20 Should the teeth be pulled? An analysis of WTO sanctions

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The most salient feature of the World Trade Organization (WTO) dispute settlement system is the possibility of authorizing a trade sanction against a scofflaw member government. Yet this feature is a mixed blessing. On the one hand, it fortifies WTO rules and promotes respect for them. On the other hand, it undermines the principle of free trade and provokes "sanction-envy" in other international organizations. Undoubtedly, the implanting of "teeth" by the WTO negotiators was one of the key achievements of the Uruguay Round, and a very significant step in the evolution of international economic law. But after six years of experience, WTO observers are beginning to consider whether recourse to damaging trade measures was a good idea.[1] This essay provides an analytical framework for rethinking WTO trade sanctions.

To be sure, the WTO Agreement does not employ the word "sanction." What the Dispute Settlement Understanding (DSU) of 1994 says in Article 22 is that if a government fails to bring a measure found to be inconsistent with a WTO rule into compliance, it shall enter into negotiations with the government invoking dispute settlement, and if no mutually acceptable compensation is agreed, the plaintiff government may seek authorization from the WTO Dispute Settlement Body (DSB) "to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."[2] This language is based on a similar provision in the General Agreement on Tariffs and Trade (GATT) of 1947. It provided that the CONTRACTING PARTIES may give a ruling in a complaint regarding the failure of a party to carry out its obligations. If the CONTRACTING PARTIES

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1 Edward Alden, *Gloom Descends Over Former Supporters of the WTO's Procedure for Disputes*, FIN. TIMES, Dec. 6, 2000, at 8 (discussing unhappiness with WTO trade sanctions); Transatlantic Business Dialogue, Cincinnati Recommendations, Nov. 16–18, 2000, at 37 (urging governments to rethink the present system of WTO sanctions); Paul Magnusson, *Take a Break, Trade Bullies*, BUS. WEEK, Nov. 6, 2000, at 100.

2 Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Art. 22, *in* Agreement Establishing the World Trade Organization, April 15, 1994, Annex 2, *available in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS. THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999). All other WTO Agreements cited here are also in this WTO volume.

"consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations as they determine to be appropriate in the circumstances."[3]

Yet even without using the S-word, the WTO utilizes a sanction. As will be shown in this article, the purpose of the WTO action is to induce compliance, and that is properly called a "sanction." With the advent of the WTO, the trade policy community has recognized that the WTO system is different than the GATT system, and has increasingly employed the term "sanction" to describe what DSU Article 22 authorizes. The old GATT idea of suspending concessions has metamorphosed in the WTO into a trade sanction.

Authorizations for WTO sanctions do not occur often. Out of the thirty-seven disputes in which a defendant government was judged in violation, only two have led to trade sanctions.[4] The two cases involved the European Communities (EC) as the defendant – the *Bananas* and meat *Hormones* disputes. In December 2000, the DSB authorized Canada to impose trade sanctions against Brazil in the Aircraft dispute, but Canada has not yet done so.[5]

The refusal of the EC to comply after being sanctioned has led to two critical perspectives on the DSU. One camp says that the sanctions failed because the teeth are not sharp enough. In the United States, proponents of this view in Congress succeeded in enacting a "carousel" provision to rotate the targets for trade sanctions. The other camp says that the *Bananas* and *Hormones* episodes demonstrate the disutility of trade sanctions. An exemplification of this view in the United States was the Meltzer Commission which stated in March 2000 that "instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel, or provide equivalent trade liberalization."[6]

A less critical, and probably majority, perspective is that it is too soon to judge the merits of WTO sanctions. The *Bananas* and *Hormones* episodes are far from over.[7] Moreover, in some cases, such as *Australia Salmon*, the threat of WTO-authorized sanctions was probably instrumental in securing compliance by the defendant government.[8]

3 General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXXII:2, 55 UN Treaty Services 194.

4 Author's tabulation using data on WTO website as of December 11, 2000.

5 Jennifer L. Rich, *WTO Allows Canada Record Sanctions Against Brazil*, N.Y. Times, Aug. 23, 2000, at C4; Daniel Pruzin, *WTO Gives Canada Green Light to Impose Sanctions on Brazilian Exports*, Daily Report for Executives (BNA), Dec. 13, 2000, at A-1. *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, Decision by the Arbitrators*, WTO doc. WT/DS46/ARB (Aug. 28, 2000) [hereinafter Brazil Aircraft Article 22 Decision].

6 International Financial Institutions Advisory Committee Report, March 2000, at 57.

7 *See, e.g.*, Gary G. Yerkey, *U.S. Beef Producers Propose Easing Sanctions if EU Eliminates Hormone Tests*, Daily Report for Executives (BNA), Oct. 10, 2000, at A-20.

8 *Canada Drops Proposal to Retaliate in WTO Salmon Dispute with Australia*, 17 Int'l Trade Rep. (BNA) 1250 (2000). Such threats also worked in the GATT era even with non-authorized retaliation.

While it may be too soon to issue a conclusive judgment, it is not too soon to begin an assessment of the experience of WTO sanctions. Such an assessment should consider the impact of sanctions for achieving compliance with WTO rules. Yet it should also go beyond that to consider how such "hard" enforcement affects public opinion about the WTO and trade itself. Without trade sanctions, surely no one would call the WTO the "World Takeover Organization," as some protestors did at the Seattle ministerial conference. A comprehensive assessment should also consider the impact of WTO sanctions on other international treaty systems that may want to emulate the WTO in employing trade sanctions.

This article attempts a preliminary assessment along these lines. It proceeds in four parts. Part I discusses the role of trade sanctions in the trade regime, emphasizing the difference between compensation that restores a previously balanced exchange and purposive trade measures to induce compliance. Part II lays out the advantages and disadvantages of the current use of trade sanctions in WTO dispute settlement. Part III explores alternatives to trade sanctions, including "softer" measures that may one day replace trade sanctions. Part IV makes recommendations and concludes.

I Role of trade sanctions in the trade regime

This part provides a brief history of the sanctioning idea and discusses the provisions in the GATT and the WTO. My thesis is that the GATT concept of rebalancing concessions was transmogrified by the WTO into a trade sanction. It is true, of course, that the drafters of GATT in 1947 recognized the sanction-like quality of GATT-authorized trade retorsion. But the sanction paradigm was resisted during the GATT years. Only after the WTO began to operate did it become routine to refer to WTO-authorized trade measures as a "sanction."

A Background

The idea of retaliation is an old one. The most famous command was given by the God of the Old Testament: "If anyone injures his neighbor, whatever he has done must be done to him: fracture for fracture, eye for eye, tooth for tooth."[9] This sentiment has continuing appeal to human emotion, but is not a general principle of law.

Trade retaliation goes back many centuries, and became part of US law in the Antidumping Act of 1916. This provision, still in force, provides that "Whenever

Horlick points out that the US government complied in the GATT manufacturing clause dispute because of the threat of retaliation. Gary Horlick, *Dispute Resolution Mechanism – Will the United States Play by the Rules?*, 29 J. WORLD TRADE 163, 168 (Apr. 1995).

9 Leviticus 24:19–20.

any country . . . shall prohibit the importation of any article [which is] the product of the soil or industry of the United States and not injurious to health or morals, the President shall have the power to prohibit . . . the importation into the United States of similar articles'' or other articles from that country.[10] This provision has seen little use.

The first treaty compliance process to provide for a trade sanction was in the International Labour Organization (ILO), as set out in the Treaty of Versailles in 1919. These rules served as a model for subsequent international dispute mechanisms, such as the GATT. The ILO rules provided that a government (or non-government delegate!) could initiate a complaint that another government was not observing an ILO convention that both had ratified.[11] The ILO Governing Body would then have the option of calling for a Commission of Inquiry to be drawn from rosters nominated by governments.[12] The Commission was to investigate the matter and make findings of fact, and then recommend steps that should be taken to address the complaint, and the time within which they should be taken.[13] The Commission could also indicate ''measures of an economic character against a defaulting Government which it considers to be appropriate.''[14] Either government could then appeal the matter to the Permanent Court of International Justice which was to make the final decision on merits and on any ''measures of an economic character'' that other governments would be justified in taking.[15] No government was required to undertake such economic measures, but *any* government could do so if the defaulting government did not carry out the recommendations within the time specified.[16] Should the defaulting government later contend that it had come into compliance, it could request a Commission of Inquiry to verify its contention and, if verified, the ''measures of an economic character'' were to be discontinued.[17]

The ILO's elegant procedure was never fully utilized.[18] No economic measures were ever recommended. It was not until eighty-one years later that the ILO Conference, pursuant to an amended Constitutional provision, authorized measures against a government for refusing to adhere to a ratified ILO Convention.[19] This

10 15 U.S.C. §75. 11 Treaty of Versailles, June 28, 1919, 225 Consol. T.S., Art. 411.

12 *Id*. Arts. 411–412. The Commission was to be tripartite with government, employer, and worker members. The actual selection was to be made by the Secretary-General of the League of Nations from the roster.

13 *Id*. Art. 414. 14 *Id*. The report was to be made public. 15 *Id*. Arts. 415–418.

16 *Id*. Art. 419.

17 *Id*. Art. 420. This forward-looking provision is noteworthy because the DSU currently lacks a discrete mechanism to de-authorize retaliation.

18 Cesare P. R. Romano, *The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements*, International Institute for Applied Systems Analysis, May 1996, at 12–14; Francis Maupain, *The Settlement of Disputes within the International Labour Office*, 2 J. Int'l Econ. L. 273, 283–84 (1999) (discussing the pre-1946 procedure and noting its one-time use).

19 *In Historic Vote, ILO Assembly Tightens Pressure on Myanmar*, ILO Focus, Summer/Fall 2000, at 1. *See*

occurred in 2000 with the series of measures against Myanmar (Burma) for continued failure to comply with the ILO Forced Labor Convention (No. 29).[20]

No general multilateral trade treaty included dispute settlement backed by trade enforcement until the advent of the GATT.[21] But in the first half of the twentieth century, some multilateral commodity treaties did so. For example, the Sugar Agreement of 1937 provided that the Sugar Council could hear complaints about a party's failure to comply, and recommend measures to other parties "in view of the infringement."[22] If the Council decided that other parties should prohibit the importation of sugar from the infringing country, the Agreement provided that this "shall not be deemed to be contrary to any most-favoured-nation rights which the offending Government may enjoy."[23]

In the decades since the founding of the GATT, dozens of regional trade agreements have established dispute mechanisms.[24] Many of these agreements provide for trade remedies analogous to GATT Article XXIII.[25] Only a small part of this experience is addressed here.

