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ENHANCING THE WTO TOOL KIT: THE CASE FOR FINANCIAL COMPENSATION

Rebecca Ullman

INTRODUCTION

World Trade Organization Dispute Settlement Understanding 160 represents an intersection of domestic law and international law. The subject of Dispute Settlement Understanding 160 (“DSU 160”) is the Fairness in Music Licensing Act, an American legislative act that extended copyright protection terms and carved out significant exemptions for commercial establishments.¹ The exemptions set forth in the Fairness in Music Licensing Act (“FMLA”) conflict with U.S. international intellectual property obligations such that one must question whether there should be new and different remedies available to assist parties in meeting their international obligations.

The objective of this paper is to provide background information on DSU 160 and an update as to its recent progress, or lack thereof, and to argue that the case, as it stands now, is convincing evidence that financial compensation should be a remedy available to World Trade Organization (“WTO”) members. Section I provides a context of the FMLA within the history of public performance rights in American copyright law, detailing the provisions of the legislation in question. Section II discusses the FMLA in the context of international copyright obligations and the development of DSU 160. Section III describes the currently available WTO remedies and introduces the concept of financial compensation as a remedy. Finally, Section IV presents a hypothetical situation in which financial compensation is used as a remedy in DSU 160, and argues that such a situation presents strong evidence in favor of adopting financial compensation as a WTO remedy.

I. HISTORY OF COPYRIGHT PROTECTION

From its inception, the United States recognized the value and importance of copyright protection. The U.S. Constitution contains a clause authorizing Congress to enact legislation granting authors the right to benefit from their literary production.² Many attribute the cultural and economic power of the United States to its early embrace

¹ Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2830 (codified as amended at 17 U.S.C. §§ 101, 110, 504 & 512) [hereinafter FMLA].

² U.S. Const. art. 1, § 8 cl. 8.

of copyright protection and the reward and incentive it offered authors in the form of a limited monopoly.³

Congress granted copyright owners the right to control public performances of dramatic compositions in 1856,⁴ and the public performance right was extended to musical works in 1897.⁵ The 1909 Copyright Act provided some protection against unauthorized public performance of a non-dramatic musical work.⁶ Owners of non-dramatic musical works had only the right to prevent unauthorized *for profit* performance, whereas non-profit, non-dramatic musical performances were exempt. Owners of dramatic works had the exclusive right to control public performance regardless of whether it was for profit.⁷

After the passage of the 1909 Act, the term “for profit” was the focus of much disagreement. Clearly, a concert at which the audience paid to hear a singer or listen to a recording was considered for profit. But what about music played in restaurants, retail stores, or hotels? In these situations, the music is not the focus of the economic transaction, but played because it adds to the atmosphere and contributes to the profit earned by the establishment. The U.S. Supreme Court first interpreted the term “for profit” in *Herbert v. Shanley Co.* where it found that to establish that music was played for profit, a plaintiff only had to show that the music contributed to the profitability of the establishment.⁸ In the opinion, Justice Holmes stated:

It is true that the music is not the sole object, but neither is the food, which could be cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal.⁹

In *Buck v. Jewell-La Salle Realty*, a hotel broadcasted radio programming over loudspeakers into the guest rooms.¹⁰ The Supreme Court held that the broadcast constituted a public performance under

³ See generally Todd Hagins, *Robbing Peter Gabriel to Pay Paul's Diner: Plunder, the Free Market, and the Fairness in Music Licensing Act*, 7 TEX. REV. L. & POL. 385, 389 nn.12–13 (2003) (citing articles discussing the Americanization of European television and the important role of intellectual property in the global marketplace and the value of companies trademarks).

⁴ Act of Aug. 18, 1856, ch. 169, 11 Stat. 138–39 (1856).

⁵ Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1897).

⁶ Copyright Act of 1909, 17 U.S.C. §1 (1976) (repealed 1976).

⁷ *Id.* at §1(d).

⁸ *Herbert v. Shanley*, 242 U.S. 591, 595 (1917).

⁹ *Id.*

¹⁰ *Buck v. Jewell-La Salle Realty*, 283 U.S. 191 (1931).

the 1909 Copyright Act, and in doing so, established the doctrine of “multiple performances.”¹¹ Under this doctrine, the first performance is the original broadcast by the radio station (which must be licensed), and the second is the commercial establishment’s broadcast of radio programming over speakers (which had to be licensed in for-profit situations under the 1909 Copyright Act). The Court emphasized the hotel’s control over the music and compared it to hiring an orchestra to play live music: “[i]n each the music is produced by the instrumentalities under its control.”¹²

After the *Buck* decision, copyright owners sought enforcement of their newly elaborated right to receive compensation for re-broadcasts of radio programming.¹³ If a commercial establishment wanted to play the radio, and therefore create a multiple performance, they were required to obtain a license. Performing rights organizations, such as the American Society of Composers, Artists, and Publishers (“ASCAP”), soon began including, and charging for, specific provisions for multiple performances in their standard licenses.¹⁴ The right to collect for re-broadcasts was also extended to cable television.¹⁵ Those who did not purchase a license risked liability.

The Supreme Court returned to the issue of re-broadcasts in 1975 in *Twentieth Century Music Corp v. Aiken*, where copyright owners sued for infringement a small fast food restaurant that played the radio via a receiver and four speakers of the type typically found in private homes.¹⁶ The copyright owners claimed the broadcast constituted a performance for which they were not compensated.¹⁷ The Court held that playing the radio in such a manner did not constitute a performance because of the small size of the establishment and the limited broadcasting equipment.¹⁸ The Court also used a floodgates argument, stating that thousands of small businesses would be subject to liability should the Court find it was a performance.¹⁹

The *Aiken* decision became the basis for statutory exemptions in the 1976 Copyright Act. The House Conference Report stated:

¹¹ *Id.*; David E. Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475, 480 (1987).

¹² *Buck*, 283 U.S. at 201.

¹³ Shipley, *supra* note 11 at 480–81.

¹⁴ *Id.* at 481.

¹⁵ *Id.* at 481–82.

¹⁶ *Twentieth Century Music v. Aiken*, 422 U.S. 151, 152–53 (1975).

¹⁷ *Id.* at 153.

¹⁸ *Id.* at 162

¹⁹ *See id.*

It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp v. Aiken* . . . which merely augmented the home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.²⁰

The final version of the 1976 Copyright Act gave the owner of a copyright in a musical composition the exclusive right to “perform the copyrighted work publicly.”²¹ The Act defines perform as “[to] recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”²² The Act defined public as a performance that was either in a space open to the public or a place where a “substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”²³ A transmission is considered to be a public performance if it is transmitted to the public, “whether the membership of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”²⁴ Section 110(5)(A), entitled the “Homestyle Exemption,” carved out a public performance exemption for:

Communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless —

- (A) a direct charge is made to see or hear the transmission; or
- (B) the transmission thus received is further transmitted to the public.²⁵

Although the 1976 Copyright Act sought to clarify the rules regarding radio play in small commercial establishments, it left many of the statutory terms undefined, and thus open to judicial interpreta-

²⁰ H.R. REP. NO. 94-1733, at 75 (1976) (Conf. Rep.).

²¹ Copyright Act of 1976, Pub. L. No. 94-553, § 106(4) 90 Stat. 2541.

²² *Id.* at § 101.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at § 110(5)(A).

tion.²⁶ Courts had differing opinions on what constituted homestyle equipment, whether it was acceptable to hide the speakers from view, and whether “small commercial establishment” referred to the physical size of the premises in question only or the size of the parent company.²⁷ Courts agreed that modifying homestyle equipment to increase its impact disqualifies the user from the Homestyle Exemption; that, in general, the greater number of speakers, the less the chance of exemption; and that the use of homestyle equipment does not give the user permission to further transmit the broadcast.²⁸

The public performance exemption was further explicated in the FMLA of 1998.²⁹ The main purpose of the FMLA was to extend the term of copyright protection, but it also included modifications to the Homestyle Exemption in Section 110(5) of the 1976 Copyright Act.³⁰ The original Homestyle Exemption moved to subsection (A) and a second exemption, called the Business Exemption, was added in subsection (B) to cover the performance of non-dramatic musical works in commercial establishments.³¹ The Business Exemption is divided into two sections, one covering restaurants and the other general commercial enterprises. If a general commercial enterprise is less than 2,000 gross square feet, then it does not need to obtain a license to play music via a radio or television.³² If it is more than 2,000 gross square feet, it is subject to restrictions regarding the equipment through which it re-broadcasts.³³ Thus, to be exempt, audio equipment may have no more than six loudspeakers in total and no more than four per room.³⁴ With audiovisual equipment, there may be no more than four televisions per room, no more than six televisions total, and no television with a screen greater than fifty-five inches.³⁵ Restaurants smaller than 3,750 gross square feet are exempt from re-broadcast licenses, and those larger than 3,750 gross square feet must follow the same restrictions as general commercial establishments larger than 2,000 gross square feet.³⁶

²⁶ See Copyright Act of 1976, *supra* note 21 at § 101.

