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RETHINKING WTO TRADE SANCTIONS

By Steve Charnovitz[*]

The most salient feature of dispute settlement in the World Trade Organization (WTO) is the possibility of authorizing a trade sanction against a scofflaw member government. This feature, however, is a mixed blessing. On the one hand, it fortifies WTO rules and promotes respect for them. On the other hand, it drains away the benefits of free trade and provokes "sanction envy." Undoubtedly, putting teeth in the WTO was one of the key achievements of the Uruguay Round ending in 1994, and a very significant step in the evolution of international economic law.[1] Yet after six years of experience, WTO observers are questioning whether the availability of trade enforcement is sensible.[2] This article undertakes an appraisal of trade sanctions as a WTO instrument, and concludes that this practice undermines the trading system. In view of this dysfunction, the article explores alternatives to trade enforcement and points to some softer measures that might have promise.

At the start, I must admit that the Marrakesh Agreement Establishing the World Trade Organization and its annexes do not actually employ the term "trade sanction."[3] What the WTO Dispute Settlement Understanding (DSU) says in Article 22 is that if a government fails to bring into compliance a measure found to be inconsistent with a WTO rule, it shall enter into negotiations with the government invoking dispute settlement, and if they do not agree upon mutually acceptable compensation, the complaining 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."[4]

[*] Attorney, Wilmer, Cutler & Pickering, Washington, D.C. The views expressed are those of the author only. This article is based on a paper delivered at a conference at the University of Minnesota Law School in September 2000. The conference was held to prepare a Festschrift in honor of Robert E. Hudec. Thanks to Robert Hudec, Gary Hufbauer, Joost Pauwelyn, John Peterson, Kal Raustiala, and J. David Richardson for their helpful comments.

[1] William H. Lash III, *The Limited But Important Role of the WTO*, 19 CATO J. 371, 375 (2000) (arguing that the U.S. had to impose trade sanctions on the EC to preserve the integrity of the WTO; otherwise WTO critics around the world could rightly say that the GATT was back); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Toward a More Collective Approach*, 94 AJIL 335, 339 (2000) (stating that the WTO's forward-looking enforcement approach can be seen as a major step ahead in international law).

[2] Edward Alden, *Gloom Descends over Former Supporters of the WTO's Procedure for Disputes*, FIN. TIMES (London), Dec. 6, 2000, at 8 (discussing unhappiness with WTO trade sanctions); Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 15, 28 (2001) (explaining that large-scale retaliation through the WTO "makes ever more people hostile to the WTO, which is seen as authorizing bullying tactics"); Edwini Kessie, *Enhancing Security and Predictability for Private Business Operators Under the Dispute Settlement System of the WTO*, J. WORLD TRADE, Dec. 2000, at 1, 16 (suggesting that it might be advisable to abolish the remedy of retaliation); Brink Lindsey, Daniel T. Griswold, Mark A. Groombridge, & Aaron Lukas, *Seattle and Beyond: A WTO Agenda for the New Millennium*, 28, 29–31 (Nov. 4, 1999) (stating that the most serious problem with the WTO procedures is their reliance on trade sanctions as the ultimate remedy), Cato Institute, *at* <http://www.cato.org> [hereinafter Lindsey et al.]; Bruce Stokes, *Something's Missing Here*, NAT'L J., May 19, 2001, at 1514; Transatlantic Business Dialogue, *Cincinnati Recommendations* 37 (Nov. 16–18, 2000) (urging governments to rethink the present system of WTO sanctions), *at* <http://www.tabd.org>.

[3] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999) [hereinafter WTO Agreement]. All other WTO Agreements cited here are reprinted in this WTO volume and are available on the WTO Web site, <http://www.wto.org>.

[4] Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22.2, WTO Agreement, Annex 2 [hereinafter DSU]. The DSB consists of all WTO member governments and supervises the WTO dispute settlement process. The DSB formally adopts dispute panel reports if they are not appealed. If the report is

This language is based on a similar provision in the General Agreement on Tariffs and Trade (GATT) of 1947.[5] 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 "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 under this Agreement as they determine to be appropriate in the circumstances."[6]

Yet even without the term "sanction," that is what the WTO can impose. As will be shown in this article, the purpose of the WTO-authorized action is to induce compliance, and that is properly called a "sanction." With the advent of the WTO, the trade policy community has increasingly employed the term "sanction" to describe what DSU Article 22 authorizes.

