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Measuring TRIPS Compliance and Defiance: The WTO Compliance Scorecard
Edward Lee*

An ancient parable, perhaps aptly attributed to different lineages and cultures, tells the story of several blind people attempting to figure out an elephant, each touching only a different part of the elephant.¹ Each feature of the elephant is accurately described, but no account adequately captures “the whole of the beast.”² In many ways, the WTO stands today like the elephant in the parable. Some commentators extol the success of the WTO dispute system in securing an “excellent compliance record” in adjudicated decisions, particularly when compared to the prior GATT system.³ Others, however, believe the WTO system is deeply flawed or ineffective for any number of reasons.⁴ But no matter how many commentators attempt to analyze the WTO, none is able to capture the whole of the beast. Though numerous scholars have attempted to assess how successful the WTO has been so far, their answers have been dependent on the particular feature analyzed and the perspective of each analyzer, much like the accounts of the blind people in the parable.

This Article continues in the same vein. It assesses one aspect of the WTO: a country’s efforts to correct a violation of the TRIPS Agreement⁵ as found by a WTO decision in the Dispute Settlement Body (DSB). As the tale above cautions, this inquiry provides only a limited view of the functioning of the WTO.

But this analysis is important for at least two reasons. First, at the WTO’s inception, the elaborate framework established by the Dispute Settlement Understanding of the WTO was hailed as the “crown jewel” of the entire WTO system.⁶ Thus, one cannot determine if the WTO is successful in its mission without some analysis of its

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dispute settlement system. And that is particularly true for intellectual property laws, which, unlike trade laws subject to the prior GATT, had no prior international enforcement mechanism to handle disputes before the creation of the WTO. Second, examining WTO decisions involving TRIPS violations can provide a window on the WTO’s effectiveness in encouraging or inducing compliance in difficult or contentious controversies between countries—or, in other words, the hard cases. A true test of any institution is its ability to handle the controversies that are difficult to resolve.

This Article proceeds in four parts. Part I surveys TRIPS disputes brought before the WTO since its inception (2005 to Jan. 2011), with particular focus on disputes that culminated in a panel or Appellate Body decision. Part II proposes the WTO’s adoption of a TRIPS Compliance Scorecard that will keep track of a country’s response to correct its violation. Two alternative methods are offered—a simple and a complex score. The Scorecard can offer greater transparency, enable greater cross-country comparisons, and perhaps serve to induce countries to correct their violations in a reasonable time. Part III discusses other measures that the WTO can adopt alongside the TRIPS Compliance Scorecard, including computing scorecards for countries’ compliance in all other WTO disputes and imposing procedural penalties on countries with low compliance scores. Part IV addresses objections.

I. Statistics on the First Fifteen Years of TRIPS

The fifteenth anniversary of the TRIPS Agreement’s effective date marks a good time for reflection. With the deadlock in the current Doha Round of negotiations, the WTO, as an institution, seems at a crossroads. Yet the current stalemate cannot erase the accomplishments of the WTO over the past 15 years in handling trade-related disputes among countries. This Part analyzes the number of IP disputes brought before the WTO since its inception in 2005 to Jan. 2011, and tracks how these IP disputes were disposed, whether by settlement or WTO decision. The survey shows the following: (i) few IP challenges—29 of the 419 total WTO challenges (roughly 7%), or 22 disputes if related matters are paired—have been brought, the majority of which (20 of 29 disputes, or 15 of 22 matters) were against developed countries; (ii) only a few TRIPS challenges—8 matters or roughly 36% of the TRIPS matters—were pursued to a WTO decision, with all but one finding a TRIPS violations; (iii) only 2 TRIPS violations—both involving the U.S.—have still not been corrected as of Jan. 2011, although the EU, the

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7 See infra note 14 and accompanying text.
8 One reason that TRIPS lends itself to hard cases is that many of its provisions or minimum standards were left intentionally vague or open-ended, in order to bridge differences among countries in the North v. South and North v. North (e.g., U.S. v. EU) divides. See Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights 17 (2007).
9 See Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System 274 (1993) (“The primary test of a legal system is the extent to which the system can elicit compliance when a valid legal claim is asserted.”).
11 For simplicity, in this section, I include under “settlement” any dispute that was not pursued to a formal WTO panel, even if no “mutually agreed settlement” was announced by the countries to the WTO.
complainant in both cases, has not sought retaliation in either case; and (iv) the U.S. and EU have been the biggest participants in TRIPS disputes, both as complainant and respondent, with every TRIPS dispute brought so far involving either the U.S. or EU, or both.\(^\text{12}\)

### A. The WTO’s Dispute Settlement Body and Understanding

The WTO’s Dispute Settlement Body (DSB), created by the Dispute Settlement Understanding (DSU),\(^\text{13}\) was touted to be a major development for both international IP and trade. For the first time in history, countries recognized an international institution that had enforcement power—putatively with teeth—to help ensure countries complied with their international obligations regarding the minimum standards of IP protection. All of the prevailing international IP agreements prior to TRIPS—such as the Berne, Paris, and Rome Conventions—lacked effective enforcement mechanisms to curb countries’ violations of the treaties.\(^\text{14}\) In other words, before the WTO, countries could violate their IP treaty obligations at will—and with impunity.

The DSB was designed to change that—not only for IP laws, but also for international trade subject to the prior GATT system. The problem with the GATT-1947 dispute settlement system for obligations under the General Agreement on Tariffs and Trade (GATT 1947) was that it was easy for countries to evade. Both the establishment of a panel and a panel’s ruling required a consensus (sometimes called a “positive consensus”) from member countries before the GATT Council could adopt the ruling—which meant that a country found to be in violation could “veto” or block a panel or ruling simply by voting against it.\(^\text{15}\) On several occasions, countries “vetoed” adverse

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\(^{12}\) See infra Part I.B. Joost Pauwelyn conducted a similar study. See Joost Pauwelyn, *The Dog That Barked But Didn’t Bite: 15 Years of Intellectual Property Disputes at the WTO*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708026. Because his data set is smaller (up to DS402), and my groupings of disputes may be different, my figures may be slightly different than his.

\(^{13}\) See *Understanding on Rules and Procedures Governing the Settlement of Disputes* arts. 16(4) & 17(14), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

\(^{14}\) Although the Berne and Paris Conventions authorize members to bring disputes before the International Court of Justice (ICJ), a member can opt out of the enforcement scheme and “not consider itself bound” by the ICJ. See *BERNE CONV.* art. 33(2); *PARIS CONV.* art. 28(2); see also Graeme B. Dinwoodie, *Some Remarks on the Limits of Harmonization*, 5 J. MARSHALL REV. INTELL. PROP. L. 596, 597 (2006) (criticizing ICJ’s apparatus as “toothless”); Gabriel L. Slater, Note, *The Suspension of Intellectual Property Obligations Under TRIPS: A Proposal for Retaliating Against Technology-Exporting Countries in the World Trade Organization*, 97 Geo. L.J. 1365, 1377 & n.58 (2009). No country ever brought a Berne Convention dispute before the ICJ. See Frederick M. Abbott, *The Future of the Multilateral Trading System in the Context of TRIPS*, 20 Hastings Int’l & Comp. L. Rev. 661, 664 n.13 (1997). The Rome Convention (for broadcasts, performances, and phonograms) also authorizes disputes to be heard before the ICJ, but does not allow countries to opt out. See *ROME CONV.* arts. 30-31. However, the ICJ has been saddled with a slow process, and its decision ultimately depends on either a country’s acceptance or enforcement by the United Nation’s Security Council, which is unlikely for matters related to IP. See Monique L. Cordray, *GATT v. WIPO*, 76 J. Pat. & Trademark Off. Soc’y 121, 131-32 (1994).

decisions, which may have contributed to the overall lack of confidence in and infrequent use of the GATT dispute system—only 100 panel reports were adopted between 1947 and 1994.\textsuperscript{16} By contrast, the WTO flips the approach so that WTO panel decisions are automatically approved unless a consensus (i.e., a “negative consensus”) of countries votes against adopting the decision.\textsuperscript{17} Perhaps ironically, the change in procedure occurred because the U.S. had been resorting to unilateral trade sanctions against countries under its trade law known as “Section 301” of the Trade Act of 1974\textsuperscript{18} as a way to counteract the ability of offending countries to veto GATT decisions.\textsuperscript{19} Other countries despised the U.S. Section 301 sanctions and made a deal with the U.S.: GATT decisions would be automatically approved (unless a negative consensus voted against a decision), and in exchange the U.S. would discontinue its unilateral Section 301 trade sanctions.\textsuperscript{20}

The DSU has a series of remedial steps for the DSB to take in response to a violation, leading to the ultimate sanction of retaliation by a country against the offending country if it fails to comply.\textsuperscript{21} First, the violating country is afforded a “reasonable period of time” to implement the WTO recommendations, which typically consist of the country bringing its laws into compliance.\textsuperscript{22} As a suggested guideline, the time for implementation is not to exceed 15 months, although “the time may be shorter or longer, depending upon the particular circumstances.”\textsuperscript{23} If the violating country does not fix the violation within the reasonable time, Article 22 of the DSU allows the complainant country to request (i) mutually acceptable compensation from the violator, or, if no agreement is reached between the countries, (ii) the complainant’s suspension of concessions or other obligations to the violator—what is commonly known as “retaliation” or trade sanctions.\textsuperscript{24} But these remedies are “temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement

\textsuperscript{16} Meredith Kolsky Lewis, The Lack of Dissent in WTO Dispute Settlement, 9 J. INT’L ECON. L. 895, 897 & nn. 5-6 (2006).
\textsuperscript{17} Bello, supra note 15, at 773-74; DSU arts. 16(4); 17(14), supra note 13.
\textsuperscript{18} See 19 U.S.C. § 2411 (year).
\textsuperscript{20} Id. For the most part, the U.S. has avoided using unilateral trade sanctions since the formation of the WTO, but it still unilaterally monitors and issues warnings—in the so-called Special 301 reports—against other countries for their lack of enforcement of IP law or blocking of U.S. goods from their markets. See Sean Flynn & Joe Karaganis, From TRIP to ACTA: The Rise of the Enforcement Agenda, 18 J. INTELL. PROP. L. (forthcoming 2011).
\textsuperscript{21} See DSU arts. 21-22, supra note 13. As of Jan. 2011, the WTO has authorized only nine instances of retaliation, although the complainant may not have exercised that right in every dispute —5 against the U.S., 2 against the EU, 1 against Brazil, 1 against Canada. See List of WTO Disputes Authorizing Trade Sanctions 2011 (on file with author). The U.S. disputes were: DS108 (Foreign Sales Corporations); DS136 (Anti-Dumping Act of 1916); DS217/234 (Byrd Amendment); DS267 (Upland Cotton); and DS285 (Gambling). The EU disputes were: DS26/48 (Hormones); and DS27 (Bananas). The Brazil dispute was DS46 (Export Financing Programme for Aircraft), while the related Canadian dispute was DS222 (Regional Aircraft).
\textsuperscript{22} See DSU art. 21(2), supra note 13.
\textsuperscript{23} Id. art. 21(c)(3).
\textsuperscript{24} Id. art 22(3); see Davey, supra note 3, at 123 n.33.
has been removed.” During this entire time, the DSB has a duty to “keep surveillance of the implementation of adopted recommendations or rulings” and is supposed to monitor the situation “until the issue is resolved.”