²⁷ Laura A. McCluggage, *Section 110(5) and the Fairness in Music Licensing Act: Will the WTO Decide the United States Must Pay to Play?*, 40 IDEA 1, 12–15 (2000).

²⁸ *Id.*

²⁹ FMLA, *supra* note 1.

³⁰ Copyright Act of 1976, *supra* note 21 at § 1105(5).

³¹ *Id.*

³² *Id.* at § 110(5)(B).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

The FMLA, in general, was a product of concerted lobbying efforts.³⁷ Lobbies for copyright owners, including the Disney Corporation and famous singers like Don Henley from the musical group The Eagles, testified before Congress, urging it to extend the term of protection.³⁸ The exemptions in Section 110(5)(B) were the result of lobbying efforts by the restaurant and bar associations.³⁹ The exemptions were hotly contested by U.S. performing rights organizations.⁴⁰ In testimony before the Subcommittee on Courts and Intellectual Property, Wayland Holyfield, a singer, songwriter, and representative of ASCAP, said:

We're individual American songwriters who have made American music the most popular in the world. Our efforts should be the pride of all Americans. Instead, here we are defending ourselves against legislation which would take our property and give it for free to people who would profit from it. And that's the whole deal about why we're here.⁴¹

Conversely, Peter Madland, a restaurant owner and representative of Wisconsin taverns, said:

The issue is a very, very complicated one, but let's keep in mind we do have 134 cosponsors to this bill. There was a national survey that said 72 percent of the people agreed that restaurants and bars should not have to pay for use of radio and television. These are your constituents that say this. I don't know what they do for contributions, but they're your constituents, and I think you, as Congress people, should listen to them.⁴²

³⁷ Hagins, *supra* note 3 at 402.

³⁸ Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 388 (2000).

³⁹ See generally *Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 Before the Subcomm. on Courts and Intell. Prop.*, 106th Cong. 74 (1997).

⁴⁰ See e.g., *Music Licensing in Restaurants and Retail and Other Establishments: Hearings on H.R. 789 Before the Subcomm. on Courts and Intellectual Property*, 106th Cong. 4 (1997) (statement of Howard Coble, Chairman Subcomm. on Courts and Intellectual Property).

⁴¹ *Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 Before the Subcomm. On Courts and Intellectual Property*, 106th Cong. 73, 74 (1997) (statement of Wayne Holyfield, songwriter).

⁴² *Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 Before the Subcomm. on Courts and Intellectual Property*, 106th Cong. 216 and 219 (1997) (statement of Peter Madland, tavern owner).

Restaurant and store owners were victorious and saw the Business Exemption enacted, but the controversy soon moved to the international stage.

II. INTERNATIONAL COPYRIGHT LEGISLATION AND DSU 160

A. *International Copyright Legislation*

The FMLA took what was essentially a *de minimis* exemption in Section 110(5) of the 1976 Copyright Act and broadened it considerably.⁴³ Even before the FMLA was enacted, various experts expressed concern that the newly broadened exemptions would conflict with international obligations, specifically the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁴⁴

The United States acceded to the Berne Convention in 1988.⁴⁵ It requires parties to the treaty to treat the copyrighted work of other members as they would the works of their own nationals.⁴⁶ Article 11 of the Berne Convention gives authors of dramatic, dramatic-musical, and musical works the exclusive right to authorize the public performance of their works.⁴⁷ Article 11^{bis}(1) specifies that authors have the exclusive right to authorize the broadcasting, rebroadcasting, and public communication by loudspeaker or analogous instrument of their works to the public.⁴⁸ Article 11^{bis}(2) permits countries to determine the conditions under which Art 11^{bis}(1) may be enforced, as long as the enforcement regime does not prevent authors from obtaining equitable remuneration.⁴⁹ Article 11^{bis}(2) is interpreted to mean that countries may implement compulsory licensing regimes as long as they provide copyright owners with compensation.⁵⁰

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris on July 24, 1971) [hereinafter Berne Convention]. Dawn M. Larsen, *Note: The Effect of the Berne Implementation Act of 1988 on Copyright Protection for Architectural Structures*, 1990 U. ILL. L. REV. 151, 152 (1990).

⁴⁶ Berne Convention, *supra* note 45, at 233.

⁴⁷ *Id.* at 241.

⁴⁸ *Id.* at 241, 243.

⁴⁹ *Id.* at 243.

⁵⁰ World Intellectual Property Organization [WIPO], *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, at 79, BC-11bis. 22 (2003).

TRIPS is a WTO treaty, and as such all members of the WTO must accede to it.⁵¹ It requires member states to comply with the Berne Convention.⁵² Members are allowed to limit and provide exceptions to rights granted as long as these exceptions are limited in nature and do not “conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”⁵³ During the same hearings at which performing rights organizations and restaurant owners testified, the U.S. Copyright Office expressed concern that the proposed FMLA would violate U.S. international copyright commitments.⁵⁴ Marybeth Peters, Register of Copyrights, noted that an exemption as broad as the one proposed in Section 110(5)(B) appears to fall “outside the scope of the permissible ‘small exceptions’” permitted under both the Berne Convention and TRIPS.⁵⁵ Bruce A. Lehman, then Assistant Commissioner of Patents and Trademarks, testified that the United States joined the Berne Convention with the understanding that the Section 110(5) Homestyle Exemption was a *de minimis* exemption, and to subsequently enlarge the scope of the exemption would cause U.S. trading partners to claim a violation of international commitments.⁵⁶ Included in the Senate Congressional Record was a letter from Deputy U.S. Trade Representative Richard W. Fisher to Representative Mary Bono.⁵⁷ In it, he noted that the European Union had already expressed “significant concern about the pending legislation” and had threatened to bring dispute settlement proceedings in the WTO to challenge the existing Homestyle Exemption.⁵⁸ Adding the more expansive business exemption would only add fuel to the growing outrage over U.S. exemptions.⁵⁹

⁵¹ Marrakesh Agreement Establishing the World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Apr. 15, 1994 1869 U. N. T. S. 299, 301 [hereinafter TRIPS].

⁵² *Id.* at 301.

⁵³ *Id.* at 305.

⁵⁴ *Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 Before the Subcomm. on Courts and Intellectual Property*, 106th Cong. 74 (1997) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress), available at http://commdocs.house.gov/committees/judiciary/hju43667.000/hju43667_of.htm.

⁵⁵ *Id.* at 43.

⁵⁶ *Id.* (statement of Bruce Lehman, Assistant Comm’r of Commerce).

⁵⁷ *Music Licensing in Restaurants and Retail and Other Establishments: Hearing on H.R. 789 Before the Subcomm. On Courts and Intellectual Prop.*, 106th Cong. 74 (1997) (letter from Richard Fisher, Deputy Trade Representative).

