyn, *supra* note 13, at 496.

⁴⁵ *Id.* at 497.

⁴⁶ ROBERT Z. LAWRENCE, CRIMES AND PUNISHMENTS? RETALIATION UNDER THE WTO, 79-89 (PIIE, 2003).

⁴⁷ Bryan Mercurio, *Why compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding*, 8(2) WORLD TRADE REV., 1 (2009).

⁴⁸ Bown & Pauwelyn, *supra* note 13, at 56.

⁴⁹ Alexander W. Klint, *Rethinking Retaliation in the WTO Dispute Settlement System: Leveling the Playing Field for Developing Countries in Asymmetric Disputes*, in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES, (K. Alexander & M. Andenas eds., 2008).

of an earlier time before the Trump Administration and before the increasing use of retaliatory measures in US subsidies and anti-dumping cases. It is now clear that retaliatory measures are not a rare outcome that can be avoided but are increasing in frequency and may even be a go-to strategy when dealing with American trade unilateralism. Shaffer and Ganin have shown that no matter how we conceptualise the function of retaliation, compliance is the largest single overarching goal pursued by complainants.⁵⁰ We know this because the strategies used by retaliating Members aim to build political pressure for compliance.

C. *The Primacy of Compliance*

The strategy of targeting a small number of politically significant producers within the respondent suggests that compliance, and not rebalancing, is the complainants' primary goal.⁵¹ Complainants have found that concentrating retaliatory measures on politically influential export groups is a more effective way to induce compliance than increasing tariffs by a lower rate across the board or targeting the sector that benefitted from the WTO's inconsistent measure.⁵²

These strategies taken together are a form of negative reciprocity that seeks a path back to compliance.⁵³ Rebalancing trade, compensating loss, and deterring future non-compliance are salutary secondary benefits to that primary goal.

But the rise of American non-compliance, when considered alongside the recent action on the AB and the Trump tariffs, requires that we reconsider the place of retaliation in trade governance. Does it work outside the WTO? Does it work when applied to the hegemon? Furthermore, negative reciprocity, with all its baggage of punishment, may be a defining element in a less-orderly era of trade relations in the upcoming decades. The next section develops three case studies of negative reciprocity at the WTO. It shows how the dual reciprocal goals of symbolic punishment and increased bargaining leverage came to be, through a process of trial and error over twenty-five years and twenty-six cases.

III. EVIDENCE FROM WTO DISPUTE SETTLEMENT

There have been twenty-six cases at the WTO in which retaliation has been authorised under DSU Article 22 due to non-compliance on the part of the responding party. In eighteen, or 69% of these cases, retaliation was approved against the US. In a further eight cases, the EU (four panels), Canada (two panels),

⁵⁰ Shaffer & Ganin, *supra* note 14.

⁵¹ *Id.*

⁵² *Id.* at 84.

⁵³ Andreas Schedler, *Democratic Reciprocity*, 29(2) J. POL. PHIL., 252 (2021).

and Brazil and Japan (one panel each) were Respondents. In the simplest terms, the problem of non-compliance began as a problem of intractable disputes involving subsidies and domestic industrial protection in Europe but has evolved to be a problem of inducing American compliance in subsidies and anti-dumping disputes (see Figure 2 below).



Figure 2: Authorisation to Retaliate Against the US

The narratives below group disputes according to the success of retaliatory measures. The first case study presents disputes where retaliation failed, backfired, or was otherwise not a factor in the resolution of the case. These cases are a mixed bag of subsidy disputes, services, copyrights, and anti-dumping. But they all share one thing in common: retaliation was not viable. Next comes a case study of disputes with mixed outcomes in which negative reciprocity was a factor in eventual compliance but perhaps not determinative. The final case study presents a set of disputes in which retaliation worked. These cases include mostly subsidies and anti-dumping cases in which the US was the respondent (see the Appendix for a complete list of WTO disputes in which retaliation was authorised).

A. Disputes Where Retaliation Did Not Induce Compliance

There are four cases in which retaliation was authorised, but it played no role in compliance, either because it was unworkable due to sparse trade, because the value of the retaliation was so negligible as to not create an incentive to comply, or because

the complainant believed that retaliation against a much larger trade partner was too politically costly. The aircraft disputes between Brazil and Canada are a good example of a bilateral relationship where trade retaliation was not practical.⁵⁴ Both countries subsidised competing regional jet industries. Canada sued Brazil and was granted authorisation in 2000 to retaliate up to USD 344.2 million CAD per year.⁵⁵ Brazil then took Canada to the WTO, won, and was granted leave to retaliate with tariffs up to a value of USD 247.8 million USD per year in 2003.⁵⁶

Retaliation would have been unproductive because trade between Canada and Brazil is low. Additionally, bilateral relations curdled. Neither Canada nor Brazil was willing to give up state support for aircraft exports, although both governments restructured state support following the dispute settlement. The dispute dragged on, and in 2017, Brazil filed another case at the WTO. The case was dropped in 2021 after Bombardier exited the regional jet business entirely, selling its A220 program to Airbus and the Canadian Regional Jet (CRJ) business to Mitsubishi.⁵⁷

In the first case testing copyright disciplines under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the EU sued the US over Section 110(5) of the Copyright Act. Following a finding of non-compliance, the EU was granted authorisation to retaliate up to a value of 1.22 million euros per year.⁵⁸ The case was resolved through mutual agreement in which the US paid USD 3 million into a fund for music copyright holders in Europe.⁵⁹ It is not that retaliation did not move the needle in this case, but rather that it was such a symbolic amount that we cannot say with any real conviction whether American decision makers were moved by the retaliation or simply a desire to close the book on a continuing irritant.