As should be evident, the DSU establishes an elaborate process whose main goal is to secure either settlement or “[p]rompt compliance with recommendations or rulings of the DSB.” One thing to note, however: the remedial aspect of the DSU is forward-looking, seeking the country’s removal or change of the offending law; it does not require the violating country to pay compensation or a penalty for the past violation. In this regard, the DSU is lenient on violations—and different from the approach in some other areas of international law. Sanctions are to be imposed only after a country refuses to comply with a WTO decision. As a general rule, the DSB seeks prospective compliance by violating countries. The next section examines how well the DSB has achieved that end.

B. TRIPS Disputes, 1995 – January 2011

From 1995 to Jan. 2011, WTO countries brought 29 formal complaints involving the TRIPS Agreement out of the 419 total challenges—or just roughly 7% of all WTO disputes. Some of the complaints involved related controversies, which, if paired together, would reduce the total number to 22 different TRIPS matters. A recent set of challenges brought by India and Brazil against the EU in 2010 for seizure of generic drugs in transit was still pending in Jan. 2011, although the dispute brought by India appears close to a settlement.

I. Settled cases

Most of the TRIPS complaints were settled by the countries or were not pursued to a WTO dispute panel. Excluding the pending EU generic drug dispute, 62% of TRIPS challenges (13 of 21 completed matters) settled or were not pursued.

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25 DSU art. 22(8), supra note 13.
26 Id. art. 21(6).
27 Id. art. 21(1).
29 For an interesting proposal to use compensation as a remedy in the DSB, see Marco Bronckers & Naboth van den Broek, Financial Compensation in the WTO: Improving the Remedies of the WTO Dispute Settlement, 8 J. INT’L ECON. L. 101 (2005).
31 See id.
33 See Analysis of TRIPS Disputes, supra note 30.
2. WTO panel and AB decisions

Out of the 21 resolved TRIPS matters, only 8 went to a WTO panel for decision.\(^{34}\) In all but one dispute (DS59 Indonesia Auto) at least one violation of TRIPS was found.\(^{35}\) However, of the 7 matters in which violations were found, it is worth pointing out that 5 of those decisions also found some aspect of the respondent’s challenged law was consistent with TRIPS—perhaps rendering the appearance of a Solomonic judgment.\(^{36}\) Only 3 of the 7 (43\%) panel decisions in which a TRIPS violation was found were appealed to the Appellate Body.\(^{37}\) That is lower than the general rate for WTO panel decisions for which approximately 70\% of all panel reports were appealed.\(^{38}\)

3. Disputes by subject matter

In terms of subject matter before the WTO panels, 3 decisions involved patents; 2 involved copyrights; 3 involved trademarks or geographical indications; and 1 also involved customs disposal of counterfeit and pirated goods, as well as criminal law requirements under TRIPS.\(^{39}\)

4. Complainants and respondents

In the 22 TRIPS matters, the complainants and respondents were as follows:

\(^{34}\) See id.

\(^{35}\) See id.

\(^{36}\) See id.

\(^{37}\) See id.


\(^{39}\) See id. Some of the disputes also involve challenges brought under GATT or other trade agreements, but they are included as long as one challenge in the disputes involves TRIPS. See, e.g., Panel Decision, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/R (July 2, 1998) (DSB adopted July 23, 1998). Conversely, some non-TRIPS involve IP-related issues, but those disputes were not included here. See infra note 121.
### TRIPS Disputes, 2005 to Jan. 2011

<table>
<thead>
<tr>
<th>Complainants (some matters have multiple complainants)</th>
<th>Respondents (some matters have multiple respondents)</th>
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</thead>
<tbody>
<tr>
<td><strong>Member</strong></td>
<td><strong>Disputes</strong></td>
</tr>
<tr>
<td>United States</td>
<td>17</td>
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<tr>
<td>EU</td>
<td>5</td>
</tr>
<tr>
<td>Brazil</td>
<td>7</td>
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<tr>
<td>Australia</td>
<td>2</td>
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<tr>
<td>Canada</td>
<td>1</td>
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<td>India</td>
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<td>Indonesia</td>
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<td>Denmark</td>
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<td>Indonesia</td>
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<td>Ireland</td>
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<td>Japan</td>
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<td>Pakistan</td>
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<td>Portugal</td>
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<td>Sweden</td>
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</table>

The breakdown of complainants and respondents is interesting on several fronts. First, the U.S. is the biggest complainant, filing a challenge in 77% (17 of 22) of the TRIPS matters. The EU is the second biggest complainant, filing challenges in 32% (7 of 22) of the TRIPS matters. Only two developing countries (Brazil and India) have raised TRIPS challenges so far, which were against the U.S. and the EU. The large number of complaints by the U.S. and EU is also reflected in WTO challenges generally. According to Leitner and Lester’s 2009 study, the U.S. brought the most WTO challenges (93, representing 22% of challenges) in the WTO, while the EU, the second most (81, representing 19%).

Second, the EU has the most TRIPS challenges (at 5) against it, with the U.S. with the second most at 4 challenges. A similar breakdown exists for all WTO disputes; according to Leitner and Lester’s survey, the U.S. has received the most challenges at 108 (27%), with the EU second at 67 (17%). The majority of TRIPS complaints have been against developed countries. 15 of the 22 TRIPS disputes (68%) were against developed countries, while 7 (32%) were against developing countries.

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40 See Analysis of TRIPS Disputes, *supra* note 30.
41 Id. The percentage with the U.S. percentage is greater than 100 because several countries can bring challenges in the same WTO matter.
42 Id.
43 See Leitner & Lester, *supra* note 38, at 207 (table 1).
44 See Analysis of TRIPS Disputes, *supra* note 30.
45 See Leitner & Lester, *supra* note 38, at 207 (table 2).
46 See Analysis of TRIPS Disputes, *supra* note 30.
the 15 matters against developed countries, all but two were brought by developed countries. Conversely, all of the 7 disputes against developing countries were brought by developed countries. Thus, in the majority of TRIPS challenges, the disputes involved the North versus the North, although the North did go after the South in 7 disputes.

Third, the TRIPS challenges before the WTO are a “U.S.-EU show.” Remarkably, every single TRIPS challenge in the first 15 years of the WTO had either the U.S. or the EU, or both, involved in the dispute either as a complainant or respondent. The heavy U.S. and EU involvement in TRIPS disputes is consistent with their dominance in WTO disputes generally. From 1995 to 2009, 43.3% of the total disputes involved either the U.S. or EU as complainant, while 43.8% of the total complaints involved either the U.S. or EU as respondents. 50 disputes pitted the U.S. and EU against each other, 5 of which involved TRIPS disputes. More recent trends from 2005 to 2009 indicate, however, that the U.S. and EU have decreased their number of WTO challenges, while developing countries have increased their challenges. Also, China has become a more frequent participant in WTO disputes mainly as a respondent, but also as a complainant. Despite the recent trends, the TRIPS disputes have been dominated by the U.S. and EU throughout the entire period.

5. **Time to correct violations**

Finally, in terms of TRIPS compliance, all of the offending countries in the 7 disputes with a TRIPS violation— with the notable exception of the U.S. in 2 of the disputes—enacted changes to their laws to bring them into compliance. The U.S. has not corrected its violations in the Section 110(5) and Havana Club Rum disputes. The average time it took the offending countries other than the U.S. to correct their violations was less than a year (10.4 months) from the DSB’s adoption of the WTO decision. The breakdown by member and dispute is shown in the following Table:

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47 Id.
48 Id.
49 Id.
50 See Leitner & Lester, supra note 38, at 208.
51 Id. (50 disputes); Analysis of TRIPS Disputes, supra note 30 (5 TRIPS disputes).
52 See Leitner & Lester, supra note 38, at 208-09.
53 Id. at 216-17.
54 See Analysis of TRIPS Disputes, supra note 30.
Time Taken by Member to Comply with WTO Decision

<table>
<thead>
<tr>
<th>Member and Dispute</th>
<th>Time to Comply</th>
</tr>
</thead>
<tbody>
<tr>
<td>India – Pharmaceutical Patents (“mailbox rule”)</td>
<td>15 months fixed</td>
</tr>
<tr>
<td>Canada – Pharmaceutical Patents</td>
<td>4 months fixed</td>
</tr>
<tr>
<td>Canada – Patent Term</td>
<td>9 months fixed</td>
</tr>
<tr>
<td>EU – Trademark and GIs</td>
<td>1 year fixed</td>
</tr>
<tr>
<td>China – IP Rights</td>
<td>1 year fixed</td>
</tr>
<tr>
<td>U.S. – Section 110(5)</td>
<td>10 years + counting*</td>
</tr>
<tr>
<td>US. – Havana Club Rum</td>
<td>9 years + counting*</td>
</tr>
</tbody>
</table>

Thus, with the exception of the U.S., members have corrected their TRIPS violations within a short amount of time. Although the sample is small, 71% of the TRIPS violations have been fully (and timely) corrected—a number that is similar to Hudec’s analysis of full correction in 68% of GATT disputes from 1948 to 1990.56 Davey estimates that, in the first ten years of the WTO, successful implementation occurred in 83% of the disputes.57

II. Developing the TRIPS Scorecard for Compliance and Defiance

The idea of using a scorecard or rating system is, of course, not new to the law or regulators—just think of the air quality index, credit ratings, Gross Domestic Product (GDP), and the Human Development Index.58 Scholars, too, have proposed scorecard or index systems to enhance our understanding of various things, ranging from competitiveness in countries and intellectual property enforcement, to the quality of life in countries and even judicial rankings.59 Even within the WTO, the EU has proposed that the WTO Secretariat use a “scorecard” to ensure transparency in country compliance.