⁵⁸ *Id.*

⁵⁹ *Id.*

B. World Trade Organization Dispute Settlement Understanding
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Despite admonishments from various experts, Congress passed the FMLA and thus enacted the Business Exemption in Section 110(5)(B) and the newly tailored Homestyle Exemption in Section 110(5)(A). In January of 1999, the European Communities (“EC”) requested consultations with the United States regarding Section 110(5) of the FMLA under Article 4 of the WTO Dispute Settlement Understanding and Article 64.1 of TRIPS.⁶⁰ Consultations were held in March of 1999, but the parties failed to reach a mutually acceptable agreement.⁶¹ The EC requested an examining panel under Dispute Settlement Understanding Article 6 and TRIPS Article 64.1.⁶² The EC alleged that the exemptions provided in Section 110(5)(A) and (B) violated U.S. obligations under TRIPS, and requested that the Panel: (1) find that the United States had violated Article 9.1 of TRIPS and Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention, and (2) recommend that the United States bring its domestic legislation into conformity with its international obligations.⁶³ The United States countered that its legislation complied fully with both Article 13 of TRIPS and the substantive requirements of the Berne Convention.⁶⁴

The panel submitted its report in June of 2000. It found that the Section 110(5)(A) Homestyle Exemption satisfied Article 13 of TRIPS (minor exemptions) and was thus consistent with Berne Conventions obligations.⁶⁵ However, it found that the Section 110(5)(B) Business Exemption did *not* meet Article 13 requirements, and was, therefore, inconsistent with Berne Convention obligations.⁶⁶ The Panel’s decision focused on the TRIPS Article 13 test that requires that exemptions: (1) be confined to certain special cases, (2) do not conflict with the legitimate interests of the right holder, and (3) do not unreasonably prejudice the legitimate interests of the right holder.⁶⁷ The Panel found Section 110(5)(A) met the Article 13 requirements, because the exemptions were sufficiently limited⁶⁸ and dramatic musical right holders would not expect to license or receive compensation

⁶⁰ Panel Report, *United States-Section 110(5) of the US Copyright Act*, ¶ 1.1, WT/DS160 (June 15, 2000) [hereinafter Section 110(5) Case].

⁶¹ *Id.* ¶ 1.2.

⁶² *Id.*

⁶³ *Id.* ¶ 6.1.

⁶⁴ *Id.* ¶ 6.2.

⁶⁵ *Id.* ¶ 7.1.

⁶⁶ *Id.*

⁶⁷ TRIPS, *supra* note 51, at art. 13.

⁶⁸ Section 110(5) Case, *supra* note 60, ¶¶6.143, 7.1.

from the performances in question.⁶⁹ The Panel found Section 110(5)(B) did not meet the criteria because the number of businesses it included was too large,⁷⁰ right holders of musical works would be in a position to authorize secondary broadcasts and receive compensation,⁷¹ and the United States failed to prove that the exemption did not unreasonably prejudice the legitimate interests of the right holder.⁷²

In July of 2000, the WTO Dispute Settlement Body (“DSB”) adopted the Panel’s report, and in August, the United States informed the DSB that it would require a “reasonable period of time” to implement the recommendations and rulings, as permitted under Dispute Settlement Understanding Article 21.3.⁷³ After the parties failed to agree on the definition of a “reasonable period of time,” the EC requested binding arbitration to determine the implementation period.⁷⁴ The United States argued for an implementation between fifteen and seventeen months, ending on December 31, 2001,⁷⁵ while the EC maintained a reasonable period of time was ten months.⁷⁶ The arbiter found a reasonable time period was twelve months from the adoption of the Panel’s report (July 27, 2000),⁷⁷ making the deadline for implementation July 27, 2001.

With the implementation deadline quickly approaching and no sign of U.S. legislative compliance, the EC and the United States struck a deal giving the United States until December 31, 2001 to make the required changes in exchange for participation in a binding arbitration to determine the level of nullification and impairment of benefits to the EC as a result of Section 110(5)B.⁷⁸ Should the United States fail to make the required changes by the new, extended dead-

⁶⁹ *Id.* ¶¶ 6.218, 6.271.

⁷⁰ *Id.* ¶ 6.133.

⁷¹ *Id.* ¶ 6.210.

⁷² *Id.* ¶ 6.265.

⁷³ World Trade Organization, Dispute Settlement: DSU 160 United States - Section 110(5) of the Copyright Act, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Feb. 9, 2010). *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round art. 21.3, 33 I.L.M. 1125 (1994).

⁷⁴ World Trade Organization, Dispute Settlement: DS 160 United States - Section 110(5) of the Copyright Act, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm (last visited Feb. 9, 2010).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Intellectual Property: EU Blasts WTO Arbitration Award in Music Licensing Dispute with U.S.*, Patent, Trademark & Copyright Law Daily (BNA), at D-2 (Nov. 26, 2001).

line, the EC was entitled to claim against the United States the amount of nullification and impairment determined by the arbitration panel.⁷⁹ The arbitration request was the first of its kind under Article 25.2 of the Dispute Settlement Understanding.⁸⁰

The financial compensation arbitration was important because there was a large discrepancy between the figures submitted by the United States and those submitted by the EC. The United States claimed annual losses from the legislation were approximately US\$446,000-\$733,000,⁸¹ while the EC claimed losses of approximately US\$25 million.⁸² The discrepancy was a result of different methods of calculation. The EC argued that the proper method of calculation was one that assumed all establishments using copyrighted works of EC right holders were licensed.⁸³ The United States argued for a *de facto* approach where damage was measured by determining the difference between the amount EC right holders were receiving before the amendment and the amount they received after the amendment.⁸⁴ The arbiters agreed with the United States that the level of compensation should equal the amount of licensing revenue that the EC could reasonably expect to receive.⁸⁵ The Panel determined that: (1) royalties should be calculated based on the amount paid by U.S. performing rights organizations to EC right holders as opposed to the amount collected by U.S. performing rights organizations,⁸⁶ (2) nullification and impairment should be assessed from the date the matter was referred to the Panel, in this case approximately June 30, 2001,⁸⁷ and (3) as a result of Section 110(5)(B) was US\$1.1 million per year.⁸⁸

January 2002 came and went without changes in U.S. legislation.⁸⁹ The EC proposed retaliation by levying a special fee on U.S. nationals in connection with border measures concerning copyrighted

⁷⁹ *Id.*

⁸⁰ *Trade: WTO Chief Moore Appoints Arbitrators in Music Licensing Decision Against U.S.*, Patent, Trademark & Copyright Law Daily (BNA), at D-5 (Aug. 13, 2001).

⁸¹ Award of the Arbitrators, *United States-Section 110(5) of the US Copyright Act* ¶ 4.3, WT/DS160/ARB25/1 (Nov. 9, 2001).

⁸² *Id.* at ¶ 4.2.

⁸³ *Id.* ¶ 3.4.

⁸⁴ *Id.* ¶ 3.5.

⁸⁵ *Id.* ¶ 3.33.

⁸⁶ *Id.* ¶ 3.58.

⁸⁷ *Id.* ¶ 4.24.

⁸⁸ *Id.* ¶ 4.73.

⁸⁹ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Recourse by the European Communities to Article 22.2 of the DSU*, Jan. 11, 2002, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114288.pdf (last visited Feb. 20, 2010).

goods in the amount of US\$1.05 million per year.⁹⁰ The United States objected to this method of retaliation, claiming it did not conform to Dispute Settlement Understanding Articles 22.6 and 22.3, and called for arbitration.⁹¹ The EC agreed to give the United States more time to implement the required changes in exchange for a suspension of the arbitration proceeding.⁹²

In June 2003, the EC and United States reached an agreement where the United States paid US\$3.3 million into a fund for the promotion of authors' rights and assistance to EU performing rights organizations.⁹³ The payments were to be backdated to December 2001 to cover a three year period of U.S. legislative non-compliance.⁹⁴ The settlement was contingent upon the understanding that Section 110(5)(B) was to be amended by the end of 2004.⁹⁵

Dispute Settlement Understanding Article 21.6 requires adopted recommendations and rulings issued by WTO panels to be kept under surveillance until they are resolved.⁹⁶ Accordingly, the United States issues monthly updates communicating its progress toward implementation of the required legislative changes. Unfortunately, since the agreement in 2003, the updates have had little to

⁹⁰ *Id.* See *EU, Japan Agree to Give U.S. More Time to Comply with Copyright Ruling*, Patent, Trademark & Copyright Law Daily (BNA), at D-3 (Jan. 22, 2002).

⁹¹ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Request for Arbitration under Article 22.6 of the DSU*, Jan. 18, 2003, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114298.pdf (last visited Feb. 20, 2010).

⁹² *EU, Japan Agree to Give U.S. More Time to Comply with Copyright Ruling*, Patent, Trademark & Copyright Law Daily (BNA), at D-3 (Jan. 22, 2002).

⁹³ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Notification of Mutually Satisfactory Temporary Agreement*, 26 June 2003, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114303.pdf (last visited Feb. 20, 2010). See *U.S. to Pay \$3.3 Million to EU Music Groups in Temporary Settlement of Licensing Dispute*, Patent, Trademark & Copyright Law Daily (BNA), at D-8 (June 25, 2003).