In *US — Gambling*, Antigua and Barbuda won against the US and received authorisation to retaliate, including through the withdrawal of cross-sector trade concessions in the form of a suspension of TRIPS obligations.⁶⁰ Antigua could ignore copyright on American media and pharmaceuticals worth USD 21 million per

⁵⁴ Helena D. Sullivan, *Regional Jet Trade Wars: Politics and Compliance in WTO Dispute Resolution*, 12(1) MINN. J. GLOB. TRADE, 71 (2003).

⁵⁵ *AB Report Brazil—Export Financing*, *supra* note 28.

⁵⁶ Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WTO Doc. WT/DS222/R (adopted Feb. 19, 2002).

⁵⁷ CBC News, *Bombardier exits the commercial plane business, sells remaining A220 stake to Airbus*, CBC (Feb. 13, 2020) <https://www.cbc.ca/news/business/bombardier-financial-results-airbus-c-series-1.5462182>.

⁵⁸ Panel Report, *United States—Section 110(5) Copyright Act*, WTO Doc. WT/DS160/R (adopted June 15, 2000).

⁵⁹ *Id.*

⁶⁰ Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted May 22, 2007).

year. But as a small Caribbean country that relies on US imports, any retaliation would hurt them more than the US.⁶¹ Antigua opted for a negotiated settlement rather than the withdrawal of cross-sector trade concessions. By 2018, Antigua had implored the WTO's Director General to weigh in on the case. They wanted the US to make a monetary payment, which Antigua argued was the only way to collect a settlement that would not hurt their economy by antagonising their biggest trading partner. So far, the US has only offered a token payment of approximately USD 2 million.⁶²

The US — *Washing Machines* dispute is unique as an example of effective non-retaliation.⁶³ The US imposed anti-dumping duties on washing machines from South Korea.⁶⁴ South Korea won the right to retaliate against American non-compliance but did not do so to avoid further angering the Trump Administration. Mexico, China, and South Korea must deal with extra duties on supposedly dumped washing machines. All three countries responded by eating the cost of the duties while maintaining profit margins by shifting production to lower-cost jurisdictions, such as Vietnam. Then they raised prices on accompanying laundry dryers-washers and dryers are usually sold in matching sets.⁶⁵ The anti-dumping fines brought USD 81 million into the US government accounts but ended up costing American consumers an estimated USD 1.5 billion in higher prices for washers and dryers.⁶⁶ Retaliation was not a factor, at least in part, because firms had an effective way to counter the anti-dumping duties.

B. *Mixed Results for Retaliation*

This set of seven disputes all revolve around market access for agricultural commodities and softwood lumber. They relied on retaliation, or the threat thereof, to enforce compliance in areas where leading WTO stakeholders had significantly

⁶¹ ANDREW F. COOPER, *INTERNET GAMBLING OFFSHORE: CARIBBEAN STRUGGLES OVER CASINO CAPITALISM* (Palgrave Macmillan 2011).

⁶² Tom Miles, *Storm-battered Antigua asks US to settle 12-year old WTO bill*, REUTERS (Sept. 29, 2017), <https://www.reuters.com/article/us-usa-antigua-wto-idUSKCN1C4165>.

⁶³ Appellate Body Report, *United States—Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (adopted Sept. 26, 2016).

⁶⁴ Petros C. Mavroidis & Thomas J. Prusa, *Die Another Day: Zeroing in on Targeted Dumping - Did the AB Hit the Mark in US-Washing Machines?*, 17(2) *WORLD TRADE REV.*, 239 (2018).

⁶⁵ Aaron Flaaen et al. *The Production, Relocation, and Price Effects of US Trade Policy: The Case of Washing Machines*, 110(7) *AM. ECON. REV.*, 2103 (2020).; Aaron Flaaen et al., *The Production, Relocation, and Price Effects of US Trade Policy: The Case of Washing Machines* (U. Chi., Working Paper No. 2019-61, 2019).

⁶⁶ John Brinkley, *Trump is Likely to Lose His War on Imported Washing Machines*, FORBES (Apr. 29, 2019), <https://www.forbes.com/sites/johnbrinkley/2019/04/29/trumps-is-likely-to-lose-his-war-on-imported-washing-machines/?sh=6c4fb3ff5772>.

invested in protection at home.⁶⁷ Retaliation played a role in the resolution of each of these cases, often as a bargaining chip in determining the final form of political settlement, but we cannot ascribe a major impact for retaliation – either because its impact is not clear or because retaliation remained only as a threat in the background.

In *EC — Hormones*, the US initiated a dispute about Europe's ban on hormone treated beef and was given authorisation to apply retaliatory tariffs worth USD 116.8 per year in 1999.⁶⁸ Canada also initiated dispute settlement on the same issue and was granted the right to retaliate against Europe to the value of USD 11.3 million per year. The US applied targeted tariffs on agricultural goods from Europe, but it did not sway European public opinion about the dangers of hormone-treated beef. In 2009, Europe and the US signed a memorandum of understanding that struck a balance with a limited ban on American hormone-treated beef and a limited number of US tariffs staying in place.

For Canada, the hormone dispute was resolved through the signing of the Comprehensive Economic and Trade Agreement (CETA) in 2016.⁶⁹ The agreement included a large enough duty-free quota for Canadian ranchers (64,950 tonnes) to make hormone-free production for the EU market viable.⁷⁰ Europe got increased access to the Canadian government's procurement contracts. The beef in Europe remains substantially free of growth hormones, and Canada and the US have received limited access to European beef markets.⁷¹ Retaliation was a factor in that it created a bargaining position for US negotiators, but it did not affect public sentiment in Europe about the justice of the American position.