This article proceeds in four parts. Part I summarizes the WTO disputes in which a retaliatory sanction was authorized or sought, and then discusses the need for appraisal. Part II examines the role of trade sanctions in the trading system. Beginning with a discussion of some important historical antecedents, part II shows the transformation of international trade law from viewing the GATT-authorized "suspension of concessions" as rebalancing to viewing the WTO-authorized suspension as enforcement. Part III appraises the advantages and disadvantages of using trade remedies in WTO dispute settlement. The article demonstrates that success in inducing compliance by the defending country is only one of several relevant factors by which to judge the merits of trade remedies. Part IV explores alternatives to trade sanctions for achieving a better WTO compliance system.

Before proceeding, however, a brief digression regarding terminology may be helpful. A state that violates an international obligation is responsible for the wrongful act toward the injured state, and the latter state can then raise an international claim and pursue a "remedy."[7] As Elisabeth Zoller pointed out, many terms have been used to describe this bilateral conflict and the recourse to a remedy by the injured state.[8] Among these terms are "retorsion," "reprisal," "reciprocity," "retaliation," "countermeasure," "sanction," and "punishment." "Countermeasure" is the legal term employed in the International Law Commission's draft articles on state responsibility and the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*.[9]

Although it was once possible to characterize the GATT as a self-contained contractual arrangement in which the rules of state responsibility were adventitious, that does not apply to the WTO. The Appellate Body addressed the relationship between the WTO and general international law in its first decision when it declared that the DSU "reflects a measure of recognition that the *General Agreement* [on Tariffs and Trade] is not to be read in clinical

appealed to the WTO Appellate Body, the DSB formally adopts the panel reports as modified by the Appellate Body. The DSB may fail to adopt a panel report by consensus, including the consent of the winning party, *see* DSU *passim*, but this has never happened. Under the DSU, if the defending government fails to bring its WTO-inconsistent measure into compliance, the complaining government, after 20 days of negotiations, may request authorization from the DSB to suspend concessions. DSU Art. 22.3. If the defending government objects to the level of suspension proposed, it may seek arbitration. DSU Art. 22.6. The decision of the arbitrator(s) is final. DSU Art. 22.7. Note also that the DSU can be used for a complaint against another country that does not allege a violation of WTO rules. DSU Art. 26. This "non-violation" cause of action will not be addressed here.

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT]. The current version of the GATT is now in Annex 1A of the WTO Agreement.

[6] GATT Art. XXIII:2. A "concession" in the GATT context was typically an agreement to lower a tariff and/or bind it. Binding a tariff means agreeing not to raise it.

[7] AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 3 (Peter Malanczuk ed., 7th rev. ed. 1997).

[8] ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984).

[9] State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.600, pt. 2 *bis*, ch. II (2000) [hereinafter Draft Articles on State Responsibility], *at* <http://www.un.org/law/ilc/index.htm>; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §905 (1987).

isolation from public international law."[10] Surely one of the most interesting features of WTO jurisprudence has been the way the Appellate Body and the panels are resorting to other treaties, customary international law, international judicial and arbitral judgments, and the writings of publicists in order to render trade decisions.[11]

Let me note how this article will use the language of remedies. The terms "retorsion" and "reprisal" will be avoided. "Retaliation" will be used, but in a neutral way to mean either a sanction or a rebalancing of trade concessions. The term "countermeasure" will appear in two separate contexts: the SCM Agreement, which provides for "countermeasures" in response to a violation;[12] and the draft articles on state responsibility.[13] The key term in this article, however, is "sanction," and I impute a different connotation to it than Zoller. Writing over fifteen years ago, she characterized a "sanction" as a form of punishment.[14] Yet in recent years, in both the United Nations Security Council and the WTO, the term "sanction" has been employed to describe a coercive act authorized by the international community in response to a breach of an obligation by a scofflaw state. In this usage, a "sanction" is a purposive measure by one or more states to influence governmental behavior in the target state.[15] Simple punishment is not the intent, although the users hope that the punishing effect of the sanction will correct misbehavior.