56 See HUDEC, supra note 9, at 278-79.
57 See William J. Davey, The WTO Dispute Settlement System: The First Ten Years, 8 J. INT’L ECON. L. 17, 47 (2005). The figures noted above from Hudec and Davey do not measure timeliness, however. Davey’s estimate based on four years of WTO decisions suggests that the overall average time for implementation is over 15 months. See id. at 49.
with any rule eventually adopted governing fisheries subsidies. As the EU proposal suggests, a scorecard can provide greater transparency and attention to compliance with treaty obligations, and it enables greater cross-country comparisons on the same index. This Part proposes that the WTO utilize a TRIPS Scorecard to monitor countries’ correction of any TRIPS violations found by the DSB.

A. Theories of Compliance and Defiance

Before turning to the TRIPS Scorecard, it would be fruitful to put the discussion of a compliance scorecard against the backdrop of the larger, normative debate over (non)compliance with international law. Although it goes beyond the scope of this Article to resolve this longstanding, if not never-ending, debate, the theories are useful to frame the later discussion of the Compliance Scorecard.

1. Noncompliance as inevitable or even acceptable

A number of leading theorists characterize the failure of member countries to correct their own violations of a treaty as inevitable in an international system with political actors. The late Robert Hudec was a leading advocate of this political realist view. Hudec believed that international trade law was not immune from politics. The GATT dispute system would fail in so-called “wrong cases,” Hudec wrote, in which the political will of the countries to comply was lacking or diminished. One type of wrong case involves a country’s “ordinary noncompliance” with a treaty due to political expediency or special interest pressure in the country. No matter how elaborate the dispute settlement procedures, Hudec doubted their ability to discipline countries effectively because compliance depended on the political will of countries to comply, in Hudec’s view.

In a prescient passage worth quoting at length, Hudec cautioned:

A third lesson suggested by the GATT’s experience is that political will is really more important than rigorously binding procedures—that strong procedures by themselves are not likely to make a legal system very effective if they do not have sufficient political will behind them….The current fascination with the novel WTO procedures tends to obscure the importance of this first and most important condition of success.

What can be said today about the political will behind the new WTO system? Based on first impressions, the answer should begin on a note of skepticism. Today’s WTO governments are the same governments, more or less, as the ones that stood behind the old GATT disputes system. While those governments did achieve a level of compliance that was exceptional by international standards, their commitment was not strong enough

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62 Id. at 159.
63 Id.
64 See Hudec, supra note 19, at 11.
to deter occasional outbreaks of noncompliant behavior, particularly among its leading citizens. The new WTO system asks for a stronger political commitment because it sets the bar higher. Yet it is difficult to identify any major changes in national political life in the major WTO countries that will make their political systems more receptive to WTO legal discipline than they were in the decade or two before the WTO came into being. 65

As discussed in the next Parts, Hudec’s prediction about noncompliance in the WTO turned out to be uncanny. Although Hudec was not sanguine about the WTO’s ability to prevent ordinary noncompliance by countries, he was no advocate for acceptance of noncompliance. Instead, Hudec advised the WTO “to treat the failed legal ruling with persistence, patience and practicality—the persistence of keeping the matter on its agenda, the patience of doing so for what may be a long period of time, and the practicality of fashioning eventual accommodations that produce a result that can be said to be consistent with long-term respect for GATT/WTO law.” 66

Jack Goldsmith and Eric Posner adopt a view of international law that treats noncompliance as simply a byproduct of a country’s self-interest. In their rational choice theory, countries agree to international treaties out of their own self-interest; thus, compliance ultimately depends on a country’s own self-interest in complying or not. 67 Goldsmith and Posner’s approach puts a more positive—or at least political realist—gloss on a country’s violation of a treaty. While Hudec’s approach highlights the lack of political will of a country, Goldsmith and Posner’s approach focuses on the rational and self-interest reasons for a country to choose to violate its treaty obligations. Goldsmith and Posner do acknowledge, however, that more powerful countries like the U.S. have greater “freedom of action” to violate treaties than weaker countries in the GATT/WTO system. 68 A similar view of rational noncompliance is taken by Judith Bello specifically regarding the WTO. 69

2. Noncompliance as a negative violation to be corrected

Another school of thought views a country’s violation of its treaty obligations as a negative that a country should correct because treaties are legal obligations. Abram Chayes and Antonia Handler Chayes argued that “[t]he norms established by treaties are legal norms, at least in that they embody rules acknowledged in principle to be legally binding on states that ratify them.” 70 Moreover, “[t]he rule that ‘every treaty in force is binding on the parties to it and must be performed in good faith,’ codified in Article 26 of

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65 Id. at 11-12 (ellipses and emphasis added).
66 Id. at 15.
68 Id. at 162.
the Vienna Convention on the Law of Treaties, has long been recognized as a fundamental background norm of international law.”

In short, international law functions as a rule of law.

Legal scholars who believe in the binding nature of international treaties often take different views on how best to achieve treaty compliance. For example, the Chayes believed that treaty noncompliance stems principally from a country’s “lack of capability or clarity or priority,” and not from a country’s “willful disobedience.” They advised, therefore, not coercive sanctions for treaty enforcement, but rather, building member compliance through “management” instruments of transparency, dispute settlement, capacity building, and uses of persuasion. By contrast, Harold Koh argued that the key to compliance is a country’s “repeated participation in the transnational legal process” by which a country will face “frictions” in reaction to its noncompliance; over time, the country is likely to move “from one-time grudging compliance with an external norm to habitual internalized obedience.” Thomas Franck, by contrast, contended that treaty compliance is best secured when countries view the international rules to be fair.

The WTO adopts the view that treaty violations are negative occurrences that should be corrected. The DSU states: “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” The DSU considers that “[i]n the absence of a mutually agreed solution [between the countries], the first objective of the dispute settlement mechanism” is the “secur[ing of] the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” As John Jackson explained, the DSU “clearly establishes a preference for an obligation to perform the recommendation.”

With that in mind, this Article begins with the premise that the WTO, as an institution, seeks countries’ compliance with their WTO treaty obligations once a violation has been found in the DSB. Although the proposed Scorecard does not mandate that countries adopt a certain view in this normative debate, from the WTO’s perspective, the Scorecard shares the second view above that WTO violations are to be corrected. The viewpoint adopted herein is not meant to favor a particular country or group of countries, but instead, to serve the WTO as an institution. The next section considers a better way for the WTO to keep track of compliance.

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71 Id.
72 Id. at 22.
73 Id. at 22-28.
76 DSU art. 21(1), supra note 13.
77 Id. art. 3(7) (emphasis added).
78 See Jackson, supra note 69, at 63 (emphasis in original).
B. The TRIPS Compliance Scorecard

The WTO website, administered by the WTO Secretariat, tracks every dispute ever brought before the WTO, including, in the event of a violation, a country’s efforts to correct a law found by a WTO decision to be in violation of a treaty obligation. But the WTO website does so in a way that is not all that helpful.\(^79\) To be sure, a lot of information is presented on the WTO website, but in ways that are not always easy to digest or understand. It offers too much information and minutiae, without sufficient summaries or an overall view. The information on the WTO website is dispersed across the individual web pages for each dispute—meaning one cannot know the dispositions of all WTO disputes, including countries’ correction (or not) of violations, without clicking on all the different links for the individual cases. In some instances, the information does not appear to be current.\(^80\) In short, the website is not user-friendly or helpful for someone trying to get an overall picture of the DSB.

This Article proposes a better way: the tabulation of a TRIPS Compliance Scorecard measuring a country’s attempt to correct any treaty violation that a WTO panel or the Appellate Body has found. On a single webpage, the WTO would list the TRIPS Compliance Scorecards for all countries ever to have been found to be in violation of TRIPS. (Countries that had no such violations would not be listed.) Through this webpage, the WTO and its members may make cross-country comparisons and a more informed assessment of the effectiveness of the DSB. A compliance scorecard arguably falls within the power of the WTO Secretariat, which has the responsibility of providing “secretarial and technical support” to WTO panels—a power that authorizes, for example, the Secretariat’s creation and maintenance of the WTO’s current website for dispute cases.\(^81\) A simple version of a scorecard would be merely a cosmetic change to the current website—like rearranging furniture on the deck. To the extent a more complex scorecard would require further DSB consideration, the DSU arguably recognizes the power to use a scorecard under the broad “surveillance” power granted to

\(^79\) The WTO keeps track of such information on the specific webpage for each dispute resolved by a panel decision under the heading of “Implementation Status of Adopted Reports.” See, e.g., United States – Section 110(5) of the US Copyright Act, DS160, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Feb. 7, 2011). Although the WTO website allows searching by “current status” of disputes, the search result only lists dispute numbers of the cases; a person needs to click on each link in order to find description of the case and its status. See Current Status of Disputes, at http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm (last visited Feb. 7, 2011). Also, the WTO website posts minutes from DSB meetings in which the status of some disputes and failures to correct violations is reported. See, e.g., Surveillance of Implementation of DSB Rulings, June 22, 2010, at http://www.wto.org/english/news_e/news10_e/dsb_22jun10_e.htm. Finally, each year the WTO publishes an Annual Report that discusses the status of open cases in the DSB. See, e.g., WTO ANNUAL REPORT 2010, http://www.wto.org/english/res_e/publications_e/anrep10_e.htm. None of these materials provides an easy-to-view summary of all uncorrected violations or how long they have remained so.


\(^81\) See id. art. 27(1); Dispute Settlement: The Disputes, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results (“This summary has been prepared by the Secretariat under its own responsibility.”) (last visited Feb. 7, 2011).
the DSB.\textsuperscript{82} My proposal is for the WTO to supplement the information currently on its website with a TRIPS Scorecard.

1. Why a Scorecard?

Scholars and policymakers have increasingly analyzed the effectiveness of the WTO as an institution by examining members’ compliance with their obligations, especially through the dispute settlement process.\textsuperscript{83} To be sure, focusing on just dispute settlement cases is deficient because it ignores compliance that routinely occurs outside the dispute settlement process, such as in countries’ enactment and enforcement of intellectual property laws. Nonetheless, some benefit may be gained by looking at how well countries have complied with their obligations in more controversial areas that have led to WTO disputes. After all, the so-called “crown jewel” of the WTO would be fool’s gold if the DSB itself lacked effective enforcement.