Although the League of Nations could authorize economic sanctions against countries that resorted to war, and although the United Nations Security Council can call for economic sanctions against a country guilty of a breach of peace, such sanctions were imposed only three times between 1920 and 1990.[26] Since then, however, economic sanctions have been used frequently.[27] It is possible for the Security Council to use sanctions to enforce a decision of the International Court of Justice, but the Security Council typically takes action independently of judicial decisions.[28] The authors of GATT recognized the potential conflict between UN-directed trade sanctions and GATT rules, and therefore provided a

also Business Letter to Albright on Burma, INSIDE U.S. TRADE, Jan. 5, 2001, at 8 (stating that business leaders around the world view the ILO action as a very important step and one to be taken seriously).

20 Aaron Bernstein, *Labor Standards with Teeth?*, BUS. WEEK, June 19, 2000, at 14. The actions took effect in November 2000.

21 *See* MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS PAST AND FUTURE 215–217 (1944).

22 International Agreement regarding the Regulation of Production and Marketing of Sugar, May 6, 1937, Art. 44, 4 Malloy 5599, 5611. Such a decision was to be made by a three-quarters vote. The International Sugar Convention of 1902 had directed parties to impose countervailing duties on subsidized sugar from non-party countries.

23 *Id*. Art. 44.

24 James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000).

25 *See id*. at 156–157.

26 GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED. SUPPLEMENTAL CASE HISTORIES 24–25, 33–34, 285–286 (2d ed: Washington, DC, 1990). The three cases were Paraguay/Bolivia and Italy in the 1930s and Rhodesia in the 1960s–70s.

27 THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 289–290 (1995); The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, U.N. Doc. E/CN.4/Sub.2/2000/33, June 21, 2000, Annex 1 (reviewing the recent episodes).

28 *See* U.N. Charter ch. VII & Art. 94.

GATT exception for trade measures taken in pursuance of obligations under the UN Charter for the maintenance of peace and security.[29] Thus, the recent UN trade sanctions imposed on Sierra Leone[30] regarding "conflict diamonds" do not violate the WTO.

B The GATT system

Because the drafters of the Charter for the International Trade Organization (ITO) included an entire chapter on the "Settlement of Differences," the dispute settlement provisions in the GATT are bare bones.[31] The remedies in the GATT and the (defunct) ITO Charter were similar, however. In the GATT, the CONTRACTING PARTIES may authorize a complaining country to suspend the application of such concessions or other obligations as the Contracting Parties determine to be appropriate.[32] In the ITO Charter, the Conference had the authority to release an injured country from obligations (or previously granted concessions) to any other country "to the extent and upon such conditions as it considers appropriate and compensatory, having regard to the benefit which has been nullified or impaired."[33] One difference in the treaties is that the ITO provision specifies an action that is "appropriate and compensatory," while the GATT uses the term "appropriate," but not the term "compensatory." Neither the GATT nor the ITO Charter employed the terms "retaliation" or "sanction."

In his study of the GATT and ITO preparatory work, John Jackson concludes that "it was clear that the draftsmen had in mind that [GATT] Article XXIII would play an important role in obtaining compliance with the GATT obligations."[34] He also notes that there were differing views on how far Article XXIII should go – that is, whether the suspension provision should be limited to the equivalence of the damage done, or should authorize action in the nature of a sanction. Some countries, such as the Arab League, opposed recourse to sanctions.[35]

In his study of the ITO preparatory work, Robert Hudec explains that the issue of compensation versus sanctions proved to be controversial, and so was sent to a working party. The working party agreed that even in the case of a legal violation,

29 GATT Art. XXI(c).

30 *See* Michael Littlejohns, *UN Backs Diamonds "Blood Trade" Measures*, FIN. TIMES, July 6, 2000, at 8.

31 *See* Charter for the International Trade Organization [hereinafter ITO Charter], ch. VIII, *reprinted in* ALSO PRESENT AT THE CREATION (Michael Hart ed., 1995) at 169. The ITO Charter never went into force.

32 GATT Art. XXIII:2. It should be noted that the GATT approach is consistent with the Vienna Convention on the Law of Treaties. Article 60 of the Vienna Convention provides for suspending a treaty in whole or part as a response to a material breach of the treaty.

33 ITO Charter, Art. 95.3.

34 JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 169 (1969).

35 ALSO PRESENT AT THE CREATION, *supra* note 31, at 145.

the remedy should be compensatory and no more.[36] Yet as Hudec points out, the working party's language was not included in the ITO or its Annex. In Hudec's view, the drafters did not want to say that the offending country owed no more than compensation because that would have suggested that the ITO obligations were merely a duty to pay for damage done, rather than a duty to adhere to the rules.

Clair Wilcox, a leading US drafter, wrote a book about the ITO Charter in 1949, and his discussion of dispute resolution illuminates the dualistic role of these provisions. Wilcox explains that releasing the complaining government from its obligations is regarded "as a method of restoring a balance of benefits and obligations . . . It is nowhere described as a penalty to be imposed on members who may violate their obligations or as a sanction to insure that these obligations will be observed."[37] But Wilcox does not stop there. He goes on to predict: "But even though it is not so regarded, it will operate in fact as a sanction and a penalty."[38]

The historical record is unclear as to when the term "retaliation" began to be widely used to describe a GATT Article XXIII action.[39] The repeated use of that term in Kenneth Dam's book (on the GATT) in 1970 may have popularized "retaliation" as a GATT principle.[40] Dam explained that the act of retaliation constitutes "the heart of the GATT enforcement system."[41] The term "retaliation" connotes more belligerence than a rebalancing of negotiated concessions.

The term "sanction" was occasionally used by GATT experts. For example, a Secretariat Note in 1965 characterized withdrawing concessions under Article XXIII as "the final sanction."[42] In 1969, John Jackson described Article XXIII as a "sanctioning procedure."[43] In 1975, Eric Wyndham-White wrote that "The contractual nature of GATT determines the nature of its provisions for enforcement and sanctions."[44] In 1984, Guy de Lacharrière wrote that the GATT had once permitted The Netherlands to impose a "sanction" on the United States.[45]

But generally "GATTologists" avoided using that term.[46] I can remember being taught in the early 1980s that GATT Article XXIII was to be distinguished from a

36 Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence* (1970), *in* ROBERT E. HUDEC, ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 17, 28–30 (1999).

37 CLAIR WILCOX, A CHARTER FOR WORLD TRADE 159 (1949).

38 *Id*. *See* JOHN JACKSON, THE WORLD TRADING SYSTEM 93 (1992).

39 In 1952, the chairman of the GATT Intersessional Committee used the term "retaliatory action." WTO, GUIDE TO GATT LAW AND PRACTICE 693 (World Trade Organization ed., 1995).

40 KENNETH W. DAM, The GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 357, 359, 364, 366–367 (1970). Dam cites a 1955 GATT Working Party report that refers to "retaliatory action." *Id*. at 367.

41 *Id*. at 364. 42 GUIDE TO GATT LAW AND PRACTICE, *supra* note 39, at 682.

43 JACKSON, *supra* note 34, at 763. *See also* JACKSON, *supra* note 38, at 110 (discussing GATT sanctions).

44 Eric Wyndham-White, *Negotiations in Prospect*, *in* TOWARD A NEW WORLD TRADE POLICY: THE MAIDENHEAD PAPERS 321, 329 (C. Fred Bergsten ed., 1975).

45 Guy de Lacharrière, "The Settlement of Disputes between Contracting Parties to the General Agreement," at 7–8 (manuscript on file).

46 JACKSON, *supra* note 34, at 166 (noting that the term sanction is usually avoided).

trade sanction. The standard portrayal of this Article was a rebalancing of concessions.

One reason why the rebalancing paradigm lasted so long was that no GATT-authorized trade action ever occurred. The CONTRACTING PARTIES authorized an Article XXIII suspension only once, back in 1952, and The Netherlands did not impose the authorized quota.[47] So Wilcox's prediction never had the opportunity to ripen.[48]

C The WTO system

The GATT dispute settlement system was completely renovated in the WTO. Defendant governments lost their power to block the formation of dispute panels and to block the adoption of panel reports. The establishment of the Appellate Body made the system more judicial and authoritative. At Marrakesh, the trade ministers commended themselves for "the stronger and clearer legal framework they have adopted for the conduct of world trade, including a more effective and reliable dispute settlement mechanism."[49]

The political flexibility inherent in the GATT was eliminated in the WTO.[50] The GATT said that the CONTRACTING PARTIES "*may*" authorize suspension of concessions if the circumstances are "serious" enough and as they determine to be "appropriate."[51] By contrast, the DSU states that, after certain procedures have elapsed, the DSB "*shall* grant authorization to suspend concessions or other obligations."[52] In addition to being mandatory, the new procedures remove judicial discretion to resist a suspension in inappropriate or non-serious situations. The level of such a suspension is to be equivalent to the level of the nullification and impairment.[53]

Other provisions in the DSU changed the context of GATT-authorized trade measures. DSU Article 22.8 states that suspension actions "shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed."[54] DSU Article 23.2(c) states that suspension actions are "in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time." The tenor

47 Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade* (1971), *in* Essays, *supra* note 36, at 77, 101 n. 45; Letter from J. M. Posta of Dutch Ministry of Economic Affairs, Aug. 3, 1995.

48 *See* text accompanying *supra* note 38.

49 Marrakesh Declaration, *in* The Results of the Uruguay Round of Multilateral Trade Negotiations, *supra* note 2, at iii.

50 *See generally* Cherise M. Valles & Brendan P. McGivern, *The Right to Retaliate under the WTO Agreement,* 34 J. World Trade 63 (Apr. 2000) (discussing the DSU rules).

51 GATT Art. XXIII:2 (emphasis added).

52 DSU Art. 22.6 (emphasis added). The DSB acts unless there is a consensus to reject the request.

53 DSU Art. 22.4. 54 DSU Art. 22.1 makes the same point.

of these provisions is that a suspension operates as an instrument of enforcement. The GATT provided for the same retaliatory instrument, but the subtext was different. With the GATT, one could view the suspension of "concessions or other obligations" as an internal decision to re-equilibrate tariffs or quotas in the absence of a satisfactory adjustment achieved bilaterally. But with the WTO, a suspension now has an externally directed purpose of inducing compliance.