⁹⁴ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Notification of Mutually Satisfactory Temporary Agreement*, 26 June 2003, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114303.pdf (last visited Feb. 20, 2010).

⁹⁵ See *U.S. to Pay \$3.3 Million to EU Music Groups in Temporary Settlement of Licensing Dispute*, Patent, Trademark & Copyright Law Daily (BNA), at D-8 (June 25, 2003).

⁹⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round art. 21.6, 33 I.L.M. 1125 (1994) [hereinafter DSU].

offer in the way of substantive progress.⁹⁷ Each of the sixty updates state, “The U.S. Administration has been working closely with the U.S. Congress, and will continue to confer with the European Communities, in order to reach a mutually satisfactory resolution of this matter.”⁹⁸ Communication with the U.S. Trade Representative’s legal staff in charge of DSU 160 provided no further information than that provided in the official Art. 21.6 updates.⁹⁹ The most recent U.S. report to the DSB on December 21, 2009, provided no new updates.¹⁰⁰ The lack of progress toward amending Section 110(5)(B) cannot be attributed to U.S. congressional resistance to addressing copyright legislation because there have been many proposed amendments to U.S. copyright law, including one to Section 110(5)(C) in February of 2008,¹⁰¹ but none that would remedy the problems identified in DSU 160.

From the information above, one can draw several conclusions. First, the United States has not amended Section 110(5)(B) for undisclosed reasons and shows no sign of political progress toward a solution. In fact, when Representative Sensenbrenner, a sponsor of the FMLA, heard of the original panel’s decision, his spokesperson said the FMLA “is U.S. law, and allowing an international body to say, ‘You will change the law,’ is not a good precedent to set.”¹⁰² After nine years (2001–2010), presumably lack of time is no longer the issue. Second, the WTO Dispute Settlement Understanding provides for two remedies in the case of non-compliance—trade retaliation and trade concessions¹⁰³—neither of which have been used in the nine years of non-compliance. At one point, the EC threatened trade retaliation, but it quickly backed down. The United States has not offered, nor the EC demanded, trade concessions. This leads to the conclusion that the

⁹⁷ See, e.g., European Commission Trade, *WTO Dispute Settlement, Cases Involving the EU*, <http://trade.ec.europa.eu/wtodispute/show.cfm?id=155&code=1>; see, e.g. World Trade Organization, *Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute*, United States Section 110(5) of the US Copyright Act (WT/DS160).

⁹⁸ See e.g., European Commission Trade, *WTO Dispute Settlement, Cases Involving the EU, Status Report by the United States*, Dec. 7, 2004, http://trade.ec.europa.eu/doclib/docs/2004/december/tradoc_120595.pdf (last visited Feb. 20, 2010).

⁹⁹ E-mail from Probir Mehta, U.S. Trade Representative Attorney in charge of DSU 160, to author (Dec. 2, 2009) (on file with author).

¹⁰⁰ Statements by the U.S. at the Dec. 21, 2009 DSB Meeting, <http://geneva.usmission.gov/2009/12/21/1221dsb/>.

¹⁰¹ S. 2591, 110th Cong. §1 (2008).

¹⁰² Anne Hiaring, *Fish or Fowl? The Nature of WTO Dispute Resolution Under TRIPS*, 12 ANN. SURV. INT’L & COMP. L. 269, 282–83 (2006).

¹⁰³ DSU, *supra* note 96, at art. 22.1.

remedies are, in some way, ineffective or inappropriate for the current situation. Third, the parties agreed upon and exchanged financial compensation as temporary remedy to the dispute, which indicates they found it to be an effective temporary remedy. Finally, without progress toward a solution, DSU 160 is creating a precedent of non-compliance that threatens the integrity of the WTO system.

III. WTO TRADE REMEDIES AND THE FINANCIAL COMPENSATION MODEL

A. *Current Remedies Available Under the WTO System*

The WTO Dispute Settlement Body was established to settle disputes that arise when a country adopts a trade measure or takes some action that one or more fellow WTO members considers a violation of the WTO agreements, or when a member fails to live up to its international obligations.¹⁰⁴ If a member state fails to abide by the decision of the DSB, the winning party has two options to attempt to force compliance. The first option is trade retaliation where the winning country withdraws certain concessions in the amount equal to the damage caused by the original breach.¹⁰⁵ The second option is trade concessions; here, the losing country compensates the winning country with additional concessions equal to the original breach.¹⁰⁶

Financial compensation, such as that type paid by the United States to the EC in DSU 160, is not explicitly available as a remedy and DSU 160 was the first time financial compensation was used to temporarily resolve a dispute.¹⁰⁷ The financial compensation in DSU 160 was for only part of the period of non-compliance, differentiating it from the other trade remedies that last until there is compliance. Therefore, whether financial compensation has been successfully read into Article 22 is ambiguous and uncertain. The idea of financial compensation is not new and has been supported by developing countries since 1965, more recently by various countries calling for DSU reform.¹⁰⁸

¹⁰⁴ World Trade Organization, Understanding the WTO: Settling Disputes A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 9, 2010).

¹⁰⁵ DSU, *supra* note 96, at art. 22.

¹⁰⁶ *Id.*

¹⁰⁷ Pei-kan Yang, *Some Thought on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 423, 432-33 (2008); *see also* Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127, 162 (2007) ("The Bananas case may have been settled informally between Ecuador and the European Communities through cash consideration.").

¹⁰⁸ Yang, *supra* note 107, at 447; Trachtman, *supra* note 107, at 145.

There are various models that propose financial compensation as a remedy. In their article *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*,¹⁰⁹ Marco Bronckers and Naboth van den Broek present a well-developed and comprehensive model that addresses the major benefits and difficulties associated with financial compensation. Using this model as a rubric, the following section will hypothesize that had financial compensation been available to the parties in DSU 160, it would have provided an expedient and satisfactory remedy for both parties and would have prevented the extended period of non-compliance that poses a threat to the integrity of the WTO system.

B. *Financial Compensation Model*

The Bronckers and van den Broek financial compensation model is based upon a proposed amendment to the WTO's Dispute Settlement Understanding, rather than a new interpretation of the current agreement.¹¹⁰ The proposed amendment would provide a member whose rights were infringed with a choice of remedies—trade concessions, trade retaliation, or financial compensation.¹¹¹ The amount of financial compensation would be assessed by a panel, and either backdated to the beginning of the infringement for clear or “bad faith” breaches, or, in more ambiguous cases, begin following the finding by a panel or the WTO Appellate Body.¹¹² Compensation would be restorative and not punitive in nature, though the model would allow for minor annual increases in the amount of damages due to reflect the increasing cost of non-compliance to those harmed by the measure, as well as to the WTO system itself.¹¹³ Finally, Bronckers and van den Broek suggest that individual WTO members must have sovereign discretion to distribute compensation payments to their domestic private parties that suffered from the breach.¹¹⁴

The model proposes a liquidated damages formula that would dictate pre-set standard sums for various types of violations.¹¹⁵ These pre-determined amounts could be linked to the size of the defending member's economy and assets so that effect of the compensation would

¹⁰⁹ Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT'L ECON. L. 101 (2005).

¹¹⁰ *Id.* at 123–25.

¹¹¹ *Id.* at 107.

¹¹² *Id.* at 124–25.

¹¹³ *Id.* at 124.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 125.

be proportional, regardless of the country's economic size.¹¹⁶ Establishing pre-set standard sums is a way to circumvent the problem of calculating damages, which can be done in many ways and thus could be a source of controversy.¹¹⁷ In DSU 160, the parties, with the help of an arbitration panel, were able to agree on the amount of financial compensation,¹¹⁸ though had pre-set sums been available they may have saved significant arbitration costs. The Bronckers and van den Broek model includes special allowances for developing countries, or those with smaller economies, that would allow them to claim financial compensation without having it claimed against them.¹¹⁹ It also suggests that larger or richer developing countries might be entitled to an "opt-out" clause that would exempt them from the system of financial compensation.¹²⁰

IV. DSU 160 – THE CASE FOR FINANCIAL COMPENSATION

A. *Embodying the Benefits*

The following section examines how DSU 160 embodies the benefits of financial compensation identified in the Bronckers and van den Broek model. A summary of each argument presented by Bronckers and van den Broek will be presented, followed by an application of the argument to DSU 160.