Good governance in the WTO requires transparency and access to information related to WTO matters.\textsuperscript{84} Such transparency is important to earn the respect and trust of countries, individuals, NGOs, and other non-state actors that are affected by WTO decisions.\textsuperscript{85} Indeed, the WTO already shares this goal. As the Appellate Body has stated, Article X of GATT 1994 “embod[i]es a principle of fundamental importance—that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality.”\textsuperscript{86} As the AB explained:

The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions. The essential implication is that Members

\textsuperscript{82} Article 21(6) instructs that the “DSB shall keep under surveillance the implementation of adopted recommendations or rulings.” DSU art. 21(6), supra note 13. A scorecard would be a form of surveillance on such implementation. For further discussion of the authority of the WTO to implement a scorecard, see infra Part IV.A.2.


\textsuperscript{84} See, e.g., Steve Charnovitz, Transparency and Participation in the World Trade Organization, 56 RUTGERS L. REV. 927, 928 (2004);


and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements, and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures ...  

Although Article X deals with transparency in member nations, the same principle should apply generally to the WTO as an institution. Indeed, the WTO would lose legitimacy if it required countries to follow good governance principles that the WTO itself flouted. Accordingly, the current website of the WTO publicly disseminates an incredible amount of information about WTO decisions, consistent with this overriding goal of transparency.

More generally, scholars and regulators such as Cass Sunstein, now Administrator of the White House Office of Information and Regulatory Affairs, have recognized the importance that administrative bodies disseminate information in formats people can easily understand and use. If we apply this principle to the WTO, we find a chief defect in the WTO’s website: it provides too much information in piecemeal fashion without any accompanying overall summary. The WTO website is like being stuck in a million trees, without any view of the forest.

The proposed Scorecard would help to fix the WTO website by making it more user-friendly. The Scorecard distills information from the WTO website and winnows it down to a single table listing scores of country compliance with DSB rulings. This Article proposes two options for the TRIPS Scorecard: (1) a simple formula and (2) a complex formula. The WTO would select only one type of Scorecard to use, although the underlying data used in the simple formula might also be listed along with the Complex Scorecard.

2. Simple TRIPS Compliance Scorecard

One option for the WTO would be to adopt a Simple TRIPS Compliance Scorecard. It would track two variables: (1) the total number of a country’s laws in violation of TRIPS by the DSB, and (2) the time a country takes to correct the violation. Zero (0) is a perfect score for each country, representing no violations. For each violation uncorrected, a negative number would be assigned. Thus, under this simple

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87 Id. (emphasis added). For further discussion, see Padideh Ala’l, From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance, 11 J. INT’L ECON. L. 779 (2008).
88 See RICHARD H. THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 204 (2008) (“In both the public and private sectors, a primary goal should be to increase transparency.”); The Power Brokers: Cass Sunstein, Office of Information and Regulatory Affairs, Jan. 8, 2011, http://images.businessweek.com/slideshows/20110119/the-power-brokers/slides/2 (“Ideas he championed as a behavioral economics advocate on the importance of disclosing information in readily understandable form are surfacing in the regulatory world.”).
89 One thing to avoid is using two “Scorecards,” in order to avoid confusion, especially given that the perfect scores are dramatically different between the two types of Scorecards (0 and 100).
approach, if Country A has 3 laws in violation of TRIPS, its score would be -3. Once a
country corrects a violation, the number would decrease by one for each violating law
corrected. For example, if Country A corrected 2 of its laws, the score would improve to
-1. The scores can be tabulated after the reasonable time for implementation expired for
a violating country, which would typically allow at least a one-year grace period.

The Simple TRIPS Scorecard breaks down as follows:

<table>
<thead>
<tr>
<th>TRIPS Compliance Scorecard (Simple) (Jan. 2011)</th>
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</thead>
<tbody>
<tr>
<td>Member</td>
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<tr>
<td>--------</td>
</tr>
<tr>
<td>United States</td>
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<tr>
<td>Canada</td>
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<tr>
<td>China</td>
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<tr>
<td>EU</td>
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<tr>
<td>India</td>
</tr>
</tbody>
</table>

The Simple TRIPS Scorecard can be broadened to include some measure of the
time a country in violation has taken before correcting the violation(s), as depicted below:

<table>
<thead>
<tr>
<th>TRIPS Compliance Scorecard (Simple) (Jan. 2011)</th>
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<tbody>
<tr>
<td>Member</td>
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<tr>
<td>China</td>
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<tr>
<td>EU</td>
</tr>
</tbody>
</table>

The Simple TRIPS Scorecard shows that most of the violations were fixed within a short
amount of time. The U.S. still has not corrected its 2 violations after 9 and 10 years
counting, however. 90

The two variables in the Simple Scorecard track two important values recognized
by the DSU. First, consistent with Article 3’s recognition of the “first objective” of
correcting the violation (absent a mutual agreement), 91 the Scorecard keeps track of live
violations until they are corrected. Second, consistent with Article 21’s goal of
compliance within a “reasonable period of time,” 92 the Scorecard monitors the time
countries take to comply with WTO decisions. 93

90 See supra note 55.
91 DSU art. 3(7), supra note 13.
92 Id. art. 21(3)(c).
93 The Simple Scorecard might also list other variables, such as: (1) total number of challenges a
country faced, (2) number of mutually agreed solutions, timely corrections of violations, and disputes in
which the country was found to have no violation at all (what I call “Good Behavior Credit” in the next
section); and (3) number of trade sanctions authorized (if any) against a country. The danger of listing
more variables, however, is that the scorecard may become too complicated—defeating the purpose of the
scorecard in the first place.
Of course, some judgment would have to be made as to what constitutes a “violation.” My view is that the Scorecard should count the number of laws in violation, not the number of treaty provisions violated. This avoids the potential problem of “double counting” a law that may violate several provisions, such as national treatment and most favored nation, which may be common given their overlap. Consistent with the DSU’s focus, the Scorecard tracks the number of laws that need to be corrected. But does a law with two or more violating provisions constitute one violation or several? For simplicity, my preference would be for the WTO to treat all related provisions or laws as constituting one violation as long as they all related to a common violation of a treaty provision. Also, my proposal is guided by a principle of leniency and is designed to offer some leniency to noncompliant countries in the calculation of their Scorecards. Thus, in close cases, the principle of leniency would counsel the WTO to adopt the lower number of violations for the Scorecard.

The Simple Scorecard might assign different points to violations depending on if they were major or minor—e.g., 2 for major violations, 1 for standard violations, and .5 for mere technical or minor violations. For example, a violation of national treatment (discriminating against foreign nationals) could be treated as a more serious violation than a violation of the “mailbox rule” for preserving priority of patent applications during a developing country’s transitional period. However, I believe this approach is misguided. Especially for the Simple Scorecard, the goal should be to minimize the need for making subjective judgments in tallying up the scorecard. A bean counter should be able to perform the task.

3. Complex TRIPS Compliance Scorecard

The Simple Scorecard is easy to formulate by simply listing raw numbers for live violations and years taken to comply. An alternative approach would be to include both variables into a single number along a scale measuring overall compliance with WTO decisions involving TRIPS. This approach is what I call the Complex TRIPS Compliance Scorecard.

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94 See TRIPS Agreement arts. 3-4, supra note 5.
95 This principle of leniency is not expressly discussed in the DSU, although the series of steps delineated in the DSU to achieve a “positive solution”—with the “last resort” of trade sanctions—do embody a lenient approach. See DSU art. 3(7), supra note 13. Moreover, customary international law recognizes the interpretive principle of dubio mutius under which an ambiguous treaty provision is to be interpreted as creating a less onerous burden on the party in question. See Carlos Manuel Vazquez, Judicial Review in the United State and in the WTO: Some Similarities and Differences, 36 GEO. WASH. INT’L L. REV. 587, 604-05 (2004). Likewise, the rule of lenity favors a similar approach in the context of international criminal law. See Alison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 84-85 (2005). The WTO’s Anti-Dumping Agreement follows a similar approach in Article 17.6. See Vazquez, supra, at 604-05.
The Complex Scorecard can provide a clearer indicator of a country’s overall performance or compliance in the DSB by reducing it into a single number, much in the same way as GDP indicates national economic growth, or GPA or grade point average informs students of their overall performance in school. If the overall score is easy to understand (getting a 4.0 in school is excellent, e.g.), then the score is better as an overall indicator of performance than would be looking at just the individual raw scores. Another advantage with this approach is that the WTO can weigh the variables and include other variables in the computation of the complex score in a way that signaled the WTO’s view of the importance of a variable. For example, as proposed below, the formula can be devised to weigh more negatively a country with multiple uncorrected violations versus a single uncorrected violation—the basic premise being that a first offense is not as bad as multiple offenses. On the other hand, the Complex Scorecard has tradeoffs. Adding and weighting more variables in the Scorecard may bring greater complexity and controversy. Too much complexity or controversy would defeat the whole purpose of transparency in the Scorecard.

a. The basic formula

With that caveat in mind, I offer a basic formula for the proposed Complex TRIPS Scorecard, followed by optional variables that may be added if so preferred. The basic formula is as follows:

$$\text{Complex Compliance Score} = 100 - x (y_1 + y_2 + y_3 + \ldots)$$

100 represents the perfect score of compliance following an adverse WTO decision against a country. X represents the number of laws in a country still in violation. For each law in violation, Y represents the number of years after a final WTO decision in which the law has not been corrected. Only uncorrected violations are included in the calculation. As with the Simple Scorecard, only countries that had received adverse decisions from the DSB would be listed on the Complex Scorecard.

Under the above formula, a country loses its perfect score of compliance (100) as soon as it has an uncorrected violation that has lasted a year or longer after the WTO decision. Before a year has elapsed, however, the country would still have a perfect score of 100. Thus, the country effectively has a one-year grace period from the date the DSB

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97 See Sunstein, supra note 59, at 1304-08.
98 It goes beyond this Article’s scope to provide a full discussion of this principle. The principle has applications in both national and international law. For example, in criminal law, treating more severely multiple and repeat offenses is a common principle in many Western countries, including the United States. See Julian V. Roberts, The Role of Criminal Records in the Sentencing Process, 22 CRIME & JUST. 303 (1997). The principle also is common in copyright infringement policies and laws, sometimes called the “graduated response” or “3 strikes law” that require termination of Internet accounts for “repeat infringers.” See David W. Quist, Three Strikes and You’re Out: A Survey of Foreign Approaches to Preventing Copyright Infringement on the Internet, 66 BUS. LAW. 261 (2010); Peter K. Yu, The Graduated Response, 62 FLA. L. REV. 1373 (2010). The U.S. DMCA safe harbor follows this approach. See 17 U.S.C. § 512(i)(1)(A) (requiring implementation of repeat infringer policy). In international law, the principle of “cessation and non-repetition” of wrongful acts is meant to deter repeat violations by a country. See Cho, supra note 69, at 771-72 & n.39.
adopts the decision in which to comply with the WTO recommendations before the country loses its perfect compliance score of 100. The formula can be altered to give a greater grace period, such as 2 or 3 years, in order to accommodate perceived difficulties or political realities of enacting legislation. However, I have chosen to use 1 year as the default grace period because it is a common “reasonable period of time” used in WTO disputes, and because countries with TRIPS violations have, for the most part, corrected their violations within a year.