Some arbitrators expounding DSU Article 22 have held that its rationale is to induce compliance. In *US – EC Bananas*, the DSU Article 22.6 arbitrators stated that "We agree with the United States that this *temporary* nature [of countermeasures] indicates that it is the purpose of countermeasures to *induce compliance*."[55] In *Ecuador – EC Bananas*, the arbitrators stated that the "desired result" of suspension is "to induce compliance" and to do so, the complaining governments may seek suspension that is "strong."[56]

When a trade measure (on unrelated products) is used against a country to induce its compliance with international obligations, that is properly called a "sanction." The more technical term for this is a "countermeasure."[57] Note that the WTO Agreement on Subsidies and Countervailing Measures (SCM) actually uses the term "countermeasures" to describe the action that can be authorized by the DSB when a government fails to comply with a panel report.[58]

In the *Brazil Aircraft* subsidy dispute, the arbitrators declared that an appropriate countermeasure "*effectively* induces compliance."[59] Furthermore, the arbitrators determined that SCM countermeasures need not be based on the level of

55 *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision of the Arbitrators*, WTO doc. WT/DS27/ARB (April 9, 1999), para. 6.3.

56 *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators*, WTO doc. WT/DS27/ARB/ECU (Mar. 22, 2000) [hereinafter EC–Ecuador Article 22 Decision], para. 72.

57 In the Draft Articles on State Responsibility, the term "countermeasure" refers to a unilateral action taken with or without multilateral approval. *See* DRAFT ARTICLES ON STATE RESPONSIBILITY WITH COMMENTARIES THERETO ADOPTED BY THE INTERNATIONAL LAW COMMISSION UPON FIRST READING (January 1997), at Chapter III General Commentary, para. 1 and Art. 47 Commentary, para. 1, available on www.un.org/law/ilc/reports. *See also United States – Import Measure on Certain Products from the European Communities, Report of the Panel*, WTO doc. WT/DS165/R (July 17, 2000) [hereinafter Bananas Retaliation Panel Report], para. 6.23, n. 100 (discussing the international law of retaliation); Brazil Aircraft Article 22 Decision, *supra* note 5, at para. 3.44 (discussing the Draft Articles); Pieter Jan Kuyper, *International Legal Aspects of Economic Sanctions*, *in* LEGAL ISSUES IN INTERNATIONAL TRADE 145–75 (Peter Sarcevic & Hans van Houtte eds., 1990) (summarizing the law of economic sanctions).

58 Agreement on Subsidies and Countervailing Measures, Arts. 4.10, 7.9. Footnote 9 to Article 4.10 states that the term "countermeasure" is not meant to allow countermeasures that are "disproportionate." This is generally thought to bar countermeasures based on a concept of punitive damages.

59 Brazil Aircraft Article 22 Decision, *supra* note 5, paras. 3.44–3.45. The arbitrators point to Article 47 of the Draft Articles on State Responsibility which notes that countermeasures are to be used against a State that has committed a wrongful act in order "to induce it to comply" with its international obligations.

"nullification or impairment."[60] In other words, the arbitrators rejected rebalancing as the basis for setting the level of the countermeasure. Instead, they permitted retaliation equal to the size of the subsidy.[61]

The nature of WTO obligations – far broader than GATT's – is another reason why it is very difficult to maintain that DSU Article 22 measures are merely a rebalancing of concessions when the bargained-for terms of the contract are not fulfilled. This point can be made for both *Bananas* and *Hormones*, but is clearer in *Hormones*. In that dispute, the EC was regulating the use of hormones without basing its action on a risk assessment. This regulation violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and the panel was able to quantify the level of "nullification or impairment" to serve as the basis for the US retaliation. But the exact nature of SPS obligations is far from evident by looking at the text. These obligations have been spelled out through a series of important decisions by the Appellate Body.[62] Because the law itself is so ambiguous, it is hard to view interpreting and enforcing that law merely as maintaining a delicate balance of concessions or restoring the expected value of the Uruguay Round contract.

Another problem with the old rebalancing idea is that in the two retaliations so far, the US government did not technically suspend concessions. The US retaliation imposed 100 percent tariffs (intended to be prohibitive) on an array of goods. Yet none of the tariffs on these goods in 1947 even approached 100 percent, and so the US countermeasures were not technically a suspension of a GATT concession.[63] So the US action looks much more like a sanction than a withdrawal of trade concessions to EC countries.

The Article 22.6 arbitrators have not considered whether the 100 percent tariffs could qualify as a suspension of a concession.[64] Of course, DSU Article 22.6 also permits the suspension of "other obligations," and so arbitrators could justify the

60 *Id.* paras. 3.48, 3.54, 3.57, 3.59. In a curious passage, the arbitrators state that the approved countermeasures are not intended to be "punitive" and are not intended "to sanction" the State in non-compliance. *Id.* para. 3.55. It is unclear what this means. This author is aware of no modern episode in which economic sanctions were authorized expressly to punish rather than to change behavior or provide reparations.

61 *Id.* para. 3.60.

62 David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years*, 32 N.Y.U. J. INT'L L. & POL'Y 865 (2000).

63 Author's own tabulations. One item on the banana retaliation has a Column 2 tariff of 75 percent which was the tariff set in 1930. The US retaliatory tariffs of 100 percent are imposed in lieu of whatever tariff was already being imposed.

64 *See, e.g.*, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators*, WTO doc. WT/DS26/ARB (July 12, 1999), paras. 19, 21. In contrast to the WTO, some other treaties put a ceiling on the suspension of concessions. For example, the North American Agreement on Environmental Cooperation states that the suspension of a concession cannot introduce a higher tariff than existed at the commencement of the North American Free Trade Agreement. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Art. 24, 32 I.L.M. 1480, Annex 36B, para. 1(a).

US countermeasures as a suspension of GATT Articles I and II. But suspending fundamental GATT rules misfits the rebalancing paradigm.

In contemporary discourse about WTO dispute settlement, analysts commonly refer to DSU Article 22 measures as a "sanction." Consider several examples from points along the trade policy spectrum:

> The much more stringent dispute settlement procedure of the WTO ensures compliance – that is, withdrawal of the measure – in the case of a positive finding, or sanctions for noncompliance. *Sylvia Ostry, The Post-Cold War Trading System, 1997.*[65]
>
> [The DSU] gave complaining parties an automatic right to impose retaliatory trade sanctions in cases where the defendant government failed to comply with legal rulings. *Robert Hudec, 1999.*[66]
>
> The ILO's rules operate like the rules of Multilateral Environmental Agreements (MEAs) . . . This is in sharp contrast to the WTO, where the failure of one country to follow the mutually-agreed-upon rules can be challenged by another WTO Member country in WTO dispute panels, which are empowered to authorize trade sanctions for violations. *Lori Wallach & Michelle Sforza, Whose Trade Organization? 1999.*[67]
>
> China's commitments will be enforceable through WTO dispute settlement. For the First Time. In no previous trade agreement has China agreed to subject its decisions to impartial review, and ultimately imposition of sanctions if necessary – and China will not be able to block panel decisions. *White House Fact Sheet, 2000.*[68]
>
> The ultimate cost of disregarding WTO pronouncements is retaliatory sanctions that, if pressed far enough, can amount to economic ostracization. *Paul Stephan, 2000.*[69]
>
> If Thailand, say, fails to stamp out counterfeit Louis Vuitton handbags and pirated viagra, France and the United States can seek WTO approval to retaliate by imposing trade sanctions. *The Economist, 2000.*[70]
>
> If the defendant member refuses to either change its out-of-conformity law or offer acceptable compensation, then under WTO rules the plaintiff member can impose trade sanctions against the offending member. *Cato Institute, 2000.*[71]

65 Sylvia Ostry, The Post-Cold War Trading System 183 (1997).

66 Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minnesota J. Global Trade 1, 3 (1999). Hudec characterizes the retaliatory power under the GATT as a sanction too. *See id.* at 6 n. 8.

67 Lori Wallach & Michelle Sforza, Whose Trade Organization? 175 (1999).

68 White House Fact Sheet on Enforcement of the US–China Accession Deal, Mar. 8, 2000.

69 Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 Chicago J. Int'l L. 49, 66 (2000).

70 *The Standard Question*, The Economist, Jan. 15, 2000.

71 William H. Lash & Daniel T. Griswold, *WTO Report Card II. An Exercise or Surrender of U.S. Sovereignty*, Cato Institute Briefing Paper, May 2000, at 4.

> The WTO is unique in combining a set of binding rules with a powerful mechanism for dispute settlement and the possibility of imposing economic sanctions to enforce compliance. *International Institute for Sustainable Development, 2000*.[72]
>
> We have a dispute settlement system which provides for sanctions in the case of noncompliance. Of course, if the US complies at the end of the day [on FSC] there will be no sanctions, but if they don't comply there will be sanctions. It's as simple as that. *Pascal Lamy, 2000*.[73]

Perhaps all these officials and commentators get it wrong. But I submit that this ordinary usage reflects the reality of the law in DSU Article 22.

Recently in the *Bananas Retaliation* case, the WTO panel actually used the term "sanction," calling it "the ultimate remedy under WTO law."[74] The term sanction is also used on the WTO website, which explains that the DSB may give permission for "limited trade sanctions."[75] After the DSB gave Canada permission to retaliate against Brazil, the WTO website announced that the DSB "had agreed to let Canada impose trade sanctions."[76]

Many governments and commentators view the possibility of sanctions as a positive feature of the WTO in making its rules "enforceable."[77] With a robust dispute settlement system and potential recourse to sanctions, the WTO is portrayed as an exceptional international organization that comes closer than most to propounding real law. Whatever the truth of that observation, it seems likely that Uruguay Round negotiators were able to obtain deeper governmental commitments than they would have without the many improvements in the GATT dispute system, such as the automatic approval of DSU Article 22 retaliation.

Let me recap the discussion so far: my thesis is that although the instrument of suspending "concessions or other obligations" remains constant from the GATT to the WTO, the dualistic quality of this act has shifted. In the GATT, Article XXIII trade measures were conceived primarily as rebalancing (although analysts

72 International Institute for Sustainable Development, Statement on Trade & Sustainable Development, Oct. 2000, available at www.iisd.org.

73 Daniel Pruzin, *Lamy Says EU Will Pursue Sanctions if the WTO Rules Against U.S. on FSC Dispute*, Daily Report for Executives (BNA), Nov. 22, 2000, at G-3. Lamy is the Trade Commissioner for the EC.

74 Bananas Retaliation Panel Report, *supra* note 57, para. 5.13. The panel also refers to sanctions in paras. 5.12, 5.14, 6.106.

75 *Settling Disputes: The WTO's "Most Individual Contribution,"* from the WTO website, www.wto.org.

76 *Canada's Retaliation Against Brazil Approved in Aircraft Case*, WTO News, Dec. 12, 2000.