1. *Financial Compensation is not trade restrictive.*¹²¹

Currently, when a member does not comply with a Dispute Settlement Understanding, the member that suffered injury has two potential remedies—trade retaliation and trade concessions.¹²² Trade retaliation is restrictive because new restrictions on importation hurt domestic consumers and industries that rely on the now-limited imports.¹²³ Trade concessions do not restrict trade, *per se*, but can cause distortions to the negotiated trading system.¹²⁴ Retaliation and concessions can 'infect' innocent bystanders, who have their trading posi-

¹¹⁶ *Id.*

¹¹⁷ See Award of the Arbitrators, *United States-Section 110(5) of the US Copyright Act* ¶ 4.2, WT/DS160/ARB25/1 (Nov. 9, 2001), available at [www.worldtradelaw.net/reports/25awards/us-copyright\(25\).pdf](http://www.worldtradelaw.net/reports/25awards/us-copyright(25).pdf).

¹¹⁸ *Id.*

¹¹⁹ Bronckers & van den Broek, *supra* note 109, at 125.

¹²⁰ *Id.*

¹²¹ *Id.* at 110.

¹²² DSU, *supra* note 96, at art. 22.

¹²³ Arwel Davies, *Reviewing Dispute Settlement at the World Trade Organization: a time to Reconsider the Role/s of Compensation?*, 5 WORLD TRADE REV. 31, 34 (2006).

¹²⁴ *Id.* at 38.

tions altered by the remedy. With financial compensation, the breach is isolated to the parties involved and has few ramifications for the trading positions of other domestic parties or third parties. In a sense, the breach is quarantined and kept non-contagious until it is cured through compliance.

In DSU 160, the EC threatened to retaliate against U.S. non-compliance by implementing new measures on imported copyrighted goods.¹²⁵ The threat of retaliation was enough to spur a new agreement between the parties as to temporary compensation, demonstrating the extent to which the parties wanted to avoid retaliation in favor of a different remedy.¹²⁶

2. *Financial compensation helps redress injury.*¹²⁷

Financial compensation can provide at least partial reparation for damages caused by the WTO-illegal act.¹²⁸ In DSU 160, the arbitration panel identified the amount of income that European performing rights organizations did not receive as a result of the FMLA.¹²⁹ The amount paid by the United States to the EC could have gone to performing rights organizations to compensate the rights holders who were directly harmed by the U.S. breach, and thus redressed their injury. However, the EC chose to use the funds for different purposes.¹³⁰

3. *In most cases, financial compensation will work as well, and sometimes better, to induce compliance.*¹³¹

There are two aspects of compliance within the WTO system. The first aspect is compliance with the positive and negative aspects of the treaty obligations assumed by member states when they join the

¹²⁵ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Recourse by the European Communities to Article 22.2 of the DSU*, Jan. 11, 2002, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114288.pdf (last visited Feb. 20, 2010).

¹²⁶ *See EU, Japan Agree to Give U.S. More Time to Comply with Copyright Ruling, Patent, Trademark & Copyright Law Daily (BNA)*, at D-3 (Jan. 22, 2002); *U.S. to Pay \$3.3 Million to EU Music Groups in Temporary Settlement of Licensing Dispute*, *Patent, Trademark & Copyright Law Daily (BNA)*, at D-8 (June 25, 2003).

¹²⁷ Bronckers & van den Broek, *supra* note 109, at 110.

¹²⁸ Davies, *supra* note 123, at 40.

¹²⁹ *U.S. to Pay \$3.3 Million to EU Music Groups in Temporary Settlement of Licensing Dispute*, *Patent, Trademark & Copyright Law Daily (BNA)*, at D-8 (June 15, 2003).

¹³⁰ *Id.*

¹³¹ Bronckers & van den Broek, *supra* note 109, at 110.

WTO.¹³² The United States was found to be non-compliant with its TRIPS obligations when it passed the FMLA and remains non-compliant today.¹³³ A secondary aspect is compliance within the remedy system. The language of the Dispute Settlement Understanding indicates that parties to a dispute should either be in the process of implementing the panel's recommendations,¹³⁴ or be pursuing trade retaliation or trade concessions.¹³⁵ If a country is neither actively pursuing compliance nor using one of the trade remedies, it is undermining the WTO trading system. Allowing a country to exist in a state of unsanctioned non-compliance sets a precedent that WTO obligations may be ignored. Therefore, it should be a goal of the WTO system to avoid such rogue situations.¹³⁶

In DSU 160, compliance with the DSU recommendations will be very difficult. Compliance would involve amending the FMLA, a difficult proposition considering the political bargaining that went into its passage.¹³⁷ Without amending the FMLA, there is no legislative

¹³² World Trade Organization, Principles of the trading system: Predictability through binding and transparency, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Feb. 24 2010).

¹³³ Alben P. Petrova, *The U.S. – Section 110(5) of the Copyright Act Dispute Analysis and Forecasts for Compliance*, 15 CURRENTS: INT'L TRADE L.J. 43, 45–47 (2006).

¹³⁴ DSU, *supra* note 96, at art. 21.1 (“Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes.”).

¹³⁵ *Id.* at art. 22.2 (“If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.”).

¹³⁶ International law must often address the argument that “real law” requires a sovereign to enforce it and therefore international law is not “real law.” MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW, xl (Univ. of Connecticut Foundation Press) (1990). Janis and Kay, citing Max Weber, define “law” as an order system endowed with certain specific guarantees of the probability of its empirical validity. *Id.* Weber wrote of a “coercive apparatus, i.e., that there are one or more persons whose special task it is to hold themselves ready to apply specially provided means of coercion (legal coercion) for the purpose of norm enforcement.” *Id.* at xli. To be an effective and coherent legal system, the WTO must provide “certain specific guarantees of the probability of its empirical validity.” Instances in which members are neither in compliance with international obligations nor in compliance with trade remedies, undermine the specific guarantees of validity that make the WTO an efficacious legal system.

¹³⁷ See *supra* notes 39–42.

basis for the United States to collect royalties from commercial establishments. The more realistic option is to use a trade remedy to compensate the right holders who would otherwise receive royalties. As discussed above, the fact that trade retaliation or trade concessions have not been used indicates that the remedies are in some way ineffective or inappropriate for the situation. On the other hand, DSU 160 demonstrates that financial compensation can provide an alternative remedy and thus a way to remain a way for the breaching country to remain a compliant member of the WTO system.

4. *Financial compensation does not lead to disproportionate burden on innocent bystanders.*¹³⁸

As discussed above, trade retaliation and concessions impose costs upon private parties who were previously external to the dispute. Externalizing the costs of trade remedies is unfair in many respects and may cause domestic turmoil.¹³⁹ Financial compensation, on the other hand, would be an obligation that could be distributed over the offending country's budget, and thus not impose specific costs on specific, innocent bystanders.¹⁴⁰ In DSU 160, the financial compensation issued from the U.S. government's coffers and not from trade distortions applied to private parties.¹⁴¹

5. *Financial compensation can be a disincentive to foot-dragging.*¹⁴²

Allowing financial compensation as a remedy prevents countries from delaying the dispute settlement process, especially if damages are assessed retroactively.¹⁴³ If damages are assessed from the beginning of infringement, countries have an easily measurable incentive to come into compliance as soon as possible.¹⁴⁴ Financial compensation is an efficient remedy that imposes few procedural costs once it has been calculated, while traditional remedies involve additional calculations.¹⁴⁵ As trade volumes are not static, trade retaliation and

¹³⁸ Bronckers & van den Broek, *supra* note 109, at 110.

¹³⁹ Davies, *supra* note 123, at 44.

¹⁴⁰ *Id.*

¹⁴¹ Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559 (2003).

¹⁴² Bronckers & van den Broek, *supra* note 109, at 110.

¹⁴³ *Id.* at 110-11.

¹⁴⁴ Davies, *supra* note 123 at 40.

¹⁴⁵ See Robert Howse & Robert W. Staiger, *United States-Anti-Dumping Act of 1916 (Original Complaint by the European Communities)- Recourse to Arbitration by the United States Under 22.6 of the DSU*, WTREV 2005, 4(2), 295-316, 302. (Outlining the three-step analysis to be used to determine the level of nullification or impairment caused by the measure introduced by the defendant. In the case of financial compensation, the analysis would be complete after this step. With

trade concessions measures must be monitored and re-calculated to ensure that the remedy is proportional to the breach.¹⁴⁶ The third round of arbitration in DSU 160 began because the United States argued that retaliatory measures used by the EC were in excess of the determined harm, though the amount of nullification and impairment had already been determined through arbitration.¹⁴⁷ Financial compensation is much simpler and easy to execute than trade retaliation or trade concessions.