To get an idea of how the Complex Scorecard works, imagine that Country A had 1 violation that had not been corrected for 1 year. Country A would receive a score of 99. Each year thereafter, the score decreases by 1 as depicted for the first ten years of noncompliance on the diagram below.

| Sample Compliance Scorecard for Member with 1 Violation |
|----------------|----------------|------------|
| Live violations | Years in violation | Score |
| 1              | 1               | 99        |
| 1              | 2               | 98        |
| 1              | 3               | 97        |
| 1              | 4               | 96        |
| 1              | 5               | 95        |
| 1              | 6               | 94        |
| 1              | 7               | 93        |
| 1              | 8               | 92        |
| 1              | 9               | 91        |
| 1              | 10              | 90        |

Consistent with a principle of leniency, the scoring system is lenient on what might be likened to “first-time offenders” or the “first offense.” A country with only 1 uncorrected violation may still maintain a high compliance score, even after many years of failing to correct the single violation. Each year of noncompliance decreases the overall score only by a factor of 1. A country could maintain a positive score even with 100 years of noncompliance.

However, the Scorecard treats more severely countries that have multiple laws in violation of treaty obligations. Under the formula, the number of violations is multiplied by the sum of the number of years a country has failed to correct each violation. The “multiplier effect” here produces a lower compliance score for a country that has multiple violations uncorrected versus a country that has only a single violation. For example, if Country B had 2 violations that were uncorrected for just 2 years, Country B receives a

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100 See supra Part I.B.5.
compliance score of 92. By contrast, because Country A had only 1 violation, it would receive a score of 92 only after 8 years of noncompliance.

<table>
<thead>
<tr>
<th>Sample Scorecard for Member with 2 Violations</th>
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<tbody>
<tr>
<td>Live violations</td>
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After year 10 of noncompliance, Country B receives a compliance score of 60 for its 2 violations—which is much worse than Country A’s score of 90 after year 10 for only 1 violation. The reason for the disparity is the multiplier effect: For two violations uncorrected for the same length, each year of noncompliance decreases the overall score by a factor of four. For three violations, by a factor of nine. For four violations, by a factor of sixteen, etc. The basic idea behind the multiplier effect is that the leniency afforded to a country with outstanding violations under the Scorecard should decrease, by a larger degree, with each additional violation committed.

Using this formula, the compliance scores in January 2011 for countries with past TRIPS violations in the DSB are:

<table>
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<tr>
<th>TRIPS Compliance Scorecard (Complex) (Jan. 2011)</th>
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<tr>
<td>Member</td>
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</tr>
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</table>

The U.S. score was determined as follows: 100 – 2 violations (10 years + 9 years) = 62. Bear in mind: the U.S. can dramatically improve its score simply by correcting one of the violations. For example, should the U.S. correct its longest standing violation in the Section 110(5) case, the U.S. compliance score would jump nearly 30 points to 91, even though the U.S. still had one TRIPS violation outstanding.

b. The trade sanction multiplier

The basic formula of the TRIPS Compliance Scorecard can include other variables. One option would be to include a multiplier to the computation of years of
delay in those disputes in which the respondent country obtains WTO authorization of the ultimate penalty of trade sanctions against a violating country.\footnote{See DSU art. 22, \textit{supra} note 13.} Thus, below, \( S \) represents the multiplier for trade sanctions:

\[
\text{Compliance Score with Trade Sanctions} = 100 - x (y_1 S + y_2 + y_3 + \ldots)
\]

For each dispute involving trade sanctions, the years uncorrected (\( Y \)) is multiplied by the trade sanction multiplier (\( S \)).

For example, the trade sanction multiplier might be 3, a number used sometimes in national disputes for the trebling of awards or penalties for more severe offenses. If Country C was subject to trade sanctions in the WTO for 1 violation that had gone uncorrected for 10 years, Country C would receive a compliance score of 70. After year 11, the compliance score would drop to 67. And, if Country C had another violation that was not corrected for over 1 year (but without trade sanctions), Country C’s score would worsen even more. For example, if Country C had 1 violation uncorrected for over 13 years that was subject to trade sanctions, and a second violation uncorrected for 1 year but without trade sanctions, Country C’s compliance score would drop to 20.\footnote{The number is determined as follows: 100 – 2((13 \times 3) + 1) = 20.}

The theory behind the trade sanction multiplier is that the DSB’s authorization of the ultimate penalty of a trade sanction against a violating country should factor negatively in the country’s Compliance Scorecard. Like the authorization of trade sanctions, the multiplier signals that the complainant country is dissatisfied with the violator’s continued noncompliance, and that the violator has not complied with the DSB’s recommendations within a reasonable time. However, some may view the trade sanction multiplier as inappropriate because it ignores the positive benefits that may be obtained from trade sanctions. As Henning Grosse Ruse-Khan has argued, because the authorization of trade sanctions is tied to a level “equivalent to the level of nullification or impairment” suffered by the complainant country,\footnote{See Henning Grosse Ruse-Khan, \textit{A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations}, 11 J. INT’L ECON. L. 313, 325-26 (2008).} trade sanctions can be seen as positive “re-balancing [of] the level of bilateral WTO commitments between the two countries.”\footnote{See id.} This rebalancing may be seen as a positive remedy or process in its own right, instead of simply a means to induce compliance.\footnote{See DSU arts. 3(7), 22(8), \textit{supra} note 13.} In such case, using a trade sanction multiplier may be considered unduly severe in treating what may be a positive development.

On the other hand, the DSU prioritizes the country’s removal of its offending law as “the first objective” outside of a mutually agreed solution and indicates that the “last resort” of trade sanctions are “temporary and shall only be applied until such time as the measure found to be inconsistent … has been removed,” or the member otherwise resolves the nullification of benefits or reaches a mutually agreed solution.\footnote{See DSU arts. 3(7), 22(8), \textit{supra} note 13.}
hierarchy of measures under the DSU prioritizes compliance with WTO agreements over other possible goals, such as rebalancing. Every violation of the WTO agreements seeks compliance with DSB recommendations, but very few disputes have involved trade sanctions—and the putative possibility of rebalancing that may accrue. Moreover, the WTO’s authorization of the “last resort” of trade sanctions against a violating country is not typically hailed as a positive development in the WTO, but rather, the opposite.107

c. The good behavior credit

Conversely, credit can be included in the Complex Compliance Scorecard for “good behavior” of a country for positive actions by a country, including: (i) promptly correcting a past violation within the reasonable time for implementation, (ii) reaching mutually agreed solutions in other disputes, or (iii) successfully defending itself from a challenge by a WTO finding of no violation.

For example, if a country had corrected a violation within a reasonable time, we might give, let’s say, 3 bonus points or good behavior credits to the Compliance Score to help offset any ongoing violations.108 Likewise, because the DSU prefers that countries reach mutually acceptable solutions instead of litigating WTO challenges, good credits might be given to any respondent that reaches a mutually agreed solution following a challenge to its law.109 In the equation below, Good Behavior Credit (G) would equal 3 times the total number of timely implementations, mutually agreed solutions, and successful defenses the country had.

\[
\text{Compliance Score with Good Behavior} = 100 - x(y_1S + y_2 + y_3 + \ldots) + G
\]

With good behavior credit, the Complex TRIPS Compliance Scorecard would be:

| TRIPS Compliance Scorecard (Complex + Good Behavior Credit) (Jan. 2011) |
|-----------------------------|-----------------------------|
| Member                     | Compliance Score |
| Canada                     | 100                         |
| China                      | 100                         |
| EU                         | 100                         |
| India                      | 100                         |
| United States              | 59                          |

Notice the U.S. score improves slightly from 62 to 59, receiving good credit in one TRIPS dispute.110 (More dramatic improvement occurs in the U.S. trade disputes, as discussed in Part III below.)

108 If a country had no live violations, its score would return to 100; the good behavior credit would not be “banked,” at least not until a live violation was in play.
109 See DSU arts. 3(7), supra note 13.
Multipliers for developed v. developing countries

Finally, another option would be to include a multiplier for developed countries, based in part on the assumption that developed countries have greater resources to protect and enforce intellectual property, and, therefore, should serve as a greater example for other countries. To some extent, TRIPS already recognizes this assumption in the transitional provisions afforded to developing and least developed countries. In the formula below, D represents the multiplier for a developed country with a TRIPS violation.

$$\text{Compliance Score} = 100 - x (y_1 + y_2 + y_3 + \ldots)D$$

If the multiplier were 1.5, the U.S. compliance score would be 43 instead of 62.

Alternatively, instead of a developed country multiplier, we can include a discount for developing countries. For example, the discount multiplier might be .5, effectively giving a developing country twice the time a developed country has before receiving the same compliance score. A developing country with 1 live violation for 10 years would receive a compliance score of 95 (instead of 90 for a developed country in the same scenario).

C. The Validity of the TRIPS Compliance Scorecard

Some may question the validity or usefulness of the scores computed under my formula, either the simple or the complex scores. In January 2011, the U.S. scored the worst of all WTO countries on the TRIPS Compliance Scorecard using either formula—which runs counter to the popular perception that the U.S. is a leading nation for the protection of IP. Conversely, China receives a perfect score under my formula based on its correction of its TRIPS violations—which, again, runs counter to the popular perception that China is the largest source of counterfeit goods and pirated works in the

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111 See TRIPS Agreement arts. 65-66, supra note 5 (transitional provisions; least-developed countries); DSU art. 24, supra note 13 (special procedures for least-developed countries).
112 The U.S. score would be determined as follows: 100 – 2(10 + 9)1.5 = 43.
The “disconnect” between the scores and popular perception over IP protection may lead some to doubt the usefulness of the Scorecard.