77 *See, e.g.*, Jonathan C. Spierer, *Dispute Settlement Understanding: Developing a Firm Foundation for Implementation of the World Trade Organization*, 22 Suffolk Transnat'l L. Rev. 63, 103 (1998) (noting that the DSU adds teeth to the GATT and makes the rules enforceable). In its decision in *Japan – Alcohol*, the Appellate Body opines that "WTO rules are reliable, comprehensible and enforceable." *Japan – Taxes on Alcoholic Beverages, Report of the Appellate Body*, WTO doc. WT/DS8/AB/R (Oct. 4, 1996), at 37.

recognized the sanction potential). In the WTO, the trade measure is conceived primarily as a sanction, while the rebalancing idea retains vestigial influence.

As economists have long observed, a single instrument cannot serve two distinct purposes. Thus, one would not expect WTO-sponsored trade measures to serve equally well the purposes of rebalancing and inducing compliance. Because the DSU prescribes retaliation at a dose equal to "nullification or impairment," that will limit its effectiveness at inducing compliance.[78] So the trading system has embraced the idea of a compliance sanction even though it lacks authority to authorize actions tough enough to compel.

The mismatch between instrument and purpose gets even more complex in considering two other possible goals for DSU Article 22 trade measures.[79] One is "compensation" in the contract-law-sense of recompensing damages in order to make the injured party whole. If that is the yardstick for Article 22 measures, then they are inadequate because they do not make the defendant liable for full restitution. The other possible purpose is to deter WTO violations. Because they are limited to offsetting the "nullification or impairment," Article 22 trade measures will be inadequate to deter misbehavior. Thus, when governments regularly obey international trade rules, fear of Article 22 sanctions is not a big explanatory factor. As Robert Hudec has pointed out, "Ultimately, GATT law works because governments want it to work, not because they are bullied into compliance by trade sanctions."[80]

In summary, although the form of countermeasures remained substantially the same in the GATT and the WTO, the purpose behind the measures changed. Wilcox's prediction that rebalancing measures would be perceived as sanctions is on the mark fifty years later. Ironically, the WTO has now achieved a sanction-based dispute settlement system similar to the one intended for the ILO in 1919, but never embraced because of its poor fit to the ILO's mission. Part II of this essay will consider the question of whether trade sanctions are a good fit for the WTO's mission.

The most remarkable feature of the transformation from GATT retaliation to WTO sanction is that at no point did governments make an explicit choice to move from one principle to the other. It just happened through the application of WTO law. Although some governments and commentators may deny that any change has occurred, the evidence seems compelling that it has. We should draw conclusions from that evidence. As Hans J. Morgenthau once explained, a "science" of international law must be able to revise "the traditional pattern of assumptions,

78 Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 343–344 (2000).

79 FREDERIC L. KIRGIS JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 554 (2d ed. 1993) (noting three purposes of sanctions – compulsion, deterrence, and retribution).

80 Robert E. Hudec, *GATT Legal Constraints on the Use of Trade Measures against Foreign Environmental Practices*, *in* FAIR TRADE AND HARMONIZATION 95, 114 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (footnote omitted).

concepts and devices'' by looking at ''the rules of international law as they are actually applied.''[81]

II Assessing WTO trade

Part II provides a preliminary assessment of the use of trade sanctions in the WTO. Section A considers the advantages of trade sanctions. Section B considers the disadvantages. Section C summarizes. In this essay, no attempt is made to quantify any of these points so that they can be objectively weighed against each other.

A Advantages of WTO sanctions

This section will list seven distinct advantages in making trade sanctions available to the plaintiff government when a defendant government fails to comply with a DSB recommendation. Advantages 1–3 and 7 are to the parties to the dispute. Advantages 4–7 are to the WTO membership as a whole. Note that advantages 1–5 occur regardless of whether the trade action is perceived as rebalancing or as a sanction.

1 Venting and closure for plaintiff

Perhaps the most important purpose served by trade sanctions is that the plaintiff government can signal its outrage, placate the injured domestic constituency, and close the chapter so that it can move on.[82] In the *Bananas* and *Hormones* retaliations, the US Trade Representative (USTR) made clear to the European and American publics that it was taking strong action against the noncompliance. The USTR action gave the domestic industry some vindication. And the retaliation defused the issues to some extent.

The problem with this advantage is that the closed chapter is not staying closed. The EC gave no thought to counter-retaliation and so, to that extent, the US action could be the final step. But DSU Article 22.1 states that suspension is ''temporary,'' and therefore the question of EC compliance will always be an issue for USTR. Moreover, as the enactment of the carousel shows, the affected domestic interests are not satisfied with the current level of retaliation.[83] So while venting

81 Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 261 (1940).

82 *See* Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, *in* ESSAYS, *supra* note 36, at 153, 181 (stating that retaliation is primarily a symbolic act, a way of making clear the seriousness of the government's objection to whatever it is retaliating about).

83 Helene Cooper, *Food Fight With Europe May Worsen*, WALL ST. J., Sept. 6, 2000, at A2.

and closure could be an advantage, the evidence suggests that it may only be a temporary one.

2 *Gaiatsu for defendant*

Being retaliated against can also be useful for the defendant government by giving it leverage at home to change the law. The phenomenon of foreign pressure to promote internal change is often called "gaiatsu," the Japanese term for it. This hypothesis assumes that the government wants to comply with WTO rules but cannot because of domestic politics. The threat of sanctions changes the domestic political balance, however, by catalyzing the forces who would be hurt by the retaliation.

This would be a clever technique if it worked. It has not worked so far in *Bananas* or *Hormones*.[84] Yet one can see evidence for it in a few cases such as *U.S. Gasoline*, *Australia Salmon*, and *Canada Periodicals*, where the defendant governments were able to reverse discriminatory policies that had been promoted by special interests.

3 *Usability of sanctions*

Probably the clearest advantage of a trade sanction is that it can be implemented by the plaintiff country once the DSB approves it. Unlike compensation which requires a bilateral agreement, the trade sanction is self-implementing in the sense that the plaintiff government can act alone. This may seem an obvious point, but it is a big advantage over alternative instruments.

4 De facto *political safeguard for defendant*

A refusal to comply with a panel report and a consequent willingness to accept sanctions can be viewed as a safeguard. The trading system has always recognized in GATT Article XIX the need for a safety valve to let governments protect seriously injured sectors. (When that occurs, an affected country can respond with a discriminatory trade measure unless it has been adequately compensated.) But such safeguards are only available *de jure* for protectionist purposes. Perhaps DSU Article 22 trade sanctions make available a *de facto* political safeguard.

Because of its state-centric orientation, the WTO pays no attention to democratic processes in member countries.[85] Each government is obliged to comply with WTO rules, but no thought is given to whether its Congress or Parliament will approve

84 *See* Geoff Winestock, *Why U.S. Trade Sanctions Don't Faze Europe*, WALL ST. J., Sept. 8, 2000, at A15 (discussing the fragmentation of European trade associations).

85 *See, e.g.*, William A. Dymond & Michael M. Hart, *Post-Modern Trade Policy – Reflections on the Challenges to Multilateral Trade Negotiations after Seattle*, 34 J. WORLD TRADE 21, 33 (June 2000) (stating that the SPS Agreement requires that food safety standards be based on science rather than upon decisions by governments accountable to their electorates).

such action. Thus, a dispute panel can recommend action to a defendant government that its lawmakers simply will not approve. Indeed, a panel can dictate action that would be a Constitutional violation for a government to perform.[86]

Given this potential disconnect between WTO obligations and the political ability of democratic governments to comply with them, perhaps there should be space in the WTO for "political safeguards" in instances where disputed measures are backed by strong public support. *Hormones* could be an example of this.[87] No one denies that the European Commission would have a difficult political chore in repealing that measure. But right now, the EC has no WTO-legal way to refuse meat produced with artificial hormones. Complying with DSB recommendations remains an obligation, even after being sanctioned.[88]

5 *WTO supervises unilateralism*

In its role of authorizing sanctions, the WTO becomes the gatekeeper. The DSU requires that sanctions be approved (even if pro forma) by the DSB and provides an opportunity for the defendant government to seek arbitration of the amount of sanctions.[89] In all five instances in which Article 22 arbitrators have reviewed suspension requests, the panel cut back the retaliation proposed by the plaintiff government.[90] Because it is better that retaliatory actions be authorized than executed unilaterally, the supervision of sanctions in the DSU is a big advantage.[91]

Although the US Section 301 retaliation law was roundly criticized by many trade experts in the 1980s, Hudec took the more nuanced position that Section 301

86 One WTO agreement that does contain explicit deference to a domestic Constitution is the General Agreement on Trade in Services. Article VI:2 requires governments to establish procedures enabling service suppliers to seek review of administrative decisions regarding services. But this Article further provides that this shall not be construed to require a government to institute procedures that would be "inconsistent with its constitutional structure or the nature of its legal system."

87 Eligibility for such a safeguard might be conditioned on holding a referendum to show the public support.

88 Stefan Griller, *Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council*, 3 J. INT'L ECON. L. 441, 450–454 (2000).

89 DSU Arts. 22.2, 22.6, 22.7. If countermeasures are used under SCM Articles 4.10–4.11, the arbitrator must determine whether they are "appropriate." In the *Brazil Aircraft* decision, the arbitrators looked at the Draft Articles on State Responsibility which suggest that countermeasures "shall not be out of proportion to the degree of gravity of the internationally wrong act. . . ." Brazil Aircraft Article 22 Decision, *supra* note 5, at para. 3.44; Draft Articles on State Responsibility, *supra* note 57, Art. 49.

90 *Hormones* (2 arbitrations), *Bananas* (2 arbitrations), *Brazil Aircraft*.

91 Taming unilateral retaliation was one of the purposes of the dispute settlement system established in the ITO Charter. Petersmann quotes one of the drafters as saying, "We have sought to tame retaliation, to discipline it, to keep it within bounds." Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 3, 46 (Ernst-Ulrich Petersmann ed., 1997).

was justified disobedience given the dysfunctions in GATT dispute settlement.[92] Hudec suggested that Section 301 could lead to systemic reforms, and indeed it did. The taming of USTR's aggressive unilateralism can be viewed as a positive development even if similar retaliation ensues. USTR had already retaliated against the EC on hormones in 1989, which USTR withdrew in 1996 at the outset of the WTO litigation. So in assessing the WTO *Hormones* retaliation, one should recall that baseline.

Another way of expressing this advantage is that the DSU meets the specifications of Section 301 which, one way or the other, will be carried out by the hegemonic United States. If the DSU were rewritten to eliminate the possibility of trade sanctions, then international trade law would no longer be consistent with US domestic law, and so the United States would act outside WTO rules.