Canada — Dairy was another early WTO case in which retaliation played a mixed role in resolution.⁷² The US and New Zealand sued for market access to Canada's highly protected dairy sector, and following dispute settlement and Canadian non-compliance, they were authorised to retaliate up to USD 35 million per year. The case was again resolved through a mutually agreed solution, but the threat of retaliation was a factor in the sense that it brought Canada to the table for a

⁶⁷ MARK MANGER, *INVESTING IN PROTECTION: THE POLITICS OF PREFERENTIAL TRADE AGREEMENTS BETWEEN NORTH AND SOUTH* (Cambridge University Press 2009).

⁶⁸ Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R; WT/DS48/AB/R (adopted Feb. 13, 1998).

⁶⁹ *Id.*

⁷⁰ Tom Miles, *EU and Canada settle cattle battle at the WTO*, REUTERS (Oct. 3, 2017), <https://www.reuters.com/article/us-canada-cu-wto-meat-idUSKCN1C81HY>.

⁷¹ Jill E. Hobbs, *A Protectionist Bargain?: Agriculture in the European Union—Canada Trade Agreement*, 49(3) J. OF WORLD TRADE, 437 (2015).

⁷² Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/AB/R; WT/DS113/AB/R (adopted Oct. 27, 1999).

negotiated settlement, although the Canadian position remained unchanged, and the dairy sector remained protected behind high tariffs. The issue would continue to be a sore spot in Canada/US relations, even after increased market access was granted to American producers in the US-Mexico-Canada Agreement (USMCA/CUSMA/T-MEC) in 2020.⁷³

In yet another agricultural market access dispute, the US complained in *Japan — Apples* about Japanese use of sanitary and phytosanitary barriers to keep American apples out of the domestic market. Japan had effectively banned American apples since 1971, when it opened its markets to foreign apples in law but, in practice, banned them from using Agreement on Sanitary Phytosanitary provisions. The Japanese were concerned about American pests and chemicals, and the de facto ban followed public sentiment. The US used the threat of Section 301 review and then a WTO case to open the Japanese apple market, a similar strategy to the one employed in the opening of the market for oranges.⁷⁴ The Section 301 challenge to citrus protection threatened to block Japanese auto exports into the US. In this case, the threat of retaliation if the market for apples was not opened to American farmers was implied but real. Japan revised its restrictions on imports of apples from the US and eventually allowed American apples into the Japanese market.⁷⁵

Finally, we have the issue of compliance and retaliation in the softwood lumber trade war that predates the WTO by a decade.⁷⁶ Three of Canada's complaints against the US regarding softwood lumber have gone all the way to retaliation.⁷⁷ Both American timber lot owners and producers of Canadian softwood lumber have tried to sway public opinion and gain the sympathy of American homebuilders and other consumers of lumber products. The cases revolve around the way that Canadian provinces price the harvesting of timber on Crown land. US timber is more expensive on average, and American producers perennially make their case that Canadian timber is being dumped in the US market. At stake is the protection of American jobs in timber versus the import of cheaper Canadian softwood lumber,

⁷³ Andrea Shalal & David Ljunggren. *Canada violated USMCA trade pact by reserving dairy quotas — dispute panel*, REUTERS (Jan. 4, 2022), <https://www.reuters.com/world/americas/panel-finds-canadas-practice-reserving-dairy-quotas-inconsistent-with-usmca-2022-01-04/>.

⁷⁴ Notification of Mutually Agreed Solution, *Japan — Measures Affecting the Importation of Apples*, WTO Doc. G/AG/GEN/50/Add.1 G/L/520/Add.1 G/SPS/GEN/299/Add.1 WT/DS245/21 (Sept. 02, 2005).

⁷⁵ Gavin Goh, *Tipping the Apple Cart: The Limits of Science and Law in the SPS Agreement after Japan-Apples*, 40(4) J. WORLD TRADE, 655 (2006).

⁷⁶ Gilbert Gagné, *The Canada-US Softwood Lumber Dispute: A Test Case for the Development of International Rules*, 58(3) INTL. J., 335 (2003).

⁷⁷ Notification of Mutually Agreed Solution, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc. G/ADP/D45/2 G/L/598/Add.1 G/SCM/D51/2 WT/DS277/20 (Nov. 16, 2006).

with the added caveat that the US uses more lumber than it produces at home and that lumber in turn creates jobs in the construction industry.

American anti-dumping duties are aimed at increasing the price charged for Canadian lumber. Canadian producers want to avoid antidumping investigations, which they contend are largely cyclical and driven by the price of American timber.⁷⁸ There have been several attempts to end the lumber trade war, but retaliation has not been definitive in any of them. The most recent was the Softwood Lumber Agreement in 2006, which ended Canada's pursuit of retaliatory tariffs of more than USD 5 billion per year.⁷⁹ The SLA expired in 2015, and the issue rose again under the Trump Administration in 2017. Canada filed two cases at the WTO (DS533/534), which are stuck in limbo at the appeals stage. Softwood is a good example of an issue that cannot be resolved by retaliation alone. Even so, retaliation is a necessary precursor to a political solution, if only because Canada, as the smaller partner, uses negative reciprocity to keep the issue in front of Congress and to develop a bargaining position from which to give something in exchange for American compliance.

C. *Disputes Where Retaliation Worked*

Retaliation works when sanctions create an effective form of bargaining leverage, when the case gains broad public attention, or when sanctions are large enough to affect bilateral trade relations. The *EC — Bananas* case involved the US, EU, and ten Latin American countries and took place over twenty years and eight WTO disputes. The US and Ecuador were given leave to apply retaliatory tariffs worth USD 191.4 million per year in 1999 and 2000, and tariffs targeted iconic European industries such as French cheese and Scottish cashmere.⁸⁰ Retaliatory measures played a distinct role in the resolution of the dispute. European businesses were nervous that a far-away case involving something as innocuous as bananas could impact jobs in the cashmere sector in Scotland. Sanctions led to a negotiated settlement in 2001, in which the European Union adopted new regulations. An interim deal was signed with the Latin American countries in 2009 and a final deal in 2012.