My response is threefold. First, it is important to keep in mind that the Scorecard is not a general indicator of overall IP enforcement in a country. Instead, it is a measure of a country’s compliance with TRIPS where a violation has been adjudged by the WTO—a circumstance that can be objectively determined with certainty. TRIPS imposes certain minimum standards for intellectual property protection, but it does not necessarily ensure the high level of protection or enforcement commonly expected in (Western) media accounts of IP controversies between countries. Thus, the limitations of the Scorecard may reflect the limitations of TRIPS or WTO generally. The U.S. efforts to obtain “TRIPS-plus” protections against counterfeiting and piracy in the Anti-Counterfeiting Trade Act (ACTA) and other FTAs—all outside the WTO—provide some support for this conclusion.

While the WTO might consider a more comprehensive scorecard for issues of compliance outside of the DSB, developing a scorecard within the DSB for WTO disputes is helpful—at least as a first step—for the institution. Though limited, focusing on WTO disputes removes the possibility of disagreement or speculation over whether a TRIPS violation has occurred. Instead of perceptions or subjective views on IP enforcement, the Scorecard focuses on known WTO-determined violations. Study of these known violations is fruitful for analyzing the effectiveness of the WTO dispute settlement process.

An analogy might help explain why this is so. Imagine two taxpayers, Al and Sally. People perceived Al as a tax evader, but Sally, a model tax payer and citizen. Later, the IRS found both Al and Sally had delinquent taxes. Al quickly paid his delinquent taxes, but Sally didn’t. Measuring compliance here is still valuable for the IRS, notwithstanding the possibility that Al is, in fact, a more egregious tax evader than Sally. The IRS seeks compliance with all of its judgments. Just because Sally may be more of model citizen, that does not mean she should be given a free pass from the IRS.

Second, it is important to evaluate the merits of the Scorecard from the perspective of the institution of the WTO. The goal of the Scorecard is not meant to favor or embarrass any particular country, whether it be the U.S., EU, China, or another country. WTO justice should be blind to the country before it. It would be a huge

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117 The U.S. may well be a million times better in protecting IP than China. But unless or until the WTO finds a TRIPS violation, we have no way of knowing with certainty whether a country is failing to abide by its obligations under TRIPS. Presumably, a country’s laws have been thoroughly vetted by the WTO TRIPS Council. And one would expect that any egregious violation that survived such vetting would soon face a challenge in the dispute settlement process.
mistake to evaluate the idea of using a scorecard based on the particular scores of countries at a certain time. The scores are likely to change over time, as some violations are corrected and new disputes are brought. (For example, the U.S. score would jump from 59 all the way to 94 out of 100 if one dispute is corrected and Good Behavior Credit is included.) The right question to ask is whether the tabulation of a Compliance Scorecard is helpful to the WTO’s surveillance of disputes, not whether we like the scores of particular countries now.

Finally, to the extent the U.S., the EU, or other countries with uncorrected violations feel any uncomfortableness with their Scorecards, that reaction would be a compelling argument in favor of the WTO’s use of the Scorecard. If countries feel any pressure to correct their violations because of the greater transparency provided by the Scorecard, then it would serve the DSB’s objective in securing prompt compliance with WTO decisions. There is a serious danger that the continued, prolonged violations that have gone uncorrected may draw greater resentment by other WTO countries and undermine the overall effectiveness of the WTO.118 As a representative of Japan admonished recently, “full and prompt implementation of the DSB’s recommendations and rulings was ‘essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members.’”119

III. Supplementing the TRIPS Scorecard with Other Measures

The proposed TRIPS Scorecard is offered as a simple way for the WTO to keep better track of and to provide greater transparency to, if not pressure on, countries’ compliance with TRIPS in cases of violations determined by the DSB. This Part offers several other options that can work in tandem with the TRIPS Scorecard.

A. Scorecards for Other WTO Violations

Separate compliance scorecards can be formulated for other WTO disciplines, such as the General Agreement on Tariffs and Trade (GATT 1994), the Anti-Dumping Agreement, and the General Agreement on Trade in Services (GATS).120 Likewise, an aggregate scorecard—or a master scorecard—can be created for each country’s compliance with all WTO agreements. Computing scorecards in these other areas may provide a more complete picture of a country’s compliance record, including for

118 At a meeting of the DSB in September 2010, numerous countries expressed discontent, and near exasperation, with the longstanding WTO violations by the U.S. See Sept. 2010 Minutes, supra note 55, at ¶¶ 5-16, 20 (Cuba, Ecuador, Brazil, China, Argentina, Nicaragua, Mexico, Chile, Dominican Republic, and Japan voicing sharp dissatisfaction with the U.S.’s failure to correct its violations).
119 Id. ¶ 20 (quoting DSU art. 3(3), supra note 13).
intellectual property laws as some of the disputes under GATT, for instance, may well relate to IP.121

Because most of the other WTO agreements focus on trade, I will lump them all together in one Trade Compliance Scorecard—in part for simplicity. (Of course, individual scorecards can be made for each WTO agreement.) The simple Trade Compliance Scorecard break downs as follows for the same countries listed on the TRIPS Compliance Scorecard above:

<table>
<thead>
<tr>
<th>Member</th>
<th>Live violations</th>
<th>Years to comply</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.</td>
<td>-5</td>
<td>9 + 8 + 5 + 5 + 4 years + counting*</td>
</tr>
<tr>
<td>EU</td>
<td>-3</td>
<td>13 + 12 + 4 years + counting*</td>
</tr>
<tr>
<td>Canada</td>
<td>0</td>
<td>(3 years 8 mos. + 10 mos. + 8 mos., 3 fixed)</td>
</tr>
<tr>
<td>China</td>
<td>0</td>
<td>(1 year + 9 mos., 2 fixed)</td>
</tr>
<tr>
<td>India</td>
<td>0</td>
<td>(19 mos. + 5 mos., 2 fixed)</td>
</tr>
</tbody>
</table>

As indicated, the EU and U.S. have multiple uncorrected trade violations. The U.S. has 5 uncorrected trade violations;122 the EU, 3.123

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123 The EU’s three outstanding trade violations in Jan. 2011 were in: (1) Appellate Body Report, EC – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, DS141, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds141_e.htm (last visited Feb. 7, 2011); see also Cho, supra note 69, at 674 (“[A]lthough the EU was one of the long-standing users of the zeroing practice, it has boldly changed its policy direction in a way that fully conforms to the AB’s ruling since it lost the very first case in EC–Bed Linen.”).
Several caveats should be noted. First, the WTO website may not be entirely up-to-date, so my numbers may be affected by an inaccuracy in the WTO reporting. Second, for the U.S., I have counted as just 1 violation the four disputes (DS322, DS344, DS350, DS294) involving the U.S. “zeroing” regulations and methodology for computing antidumping duties, and have measured the violation from the earliest of the 4 disputes. I have also included the U.S. Byrd Amendment dispute as a live violation for the U.S., even though the U.S. repealed the law by the 2006 Deficit Reduction Act. In Sept. 2010, the EU, Japan, and other countries complained to the DSB that the U.S. was still continuing to issue disbursements under the Byrd Amendment, so the dispute does not appear to be entirely resolved. On the other hand, for Canada, I have not included as a live violation Canada’s violation in the Regional Aircraft dispute; although no official resolution is reported by the WTO, the dispute with Brazil appears to have been resolved.

Another caveat is that some of the live violations included in the Scorecard may be near settlement. Should some of these disputes settle, the scores may improve significantly. The EU has negotiated possible settlements of all three of its live violations, although the settlements were not yet permanent or completely resolved.  

124 See supra note 122. Zeroing, which is the subject of 10 WTO disputes, is a controversial method to calculate dumping margins, meaning the difference in price a producer charges for exports of goods to foreign markets, typically at prices below domestic prices or fair market value. Under the zeroing method, the margin is treated as zero (0)—instead of a negative margin—when export price is actually higher than the average domestic value. This methodology favors the importing country in its ability to impose antidumping duties because negative margins are ignored in calculating dumping margins—making it easier to find a positive dumping margin against an exporting country. See generally Mitsuo Matsushita, Some International and Domestic Antidumping Issues, 5 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 249 (2010).

125 See Sept. 2010 Minutes, supra note 55, at ¶ 51.

126 See id. at ¶¶ 42-50.

127 The WTO website does not list a resolution to Canada’s longstanding dispute with Brazil over subsidies for regional aircraft. See Canada – Export Credits and Loan Guarantees for Regional Aircraft, DS222, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds222_e.htm (last visited Feb. 3, 2011); see also Brazil – Export Financing Programme for Aircraft, DS46, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds46_e.htm (last visited Feb. 3, 2011). Apparently, the disagreement between Canada and Brazil over credits in the regional aircraft sector was resolved by revisions to the OECD Arrangement and a new Sector Understanding on Civil Aircraft (2007). See Dominic Coppens, How Much Credit for Export Credit Support Under the SCM Agreement?, 12 J. INT’L ECON. L. 63, 75 (2009). Given the lack of clarity, I have not listed this dispute—or the earlier aircraft disputes with Canada, DS70 and DS71—in the time for implementation category. For similar reason, I have not included DS321 involving Canada’s trade sanctions against the EU in the Hormones dispute. In EC Bananas, the WTO Annual Report indicated that, in Dec. 2009, the EU had reached a settlement with Latin American countries and was close to one with the U.S. See WTO ANNUAL REPORT 2010, supra note 79, at 84. However, no final settlement of the dispute has been reported. See European Communities – Regime for the Importation, Sale and Distribution of Bananas, DS27, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm (last visited Feb. 3, 2011); William Schomberg, EU Backs Mandleson at WTO Talks, Despite France, NATIONAL POST, Jan. 10, 2010, http://www.nationalpost.com/news/world/story.html?id=53577e94-0029-405f-813a-22249e365155 (“Other issues which remain to be resolved include a decades-old row about trade in bananas...”). In EC Hormones, the EU and U.S. reached in 2010 a temporary, 4-year agreement that might lead to a permanent resolution. See Riccardo Pavoni, Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the “WTO-and-Competing-Regimes” Debate?, 21 EUR. J. INT’L L. 649, 676-77 (2010).
Likewise, the U.S. has corrected some, but not all of its violation in one dispute.\(^{129}\) And in the Subsidies on Upland Cotton (DS267) dispute, the U.S. reached a Framework for Mutually Agreed Solution that was announced to the WTO in August 2010; although the Framework is not itself a final resolution, it appears to be moving substantially toward that end.\(^{130}\) Although one might argue that these near settlements should \textit{not} be included in the negative category in the Scorecard because they show positive developments in the disputes, I have chosen to include them. There is no guarantee the disputes are resolved, and it is probably better to avoid making difficult judgment calls in these disputes.