In DSU 160, the parties agreed to financial compensation in a relatively expedient manner, at least in comparison to the period of non-compliance. Were financial compensation an acceptable remedy, the parties could effectively exchange money and move on without costing each other, or the system, any more than was necessary.

6. *Financial compensation is in line with general public international law.*¹⁴⁸

The principles of public international law call for two reactions to breaches of treaty obligations: (1) compliance and (2) reparation for remedial purposes.¹⁴⁹ The traditional remedies address compliance but do not provide for reparations to private entities.¹⁵⁰ Financial compensation could act as a “stick” to induce compliance, and a “carrot” to make those hurt by the breach, whole.

Here, perhaps the parties agreed to financial compensation because compliance seemed unrealistic, but financial compensation offered the next best thing—reparations. In some ways, financial compensation can also achieve what WTO rule compliance seeks, making the parties whole again.

traditional remedies, a *second* three-step analysis would be needed to determine the trade impact of the complainant’s proposed retaliatory measure.) The figure determined by the second three-step analysis would need to be monitored and occasionally recalculated to ensure it remained proportional, per DSU article 22.4.

¹⁴⁶ DSU, *supra* note 96, at art. 22.4.

¹⁴⁷ *European Trade Commission, WTO Dispute Settlement, Cases Involving the EU, Request for Arbitration under Article 22.6 of the DSU*, Jan. 18, 2003, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114298.pdf (last visited Feb. 20, 2010).

¹⁴⁸ Bronckers & van den Broek, *supra* note 109, at 111.

¹⁴⁹ *Id.* See Case Concerning the Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Judgment of Sept. 13) (International Court of Justice case establishing reparations as a remedy in international law).

¹⁵⁰ Davies, *supra* note 123, at 48. “[N]ullification or impairment was equated with trade effects, which in turn refers to the total value of trade annually excluded. This methodology distances the concept of nullification or impairment from how the violation impacts upon private entities.” (in reference to several WTO Dispute Settlements). *Id.*

7. *Introducing financial compensation adds an element of fairness.*¹⁵¹

According to Bronckers and van den Broek, “fairness” plays an important role in explaining compliance with domestic and international law.¹⁵² Most parties, especially the United States and EC, will be on both sides of the WTO Dispute Settlement process, as both applicants and defendants.¹⁵³ In fact, the EC and the United States are the most active TRIPS-related complainants to the WTO.¹⁵⁴ They have an interest in a system that has integrity and treats both applicants and defendants equitably. DSU 160 represents a situation where both parties have agreed upon a remedy that they find fair, and, as demonstrated above, this remedy is in line with the premise and goals of the WTO system.

B. Addressing the Difficulties

The following section examines how DSU 160 addressed the difficulties of financial compensation identified in the Bronckers and van den Broek model. A summary of each argument presented by Bronckers and van den Broek will be presented, followed by an application of the argument to DSU 160.

1. *Monetary damages are too difficult to calculate.*¹⁵⁵

Critics are concerned that calculating the amount of financial compensation would be too difficult and the results could differ dramatically.¹⁵⁶ Bronckers and van den Broek suggest a liquidated damages model that would attach predetermined damages to specific breaches.¹⁵⁷ The amount of damages would increase every year that non-compliance continues to reflect additional damages and the increasing costs of non-compliance, but not enough to make the damages punitive in nature.¹⁵⁸

DSU 160 demonstrates that, at least in some cases, financial compensation is not too difficult to calculate, nor is it too contentious for parties to agree upon. However, if there had been predetermined

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES 369, 377 (Friedl Weis ed., 2000).

¹⁵⁴ Hiaring, *supra* note 102, at 278.

¹⁵⁵ Bronckers & van den Broek, *supra* note 109, at 113.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 125.

¹⁵⁸ *Id.* at 114.

damages for this particular type of breach, the parties might have saved the cost of the second arbitration panel.

2. *Monetary damages are unenforceable.*¹⁵⁹

The enforceability of a particular remedy must be determined in comparison to other remedies. The first question, therefore, is whether financial compensation works as a remedy; and second, whether there are more effective alternatives. In response to the question of whether countries actually pay monetary damages, Bronckers and van den Broek cite DSU 160, state-investor disputes in ICSID or NAFTA, and claims paid by Iran and the United State to private interests on the basis of awards granted by the Iran-United States Claims Tribunal as examples of situations where governments did, in fact, pay.¹⁶⁰ Another way to assess whether a remedy is actually enforceable is to examine whether members are willing to use the remedy. Professor Hudec says that all WTO governments are repeat players in the game, and that most appear as both complainants and defendants.¹⁶¹ Therefore, the optimum legal system is the one that will be most helpful in enforcing one's trade agreement rights as a complainant, while at the same time preserving the desired degree of freedom to deal with adverse legal rulings against one's own behavior.¹⁶² Members will only participate in measures that will benefit them as complainants and do not unduly hinder them as defendants. Remedies that are used by members, therefore, assume an implicit degree of enforceability.

In DSU 160, the parties agreed to financial compensation as a temporary remedy while officially pursuing compliance,¹⁶³ though nine years later there seems to be little if any progress toward a permanent solution. The parties' willingness to agree to compensation covering a defined and retroactive period of non-compliance¹⁶⁴ indicates a willingness to use financial compensation as a remedy, and to honor the obligations such a remedy creates. The financial compensation agreement in DSU 160 was limited to, and not subsequently extended beyond, a three year period during which the United States was to work towards compliance.¹⁶⁵ The limited nature of the agree-

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 115.

¹⁶¹ Hudec, *supra* note 153, at 377.

¹⁶² *Id.*

¹⁶³ European Trade Commission, *WTO Dispute Settlement, Cases Involving the EU, Request for Arbitration under Article 22.6 of the DSU*, Jan. 18, 2003, http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114298.pdf (last visited Feb. 20, 2010).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

ment does not detract from its ability to signal that members are receptive to putting financial compensation on the negotiating table, and that should financial compensation become an official remedy, they would honor their financial obligations.

In terms of comparative enforceability, trade retaliation does not have barriers to enforcement but it does have serious side effects, such as hurting innocent bystanders who were previously unaffected by the breach.¹⁶⁶ Trade concessions face similar barriers to enforcement as financial compensation, namely, the offending country must offer the remedy.¹⁶⁷ In sum, financial compensation is on equal footing in terms of enforceability with trade compensation and though less enforceable than trade retaliation, it has fewer negative side effects.

3. *Financial compensation may not reach rightful recipients.*¹⁶⁸

Under the current structure of the WTO where the only entities with legal personality are member states,¹⁶⁹ payment directly to private parties is impossible.¹⁷⁰ Member governments remain sovereign and any compensation must go to them, and, hopefully, distributed to parties injured by the breach.¹⁷¹ According to Bronckers and van den Broek, experience shows that it is possible to tailor compensation mechanisms to compensate specific parties, even if there are a great number of diverse parties.¹⁷² The logistical problem of paying out money to large groups of people has been addressed in situations like class action suits.¹⁷³

Again, to rightfully ascertain the value of financial compensation, one must compare it to the alternatives. Under trade retaliation or compensation, private parties hurt by the trade breach have no chance to recover the amount of nullification or impairment directly. To reach the rightful recipients, compensation gained through trade retaliation or trade concessions would have to be measured, monetized, and collected from the trade beneficiaries (most likely not those involved in the original breach) and redirected to parties harmed by the breach. Despite the obstacle to direct payments presented by governments, financial compensation has a far better chance to reach the rightful recipients than trade retaliation or trade compensation be-

¹⁶⁶ Davies, *supra* note 123, at 34.

¹⁶⁷ *Id.* at 38.

¹⁶⁸ Bronckers & van den Broek, *supra* note 109, at 116.

¹⁶⁹ With the exception of the European Communities, an entity that functions like a sovereign state in the WTO context. Yang, *supra* note 107, at 457.

¹⁷⁰ Bronckers & van den Broek, *supra* note 109, at n. 25.

¹⁷¹ *Id.* at 116.