In *US — FSC*, the European Communities successfully sued the US over its use of foreign sales corporations, and following non-compliance, the EU was authorised to

⁷⁸ UNITED STATES INTERNATIONAL TRADE COMMISSION, *SOFTWOOD AND LUMBER FROM CANADA, DETERMINATIONS AND VIEWS OF THE COMMISSION*, USITC PUBLICATION NO. 3509 (May, 2002).

⁷⁹ Scott Deveau, *Canada backs down on Softwood Retaliation*, THE GLOBE AND MAIL (Aug. 23, 2005), <https://www.theglobeandmail.com/news/national/canada-backs-down-on-softwood-retaliation/article22733016/>.

⁸⁰ Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO DS27/AB/RW/USA/Corr.1 (adopted Dec. 11, 2008).

apply escalating retaliatory duties worth up to USD 4.043 billion USD.⁸¹ Escalation started with tariffs of 5% on American goods that would not disrupt European investment, and by the time the provisions were repealed, the tariffs had reached 14%. The tariffs were designed to push Congress to meet its obligations, and they provoked a strong reaction.⁸² At the time, US Republicans linked the case to the Boeing/Airbus dispute and argued that the EU was aggressively pursuing compliance in the FSC case as retaliation for the American suit against Airbus subsidies.⁸³ Nevertheless, Congress repealed the grandfathered tax provisions for foreign sales corporations.

Retaliation proved to be an effective tool for ensuring compliance in anti-dumping cases when Europe and Japan pursued legal action against the US. Their lawsuits targeted the anti-dumping provisions found in Section 801 of the Revenue Act of 1916, a source of trade tension that had persisted since 1988. Under these provisions, it was unlawful to import goods into the US at prices substantially lower than their actual market value, with the explicit intent to harm US industries, obstruct their establishment, or monopolise trade. Following unfavourable judgements, the US lost both cases, leading to the granting of authorisation for the EU and Japan to retaliate in 2004. In the same year, Congress chose to repeal Section 801 before any retaliatory measures could be implemented.⁸⁴

One of the highest-profile anti-dumping cases of the early 2000s was the *US — Byrd Amendment*. The Continued Dumping and Subsidy Offset Act (CDSOA) of 2000 allowed the government to disburse anti-dumping and countervailing duties directly to domestic producers, giving American businesses an incentive to complain about foreign competition.⁸⁵ Eleven countries filed suits in two disputes, and eight were authorised to retaliate against US non-compliance. Retaliatory measures were aimed at public opinion but were also diffused across almost a dozen actors, so whatever pain was felt by the US consumers and producers was reduced. For example, the EU's piece of the retaliatory tariffs was valued at USD 27.8 million and Canada's at

⁸¹ Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations”*, WTO Doc. WT/DS108/36 (adopted Mar. 17, 2006).

⁸² *EU can retaliate against Boeing Immediately; old WTO win outstanding*, LEEHAM NEWS AND ANALYSIS, (Sept. 30, 2019), <https://leehamnews.com/2019/09/30/eu-can-retaliate-against-boeing-immediately-old-wto-win-outstanding/>.

⁸³ Nicholas J. Minella, *Motives and Consequences of the FSC Dispute: Recent Salvo in a Long Standing Trade War or Fashioning a Bargaining Chip?*, 27(3) BROOK. J. INT'L. L., 1065 (2002).

⁸⁴ Decision by Arbitrator, *United States—Anti-Dumping Act of 1916 - (Original Complaint by the European Communities)*, WTO Doc. WT/DS136/ARB (adopted Feb. 24, 2004).

⁸⁵ Benjamin H. Liebman & Kara M. Reynolds, *The Returns from Rent-Seeking: Campaign Contributions, Firm Subsidies, And The Byrd Amendment*, 39(4) CAN. J. ECON., 1345 (2006).

USD 11 million per year.⁸⁶ Even though retaliation was largely symbolic, the Byrd Amendment provoked a strong reaction in many trade partners, and Congress agreed to repeal it in 2007.

In a later anti-dumping case (*US — Zeroing*), both Japan and the EU won disputes against the American use of zeroing methodologies in anti-dumping administrative reviews (it had already been declared illegal in initial investigations). Retaliatory tariffs were used, but they were not aimed at public opinion but rather at the United States Trade Representative (USTR) and the idea that US exporters would face more uncertainty in export markets in the EU and Japan.⁸⁷ Finally, in 2012, the US agreed to phase out zeroing in administrative reviews.⁸⁸ Even though this is a win for compliance in the specific case, zeroing was later used by the US in calculating what it considered to be targeted dumping by Canada of softwood lumber.⁸⁹

In *US — Upland Cotton*, Brazil sued the US over cotton subsidies and won. Eventually, in 2009, Brazil was granted the right to apply retaliatory tariffs worth up to USD 147.4 million per year against American goods and services, including intellectual property rights.⁹⁰ The threat of cross-sector retaliation was potent, and the US agreed to a framework agreement that included annual payments, subsidy discussions, and US program modifications. Importantly, the framework agreement avoids sanctions on US goods and services, including patents and intellectual property rights.

The *Boeing — Airbus* subsidies dispute began in 2004, when the US and the EU sued each other over aircraft subsidies for Boeing and Airbus. Like in the earlier *Bombardier — Embraer* cases, neither party complied, and both won the right to levy retaliatory

⁸⁶ DSU Arbitration Decision, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS234/ARB/CAN; WT/DS234/ARB/MEX (adopted Aug. 31, 2004).

⁸⁷ DSU Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. WT/DS322/AB/RW (adopted Aug. 31, 2009).