I. WTO SANCTION PRACTICE AND THE NEED FOR APPRAISAL

Authorizations for WTO sanctions do not occur often.[16] Out of the forty-three disputes in which a defendant government was judged in violation, only two have led to trade sanctions.[17] The two cases are the notorious disputes about bananas and meat hormones in which the European Communities (EC) was found to be violating WTO rules. After the judgments, the EC did not correct the violations.[18]

[10] United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WTO Doc. WT/DS2/AB/R, at 17(Apr. 29, 1996) (Appellate Body reports are designated in WTO document numbers by the initials "AB"); *see also* Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?* 4 J. INT'L ECON. L. 111, 121–22 (2001); Gabrielle Marceau, *A Call for Coherence in International Law—Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, J. WORLD TRADE, Oct. 1999, at 87. Several years ago, Pieter Kuyper hypothesized that the GATT was a self-contained system in aspiration but not in reality. P. J. Kuyper, *The Law of GATT as a Special Field of International Law*, 1994 NETH. Y.B. INT'L L. 227, 252.

[11] *See* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AJIL 398 (1998); *see also* John H. Jackson, Remarks, 94 ASIL PROC. 222 (2000) (stating, "These first five years of the WTO may have been the most interesting five years of international jurisprudence in the history of mankind.").

[12] Agreement on Subsidies and Countervailing Measures [SCM], Art. 4.10, WTO Agreement, Annex 1A. The Tokyo Round Subsidies Code also provided for "countermeasures." Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, Art. 18.9, 31 UST 513.

[13] Draft Articles on State Responsibility, *supra* note 9, pt. 2 *bis*, ch. II (Countermeasures).

[14] ZOLLER, *supra* note 8, at 75, 106–07.

[15] *See* BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 4 (1988) (noting that sanctions seek to force a change in policy); LISA L. MARTIN, COERCIVE COOPERATION 3 (1992) (stating that governments use economic sanctions to signal resolve and to exert pressure for policy changes); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AJIL 1, 28–34, 45–46 (1989) (discussing the role of economic sanctions to prod target states); Richard W. Parker, *The Cost Effectiveness of Economic Sanctions?* 32 LAW & POL'Y INT'L BUS. 21, 25 (2000) (discussing the effectiveness of economic sanctions toward the goal of changing foreign state behavior); W. M[ichael] Reisman, *The Enforcement of International Judgments*, 63 AJIL 1, 6, 13 n.39 (1969); W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 90 (1998) (explaining that sanctions are an instrument of strategy designed to change the attitudes and behavior of the target).

[16] In this article, "WTO sanction" is used to mean a trade sanction authorized by the WTO. The WTO itself does not carry out the trade sanction. That is done by the WTO member government. *Cf.* Dirk De Bièvre, *Re-Designing the Virtuous Circle: Two Proposals for WTO Reform*, *in* RESOLVING AND PREVENTING US-EU TRADE DISPUTES: SIX PRIZE-WINNING ESSAYS FROM THE BP/EUI TRANSATLANTIC ESSAY CONTEST 15, 19 (2001) (saying that two retaliation torpedoes have been launched from the banks of Lac Leman in Geneva).

[17] Author's tabulation using data on WTO Web site as of April 30, 2001.

[18] Notwithstanding the Communities' poor performance, the centrality of compliance in the WTO was emphasized by European Commissioner for Trade Pascal Lamy in a speech to a U.S. business group in which he offered the "Hymn to Compliance." The ditty goes: "Consult before you legislate;/ Negotiate before you litigate;/ Compensate

The bananas dispute involved four complaints against the EC's restrictions on the importation of bananas.[19] In its decisions in *European Communities—Regime for the Importation, Sale and Distribution of Bananas* (*Bananas*), the WTO panel and the Appellate Body concluded that the complex, discriminatory EC banana regime violates WTO rules in numerous ways.[20] The DSB gave the EC a "reasonable period of time" of just over fifteen months to bring its banana regime into compliance, and when the EC failed to do so, the United States gained authority in April 1999 to suspend tariff concessions equivalent to $191 million.[21] The U.S. government took this action immediately by imposing 100 percent duties on selected products from various EC countries.[22] In November 1999, Ecuador asked the DSB for Article 22 authority, and the DSB later gave Ecuador the go-ahead to undertake suspension sized at $202 million.[23] Ecuador, however, never exercised its option to do so.