6 *Sanctions improve WTO stature*

Giving the WTO sanctioning authority improves its stature among international organizations and engenders respect for it. Had the teeth not been implanted, few would call the WTO the "powerful WTO" as it is routinely referred to today. Furthermore, the availability of trade sanctions may be a key explanation for the high number of complaints that are being brought to the DSB. Several of the causes of action spring from longtime violations of GATT rules which did not change in the Uruguay Round.

The corollary to this point is that if somehow the trade sanctions were surgically extracted from the DSU, the WTO would lose stature. This suggests that if sanctions are to be eliminated, they must first be replaced with an alternative that maintains respect for the WTO. Some options for doing so will be discussed in part III.

7 *Sanctions promote compliance*

In listing this advantage last, I try to point out that inducing compliance is not the sole basis for judging the success of WTO sanctions. As noted earlier, in the two cases so far where sanctions were employed, no compliance ensued. But that is too limited an evaluation.

A broader test is whether the *threat* of WTO sanctions promotes compliance so that the sanctions do not have to be imposed. In a few WTO cases, the threat of impending sanctions seems to have brought scofflaw governments into line. Such negative reinforcement occurred in the *Australia Salmon* and *Leather* disputes, where Australia took much of the action demanded by Canada and the United States.[93] The

92 Hudec, *supra* note 82, at 153.

93 *Trade War with Australia Diverted*, VANCOUVER SUN, May 17, 2000, at D3; *Compromise Averts U.S.–Australia Dispute Over Subsidies to Automotive Leather Maker*, DAILY REP. FOR EXECUTIVES (BNA), Aug. 1, 2000, at A-19.

US Foreign Sales Corporation case is another example.[94] The US Congress passed a "clean" tax bill via a suspension of the rules in the House, unanimous consent in the Senate, and another suspension in the House. The final action occurred just a few days before the date that the EC had threatened to lodge its Article 22 request with the DSB. Congress watchers agree that this unprecedented, streamline procedure for a tax bill would never have occurred without impending retaliation.

The mechanism by which the threat of sanctions induces compliance is not solely state-to-state. Rather, the sanctioning government (or sender) threatens private actors in the target country who then lobby their government to comply with the WTO recommendation.[95] As Hudec explains, "Hopefully, the economic pain caused by the retaliation, threatened or actual, will enlist the support of the affected economic interests."[96] Political scientists will recognize this as a *three*-level game, as the sanctioning government interacts with domestic private actors, a foreign government, and foreign private actors.[97]

B Disadvantages of WTO sanctions

This section lists nine distinct disadvantages of WTO-authorized trade sanctions. Disadvantages 1–3 are to the parties to the dispute. Disadvantages 1 and 4–9 are to the WTO membership. Note that disadvantages 2–6 and 8 occur regardless of whether the trade action is perceived as rebalancing or a sanction.

1 *Sanctions don't work*

As noted above, sanctions failed in the two instances when they were used. But both cases are against an intractable target (the EC), and both cases involve difficult, non-trade issues – overseas development in *Bananas* and health (or culture) in *Hormones*. So those cases may be exceptional.

If sanctions do not work, the common response will be to change WTO rules to give them more bite. Instead of a 1:1 relationship between retaliation and "nullification or impairment," one could imagine a punitive sanction with a higher ratio. The US Congressional carousel is one step toward making sanctions more

94 US Cong. Rec., Sept. 12, 2000, at H7428 (warning by the Chairman of the Ways and Means Committee that sanctions would ensue if the Congress did not change US tax law).

95 *See* Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note*, 54 Int'l Org. 603, 616–19 (2000) (discussing efforts to mobilize foreign exporters in US unilateral retaliation threats).

96 Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, *in* Improving WTO Dispute Settlement Procedures 345–376 (London: Cameron May, Friedl Weiss & Jochem Wiers eds., 2000).

97 *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 Int'l Org. 427, 434 (1988).

costly.[98] The new legislation would rotate the carousel every six months. Another proposal is to multilateralize the sanction by allowing all WTO governments to impose Article 22 measures. In 1992, Kenneth Abbott recommended that the GATT consider a multilateral suspension of concessions, which he called a "true community sanction."[99] The idea of collective retaliation in the GATT goes back to 1965 when developing countries sought this remedy for violations by large countries. The industrial countries did not agree to this parity of pain, as Hudec explains, because they were comfortable with a legal system "where they can hurt the others but some of the others cannot really hurt them."[100]

2 *No relief to injured private economic actors*

In his study of GATT "retaliation," Dam notes that "the protection afforded the [complaining] domestic industry is fortuitous, because the tariff category on which retaliation occurs is unlikely to be related to any need of that industry for protection."[101] It would be possible, of course, for policy-makers to select tariff categories to satisfy an industry's demand for protection rather than leaving it to chance. Yet that would lead to a separate disadvantage (see #6 below).

I am not aware of any study showing how much import relief was provided to livestock hormone users in the United States and Canada as a result of the *Hormones* retaliation. It would be a good research topic for an economist. A large portion of the products included in each government's retaliation list were animal products, but it is unclear to what extent they match the companies that wanted to export hormone-grown meat to the EC.[102]

The DSB has no requirement that the sanctioning government provide help to the complaining private economic actors. Indeed, the DSU completely ignores the complaining industry. One could imagine a requirement that any import duties collected in trade sanctions be paid to the complaining industry, but the DSU does not do that. In June 2000, Senator Max Baucus introduced a bill to establish a Beef Industry Compensation Trust Fund that would channel the tariffs collected from US retaliation in the *Hormones* dispute into "relief" for the US beef industry.[103] The bill was not enacted in 2000.

98 By inducing greater uncertainty about tariff levels, the carousel may increase the economic effect of retaliation.

99 Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOKLYN J. INT'L L. 31, 64–65, 78–79 (1992). This was a feature of the original Constitution of the ILO. *See* text accompanying *supra* note 16.

100 Hudec, *supra* note 96. 101 DAM, *supra* note 40, at 357.

102 *See* USTR Announces Final Product List in Beef Hormones Dispute, Press Release 99-60, July 19, 1999; Canada Retaliates Against the EU, Government of Canada News Release, July 29, 1999.

103 S. 2709, June 8, 2000. Of course, with prohibitive tariffs there would be no money to collect or redistribute.

3 *The teeth bite back*

Perhaps the biggest disadvantage of WTO sanctions is that they bite the country imposing the sanction. In the *Bananas* and *Hormones* cases, USTR imposed high tariffs on EC exports, which frustrates domestic users who suffer a loss of choice and probably have to pay higher prices for substitute products. Of course, many of these costs are simply transfers from domestic consumers to producers. But the sender country does entail some overall efficiency losses, and could end up getting hurt as much as the target country.

This inherent problem with trade retaliation has long been noted. Perhaps the earliest analyst was Adam Smith in *The Wealth of Nations,* who analyzed the utility of "retaliation" to open foreign markets.[104] Smith wrote that unilateral retaliation may be a good policy if it works to secure repeal of foreign barriers. But when "there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them."[105] In his landmark tariff study of 1921, T. E. G. Gregory explained that a retaliatory trade war causes losses among both parties.[106]

Commentators continue to point out the self-punishing nature of trade retaliation.[107] For example, in his discussion of GATT Article XXIII, Dam notes that "it often becomes painfully obvious that no one gains by retaliation."[108] Bernard Hoekman and Petros Mavroidis rue that "A basic problem with [WTO] retaliation is that it involves raising barriers to trade, which is generally detrimental to the interests of the country that does so."[109]

I am not aware of any study of the full domestic impact of the retaliatory tariffs imposed in *Hormones* and *Bananas*.[110] Such a study would have to look at the cost of securing replacements to the sanctioned products in the United States and at whether US meat exports were successfully redirected to other countries. According to the US Department of Commerce, the US government's retaliation

104 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 295 (Oxford World's Classics, 1998) (1776) (Bk. IV, Ch. II).

105 *Id*. at 296. 106 T. E. G. Gregory, Tariffs: A Study in Method 248 (1921).

107 *See* Paul Wayne Foreman, *Citizens' Power Weakens with WTO*, Idaho Statesman, Nov. 30, 1999, at 7B; EC–Ecuador Article 22 Decision, *supra* note 56, paras. 73 n. 29, 86 (noting that the party suspending obligations may also get hurt).

108 Dam, *supra* note 40, at 364.

109 Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency, and Surveillance*, World Bank, Nov. 1999, at 6.

110 A recent report by the US General Accounting Office (GAO) concludes that overall the results of the WTO dispute settlement process "have been positive for the United States." GAO, World Trade Organization. Issues in Dispute Settlement, GAO/NSIAD-00-210, Aug. 2000, at 3, 24. But the GAO did not undertake an analysis of the impact of the US *Bananas* and *Hormones* sanctions on the United States.

committee "makes every effort to minimize the harmful effects on US businesses and consumers."[111] That contention should be evaluated.[112]

The suggestion that WTO sanctions are badly targeted is based on the assumption that the sanctions are intended to hurt foreigners, not domestic denizens. But there is another theory of sanctions which suggests that the way to induce others to act is not to punish them, but rather *to punish oneself*. The hunger strike is one well-known manifestation of that view. This theory may have originated in ancient Ireland where the aggrieved party sometimes inflicted punishment on himself as a way of inducing the perpetrator to make amends for his misdeeds.[113] So if USTR intended the *Bananas* and *Hormones* sanctions to hurt Americans, Disadvantage 3 would not apply.

4 *Sanctions undermine the WTO and free trade*

In approving trade sanctions for commercial reasons, the WTO undermines its own principles favoring open trade. To be sure, this is not a complete repudiation since the WTO retains much of the mercantilist flavor of the GATT. Yet in endorsing the use of trade sanctions, the WTO seems to suggest that the sanctioning government can improve its prosperity by imposing sanctions.

Therefore, sanctions lead to a conundrum: if the United States improved its welfare after USTR imposed the 100 percent tariffs in the *Bananas* and *Hormones* cases, then why wait for the WTO to authorize such actions? On the other hand, if the welfare benefits of sanctions are dubious, then why engage in sanctions? At the very least, the use of sanctions confuses the public as to the costs and benefits of tariffs.

International agencies do not generally plan to take actions that contradict the agency's purpose.[114] For example, the World Health Organization does not authorize one party to spread viruses to another. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO's use of trade restrictions to promote freer trade is bizarre.

111 *About Section 301*, available at www.ita.doc.gov/td/industry/otea301alert/about.html. The Department maintains a "301 Alert" service to notify potential US victims of US retaliation so that they can "protect their economic interests by participating in the public comment process."