¹⁷² *Id.*

¹⁷³ *Id.* at 116–17.

cause financial compensation can be given directly to parties harmed by the breach.

In DSU 160, the EC government chose not to compensate the specific performing rights organizations that were hurt, but rather to fund special programs.¹⁷⁴ This decision was made at the discretion of the EC; nevertheless, it provided the opportunity to use the money to restore the private parties to their pre-breach positions. Should financial compensation be allowed as an official remedy and were the EC to receive annual payments from the United States, it is likely the performing rights organizations would ask for their fair share. This domestic pressure from internal sources is another way to help ensure the compensation reaches those it should.

4. *Financial compensation is more acceptable for certain measures.*¹⁷⁵

Some argue that financial compensation is more acceptable as a remedy for certain kinds of illegal administrative measures than for illegal legislative measures.¹⁷⁶ One reason is that it might be harder to identify the private parties adversely affected by legislative measures than by administrative measures.¹⁷⁷ This distinction proves unconvincing after DSU 160 where the breach was legislative and there was no issue identifying the parties adversely affected. The panel that determined the amount of damages also indicated the DSB's preferred method of calculation—ascertaining the actual injury rather than the potential injury.¹⁷⁸ Further, the Bronckers and van den Broek model suggests that financial compensation be offered as an alternative remedy, meaning if parties felt it was unsuited for their needs they could choose retaliation or trade compensation.¹⁷⁹

5. *Financial compensation has less compliance-inducing effect.*¹⁸⁰

Critics say that financial compensation will have less compliance-inducing effect because the demonstrative nature of retaliation

¹⁷⁴ *U.S. to Pay \$3.3 Million to EU Music Groups in Temporary Settlement of Licensing Dispute*, Patent, Trademark & Copyright Law Daily (BNA), at D-8 (June 25, 2003).

¹⁷⁵ Bronckers & van den Broek, *supra* note 109, at 117.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Award of the Arbitrators, *United States-Section 110(5) of the US Copyright Act* ¶ 3.33, WT/DS160/ARB25/1 (Nov. 9, 2001).

¹⁷⁹ Bronckers & van den Broek, *supra* note 109, at 117.

¹⁸⁰ *Id.* at 117–18.

sends a powerful message to the breaching government.¹⁸¹ Retaliation often causes domestic industries to lobby for compliance so that the retaliatory measures will end. Financial compensation, on the other hand, can be accomplished more quietly and without creating a domestic lobby. Bronckers and van den Broek, however, point out that given the current financial climate, “It’s only money” is hardly a winning slogan, and that financial compensation is only one choice among three options.¹⁸² If a winning country wanted to make a statement via its remedies, it would still have the opportunity to do so.

Critics in search of a compliance-inducing effect have not accounted for situations where the winning party does not feel strongly enough to invoke trade retaliation to make a statement and risk further damage to its domestic industries, or for smaller countries for whom retaliation is an ineffective measure. In the end, the amount of revenue lost to the performance rights societies in DSU 160 is proportionately small, limited in scope, and ultimately not worthy of trade retaliation.¹⁸³ Absent a U.S. offer of trade compensation or the unlikely event of legislative compliance, the case remains in blatant non-compliance and threatens the integrity of the WTO legal system.¹⁸⁴ Financial compensation offers a third, more muted, but still effective, option.

¹⁸¹ R.E. Hudec, *The GATT Legal System and World Trade Diplomacy*, 199–200 (Butterworth, 2d ed. 1990).

¹⁸² Bronckers & van den Broek, *supra* note 109, at 117.

¹⁸³ In 2001, ASCAP distributed \$511 million in royalties to rights holders. Jim Bessman, *ASCAP Has Record Distribution In 2001*, BILLBOARD BULLETIN, Feb. 7, 2002, <http://www.allbusiness.com/retail-trade/miscellaneous-retail-retail-stores-not/4364487-1.html>. Actual GESAC distributions for 2001 were unavailable, but in 2001, the original complainant in DSU 160, the Irish Music Rights Organization (IMRO), distributed €21million. Irish Music Rights Organization, *Directors Report 2001*, 9, available at <http://www.imro.ie/docs/pdfs/Directors%27%20Report%20&%20Financial%20Statements%202001.pdf>. IMRO is just one of 34 national performing rights organizations that make up Groupment Européen des Sociétés d’Auteurs et Compositeurs (GESAC), the organization that received the financial compensation paid by the U.S. to the EC. GESAC, Introduction, <http://www.gesac.org> (last visited Feb. 11, 2010). If each of the 34 domestic performing rights organizations distributed a similar amount, total GESAC distributions would have been approximately €714 million. The arbitration panel found total nullification and impairment measures to be US\$1.1 million per year, which was the equivalent of .15% of GESAC distributions, indicating the relative insignificance of the nullification or impairment to the GESAC budget.

¹⁸⁴ See *supra* note 136.

6. *Financial compensation does not change the asymmetry that exists between large and small developed and developing countries.*¹⁸⁵

Inequity between large and small, developed and developing countries is a characteristic that plagues the WTO dispute settlement system in general.¹⁸⁶ Small, developing countries have less power to pressure larger countries into compliance.¹⁸⁷ It is true that financial compensation would do little to change this dynamic.¹⁸⁸ On the other hand, financial compensation has the ability to make smaller developing countries whole, and to restore both the country and the private parties to their pre-breach positions while waiting for the longer term goal of compliance.¹⁸⁹ Retaliation cannot make parties whole, and trade concessions might restore a country to its net position, but it still creates winners and losers. Further, if a small, developing country can only rely upon retaliation in the case of non-compliance, it may determine that the expense of bringing the dispute is not worth the potential gain.¹⁹⁰ A member's failure to use prescribed remedies is a loss to the WTO system as a whole as it allows breaches to persist unaddressed. Admittedly, DSU 160 was between two large and powerful entities, the United States and the EC, but it nonetheless demonstrates how financial compensation might replace trade revenue lost because of the breach.

7. *Financial compensation allows rich countries to buy themselves out of violations.*¹⁹¹

One objection is that larger countries with deep pockets will be able to buy themselves the freedom to breach while smaller nations will be stuck either following the rules or using one of the more cum-

¹⁸⁵ Bronckers & van den Broek, *supra* note 109, at 118.

¹⁸⁶ Davies, *supra* note 123, at 34.

¹⁸⁷ *Id.*

¹⁸⁸ Bronckers & van den Broek, *supra* note 109, at 118.

¹⁸⁹ *Id.*

¹⁹⁰ Dispute Settlement Body, *Negotiations on the Dispute Settlement Understanding - Special and Differential Treatment for Developing Countries: Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, Working Documents of the DSU Negotiations, TN/DS/W/19, Oct. 9, 2002, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb ("The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and would only further deepen the imbalance in their trade relations already seriously injured by the nullification and impairment benefits.").

¹⁹¹ Bronckers & van den Broek, *supra* note 109, at 118–19.

bersome remedies.¹⁹² This contention is based on the assumption that a country will hand over a lump sum and be on its way, much like paying a traffic fine.¹⁹³ Financial compensation, like retaliation, would not be a substitute for ultimate compliance, nor would the compensation be a one time payment—it would last as long as the breach.¹⁹⁴ According to the Broeckers and van den Broek model, the amount due could increase on a yearly basis to reflect the increasing cost of non-compliance.¹⁹⁵ The charge that rich countries can use their deep pockets to achieve impunity from WTO rules ignores or underestimates the ongoing nature of compensation due and the fact that it will remain a stop-gap measure until compliance is achieved. Bronckers and van den Broek also suggest adjusted schemes for developing countries where they either only receive and not pay compensation or pay according to their abilities.¹⁹⁶

The concern that developed countries will buy themselves the freedom to breach also addresses notions of efficient breach, a discussion articulated by Schwartz and Sykes.¹⁹⁷ They first argue that the language used in the Dispute Settlement Understanding in reference to compliance is relatively weak.¹⁹⁸ They next address Article 22.8 of the Dispute Settlement Understanding, which requires that trade remedies be temporary and that the Dispute Settlement Body monitor implementation of adopted recommendations until the member achieves full compliance.¹⁹⁹ Schwartz and Sykes argue that Art. 22.8 could be interpreted to mean that remedies should be monitored to ensure the proper calibration of the remedy used, that continued publicity and oversight may serve to alert other members of a harm for which they might seek compensation, or that the ongoing oversight

¹⁹² *Id.* at 118.