In April 2001, the European Communities and the United States announced a settlement of the *Bananas* dispute.[24] The EC agreed to rearrange its banana quotas and licenses so as to guarantee rents to U.S.-based banana exporters, and in return the United States agreed to lift the trade sanctions. Because this arrangement will continue to violate WTO rules, especially by permitting the EC to set aside a market share for its former colonies, the Bush administration promised to support an EC request for a waiver of WTO rules. The EC was also able to reach a deal with Ecuador.[25]

The meat hormone dispute involved two complaints against EC restrictions on the importation of meat produced with the aid of growth hormones.[26] One complaint came from the United States and the other from Canada. In their decisions in *European Communities—Measures Concerning Meat and Meat Products* (*Hormones*), the WTO panel and the Appellate Body concluded that the Communities' ban on meat violates the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS).[27] The DSB gave the EC a "reasonable

before you retaliate;/ And comply—at any rate." Pascal Lamy, *Has International Capitalism Won the War and Lost the Peace?* Address to the U.S. Chamber of Commerce, Washington, D.C. (Mar. 8, 2001), *at* <http://europa.eu.int/comm/trade/index_en.htm>.

[19] Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000).

[20] European Communities—Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997). The Appellate Body hears appeals from panel decisions on issues of law.

[21] *See* 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 (Apr. 9, 1999) [hereinafter EC-U.S. Article 22 Decision] (arbitration decisions are designated in WTO document numbers by the initials "ARB"). The role of the arbitrator is to set the level of the suspension of concessions when the defending country objects to the level proposed by the complaining country. DSU Arts. 22.6, 22.7. The reasonable period of time can also be set by arbitration. DSU Art. 21.3.

[22] *Trade War Escalates as EU Fights US Sanctions Move*, FIN. TIMES, Mar. 5, 1999, at 1. Actually, the U.S. government jumped the gun by acting on March 3, 1999, to impose a contingent liability for duties on imports. Office of the U.S. Trade Representative [USTR], Press Release 99-17, United States Takes Customs Action on European Imports (Mar. 3, 1999). USTR press releases are available online at <http://www.ustr.gov>. The EC complained about this precipitate action at the WTO and the panel and Appellate Body found that the United States had retaliated without authority. United States—Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/AB/R (Dec. 11, 2000). When the DSB adopted this Appellate Body report on January 10, 2001, the WTO Web site announced in its *News Items*, "Dispute body adopts rulings on Korean beef and US sanctions."

[23] 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, WTO Doc. WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter EC-Ecuador Article 22 Decision].

[24] USTR, Press Release 01-23, Joint United States–European Union Press Release: U.S. Government and European Commission Reach Agreement to Resolve Long-Standing Banana Dispute (Apr. 11, 2001) (noting that from July 1, the United States "will suspend the sanctions imposed against EU imports since 1999"); USTR, Press Release 01-50, U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors (July 1, 2001); *Banana Deal Effectively Locks in U.S. Share of EU Market*, INSIDE U.S. TRADE, Apr. 13, 2001, at 1.

[25] Joe Kirwin, *Ecuador Rescinds Objection to U.S.-EU Banana Import Settlement After Negotiations*, DAILY REP. FOR EXECUTIVES (BNA), May 1, 2001, at A–6.

[26] David A. Wirth, Case Report: European Communities—Measures Concerning Meat and Meat Products, *in* 92 AJIL 755 (1998).

[27] European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998). For the Agreement on the Application of Sanitary and Phytosanitary Measures, see WTO Agreement, Annex 1A.

period of time" of fifteen months to bring its food safety measures into compliance, and when the EC failed to do so, the United States and Canada gained authority to suspend tariff concessions equal to U.S.$116 million and Can.$11 million.[28] Both governments implemented these trade restrictions quickly by imposing 100 percent duties on selected products from various EC countries.[29] In the absence of EC compliance, both complaining countries continue to levy high tariffs.

The WTO authorized trade measures in one additional dispute, but the complaining government has not yet invoked them. In July 1998, Canada lodged a complaint about Brazilian subsidies on the export of regional aircraft. In its decision in *Brazil—Export Financing Programme for Aircraft* (*Aircraft*), the WTO panel and the Appellate Body found that Brazil was using prohibited export subsidies as defined in the WTO Agreement on Subsidies and Countervailing Measures (SCM).[30] The DSB gave Brazil a "reasonable period of time" of ninety days to bring its aircraft subsidies into compliance, and after a panel found that Brazil had failed to do so, Canada gained authority in December 2000 to suspend tariff concessions equal to Can.$344 million.[31] After Brazil announced that it had taken new steps to comply, Canada agreed to the appointment of a second WTO compliance panel in January 2001 to adjudge whether Brazil had complied.[32]

In one ongoing case, *United States—Tax Treatment for "Foreign Sales Corporations"* (*Foreign Sales Corporations*), the panel and Appellate Body vindicated an EC complaint that a U.S. tax provision was an export subsidy.[33] Dissatisfied with the United States' efforts to comply, the Communities sought authorization from the DSB to impose tariffs that would prevent the export of over $4 billion of U.S. goods into the EC.[34] This request is on hold pending a review by a WTO panel of whether a new U.S. tax law constitutes compliance.