112 Sanction targets can be chosen with three possible objectives. One is to maximize the protective effect on a favored industry. Another is to minimize the harm to the domestic economy. A third is to maximize the pain to targeted foreign economic actors. Sanctioned items could also be chosen at random to minimize the corrupting influence of asking the government to pick winners and losers.

113 Doris Stevens, Jailed for Freedom 184–185 (1976). This is a biography of Alice Paul, who led the first picketing of the White House.

114 Here is one possible exception: in the World Heritage Convention system, a site can be removed from the international list if a government violates its obligations to protect the site. Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 Recueil des Cours 57 (1999).

Many groups and commentators have pointed to the contradiction of having the WTO authorize trade sanctions. For example, the International Confederation of Free Trade Unions worries that the trading system "is threatened by trade sanctions because well-connected multinationals have pushed governments into a battle for market share in consuming countries."[115] Gary Horlick says: "Stated simply, the purpose of the WTO is not to impose 100 percent duties on importers of Roquefort cheese, or other innocent bystanders."[116] (Roquefort cheese is on the US retaliation list in the *Hormones* dispute.) Joost Pauwelyn has noted the irony that the world body preaching the liberalization of trade depicts countermeasures as offering some kind of favor that should neutralize the effect of illegal trade restrictions imposed by others.[117]

5 *Sanctions trample human rights*

Legitimization of trade sanctions by the WTO tramples human rights in both importing and exporting countries. The freedom to engage in voluntary commercial intercourse is a basic human right.[118] At every point in its compliance process, the WTO fails to consider how sanctions hurt innocent victims on both ends of a disrupted transaction. In August 2000, European victims of US retaliation in the *Bananas* dispute sued the European Union for damages.[119] The lawsuit will probably not succeed, but it shows the public who is being hurt.

In making this point, I am not suggesting that the individual's right to trade is currently engrained in international human rights *law*. Unfortunately, that fundamental right is missing from the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. So the WTO law on sanctions is not inconsistent with current human rights law.

Nevertheless, the WTO is out of step with the emerging idea that the State's right to engage in trade gains content only from the individuals encompassed in it. Consider, for example, the judgment of the WTO Section 301 panel which declared:

> Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which

115 International Confederation of Free Trade Unions, Building Workers' Human Rights into the Global Trading System 29 (1999).

116 Gary N. Horlick, *Problems with the Compliance Structure of the WTO Dispute Resolution Process*, *infra* this volume at chapter 21, p. 641.

117 Pauwelyn, *supra* note 78, at 343.

118 Robert W. McGee, *Trade Embargoes, Sanctions and Blockades – Some Overlooked Human Rights Issues*, 32 J. World Trade 139, 143 (Aug. 1998) (noting that the correct approach to trade policy is to be found in rights theory, not utilitarian analysis). Trading is not an absolute right of course. It may come into conflict with social goals like public health.

119 Geoff Winestock, *European Firms Seek EU Damages for Banana War*, Wall St. J., Aug. 30, 2000, at A22.

> flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it.[120]

The panel considered such individuals in interpreting DSU rules. Recently, Pierre Lemieux has critiqued the WTO's action in the *Brazil Aircraft* case from the individual rights perspective. He writes that "trade retaliation makes no economic sense and it is not morally defensible. Instead, we should find ways to prevent governments from forbidding their own citizens to trade freely."[121]

Finally, one telling anecdote: at the anti-WTO demonstrations in Seattle in late 1999, as chronicled in the film documentary "Trade Off," some protestors showed their defiance of the WTO by eating Roquefort cheese which had been smuggled into the United States from France.

6 *Sanctions encourage protectionism*

As noted above (B2), a tension exists between providing recompense to domestic exporters hurt by foreign trade barriers and helping those same companies avoid import competition. The DSU bows a little toward protection by providing that retaliation be considered first in the same sector as the dispute.[122] Yet shielding the domestic market from foreign competition is unlikely to undo the damage caused by closed foreign markets.

In May 2000, the US Congress instituted the so-called carousel provision which requires USTR to rotate the retaliation targets every six months.[123] In addition, the new law requires USTR to include "reciprocal goods of the industries affected" on the original and subsequent retaliation lists.[124] So far, USTR has refused to turn this carousel. If USTR does so, that may make future US sanctions more protectionist.

In some instances, retaliation will occur on products chosen by a government at the behest of lobbyists who recognize sanctions as an opportunity to secure import protection. This seems to have occurred with pork in the US *Hormones* dispute.[125] Although the Clinton Administration was expected to announce new carousel sanctions in mid-June 2000, the decision was postponed to give USTR more time to evaluate over 400 suggestions from the private sector.[126] As it observes this

120 *United States – Sections 301–310 of the Trade Act of 1974, Report of the Panel*, WTO doc. WT/DS152/R (Dec. 22, 1999), para. 7.77.

121 Pierre Lemieux, *Ottawa Wins a Jet Battle, But Canadians Lose*, WALL ST. J., Dec. 15, 2000, at A17. *See also* Frederick M. Abbott, *Trade and Democratic Values*, 1 MINNESOTA J. GLOBAL TRADE 9, 21 (1992) (explaining that liberal trade promotes democratic values by respecting the individual).

122 DSU Art. 22.3(a). DSU Art. 22.3(f) defines sector.

123 Trade and Development Act of 2000, Pub. L. 106-200 §407, 114 Stat. 251, 293–294. 124 *Id*.

125 *Pork Industry Pushing for Pork-Only Hormone Retaliation List*, INSIDE U.S. TRADE, May 21, 1999, at 14; USTR Announces Final Product List in Beef Hormones Dispute, *supra* note 102.

126 *USTR Announces Procedures for Modifying Measures in EC Beef and Bananas Cases,* USTR Press Release 00-41, May 26, 2000; *Carousel Decision Faces Delay as Sides Weigh in on Retaliation List*, INSIDE U.S. TRADE, June 23, 2000, at 4–5; *Revised List of Sanctions on EU Delayed to Massive Response*, DAILY

process of special interest lobbying, the American public is unlikely to gain greater enthusiasm for US trade policy. Indeed, the dangers of retaliation were noted by the Meltzer Commission, which said that

> Retaliation is contrary to the spirit of the WTO. Sanctions increase restrictions on trade and create or expand groups interested in maintaining the restrictions. Domestic bargaining over who will benefit from protection weakens support for open trading arrangements.[127]

The availability of trade sanctions may have other predictable, negative effects. For example, industries may look for WTO violations by foreign countries (not too hard to find) and encourage a government to file cases against deep-seated foreign laws for the express purpose of using retaliation to secure new protection. Another problem is that once sanctions are turned on, vested interests collecting rents may fight hard against removing sanctions even after the defendant government takes action to comply.

7 *Sanctions encourage discrimination*

An economic sanction is perforce discriminatory against the country being sanctioned. But it is one thing to sanction a scofflaw country in a blunt way, and another to single out particular companies or subnational governments. It is unclear whether the current US retaliation is targeting companies. USTR is targeting specific EC countries, however, with the intent of influencing internal Community decision-making.[128] In *Hormones*, USTR varied the countries for several items on the hit list; none of the sanctions is EC-wide.[129] This sort of discrimination contradicts the most-favored-nation principle. But the DSU does not demand that sanction targets be selected in the least-GATT-inconsistent manner.[130]

8 *Unequal opportunities*

The sanctioning power tends to favor larger economies over smaller ones.[131] This is a disadvantage for the small countries and the WTO system. To the extent that small countries are more trade-dependent than large countries, sanctions will hurt

REPORT FOR EXECUTIVES (BNA), July 17, 2000, at A-26. Later it appeared that the US Trade Representative was holding off on carousel in order to promote negotiations with the EC in the Foreign Sales Corporation dispute.

127 International Financial Institutions Advisory Committee Report, *supra* note 6, at 57–58.

128 *EU Unlikely to Lift Beef Hormone Ban; U.S. Set to Retaliate*, INSIDE U.S. TRADE, July 23, 1999, at 9–10 (quoting Special Negotiator Peter Scher as saying that USTR targeted its retaliation against France, Germany, Italy, and Denmark because they have the largest voices in the EC).

129 USTR Announces Final Product List in Beef Hormones Dispute, *supra* note 102.

130 *See* DSU Art. 22.7 (arbitrator does not examine the nature of the concessions suspended).

131 Pierre Pescatore, *The GATT Dispute Settlement Mechanism*, 27 J. WORLD TRADE 9, 15 (Feb. 1993); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 1 (2000).

the small country more. As a victorious plaintiff, a smaller country would not be able to inflict much harm upon a larger country.

9 *WTO sets bad example*

For a trade organization to employ trade sanctions sets a bad example for other international organizations. The WTO example is not followed literally; as noted above, no other organization would contravene its own norms the way that the WTO does. But other organizations might want to utilize trade sanctions as an instrument for enforcing obligations.

If the WTO employs trade sanctions in dispute settlement, there is no principled reason why other international agencies should not do so too.[132] The unprincipled reason for having trade sanctions in the WTO, but not elsewhere, is that the WTO decides when trade sanctions can be used. From this perspective, WTO rules are constitutional in superintending the instruments that other treaties can use to achieve compliance.

This constitutional view of the WTO is objectionable for at least two reasons. First, the WTO is more of a club than an organization of global governance, due to its difficult accession process. How could such a club purport to set parameters for UN treaties? Second, many world causes, like eliminating forced labor, would seem to provide better justifications for trade sanctions than maintaining commercial reciprocity.

Although some proposals have been made for legislating WTO-like trade sanctions in other regimes in order to strengthen compliance, most commentators have suggested the opposite – bringing the rules of other regimes into the WTO for enforcement.[133] That is what happened with intellectual property in the Uruguay Round, and many civil society organizations have urged the same tack with environment and labor.[134] Such initiatives have resulted in a political challenge for the trading system, and were one factor in the failure at Seattle to launch a new WTO round.[135]

132 Multilateral environmental agreements do not generally employ trade sanctions. But several treaty regimes employ trade controls as an instrument of the treaty. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) has recommended trade controls on specified fish, such as bluefin tuna, from listed countries whose fishing practices violate ICCAT measures. *See, e.g.*, ICCAT Resolution Regarding Belize and Honduras, Nov. 1996.

133 *See, e.g.*, Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996); Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUMBIA J. TRANSNAT'L L. 659 (1998); David Robertson, *Civil Society and the WTO*, 23 THE WORLD ECONOMY 1119, 1130 (2000) (noting that the WTO dispute process is attractive to NGOs because it provides for trade sanctions).