¹⁹³ Yang, *supra* note 107, at 442 (“The proposal of monetary compensation bears no attempt to be the ultimate one-off payment to buy out the defending Member’s obligations imposed by the DSB.”).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 124.

¹⁹⁶ *Id.* at 118. Though Bronckers and van den Broek later state: “developed countries are unlikely to accept that they would have to pay financial compensation to all developing countries, without having the right to claim financial compensation from any one of them.” *Id.* at 120.

¹⁹⁷ Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002).

¹⁹⁸ *Id.* at 190 (“The statement in the first passage that compliance is “preferred” is weak- it does not say that compliance is mandatory, and it seems to us that this provision does not exclude the possibility that noncompliance may in some cases be acceptable.”).

¹⁹⁹ DSU, *supra* note 96, at art. 22.8.

“serves to check periodically on whether the impasse that led to compensation or retaliation may have lifted.”²⁰⁰ Finally, they argue that the Dispute Settlement Understanding text, taken as a whole, “allow[s] a violator to continue a violation in perpetuity, as long as it compensates or is willing to bear the costs of the retaliatory suspension of concessions” and that if full compliance were the mandatory and absolute goal, WTO members could impose greater penalty for noncompliance, such as punitive measures.²⁰¹

A dispute settlement system based solely on the principles of efficient breach would be contrary to the WTO goal of “entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.”²⁰² Schwartz and Sykes “do not dispute that a ‘preference’ for compliance seems implicit in the system.”²⁰³ However, current trade remedies, as articulated by Dispute Settlement Understanding art. 22.1, recognize that full compliance with recommendations may not be efficient or practical for members and allow them to address their breach through trade remedies without sacrificing the ultimate goal of compliance.²⁰⁴ Financial compensation would be an analogous remedy that could increase the efficiency of the remedy without sacrificing the ultimate goal of compliance.

8. *Payments of financial compensation could violate Most Favored Nation status or amount to an illegal subsidy.*²⁰⁵

Most Favored Nation (“MFN”) status, as embodied in TRIPS, says that any advantage, favor, privilege, or immunity granted by one WTO member to nationals of any other country shall be immediately and unconditionally extended to the nationals of all other members.²⁰⁶ The concern is that if one member gives financial compensation to another member, this will constitute an advantage, favor, or privilege such that it should be extended to all members.

Such concerns about MFN status are rebutted, using the Bronckers van den Boek model, on two grounds: (1) financial compensation does not constitute an advantage, favor, privilege or immunity

²⁰⁰ Schwartz & Sykes, *supra* note 197, at 190–91.

²⁰¹ *Id.*

²⁰² Marrakesh Agreement Establishing the World Trade Organization, Preamble, Legal Instruments- Results of the Uruguay Round, 33 I.L.M. 1125 (1994) *available at* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

²⁰³ Schwartz & Sykes, *supra* note 197, at 190–91.

²⁰⁴ *See* DSU, *supra* note 96, at arts. 22.1, 22.8.

²⁰⁵ Bronckers & van den Broek, *supra* note 109, at 119.

²⁰⁶ TRIPS, *supra* note 51, at art. 4.

and (2) the proposal is based upon an amendment to the WTO Dispute Settlement Understanding that would identify and address any inconsistencies such as differing treatment for developing countries.²⁰⁷ On the first ground, financial compensation that makes one party whole does not have the same features as a measure that would violate MFN status.²⁰⁸ The winning country is merely restored to the economic position to which it is entitled; it receives nothing in excess. For similar reasons, financial compensation does not amount to an illegal subsidy.²⁰⁹

Any country that successfully argues it was injured because of the breach, is entitled to compensation.²¹⁰ If compensation is received by trade retaliation or trade concessions, the potential distortions to the WTO trading regime could spiral as more and more countries alter their trading positions. Contrastingly, with financial compensation, breaches are dealt with outside trade obligations, minimizing distortions to the system. In addition, successive complainants may save on the cost of litigation by either bringing a case together, or “piggy-backing” on the elements demonstrated in the first case.²¹¹

There are several countries outside the EC that have shown particular interest in DSU 160.²¹² It is interesting to note that they have not, as of yet, taken similar action against the United States for similar breaches. One reason is that, the amount of music represented by non-U.S. and non-EC performing rights organizations and played on U.S. radio and television is small. A second reason is that the case is currently in a state of limbo, and it does not make sense to initiate further action when the result is unclear. Should DSU 160 be resolved and there be right holders with demonstrable damages claims against the United States, the path to financial compensation would be straightforward and attainable.²¹³ Should other countries piggy-back on the EC claims, the amount due from the United States to other

²⁰⁷ Bronckers & van den Broek, *supra* note 109, at 119.

²⁰⁸ See Davies, *supra* note 123, at 45.

²⁰⁹ *Id.* at 119–20.

²¹⁰ *Id.*

²¹¹ Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT’L L. 127, 161 (2007) (“[B]arriers include the cost of litigation. The cost of litigation can be reduced by arrangements by which smaller economies arrange to work together, sharing the costs. . . a move to cash remedies might induce more states to join in litigation, perhaps establishing a practice of engaging in ‘class actions.’”).

²¹² Australia, Brazil, Canada, Japan, and Switzerland were all involved in the original panel decision.

²¹³ Trachtman, *supra* note 211 at 142. (“[A]fter one state brings a successful dispute settlement case, other states may follow on through formal dispute settlement, avoiding the problem of uncertainty as to eventual success.”).

members would increase and could increase the urgency of legislative compliance.

9. *Developing countries cannot afford financial compensation.*²¹⁴

The inability of developing countries to pay financial compensation is a legitimate concern under the Bronckers and van den Broek model.²¹⁵ They suggest permitting developing countries to have a special defense against financial compensation, based upon economic difficulties, or cap the amounts for which developing countries could be liable.²¹⁶ In this way, financial compensation could be seen as giving developing countries an added tool to enforce decisions in their favor, while also protecting them from reciprocal obligations. Such an advantage could help balance the systemic inequities faced by developing countries.²¹⁷ Bronckers and van den Broek point out that developed countries are unlikely to agree to a system in which all developing countries may receive financial compensation but are not obligated to pay it.²¹⁸ Limits could be put on the system, such as identifying eligible countries by their percentages of world trade, national budgets, or ranking on the United Nations' Human Development Index.

10. *Financial compensation will never be accepted.*²¹⁹

When all more meaningful objections have been used, some critics cite the "showstopper" of unacceptability.²²⁰ Perhaps DSU 160's most reasonable contribution to the development of WTO remedies is that it shows financial compensation is feasible and determinable, and that members will pay it. Should financial compensation become an official remedy, the EC could immediately request financial compensation for the period of non-compliance from 2005–2009. The success of DSU 160 does not rule out future situations where financial compensation may be hard to determine, where it is impractical, or where countries refuse to pay. Rather, DSU 160 demonstrates there are situations in which financial compensation is a useful addition to the WTO remedy toolkit and therefore should be added.

²¹⁴ Bronckers & van den Broek, *supra* note 109, at 120–21.

²¹⁵ *Id.* at 120.

²¹⁶ *Id.*

²¹⁷ Yang, *supra* note 107 at 452 ("It has been recognized that developing countries can be given better incentives to utilize the WTO dispute settlement system if monetary compensation is allowed.").

²¹⁸ *Id.*

²¹⁹ *Id.* at 121.

²²⁰ *Id.*

CONCLUSION

International law, much like the governments of democratic nations, depends upon the consent of the governed.²²¹ Successful international legal systems respond to the needs of parties involved while maintaining the integrity of the system. The WTO faces a situation, as exemplified in DSU 160, in which its remedies do not meet the needs of the members. Large, powerful nations face difficult political choices, and developing nations struggle to use a dispute settlement system that does not provide them with enforcement strategies. DSU 160 has demonstrated that parties are willing and able to pay for their breaches. WTO members and the Dispute Settlement Body should make financial compensation a remedy alongside trade retaliation and trade concessions. The more diversity there is within the Dispute Settlement Body enforcement toolkit, the greater the chance of compliance within the WTO system.

²²¹ JANIS & KAY, *supra* note 136, at xl. (citing H.L.A. Hart's discussion of international law as a system of primary rules of obligation without secondary rules to efficiently make, recognize or enforce the primary rules).