The experience so far with WTO trade sanctions can hardly be reassuring to supporters of this mode of enforcement.[35] In the three instances where sanctions were imposed (1 *Bananas*, 2 *Hormones*), little or no compliance has ensued. In the other two episodes where sanctions were authorized (1 *Bananas*, 1 *Aircraft*), the winning country did not exercise its rights.

[28] *See* European Communities—Measures Concerning Meat and Meat Products (Hormones)—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Doc. WT/DS26/ARB (July 12, 1999) (U.S. complaint); European Communities—Measures Concerning Meat and Meat Products (Hormones)—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WTO Doc. WT/DS48/ARB (July 12, 1999) (Canadian complaint).

[29] Paul Blustein, *Europe Hit by Tariffs in Battle over Beef; U.S. Acts After EU Ignores Trade Group*, WASH. POST, July 20, 1999, at E1; *Canada Excludes UK Food Exports from EU Sanctions*, AFX News, July 30, 1999, 1999 WL 21854750. The U.S. and Canadian retaliatory tariffs of 100% are imposed in lieu of whatever tariff was already being imposed.

[30] *See* Brazil—Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU, WTO Doc. WT/DS46/AB/RW, para. 2 (July 21, 2000).

[31] 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, WTO Doc. WT/DS46/ARB (Aug. 28, 2000) [hereinafter Brazil-Canada Article 22 Decision]; Jennifer L. Rich, *W.T.O. Allows Canada Record Sanctions Against Brazil*, N.Y. TIMES, Aug. 23, 2000, at C4; Frances Williams, *Canada Is Given Go-Ahead for Brazil Sanctions*, FIN. TIMES, Dec. 13, 2000, at 12; Canada Department of Foreign Affairs and International Trade, News Release 269, WTO Grants Canada Right to Impose Sanctions Against Brazil over Aircraft Subsidy Dispute (Dec. 12, 2000), *at*<http://www.dfait.maeci.gc.ca>. Note that the WTO gave Brazil ninety days to comply, while giving the EU fifteen months in two earlier episodes.

[32] Brazil—Export Financing Programme for Aircraft—Second Recourse by Canada to Article 21.5 of the DSU, WTO Doc. WT/DS46/26 (Jan. 22, 2001). In making the request, Canada declared that in acting to seek further legal clarity, it retained the right to impose countermeasures against Brazil at any time. The panel set up under Article 21.5 is often called the "compliance panel." This episode is the only time a follow-up compliance panel has been appointed.

[33] United States—Tax Treatment for "Foreign Sales Corporations," WTO Doc. WT/DS108/AB/R (Feb. 24, 2000).

[34] Delegation of the European Commission to the United States, News Release 73/00, EU Requests WTO Compliance Panel and Authorisation to Impose Sanction Against the US in Foreign Sales Corporation Trade Dispute (Nov. 17, 2000). The EC sought a 100% tariff to be imposed on top of the regular EC tariffs. The issue in the case is whether a provision in U.S. tax law constitutes a prohibited export subsidy. Sean D. Murphy, *U.S. Position on Foreign Sales Corporations*, Contemporary Practice of the United States, 94 AJIL 531 (2000); Geoff Winestock, *U.S. Asks EU to Drop Threat of Sanctions*, WALL ST. J., May 18, 2001, at A17.

[35] *See* Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133 (2001).