134 Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 NEW ENG. L. REV. 79, 86 (1999) (noting that TRIPS inspired many observers to consider whether this model could be used for other agreements).

135 THE NEXT TRADE NEGOTIATING ROUND: EXAMINING THE AGENDA FOR SEATTLE (Jagdish Bhagwati ed., 1999); The WTO AFTER SEATTLE (Jeffrey J. Schott ed., 2000).

Since the advent of the WTO, commentators have increasingly portrayed trade sanctions as a prerequisite for an enforceable treaty arrangement. So long as the WTO retains trade sanctions, they will be an allure to activists who want to use similar enforcement in other conventional international law.[136] These activists are not going to be swayed by the argument that trade sanctions can only be employed by the one organization where their use is self-contradictory.

C Summary

A method for weighing the advantages and disadvantages against each other is not obvious. Some of the advantages and disadvantages are in direct tension – for example, Advantage 6 versus Disadvantages 4 and 9. Advantage 7 and Disadvantage 1 are also in tension.

In my view, the disadvantages of WTO trade sanctions outweigh the advantages. Disadvantages 3–4, 6, and 9 are most salient. On the other side, Advantages 1, 3, and 5, have considerable merit. Moreover, the threat of sanctions does seem to promote compliance, although this effect could diminish if WTO sanctions came into regular use.

Five years from now, with more episodes to study, the overall picture may become clearer. By then, we may learn whether sanctions are inducing compliance and whether the sanction procedure makes it harder to attain new WTO trade agreements. Even if trade sanctions are shown to be counterproductive, however, they will likely remain WTO policy until they can be replaced.[137]

III Alternatives to WTO trade sanctions

The WTO needs a rule-based dispute resolution system. This is particularly useful for smaller countries who are disadvantaged in a system where disputes can only be resolved through bargaining and settlement. Furthermore, any dispute system needs a compliance review process. The concern I am raising in this article is not about those features. It is only about the use of trade sanctions as a "last resort."[138]

Part III of this article explores alternatives to trade sanctions. Section A looks at fines and other sanctions not involving trade restrictions. Section B considers enforcement of international public law judgments in domestic courts. Section C looks at the option of trade compensation. Section D explores softer compliance approaches relying on transparency and oversight.

136 Brink Lindsey, Danial T. Griswold, Mark A. Groombridge, and Aaron Lukas, *Seattle and Beyond. A WTO Agenda for the New Millennium,* CATO Institute, Nov. 1999, at 31.

137 *See* Kathleen A. Ambrose, *Science and the WTO,* 31 LAW & POL'Y INT'L BUS. 861, 867–868 (2000).

138 *See* DSU Art. 3.7 (describing suspension of concessions or other obligations as a last resort).

A Models for sanctions other than trade

Excluding military measures, the UN Charter provides for "interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[139] But the UN Security Council generally has not attempted to isolate outlaw countries by using more than trade sanctions.[140] Outside the United Nations, a few types of non-trade sanctions have been legislated or actually used, as noted below:

1 Monetary fine

In 1993, the side agreements to the North American Free Trade Agreement provided the possibility of fines as a remedy in dispute settlement. The North American Agreement on Environmental Cooperation calls for dispute settlement on the question of whether a government is effectively enforcing its domestic law.[141] If inadequate enforcement is found by a panel and the defendant government does not fully implement the agreed-upon action plan, the panel has the obligation of imposing a "monetary enforcement assessment" on the defendant government.[142] The panel would set the size of the assessment.[143] The assessment would then be paid to a tri-national fund to be used to improve enforcement in the defendant country. These pecuniary provisions have seen no use since the Agreement went into force in 1994.

2 Loss of vote

The (Chicago) Convention on International Civil Aviation provides for dispute resolution by the ICAO Council established by the Convention.[144] An appeal is provided, and then the ensuing decision is final.[145] Any government found in default will have its voting power suspended in ICAO.[146]

3 Ineligibility for technical assistance

Governments violating a treaty can risk losing technical assistance. In 1999, the ILO Conference barred Myanmar from receiving any further technical assistance from

139 U.N. CHARTER Art. 41.
140 The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, *supra* note 27, Annex 1 (noting the use of travel sanctions).
141 North American Agreement on Environmental Cooperation, *supra* note 64, Art. 24. The Labor Cooperation Agreement has similar provisions.
142 *Id*. Arts. 31–34.
143 *Id*. Annex 34. Several factors are suggested to determine the size of the monetary assessment.
144 Convention on International Civil Aviation, Dec. 7, 1944, Art. 84, 15 U.N.T.S. 295. No party to a dispute may take part in such decisions.
145 *Id*. Arts. 85–86. 146 *Id*. Art. 88.

the ILO until Myanmar takes action to come into compliance with the ILO Forced Labour Convention.[147] Another example of this type of sanction is in the Montreal Protocol for the Protection of the Ozone Layer. The Protocol has a process to judge non-compliance that can lead to a suspension of "rights and privileges," such as benefits from the financial mechanism.[148] As of 2000, several countries have been reviewed, but no privileges have yet been suspended.[149]

4 *Flouting intellectual property rights*

In the WTO *Bananas* case, Ecuador asked for and received permission from the DSB to suspend obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[150] The WTO arbitrators noted that the suspension of obligations under the TRIPS Agreement interferes with private rights owned by natural or legal persons.[151] Nevertheless, the arbitrators pointed out that it was not within their mandate to consider whether they were giving Ecuador the go-ahead to violate intellectual property treaties.[152] Recently, Arvind Subramanian and Jayashree Watal advocated using TRIPS as a "retaliatory weapon."[153] The main difficulty these analysts see is that national laws protecting intellectual property may not be flexible enough to be suspended in a discriminatory way.[154]

Assessment

Of these alternatives, the imposition of monetary fines would be the most useful. A key advantage of a fine is that it properly targets the pain to the scofflaw country. The main disadvantage is that there is no way to compel payment. In 1915, F. N. Keen proposed that states deposit a sum of money proportioned on population or financial resources that would be available to answer international obligations.[155] This did not happen, but is still a good idea.

Having the WTO disqualify a country from voting is not a good idea because the WTO at present does not conduct any voting. Yet withdrawing other membership rights may have possibilities. One key right that could be withdrawn

147 Frances Williams, *ILO Bars Burma Over Forced Labour*, FIN. TIMES, June 18, 1999, at 4. Technical assistance would be permitted to help Myanmar come into compliance with the Convention.

148 *See* Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, Art. 11, TIAS 11097; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987 and as adjusted, Arts. 8, 10; Decisions of the Meeting of the Parties Regarding the Non-compliance Procedure and Decisions of the Implementation Committee, available at www.unep.org/ozone.

149 HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 153ff, 255ff (UNEP, 2000).

150 EC–Ecuador Article 22 Decision, *supra* note 56, para. 173(d). Ecuador had not done so as of December 2000.

151 *Id*. para. 157. 152 *Id*. para. 152.

153 Arvind Subramanian & Jayashree Watal, *Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO*, 3 J. INT'L ECON. L. 403 (2000).

154 *Id*. at 415. 155 FRANK NOEL KEEN, THE WORLD IN ALLIANCE 58 (1915).

from a scofflaw country is its right to invoke WTO dispute settlement.[156] This could perhaps be done under current DSU rules because the DSU is a "covered agreement" for purposes of authorizing retaliation.[157] Another option would be to disqualify any party in non-compliance from recommending any of its delegates to serve as chairperson of a WTO subsidiary organ. An advantage of such shaming sanctions is that they can be crafted to be irritating to the scofflaw party.[158]

Having the WTO withdraw technical assistance is not a useful idea. The WTO does not deliver much technical assistance at present, and needs to do more. Moreover, in the two cases so far in which sanctions are being used, the scofflaw defendants are EC nations which do not need WTO technical assistance. Indeed, they are often the donor countries for WTO assistance programs.

In approving trade sanctions against intellectual property owners, the WTO negates its role as a champion of intellectual property "rights." Many critics have lamented the way that the WTO pirated the intellectual property treaties of the World Intellectual Property Organization back in 1994. But having done so, WTO should not undermine those treaties by ungluing their obligations.

B Direct effect of WTO decisions

Although the WTO Agreement states that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements," the WTO does not require governments to provide recourse to domestic courts so as to enforce WTO obligations.[159] At present, it appears that no WTO member government provides for such direct enforcement in its own courts. Indeed, in recent litigation, courts have suggested that there would be a disadvantage to a country having such enforcement when its trade partners do not.[160]

Enforcing treaties or tribunal decisions in domestic courts is sometimes called giving them "direct effect."[161] How direct effect would work in a WTO context is

156 Daniel Griswold, *The Coming Trans-Atlantic Tussle* (Cato Institute, Dec. 2000).

157 DSU Art. 22.2 & App. 1.

158 Of course, the target country might object on the grounds that these actions are not equivalent to the level of nullification or impairment. DSU Art. 22.7.

159 *See* Agreement Establishing the World Trade Organization, *supra* note 2, Art. XVI:4. *See also* Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States*, 8 TEMPLE J. INT'L & COMP. L. 233, 248–249 (2000) (characterizing the DSU as second best to allowing citizens to enforce WTO rules at home).

160 Geert A. Zonnekeyn, *The Status of WTO Law in the EC Legal Order*, 34 J. WORLD TRADE 111, 118 (June 2000) (discussing Portugal v. Council); R. v. Secretary of State for the Environment, Transport and Regions, *exparte* Omega Air Ltd., Queen's Bench Division, Nov. 25, 1999, at 15–17.

161 For a good discussion of the issues regarding direct effect, see Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 91–122 (1998).

unclear. In any WTO dispute, there could be numerous plausible ways to come into compliance with WTO rules. Thus, bringing a government into compliance with WTO rules is generally thought to be a legislative or administrative function rather than a judicial one. If a domestic court were to void the WTO-inconsistent provision, it would have to decide whether the rest of the law is severable.

Two recent regional trade agreements have provided for direct effect of panel decisions, but none of these provisions has been tested. The North American Agreement on Environmental Cooperation exempts Canada from trade sanctions and instead provides that the Commission for Environmental Cooperation may file a dispute panel report in Canadian courts which then becomes an "order" of the court, following which the Commission may lodge proceedings to enforce this order.[162] The Canada–Chile Environmental Cooperation Agreement is modeled on the North American Agreement, and provides for filing a panel report in the courts of either Chile or Canada.[163]

Rather than direct effect in the judicial branch, governments can adopt special legislative or administrative procedures to facilitate compliance with adverse panel decisions. For example, US law restricts the exports of unprocessed timber from certain lands but authorizes the President to suspend this restriction if the WTO rules against it.[164] Another example is the US Uruguay Round Agreements Act which provides special procedures for implementing WTO recommendations finding fault with determinations by the US International Trade Commission or the Department of Commerce.[165]

C Trade compensation

The DSU expresses a preference for compensation over suspension of concessions, but notes that compensation is voluntary.[166] Compensation in this context means action by the defendant government to reduce trade barriers. It does not refer to financial compensation (although that outcome is not precluded).[167]

162 North American Agreement on Environmental Cooperation, *supra* note 64, annex 36A. The Labor Cooperation Agreement has similar provisions.