⁸⁸ Sungjoon Cho, *No More Zeroing? The United States Changes its Anti-dumping Policy to Comply with the WTO*, 16(8) AMER. SOC. INT'L. L. INSIGHTS, (2012).

⁸⁹ See Christine McDaniel & Edwin Vermulst, *United States—Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China: Re-Litigating through the Backdoor?*, 20(4) WORLD TRADE REV., 546 (2021) (The US lost another zeroing case more recently. In *US—Anti-dumping Methodologies*, China received authorisation to suspend concessions on up to USD 3.58 billion in American goods per year. The case predates the Trump tariffs, and this judgement is not as high a priority as the major round of Trump tariffs and China's retaliation to them. China has not yet announced how it will retaliate).

⁹⁰ DSU Arbitration Decision, *United States—Subsidies on Upland*, WTO Doc. WT/DS267/ARB/1; WT/DS267/ARB/2 (Aug. 31, 2009).

tariffs worth billions in 2019⁹¹ and 2020.⁹² The aircraft trade war was resolved through a package deal designed to lift escalating European tariffs on iconic American products that were levied following the Trump tariffs.

The deal included removing a combined USD 11.5 billion in retaliatory tariffs, pledging a five-year truce in the aircraft trade war, and offering Europe a tariff-rate quota deal for exports of aluminium and steel.⁹³ Like in the previous case between Canada and Brazil, this agreement recognises that neither party is likely to completely abandon their preferred method for supporting domestic aircraft producers. The retaliatory pile-on of European tariffs in response to the Trump tariffs was enough to bring the Biden Administration to the table to negotiate relief.

Finally, in *US—COOL*, Canada won a case against American country-of-origin labelling for meats. Following non-compliance, Canada was granted leave to retaliate on up to USD 1.055 billion CAD of US trade per year in 2015.⁹⁴ Canada released a long list of agricultural and manufactured goods that would be subject to extra tariffs. The legislation was repealed by Congress, but the issue has arisen again. The Trump Administration revisited the possibility of reintroducing a country-of-origin label for beef and pork. The Biden Administration is considering revamping the rules. Currently, cows and pigs that are processed at a US Department of Agriculture plant can be labelled ‘product of the USA,’ even if the animal was not born and raised in the US. It has become a political fight between processors and livestock groups who want the rules tightened so consumers know where their beef and pork originated.⁹⁵ Like in the softwood lumber disputes, Canadian recourse to negative reciprocity may only bring temporary relief.

⁹¹ DSU Arbitration Decision, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/RW (adopted May 15, 2018).

⁹² DSU Arbitration Decision, *United States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS353/ARB (adopted Oct. 13, 2020).

⁹³ Philip Blenkinsop, *US, EU agree truce in 17-year Airbus-Boeing conflict*, REUTERS (June 15, 2021), <https://www.reuters.com/business/aerospace-defense/eu-us-set-unveil-truce-17-year-aircraft-battle-2021-06-15/>.

⁹⁴ DSU Arbitration Decision, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/ARB/Add.1; WT/DS386/ARB/Add. 1 (adopted Dec. 07, 2015).

⁹⁵ Philip Gruber, *Vilsack to Revisit Country of Origin Labeling for Meat*, LANCASTER FARMING (May 12, 2021), https://www.lancasterfarming.com/news/main_edition/vilsack-to-revisit-country-of-origin-labeling-for-meat/article_d1a0c5dc-e7a8-57e1-8ea5-4d6b99ae653c.html.

D. Negative Reciprocity and Bargaining Leverage

Trade retaliation has long been a significant factor in trade governance. As far back as the 1980s, the US used Section 301 suits to try to enforce market opening at the GATT. Winning cases in US courts created bargaining leverage with which to negotiate market access. Later at the WTO, retaliation was enshrined in the DSU as a last resort for non-compliance. By far the biggest non-compliance issue has been around the US use of anti-dumping investigations. Anti-dumping has been called the third rail of American trade policy because of its centrality to the US approach to defending domestic industries hard hit by foreign competition.⁹⁶ It stands to reason that those aggressive anti-dumping methodologies would attract disputes, but what is important to note is how many of these practices were withdrawn after a credible threat to retaliate.

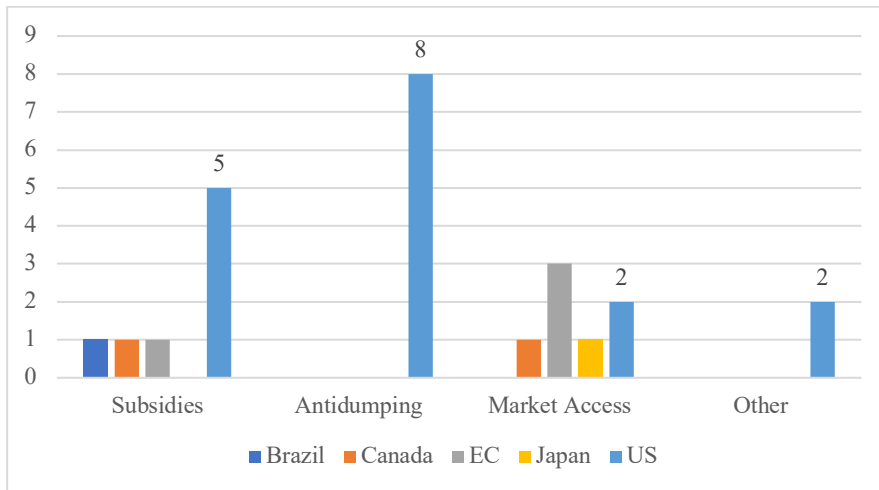


Figure 3: Categorisation of Article 22 Retaliation

Source: Original dataset

The three groupings of disputes above have shown a pattern in which retaliation is aimed at increasing the potential for compliance, as Shaffer and Ganin have argued.⁹⁷

⁹⁶ N. Gregory Mankiw & Phillip L. Swagel, *Anti-Dumping: The Third Rail of Trade Policy*, FOR. AFF. (July 1, 2005), <https://www.foreignaffairs.com/articles/united-states/2005-07-01/anti-dumping-third-rail-trade-policy>.