The refusal of the European Communities to comply after being sanctioned has led to two critical perspectives on the DSU. One school of thought is that the sanctions failed because the teeth are not sharp enough. Proponents of this view in the U.S. Congress succeeded in enacting the so-called carousel provision to rotate the product targets for trade sanctions every six months.[36] The other school says that the *Bananas* and *Hormones* episodes demonstrate how fruitless trade sanctions are. An exemplification of this view in the United States came in the Report of the International Financial Institution Advisory Commission (Meltzer Commission), which stated in 2000 that with WTO-approved trade restrictions, the "injured country then suffers twice—once from the restrictions on its exports, imposed by foreign governments, and again when tariffs or duties raise the domestic cost of the foreign goods selected for retaliation."[37]

Many observers have not yet chosen sides in this debate and believe that it is premature to draw any conclusions about the merits of sanctions, given how few trials have occurred. The *Hormones* dispute is far from over, and the threat of carousel rotation was probably a factor in getting the U.S. and EC administrations to reach a settlement in *Bananas*.[38] Moreover, the threat of WTO sanctions did apparently affect outcomes in other disputes. For instance, in *Australia—Measures Affecting Importation of Salmon* (*Salmon*), the WTO compliance panel held that Australia had not corrected the violation found earlier.[39] Australia resisted coming into compliance until Canada sought authorization to impose Can.$45 million in trade sanctions.[40]

On the basis of the practice to date, this article presents a preliminary appraisal of WTO sanctions. An appraisal should look at the impact of sanctions on achieving compliance, but 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 protesters did at the Seattle Ministerial Conference in 1999. An appraisal should also consider the impact of WTO sanctions on other international organizations that may want to emulate the WTO in employing trade sanctions.

II. Role of Trade Sanctions in the Trading System

Trade restrictions are employed for many purposes. During the twentieth century, they were used, inter alia, to safeguard domestic industry from foreign competition, stabilize currency, block unhealthy or dangerous imports, manage trade in endangered species, and control arms traffic. Such measures are not typically sanctions.

Although to somewhat paradoxical effect, trade restrictions can also be used to pry open foreign markets. This idea grew popular in the United States in the late twentieth century,

[36] Trade and Development Act of 2000, Pub. L. No. 106-200, §407, 114 Stat. 251, 293. This provision is informally known as "carousel" because it calls for a periodic rotation of the sanction list. USTR, Press Release 00-41, USTR Announces Procedures for Modifying Measures in EC Beef and Bananas Cases (May 26, 2000) (noting that the intent of §407 is to induce compliance).

[37] International Financial Institution Advisory Committee, Report (Mar. 2000), *at* <http://www.house.gov/jec/imf/meltzer.htm>.

[38] *See* Edward Alden & Peter Norman, *US Threatens EU with New Sanctions*, FIN. TIMES, Mar. 8. 2001, at 37; Helene Cooper, *Food Fight with Europe May Worsen*, WALL ST. J., Sept. 6, 2000, at A2 (reporting plans of Clinton administration to rotate the sanctioned products and to use 200% tariffs rather than 100% tariffs); Gary G. Yerkey, *U.S. Will Use 'Carousel' Law as 'Leverage' to Open Foreign Markets, USTR Zoellick Says*, DAILY REP. FOR EXECUTIVES (BNA), May 24, 2001, at A-25.

[39] Australia—Measures Affecting Importation of Salmon—Recourse to Article 21.5 by Canada, WTO Doc. WT/DS18/RW (Feb. 18, 2000). The panel found that Australia was excluding imports of chilled and frozen salmon without basing this action on a risk assessment and without using the least trade restrictive approach. This was a dispute under the SPS Agreement.

[40] Communication from Canada, WTO Doc. WT/DS18/12 (July 15, 1999); *Canada Drops Proposal to Retaliate in WTO Salmon Dispute with Australia*, 17 Int'l Trade Rep. (BNA) 1250 (Aug. 10, 2000).

but the practice originated centuries ago. Indeed, Adam Smith analyzed it in his classic study *The Wealth of Nations* (1776).[41]

In the United States, one of the earliest laws to authorize such a reprisal was enacted in 1916 and provides that "[w]henever 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.[42] That law apparently saw no use. Another provision, enacted in 1930, authorizes the president to impose additional duties on foreign countries that discriminate against U.S. commerce.[43] This authority was used against Germany and Australia during the interwar period.[44]

Aside from the International Sugar Convention of 1902,[45] the first multilateral agreement to make provision for a trade measure in response to a breach was the Covenant of the League of Nations. Article 16 provided that should any member of the League resort to war in disregard of the applicable provisions of the Covenant, the other members would "undertake immediately to subject it to the severance of all trade or financial relations."[46] In addition, Article 16 committed members to "mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures."[47]