163 Agreement on Environmental Cooperation between the Government of Canada and the Government of the Republic of Chile, Feb. 6, 1997, Art. 35. Canada negotiated bilaterally with Chile after the Clinton Administration was unable to fulfill its commitment to Chile to allow it to join NAFTA. *See* Michael Doyle, *Clinton Offers Chile Full Role in Trade Pact*, SACRAMENTO BEE, Dec. 12, 1994, at A1.

164 19 U.S.C. §620c(g).

165 19 U.S.C. §3538. For other agencies, the law imposes some procedural hurdles for complying with WTO recommendations. 19 U.S.C. §3533(g).

166 DSU Arts. 22.1, 22.2.

167 Compensation is not defined in DSU Art. 22.1. Monetary compensation has never been employed although the idea was discussed in the ITO era. *See, e.g.*, Interim Commission for the International Trade Organization, ICITO/EC.2/SR.11, Sept. 13, 1948, at 2.

Compensation in the WTO would have to be given consistently with the most-favored-nation rule.[168]

Thus, one "problem" with compensation is that in lowering tariffs to the plaintiff country, the defendant will also provide greater market access to third parties, and the sum total will likely be higher than the "nullification or impairment" to the plaintiff. Quotas are more usable for limiting compensation, but the WTO should not encourage more quotas.

Many trade law analysts favor compensation. Pauwelyn proposes that the DSU be changed to make compensation compulsory and to allow the winning plaintiff to choose the products for compensation.[169] But no one has devised a solution for making the defendant comply. It takes two to compensate. As noted above, one of the virtues of WTO sanctions is that they can be implemented unilaterally.

D Softer compliance approaches

In their study of compliance with international regulatory instruments, Abram and Antonia Handler Chayes conclude that "Coercive sanctions are more infeasible for everyday treaty enforcement than as a response to crisis. Treaties with teeth are a will-o'-the-wisp."[170] Rather than sanctions, compliance is promoted through regime processes that utilize reporting, monitoring, capacity building, and persuasion. The authors also point to the potential usefulness of participation by non-governmental organizations (NGOs) in the compliance process.[171]

It is noteworthy that the one early international organization, the ILO, that had recourse to trade sanctions in its Constitution made no use of them. Coercive sanctions were viewed as contradicting the basic norm of the organization, which is that raising labor standards is in every country's own interest.[172] Instead, the ILO sought to induce domestic implementation of ILO conventions through independent review procedures and social dialogue.[173]

The insight that compliance is promoted through softer approaches has been reached by analysts looking at many different regimes including, most notably,

168 Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 486 n. 14 (1994).

169 Pauwelyn, *supra* note 78, at 345–346. *See also* Horlick, *supra* note 116, at 642.

170 ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 67 (1995). In their view, GATT retaliation was not a sanction because the underlying theory was compensatory. *Id.* at 30.

171 *Id.* chap. 11. *See also* William M. Reichert, *Resolving the Trade and Environment Conflict: The WTO and Consultative Relations*, 5 MINNESOTA J. GLOBAL TRADE 219, 243 (1996) (noting that the WTO can use NGOs to monitor compliance).

172 Steve Charnovitz, *The International Labour Organization in its Second Century*, *in* 4 MAX PLANCK Y. B. UNITED NATIONS LAW 147, 171–172 (2000).

173 Bruce Ramsey, *No Power to Sanction, but ILO Hopes to be Taken Seriously in Trade*, SEATTLE POST-INTELLIGENCER, Nov. 29, 1999, at A6.

human rights and environment.[174] Rather than coercing governments, international treaty systems work by pulling governments into compliance through review processes and technical assistance. Behavior can be changed more easily by the power of persuasion than by the persuasion of power. As Richard N. Cooper advises: "If we want others to give the same weight to diverse human values as we do, we must persuade them, not coerce them, to shift the relative weights they choose."[175]

Even without sanctions, the WTO would have better dispute settlement than most other treaties. Compare it to the multilateral environmental regime which generally lacks independent dispute settlement.[176] For example, the International Whaling Commission has no way to investigate whether Japan's recent expansion of "scientific" whaling is legitimate or just junk science.[177] The new International Tribunal for the Law of the Sea is an important development in favor of judicialization.

The DSU rules are sophisticated and engage the defendant government in a compliance process. The DSB retains jurisdiction until the issue is resolved, and after six months, the issue of implementation goes on the agenda for each DSB meeting.[178] In addition, the defendant government must provide a written status report before each meeting. Unfortunately, the DSB meetings are not open to the public so many of the potential benefits of this surveillance are lost.

It is possible that greater transparency of the WTO's factfinding and judgments might catalyze public opinion in the countries under review. At present, the typical WTO panel report is dry, abstruse, and lengthy, as perhaps befits an international law judgment. But one could imagine each panel preparing a digestible version for the public. For example in *Hormones*, the panel could have given Eurocitizens a clear explanation for why the hormone ban failed to meet international rules.

IV Recommendations and conclusion

The DSU affirms that "full implementation of a [DSB] recommendation to bring a measure into conformity with the covered agreements" is preferred over compensation or suspension of concessions.[179] But the DSU does not do enough to

174 *See, e.g.*, The Power of Human Rights. International Norms and Domestic Change (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999); The Implementation and Effectiveness of International Environmental Commitments (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998).

175 Richard N. Cooper, *Trade and the Environment*, 5 Environment and Development Economics 501 (2000).

176 *Dispute Settlement Provisions in Multilateral Environmental Agreements, Note by the Secretariat*, GATT doc. PC/SCTE/W/4 (Oct. 20, 1994); Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution under the Kyoto Protocol*, 27 Ecology L.Q. 53, 53–79 (2000).

177 *See A Reprehensible Whale Hunt*, N.Y. Times, Aug. 15, 2000, at A26.

178 DSU Arts. 21.6, 22.8.

179 DSU Art. 22.1

secure such implementation. International norms will be adhered to when they get domesticated into national law.

New modalities are needed to promote compliance in national decision-making processes when legislative changes are required. One possibility would be to establish a DSU Optional Protocol whereby a WTO member government could sign on to the following procedure:

1. In any WTO dispute settlement, panels would be requested to use their authority to "suggest ways in which the Member concerned could implement the recommendations."[180]
2. Governments would establish a Domestic Body to consider the panel report and to draft legislation to meet WTO obligations. The Body would not have to follow the panel's suggestion as to implementation, but would be obligated to recommend, within six months, new legislation to correct the WTO-inconsistent features of current law. This Body would give interested foreign and domestic private economic actors an opportunity to provide public comments. The rules of the Body would need to preclude consideration of whether the DSB decision was correct.[181]
3. Governments would enact a fast-track procedure to provide for a legislative vote on the recommendation of the Body within four months.[182] The national Parliament or Congress would be free to reject the recommendation, and if that occurs, the issue would be returned to the WTO for Article 22 sanction procedures. Of course, the defendant government could always use its normal legislative procedures to achieve compliance.[183]
4. The process would begin immediately after the DSB adoption of the panel report. The full Optional Protocol time period would be deemed the "reasonable period of time" for DSU purposes.[184]

180 *See* DSU Art. 19.1. Pauwelyn notes that panels make such recommendations in less than one-fifth of the cases. Pauwelyn, *supra* note 78, at 339.

181 During the implementation of the Uruguay Round, Senator Robert Dole proposed establishing a panel of US judges to review the correctness of WTO decisions that held against US laws. This never happened. Gary N. Horlick, *WTO Dispute Settlement and the Dole Commission*, 29 J. WORLD TRADE 45 (Dec. 1995).

182 The suggestion of fast track is offered primarily with the US Congress in mind. But other governments might also need special procedures to assure rapid consideration. It is interesting to note that in implementing the Tokyo Round GATT agreements, the US Congress provided a fast track for changing federal law to implement recommendations under the agreements. 19 U.S.C. §2504(c)(1), (4).

183 One participant in the University of Minnesota conference raised the question of whether my proposal would be constitutional in the United States. A treaty that purports to require the Congress to vote on a proposition might not be constitutional. In my plan, the Protocol would have to be implemented with a fast-track procedure that provides for a Member of the House and Senate to introduce a bill implementing the recommendation of the Domestic Body.

184 *See* DSU Art. 21.3.

While this Optional Protocol certainly does not assure a WTO-consistent outcome, it has the potential of making it easier for a defendant country to comply. The Optional Protocol seeks to influence the defendant government's decision-making from within, rather than to change it only from without by external economic pressure. In establishing a Domestic Body, a government makes an institution responsible for transforming a DSU decision into proposed legislative language. By receiving specific suggestions from the WTO panel, the Domestic Body will start with an option on the table. By giving private economic actors (e.g., consumer nongovernmental organizations (NGOs)) the right to make statements, the Body will seek to enhance public discourse about the dispute. By providing fast-track consideration, endless delays are headed off. By underlining the fundamental role of the national legislature, the Protocol avoids the politically treacherous approach of domestic judicial enforcement of WTO decisions.

It is true that the Optional Protocol might delay the authorization of sanctions by a few months. But if the Protocol works, it will render sanctions unnecessary. That trade-off should be worth it. To be sure, some governments might frustrate the object of this Protocol by composing the Domestic Body with individuals who will resist serious efforts at compliance. Nevertheless, a well-intentioned government that wants to comply, yet faces objections from strong domestic interests, might find the Optional Protocol useful. A group of such governments might join together to put the Protocol into force.

Professor Hudec has taught us that "The process of creating any legal system, where none existed before, can only come about slowly and incrementally. The ideas and institutions that make a legal system 'effective' have to grind themselves into the political attitudes of the society – here, the society of governments – over time."[185] By contrasting WTO-sponsored sanctions with softer compliance measures, this article shows the need to grind new attitudes into the WTO. Similarly, in recommending a new domestic procedure that would be interpenetrated by a WTO panel report, this article offers a proposal for reinforcing attitudes within countries toward achieving compliance. If sound replacements to trade sanctions can be found, the WTO will improve itself by pulling out its teeth.

185 As cited in Pauwelyn, *supra* note 78, at 347.