⁹⁷ Shaffer & Ganin, *supra* note 14.

The functional mechanism through which negative reciprocity works is not a pattern of tit-for-tat but rather the second-order bargaining position it creates. This dual-reciprocity strategy has been shaped by institutional context. Increasing non-compliance by the US (and to a lesser extent, the EU) means that retaliation strategies have been organised by complainants to push the issue up the policy agenda in large, decentralised federal governments.

Retaliation is not effective when trade is sparse or the complainant cannot form a credible bargaining position. We saw this in the Canadian and Brazilian regional jet cases and in Antigua's gambling case against the US. In the agricultural market access cases and the softwood lumber trade war, retaliation's effect has been decidedly mixed. These are cases in which responding states have a significant investment in maintaining the status quo of domestic regulation. In anti-dumping cases, retaliation has been surprisingly successful and may be a factor in the US blocking of appellate review.⁹⁸ We cannot say definitively that targeted tariffs resolve compliance issues in every instance. However, it is increasingly clear that targeted sanctions are the most effective way to raise the profile of the issue and build a bargaining position that may forward negotiations towards a solution.

IV. TRADE RETALIATION BEYOND THE WTO

By the time the Trump Administration levied unilateral steel and aluminium tariffs on its closest trading partners, most of those countries had significant experience using targeted economic sanctions to pressure US policy-makers over non-compliance at the WTO. To that end, Canada, Mexico, the EU, and the UK continued a two-track strategy by which they levied retaliatory tariffs and then filed cases at the WTO without waiting for a panel report.⁹⁹ We can see from the cases above that those partners had a reasonable expectation that if their retaliatory threats were credible, they could form the basis for a negotiated settlement. What was not known was whether retaliation without the blessing of the WTO would carry the same weight.

In the Canadian context, tariff retaliation put political pressure on the US Administration to complete negotiations on dispute settlement, pharmaceutical patents, intellectual property, and dairy in the CUSMA negotiations. In the context of negotiating a regional trade agreement, retaliation had a dual function: to respond to the so-called national security tariffs and to project strength in the regional

⁹⁸ Bart Kerremans, *Divergence Across the Atlantic? US Skepticism Meets the EU and the WTO's Appellate Body*, 10(2) POL. & GOVERN., 208 (2022).

⁹⁹ (Canada, the EU, Norway, Russia, Switzerland, China, and India filed complaints against American duties on steel and aluminum. The US in turn filed complaints against retaliatory tariffs levied by Canada, Mexico, the EU, China, Turkey, Russia, and India).

negotiations. Both Canada and Mexico levied sanctions across dozens of tariff codes. The US responded to Canada's hardball tactics by working behind the scenes with Mexico to cement a deal, forcing Canada into a subordinate position, at least in terms of completing the USMCA negotiations.¹⁰⁰

In May 2019, the US lifted metals tariffs on Canada and Mexico as part of the final negotiations of the new North American trade agreement, the CUSMA/USMCA/T-MEC. Both countries received a form of tariff rate quota in which all parties agreed that if "imports of aluminium or steel products surge meaningfully beyond historic volumes of trade over a period of time, with consideration of market share, the importing country may request consultations with the exporting country."¹⁰¹ In August 2020, the Trump Administration reimposed some tariffs on Canadian steel, and Canada promptly announced retaliatory tariffs. The administration ended its planned duties the next month, imposing a tariff rate quota on aluminium until the end of the year.¹⁰²

In October 2021, the US lifted tariffs on European steel and aluminium products, but only for volumes at 2015-2017 levels, with tariffs for imports exceeding the quota. In return, the EU removed its tariffs of 10-25% on 'iconic' American goods (such as Harley-Davidson motorcycles) and shelved a planned additional round of tariffs that would have raised them further, up to 50%. The US and EU also committed to negotiating a carbon-based arrangement on steel and aluminium to create incentives to reduce carbon intensity.¹⁰³ As part of the deal, a five-year truce in the Boeing-Airbus dispute was announced. The steel and aluminium tariffs were never formally tied to the aircraft dispute. However, the retaliatory tariffs on one compounded the other and exacerbated larger concerns about Chinese competition in metals and aerospace.¹⁰⁴

¹⁰⁰ DEREK H. BURNEY & FEN OSLER HAMPSON, *BRAVER CANADA: SHAPING OUR DESTINY IN A PRECARIOUS WORLD* 26-27 (McGill-Queen's University Press 2020).

¹⁰¹ GLOBAL AFFAIRS CANADA, JOINT STATEMENT BY CANADA AND THE UNITED STATES ON SECTION 232 DUTIES ON STEEL AND ALUMINUM (May 05, 2017), <https://www.canada.ca/en/global-affairs/news/2019/05/joint-statement-by-the-united-states-and-canada-on-section-232-duties-on-steel-and-aluminum.html>.

¹⁰² Press Release, Office of the USTR, USTR Statement on Canadian Aluminum (Sept. 15, 2020).

¹⁰³ Jenny Leonard, *US Pitches Truce to Japan Over Trump-Era Steel, Aluminum Tariffs*, BLOOMBERG (Dec. 13, 2021), <https://www.bloomberg.com/news/articles/2021-12-13/u-s-pitches-truce-to-japan-on-trump-era-steel-aluminum-tariffs>.

¹⁰⁴ Alberto Nardelli et al., *US and EU agree to five-year truce in long running Boeing vs. Airbus dispute*, FORTUNE (June 15, 2021), <https://fortune.com/2021/06/15/us-eu-boeing-airbus-trade-2021/>.