Using the complex formula,\(^{131}\) the Trade Compliance Scorecard would yield the following scores:

\[
\begin{array}{|c|c|}
\hline
\text{Member} & \text{Compliance Score} \\
\hline
\text{China} & 100 \\
\text{India} & 100 \\
\text{Canada} & 100 \\
\text{EU} & 13 \\
\text{United States} & -55 \\
\hline
\end{array}
\]

Unlike the TRIPS disputes, the trade disputes have involved the WTO’s authorization of the penalty of trade sanctions in some instances. If we include a trade sanction multiplier of 3 in the formula,\(^{132}\) the scores for the U.S. and EU worsen. Because sanctions were authorized against the U.S. in the Byrd Amendment dispute, the U.S. compliance score would drop from -55 to -135.\(^{133}\) The EU fares even worse. It has


\(^{131}\) Compliance Score = $100 - x (y_1 + y_2 + y_3 + ...)$.  

\(^{132}\) Compliance Score with Trade Sanctions = $100 - x (y_1S + y_2 + y_3 + ...)$.  

been subject to trade sanctions in two longstanding disputes (EC-Bananas and EC-Hormones), which drops the EU’s score from -13 to -137. Notice, given the trade sanction multiplier, the EU score falls even below the U.S., even though the U.S. has more violations.

<table>
<thead>
<tr>
<th>Trade Compliance Scorecard (Complex + Trade Sanctions) - (Jan. 2011)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Member</strong></td>
</tr>
<tr>
<td>----------</td>
</tr>
<tr>
<td>China</td>
</tr>
<tr>
<td>India</td>
</tr>
<tr>
<td>Canada</td>
</tr>
<tr>
<td>United States</td>
</tr>
<tr>
<td>EU</td>
</tr>
</tbody>
</table>

We also might add Good Behavior Credit (of, say, 3 points) for each of those disputes in which respondents reached a mutually agreed solution before any WTO decision, successfully received a finding of no violation at all in a WTO decision, or corrected a violation within the reasonable time for implementation. In order to earn Good Behavior Credit, the country must report either the solution or the timely implementation to the DSB. With the Good Behavior Credit, the U.S.’s and EU’s scores improve as follows:

\[ \text{Compliance Score with Trade Sanctions and Good Behavior Credit} = 100 - x (y_1 + y_2 + y_3 + \ldots) + G. \]

\[ \text{See generally DSU art. 3(6), supra note 13, (“Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions ... shall be notified to the DSB”).} \]

\[ \text{For Good Behavior Credit, I did not count a settlement or implementation unless listed on the WTO website. If several disputes all related to the same matter, I counted that as just one matter for the purposes of the Scorecard, even if the country settled the dispute with several countries. I gave full credit for settlements achieved with some, but not all, complainant countries, and for disputes in which the complainant requested the DSB to terminate the challenge.} \]

\[ \text{However, I did not give credit for disputes that were reported in consultations, but without any further resolution. Nor did I give credit for a violator’s partial correction of the problem that still required DSB activity after the reasonable time for implementation. Finally, my data are limited by what the WTO website reported. Thus, to the extent the WTO website failed to indicate a settlement or implementation that a respondent country had successfully reported to the WTO, my Scorecard did not attempt to correct any WTO error.} \]
The U.S. did particularly well, receiving Good Behavior Credit for 15 timely corrections of violations, 20 mutually agreed settlements or terminations of disputes, and 6 findings of no violations at all in a dispute, for a total of 123 Good Behavior Credits. That elevates the U.S. score almost to positive territory, at -12, up from -135. The EU received Credit for timely correcting 7 violations, reaching mutually agreed settlements or terminations in 10 cases, and succeeding as respondent in 1 dispute with a finding of no violation, for 54 Good Behavior Credits and an overall score of -83, up from -137.

B. Tying Scores to Remedies or Penalties

Another option worth exploring would be for the WTO to tie the Compliance Scorecard to some greater remedy or penalty against the violating country. In addition to transparency in tracking a country’s compliance, the Scorecard might be given greater consequence. Such action would likely require the WTO’s amendment to the DSU, which would require the difficult task of garnering a consensus in the WTO. Of course, WTO countries would have to debate whether or not to pursue such an approach. I do not attempt here to conduct that debate. But, assuming such a proposal is considered desirable, one possible amendment could be the triggering of a penalty based on a country’s reaching a certain low score of (non)compliance.

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137 See 2011 Data for U.S. in WTO Disputes (on file with author). In some disputes involving the U.S. (DS206, DS296, DS335, DS343, and DS383), the WTO website indicated U.S. implementation, but without giving the actual date of implementation. It turns out 4 of those 5 disputes were timely implementations by the U.S., but one (DS206) was not. See id. I also included DS99 (DRAMs from Korea) as timely implemented, even though Korea initially disputed the U.S. claim (but later did not protest). See United States – Anti-Dumping Duty on Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea, DS99, Current Status, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds99_e.htm (last visited Feb. 7, 2011).


139 See Marrakesh Agreement Establishing the World Trade Organization, Art. X:8, opened for signature Apr. 15, 1994, 33 I.L.M. at 1144, reprinted in 1867 U.N.T.S. 3 (1994) (“The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference.”).
For example, the DSU might be amended to contain a provision that denied a country the ability to bring a WTO challenge should it go below an acceptable score. The basic notion of this procedural penalty would rest on a theory of “unclean hands”—i.e., a country with too many uncorrected violations itself could not challenge other countries in the WTO for alleged violations. The policy might be characterized as a “don’t fix, don’t challenge” policy.

The threshold for a country to lose its ability to challenge could be made strict or lenient. A lenient approach might set the threshold at a negative number on the Compliance Scorecard, effectively allowing a country to lose 100 points before suffering any penalty. For example, the “unclean hands” penalty can be tailored specifically for each WTO agreement or discipline—which would give a country a greater cushion (of 100 points per discipline) to correct violations across disciplines. Under this approach, the EU and U.S. would be subject to the “unclean hands” penalty in trade disputes, given their negative scores on the Trade Compliance Scorecard when the trade sanction multiplier and good behavior credits are used. (If the trade sanction multiplier is not used, only the U.S. would face the penalty; the EU score is 13.) No country would yet be disabled from bringing TRIPS challenges; the U.S., the sole country with uncorrected TRIPS violations, still maintains a comfortable cushion at 62, despite its noncompliance in 2 disputes. (Even more leniency would be afforded to countries if the trade disputes were divided into different scorecards by each agreement.)

Alternatively, the “unclean hands” penalty can be based on the total score from the sum of all violations—which might put greater pressure for repeat offenders to correct their violation (depending on the starting perfect score for each country). For example, under a strict approach, the WTO could give a total of 150 points for each country in the master scorecard (aggregating compliance scores for TRIPS and all WTO disciplines). Under this approach, the U.S. score worsens. It has the most uncorrected violations (7) and would receive the worst overall score: -200 under the basic formula, -312 under the formula with trade sanction multiplier, and -186 under the formula with trade sanction multiplier plus good behavior credit.

\footnote{See generally Olmstead v. United States, 277 U.S. 438, 483 (1928) (Brandeis, J., dissenting) (“a court will not address a wrong when he who invokes its aid has unclean hands”); U.S. Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465 (1957) (Patent misuse doctrine is extension of unclean hands doctrine under which “courts will not aid a patent owner who has misused his patents to recover any of their emoluments accruing during the period of misuse or thereafter until the effects of such misuse have been dissipated, or ‘purged[.]’”)}
### Master WTO Compliance Scorecard (Simple) (Jan. 2011)

<table>
<thead>
<tr>
<th>Member</th>
<th>Live violations</th>
<th>Years to comply</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>-7</td>
<td>$10 + 9 + 9 + 8 + 5 + 5 + 4$ years + counting</td>
</tr>
<tr>
<td>EU</td>
<td>-3</td>
<td>$12 + 13 + 4$ years + counting</td>
</tr>
<tr>
<td>Canada</td>
<td>0</td>
<td>(3 years 8 mos. + 10 mos. + 9 mos. + 8 mos. + 6 mos., 5 fixed)</td>
</tr>
<tr>
<td>China</td>
<td>0</td>
<td>(1 year + 9 mos., 2 fixed)</td>
</tr>
<tr>
<td>India</td>
<td>0</td>
<td>(19 mos. + 15 mos. + 5 mos., 3 fixed)</td>
</tr>
</tbody>
</table>

### Master WTO Compliance Scorecard (Complex) (Jan. 2011)

<table>
<thead>
<tr>
<th>Member</th>
<th>Compliance Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>150</td>
</tr>
<tr>
<td>India</td>
<td>150</td>
</tr>
<tr>
<td>Canada</td>
<td>150</td>
</tr>
<tr>
<td>EU</td>
<td>63</td>
</tr>
<tr>
<td>United States</td>
<td>-200</td>
</tr>
</tbody>
</table>

### Master WTO Compliance Scorecard (Complex + Trade Sanctions) (Jan. 2011)

<table>
<thead>
<tr>
<th>Member</th>
<th>Compliance Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>150</td>
</tr>
<tr>
<td>India</td>
<td>150</td>
</tr>
<tr>
<td>Canada</td>
<td>150</td>
</tr>
<tr>
<td>EU</td>
<td>-87</td>
</tr>
<tr>
<td>United States</td>
<td>-312</td>
</tr>
</tbody>
</table>

### Master WTO Compliance Scorecard (Complex + Trade Sanctions + Good Behavior Credit) (Jan. 2011)

<table>
<thead>
<tr>
<th>Member</th>
<th>Compliance Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>150</td>
</tr>
<tr>
<td>India</td>
<td>150</td>
</tr>
<tr>
<td>Canada</td>
<td>150</td>
</tr>
<tr>
<td>EU</td>
<td>-36</td>
</tr>
<tr>
<td>United States</td>
<td>-189</td>
</tr>
</tbody>
</table>

Although the U.S. and EU numbers are low, the numbers improve with resolutions in only a few disputes. For example, the U.S. scores improve considerably if the Byrd Amendment dispute (the U.S. maintains the violation is fixed) and the Upland Cotton dispute (the U.S. reached a Framework toward a mutually agreed settlement with Brazil) are deemed to be resolved. Excluding these two disputes, which seem close to final resolution, the U.S. scores improve dramatically: -35 under both the basic formula and the formula with trade sanction multiplier for the WTO Compliance Scorecard, and a positive overall score of 88 (out of 150) if Good Behavior Credit is also factored in. The dramatic improvement in U.S. score—by its resolution of only two disputes—shows how the Scorecard affords a fair amount of leniency for countries to correct violations, even
with multiple violations, especially if the country in question earns Good Behavior Credit. The U.S. still would maintain a positive overall score, despite having 5 continuing violations.