In January 2021, the UK left the EU and carried over the sanctions on US goods originally levied by the EU in response to the action on steel and aluminium. But the UK was no longer a part of the conflict between Boeing and Airbus and used its new independence on trade to discontinue “retaliatory tariffs resulting from the Boeing dispute in an effort to bring the US towards a reasonable settlement and show that the UK is serious about reaching a negotiated outcome.”¹⁰⁵ In March 2022, the US announced that the UK would again be allowed to export some steel and aluminium into the US duty-free, in line with 2018-2019 levels. The deal required that the UK audit Chinese-owned steel companies to “assess influence from the People’s Republic of China” and share that information with the US.¹⁰⁶ In exchange, the UK agreed to drop retaliatory tariffs worth USD 500 million annually on distilled spirits, agricultural products, and consumer goods.

There are three cases where partners retaliated and there has been no movement on a deal. The first is China. In April 2018, China responded to the Trump tariffs with sanctions of 15-25% on agricultural goods, alcohol, and steel pipe used in the oil and gas sectors. These measures have not prompted reconsideration by the US. The Trump Administration negotiated a separate Economic and Trade Agreement, the so-called ‘phase one agreement’ between the US and China. China agreed to purchase agricultural goods in exchange for lowering some US tariffs on Chinese goods.¹⁰⁷ Those pledges were not met, and the Biden Administration has maintained the tariffs first levied by Trump.¹⁰⁸ In June 2018, Turkey announced retaliatory tariffs of 5-35% on a range of agricultural goods, alcohol, and wood and paper products. Likewise, in August, Russia responded with tariffs of 25-45% on an unspecified list of goods. China’s, Turkey’s, and Russia’s retaliation has not produced negotiation towards a deal.

A. The Non-retaliation Counterfactual

The tariff rate quota deals given to Canada, Mexico, the EU, and the UK are not unambiguous wins. To a large extent, in over half of the measures the US admits to

¹⁰⁵ Press Release, Department for International Trade, UK announces new approach on US tariffs (Dec. 8, 2020).

¹⁰⁶ Press Release, The United States Department of Commerce, Raimondo, Tai Statements on 232 Tariff Agreement with United Kingdom (Mar. 22, 2022).

¹⁰⁷ THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ECONOMIC AND TRADE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA, <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text>.

¹⁰⁸ Chad P. Bown, *US-China phase one tracker: China’s purchases of US goods*, PETERSON INST. INT. ECON. (May 15, 2022), <https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods>.

no wrongdoing while still controlling imports and maintain the possibility of renewing an aggressive containment policy in the future. This raises the counterfactual question: would countries have gotten these half-measure deals without retaliation? The South Korean and Japanese examples are instructive in this regard.

In March 2018, South Korea avoided steel tariffs entirely and received a permanent exemption on steel tariffs in exchange for an annual import quota of 2.6 million tonnes, cutting its shipments to 70% of 2015-2017 volumes. In the wake of US tariff rate quota deals with Canada, Mexico, the EU, the UK, and Japan, South Korea is seeking to revise its deal, arguing that market conditions have changed because the TRQs received by other competitors are more flexible than a hard cap on imports.¹⁰⁹

Japan likewise did not impose retaliatory tariffs and completed a tariff rate quota deal with the US. But Japan was negotiating a free trade agreement with the US and chose not to complicate relations with retaliation on the steel and aluminium tariffs. Even so, the US did waive some of the additional tariffs on an ad hoc basis in 2020 as US manufacturers struggled to produce enough steel and aluminium for auto production.¹¹⁰ The Free Trade Agreement came into effect on January 1, 2020, shortly before Trump left office. On November 15, 2021, Japan and the US announced that they would begin talks aimed at reducing steel and aluminium tariffs.¹¹¹ In February 2022, the US announced a Tariff Rate Quota for Japanese steel in which 1.25 million metric tonnes can enter the US duty-free each year, equivalent to Japan's average exports to the US in 2018 and 2019. There was no provision to lift the tariffs on aluminium.

The outcome from South Korea's and Japan's non-retaliation strategy suggests that negative reciprocity is an important consideration when facing unilateral trade action. Even so, retaliation is not a magic bullet. Negative reciprocity is the last alternative because it is uncertain and may exacerbate power asymmetries. The evidence suggests that if retaliation works, the economic pain inflicted ought to be targeted rather than blunt, because retaliation needs to raise the profile of the case with decision-makers and create a negotiating position from which to return to the bargaining table. The US did not treat South Korea and Japan substantially differently, but the differences in outcome are significant enough to suggest that

¹⁰⁹ Troy Stangarone, *South Korea's Stake in the EU-US Talks on Steel*, THE DIPLOMAT (Nov. 21, 2021), <https://thediplomat.com/2021/11/south-koreas-stake-in-the-eu-us-talks-on-steel/>.

¹¹⁰ *US waived extra tariffs on 70% of Japanese steel and aluminum*, NIKKEIASIA (Aug. 11, 2020), <https://asia.nikkei.com/Economy/Trade/US-waived-extra-tariffs-on-70-of-Japanese-steel-and-aluminum>.

¹¹¹ Yuka Obayashi, *Japan, US agree to start talks on additional steel, aluminium tariffs*, REUTERS (Nov. 15, 2021), <https://www.reuters.com/world/asia-pacific/japan-us-agree-start-talks-extra-tariffs-steel-aluminium-2021-11-15/>.

negative reciprocity contributed to the relatively greater success of other partners, with the caveat that the EU and Canada's trade with the US is of an order of magnitude greater than that of Japan and Korea.

V. THE FUTURE OF RETALIATION

This paper has considered the puzzle of trade retaliation through the lens of negative reciprocity to explain how leading WTO stakeholders used countermeasures outside the WTO to respond to the Trump steel and aluminium tariffs. The first section reviewed the most important literature on the economics, politics, and law of WTO retaliation. It showed how the literature privileges the multilateral context and has less to say about the fact that sanctions are a bilateral practice with multilateral implications.

Furthermore, the norm of negative reciprocity, while well established in the literature of social psychology, has not yet migrated into the literature on trade governance. Negative reciprocity has been associated with the severing of trade ties and the reduction of interdependence. However, that is not its purpose, whether in social psychology or trade policy. The purpose of negative reciprocity is to cause the offending party to feel the withdrawal of goodwill and thereby return to the bargaining table. Punishment is not intended to be a breaking of the relationship but rather a moment to reflect upon its importance. This paper has hopefully moved the needle towards an understanding of reciprocity as a practice of giving and taking away, in which both are oriented towards moving the parties to greater overall cooperation. In game-theoretic terms, negative reciprocity is like defection in the prisoner's dilemma. Repeated playing shows the mutual benefit of cooperation.

Ultimately, tariff retaliation must be considered in the bilateral context of the cycle of reciprocity, where retaliation creates incentives that bring willing partners back to the negotiating table. The case studies show that retaliatory tariffs work in certain circumstances, yet more research is needed to explore the political and economic incentives that give rise to negotiated solutions to trade conflict. In the context of the Trump tariffs, retaliation likely played a role in the withdrawal of steel and aluminium tariffs for Canada, Mexico, and the EU. Notably, however, it did not work for China, Russia, and Turkey.

Negative reciprocity will likely become more important in the coming years as rising inequality within and between nations makes trade wars more frequent, as Klein and Pettis have predicted.¹¹² Trade wars may increase in frequency, as public policy and

¹¹² MATTHEW C. KLEIN & MICHAEL PETTIS, TRADE WARS ARE CLASS WARS: HOW RISING INEQUALITY DISTORTS THE GLOBAL ECONOMY AND THREATENS INTERNATIONAL PEACE (2021).

the global investment environment continue to privilege capital flows for the purpose of international investment over consumption at home. To extend Kindleberger's original insight, if the underlying economic dynamics that cause manias, panics, and crashes are not corrected, they may also produce more political populism, trade wars, and retaliation.¹¹³ Furthermore, the enormous trade embargo that went well beyond state-sponsored sanctions following the Russian invasion of Ukraine will be studied as an example of next-level weaponised interdependence. This retaliatory dynamic, along with the rise of an increasingly multipolar order, will give us plenty of opportunities to explore the uses and abuses of the negative reciprocity norm in multilateral (and regional) trade governance over the coming decades.

VI. APPENDIX: CASES IN WHICH RETALIATION WAS AUTHORISED UNDER ARTICLE 22 OF THE DSU

Case No.	Short Title	Permission to Retaliate Granted	Complainants authorised to retaliate	Type of Retaliation Authorised	Value	Retaliation a factor in resolution?
DS26	<i>EC—Hormones</i>	1999	United States	Suspension of concessions	USD 116.8 million per year	Yes
DS27	<i>EC—Bananas III</i>	1999, 2000	US, Ecuador	Suspension of concessions	USD 191.4 million per year	Yes

¹¹³ CHARLES P. KINDLEBERGER & ROBERT ALIBER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES (5th ed., 2005).

DS46	DS48	DS103/113	DS108	DS136	DS160
<i>Brazil — Aircraft</i>	<i>EC — Hormones (Canada)</i>	<i>Canada — Dairy</i>	<i>US — FSC</i>	<i>US — 1916 AC (EC)</i>	<i>US — Section 110(5) Copyright Act</i>
2000	1999	Authorisation to retaliate suspended	2003	2004	Authorisation to retaliate suspended
Canada	Canada	N/A	European Communities	European Communities	N/A
Suspension of concessions	Suspension of concessions	Suspension of concessions	Escalating suspension of concessions	Suspension of concessions	Not articulated
CAD 344.2 million per year	CAD 11.3 million per year	USD 35 million per annum	USD 4.043 billion	Open-ended	Euro 1.22 million per year (seems really low)
No	Yes	Yes	Yes	Yes	No

DS162	DS217	DS222	DS234	DS245	DS257
<i>US — 1916 AC (Japan)</i>	<i>US — Byrd Amendment</i>	<i>Canada — Aircraft</i>	<i>US — Byrd Amendment</i>	<i>Japan — Apples</i>	<i>US — Softwood Lumber IV</i>
Authorisation to retaliate suspended	2004	2003	2004	Authorisation to retaliate suspended	Authorisation to retaliate suspended
N/A	Brazil, Chile, European Communities, India, Japan, Korea	Brazil	Canada, Mexico	N/A	N/A
Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions
Open-ended	Open-ended	USD 247.8 million	Open-ended	Article 22.6 arbitration suspended pending resolution	Article 22.6 arbitration suspended pending resolution
Yes	Yes	No	Yes	Yes	Yes

DS322	DS353	DS381	DS384	DS464	DS471
<i>US — Zoning (Japan)</i>	<i>US — Aircraft</i>	<i>US — Tuna II (Mexico)</i>	<i>US — COOL</i>	<i>US — Washing Machines</i>	<i>US — Anti-dumping Methodologies</i>
Authorisation to retaliate suspended	2020	2017	2015	Authorisation to retaliate suspended	Authorisation to retaliate suspended
N/A	European Communities	Mexico	Canada	N/A	N/A
Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions	Suspension of concessions
Article 22.6 arbitration suspended pending resolution	USD 4 billion per year	USD 163.23 million per annum	CAD 1.055 billion per annum	USD 84.81 million per annum	USD 3.58 billion per annum
Yes	Yes	Yes	Yes	No	Pending