Similarly, if the EU resolves the longstanding Bananas dispute, the EU score improves to the positive territory on all cards: 118 under the basic formula, 70 under the formula with trade sanction multiplier, and 124 if the Good Behavior Credit is included with the trade sanction multiplier. With these few implementations, both the U.S. and EU would be comfortably above any procedural penalty when Good Behavior Credit is included.

IV. Addressing Objections to the Compliance Scorecard

This Part addresses some possible objections to the Compliance Scorecard. Some objections are general and apply to the idea of using a scorecard. Others are specific to the proposed Scorecards above. I will address both types of objections in turn.

A. General Objections to Using a Scorecard

1. Shaming versus diplomacy

Critics may contend that using a compliance scorecard in the WTO runs counter to the spirit of diplomacy and fostering of goodwill among WTO members. A scorecard misapprehends the nature of the WTO dispute system. The WTO dispute system should not be viewed as a rule-of-law system, but instead, a flexible system allowing for negotiated concessions. A scorecard for members listing their uncorrected violations on the WTO website may cause them embarrassment, if not outright shame. Some members may feel that so-called “naming and shaming” techniques are anathema to the WTO in that they may frustrate diplomacy.

The debate over whether the WTO is a rule-of-law or bargaining system is unlikely to be resolved. Perhaps more accurately, it is a combination of both. Although the DSU prefers members to reach their own “mutually agreed solution,” when bargaining fails—which it has in the noncompliance cases discussed above—the DSU states that “the first objective of the dispute settlement system is usually to secure the withdrawal of the measures concerned.”

Those who assert that diplomacy or bargaining should rule the WTO ignore this fundamental precept.

Moreover, putting aside this theoretical debate, the actual practices of the WTO refute the diplomacy objection. As discussed above, the WTO already publicly identifies

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141 See Bello, supra note 15, at 418; Okediji, supra note 115, at 52 (“disputes create a secondary market for renegotiation of existing bargains”).


144 DSU art. 3(7), supra note 13.
noncompliant members in numerous ways: (1) Panel and AB decisions, which are posted on the WTO website, (2) dispute summaries on the WTO website, (3) the minutes of the monthly DSB meetings, which are posted on the WTO website, and (4) the WTO Annual Reports, which are posted on the WTO website. If diplomacy and behind-the-scenes negotiations were all the WTO cared about, then none of this information would ever be publicly disclosed. After all, the “naming and shaming” of the noncompliant countries on the current WTO website should undermine diplomatic dealings by this logic, but that has not been the case.

Implicit in the “shaming” objection is the belief that delinquent WTO countries would care more—or feel more embarrassment—about their scores than the information about their violations already publicly disclosed by the WTO. This is debatable. Frankly, my fear would be the opposite—that delinquent countries would just ignore their scorecards. After all, who cares about a scorecard when the WTO already has the power to authorize trade sanctions against a country? In any event, a compliance scorecard, while aggregating the data, would not contain any information that is not already publicly disseminated by the WTO itself, other than an overall score in the case of the Complex Scorecard. Moreover, the proposed Complex Scorecard credits mutually agreed solutions—thus encouraging diplomatic negotiations—by awarding Good Behavior Credit. Diplomacy and scorecards can go hand-in-hand.

To the extent that countries would be swayed by their scorecards, that prospect strikes me as all the more reason for the WTO to use a scorecard. Because compliance with WTO decisions is a major goal of the DSB, the WTO should consider reasonable tools to achieve that end. The several uncorrected violations that have lasted over a decade in the DSB appear to be showing signs of fracturing WTO members, and leading some members openly to call into question the legitimacy of the entire WTO. 145 Diplomacy can tolerate only so much delinquency before it cracks.

2. Political feasibility of scorecard in the WTO

Perhaps the biggest objection to using a compliance scorecard in the WTO is political: irrespective of the merits and benefits of a scorecard, the WTO would never reach a consensus to adopt it. Especially those countries that have outstanding violations can be expected to vote against it.

My response is threefold. First, some version of a compliance scorecard, such as the proposed Simple Scorecard, would not need any further action or amendment by the WTO. The WTO Secretariat already provides summaries of all disputes on the WTO website, and the Director-General of the WTO provides summaries of all outstanding disputes, including violations, in his Annual Report. 146 If critics contend that a simple scorecard merely listing the number of violations for a country is outside the authority of the WTO Secretariat or Director-General, then so too would be major parts of the current WTO website and Annual Reports. Objectors would be hard pressed to argue that the

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145 See supra note 118 and accompanying text.
146 See supra note 79.
WTO website should be shut down. The Simple Scorecard merely provides the same information the Secretariat already provides, albeit in a different format.

Alternatively, the Trade Policy Review Board (TPRB) in the WTO might assume the responsibility of keeping a compliance scorecard as a part of its periodic trade policy reviews of WTO countries. Such a record-keeping procedure is consistent with the TPRB’s overall objective “to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.”\(^\text{147}\) As a part of the Trade Policy Review of each country, TPRB could include a compliance scorecard in the report.

Second, to the extent that WTO members believe that the proposed Complex Scorecard should be considered and approved by consensus, then the WTO should consider that route. Granted, the prospect of garnering a consensus may seem doubtful, if not nil. But the current situation—increasing questions by members about the DSB’s legitimacy in allowing decades-long violations to go uncorrected—may not be sustainable in the long run for the WTO as an institution. At some point, persistent, uncorrected violations may kill the WTO—or, at least, cripple its effectiveness.

Third, should the WTO fail to implement a compliance scorecard, non-governmental organizations (NGOs) or other entities—such as Global Trade Alert, International Centre for Trade and Sustainable Development (ICSTD), Organisation for Economic Cooperation and Development (OECD), or even WIPO—can easily undertake such a task. Scholars and researchers in the international IP community might volunteer their time and assistance for such a project. Having compiled the Scorecards herein with only 2 assistants, I do not believe the project would require significant labor, especially after the first scorecards are tabulated. Although a scorecard not from the WTO might carry less weight among WTO members, it would still provide the public with greater transparency of the WTO than currently exists.

**B. Specific Objections to Proposed Scorecards**

1. **Bias against big trading countries and heterogeneity problem**

Some may object that my Scorecards are flawed in treating big trading countries like the U.S. or China the same as small trading countries. Big trading countries with large economies may be expected to face many more trade challenges in the WTO than a country that has very little trade—and, therefore, the big trading countries should be afforded greater leeway under the Scorecards than other countries.

Although this argument may have surface appeal, it goes against the Dispute Settlement Understanding. There is nothing in the DSU that supports allowing big trading companies more leeway to comply with their WTO obligations. Under the DSU, each member is treated alike; the only exception is special treatment for least-developed countries\textsuperscript{148}. To the extent the WTO ever factors in trading size, the greater the size of the trading country, the more frequent the scrutiny the country receives from the WTO in the Trade Policy Review Mechanism\textsuperscript{149}.

Moreover, the fact that a country has extensive trade cuts both ways. Presumably, such countries have greater resources than small trading countries to deal with WTO disputes and compliance. Also, larger trading countries probably could get away with a lot more questionable trade practices, absent the WTO apparatus. Also, big trading countries that do face more WTO challenges have greater opportunities to earn Good Behavior Credits under the Complex Scorecard. As long as countries comply with WTO decisions, their scores would not be adversely affected by the sheer number of trade disputes they face.

A related objection is that my Scorecards treat not only all countries the same, but also all violations and all WTO agreements the same. No attempt is made to determine whether a violation is major or minor. All violations of the various WTO treaties are lumped together in the master Scorecard (although the individual Scorecards do provide narrower distinctions), one might object. This heterogeneity objection is a red-herring. The DSU itself treats the disputes all under the same dispute settlement approach and even allows cross retaliation across disciplines\textsuperscript{150}. In the WTO, IP is treated as another trade issue. In other words, the different disciplines of the WTO are all placed under the same metric in the DSU. More generally, establishing a ranking system of heterogeneous parts is perfectly feasible as long as the ranking system does not attempt to test too many different dimensions\textsuperscript{151}. In the case of the proposed Scorecards, only a few variables are measured, and they all center around one thing: compliance with WTO decisions.

2. Gaming the scorecard

One final worry is that the Complex Scorecard may lead some members to try to game the system. For example, some countries may attempt to inflate their Complex Scorecard by inviting meritless challenges in order to earn Good Behavior Credits, or bring more challenges against another member to lower its score. In short, countries would play games with their compliance scores.

Avoiding some gaming of the system is probably impossible. But I find unlikely the possibility that many countries will do so. Perhaps a few would. But there is always

\textsuperscript{148} See DSU art. 24, supra note 13.
\textsuperscript{149} See The Trade Policy Review Mechanism, http://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm (four largest trading countries reviewed every 2 years, while next 16 largest reviewed every 4 years and other countries every 6 years).
\textsuperscript{150} See DSU art. 3(7), supra note 13.
risk for a country to lose when bringing a sham dispute. Even if the sham is successful, a country could face great public embarrassment both domestically and internationally if the sham was later revealed. For example, a political leader could lose re-election if voters found out his trade representative spent hundreds of thousands of taxpayer dollars in order to conduct a sham WTO dispute. In any event, the formula for the Scorecard can be adjusted to discourage sham disputes (e.g., removing Good Behavior Credits as a variable, or otherwise penalizing the score of any country found to be engaging in sham WTO disputes).

Conclusion

The WTO can benefit from greater transparency in countries’ (non)compliance with WTO decisions administered by the Dispute Settlement Body. The current WTO website provides a wealth of data, but often in ways that are not easy to obtain an overall assessment of country compliance or the status of all ongoing disputes with adjudicated violations. To correct this design defect in the WTO website, this Article proposes the tabulation of a Compliance Scorecard for TRIPS and its other disciplines. This Scorecard, to be posted on the WTO website, would provide greater awareness of and transparency to the WTO decisions and member compliance.