At the same time that the League of Nations Covenant was written (1919), the participating governments drafted a constitution for the International Labour Organization (ILO), which established the first adjudicative process that could lead to a trade measure as an instrument of enforcement.[48] This was (and remains) a dual process of dispute settlement and compliance review. It featured state-to-state dispute settlement in that any ILO member government could initiate a complaint that another government was not observing an ILO convention that both had ratified, and the ILO Governing Body could then refer this complaint to a commission of inquiry.[49] Yet it also featured compliance review in that the ILO Governing Body—on its own initiative or in response to a complaint from a nongovernmental delegate—could call for a commission of inquiry.[50]

By 1919, the idea of state-to-state arbitration was hardly novel, but in providing for independent review within a permanent international organization, the ILO drafters took an innovative step. Commissions of inquiry were to be drawn from a panel of individuals with industrial experience that were to be nominated by the governments.[51] When called into being, a commission was to investigate and make findings of fact, and then recommend steps that should be taken to address the complaint and the time within which they should

[41] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. IV, ch. II, at 295 (Kathryn Sutherland ed., Oxford Univ. Press 1998) (1776).

[42] 15 U.S.C. §75 (1994).

[43] 19 U.S.C. §1338 (1994).

[44] Benjamin H. Williams, *The Coming of Economic Sanctions into American Practice*, 37 AJIL 386, 389 (1943). A similar provision in the Tariff Act of 1890 led to a treaty with Germany to remove objectionable discrimination. WILLIAM SMITH CULBERTSON, COMMERCIAL POLICY IN WAR TIME AND AFTER 181 (1924).

[45] The Sugar Convention of 1902 committed parties to impose a duty on imports of sugar from countries using bounties (i.e., subsidies). The Permanent Commission, composed of delegates from the parties, was to decide when such bounties existed and how much advantage they gave the exporting country. International Convention Relative to Bounties on Sugar, Mar. 5, 1902, Arts. 1, 4, 7, 191 Consol. TS 56, 1902 FOREIGN RELATIONS OF THE UNITED STATES 80. The treaty terminated in 1920. NORMAN L. HILL, INTERNATIONAL ADMINISTRATION 242 (1931).

[46] LEAGUE OF NATIONS COVENANT Art. 16, para. 1.

[47] *Id.*, para. 3.

[48] Treaty of Versailles, June 28, 1919, pt. XIII, 225 Consol. TS 188.

[49] *Id.*, Art. 411, paras. 1, 3. The ILO Governing Body was made up of delegates from twelve governments, the worker group of the delegates, and the employer group. *Id.*, Art. 393.

[50] *Id.*, Art. 411, para. 4. The feature of the ILO in which states are represented by delegates from government, employers, and workers is called tripartism.

[51] *Id.*, Art. 412.

be taken.[52] The commission could also indicate "measures, if any, of an economic character against a defaulting Government which it considers to be appropriate."[53] Either government (complaining or responding) could then appeal the matter to the Permanent Court of International Justice, which was to make the final decision on the merits and on any measures of an economic character that other governments would be justified in taking.[54] No government was required to impose such economic measures, but *any* government could do so if the defaulting government did not carry out the recommendations within the specified time.[55] Should the defaulting government later contend that it had come into compliance, it could request that a commission of inquiry verify its contention; verification would then require the discontinuance of the "measures of an economic character."[56]

This elegant ILO procedure was underutilized.[57] Very few complaints were brought until the 1960s, and 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 any measures against a government for refusing to come into compliance with an ILO Convention it had ratified.[58] This action occurred in 2000 when the ILO called for a series of stepped-up political measures against Myanmar (Burma) for continued failure to comply with the ILO Forced Labour Convention (No. 29).[59]

What flowered in the ILO, beginning in the first decade, were potent procedures for regular government reports and review by independent experts.[60] The influence of these supervisory techniques on the human rights regime is well-known. Less well-known, however, is the influence of the ILO's constitutional dispute settlement provisions on the legislation that was adopted in the trading system.

No general multilateral trade treaty included dispute settlement backed by trade measures until the advent of the GATT.[61] But in the first half of the twentieth century, some multilateral commodity treaties did so. For instance, 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."[62] If the council decided that other

[52] *Id.*, Art. 414, para. 1.

[53] *Id.*, para. 2. The report was to be made public.

[54] *Id.*, Arts. 415–18.

[55] *Id.*, Art. 419.

[56] *Id.*, Art. 420.

[57] 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); CESARE P. R. ROMANO, THE ILO SYSTEM OF SUPERVISION AND COMPLIANCE CONTROL: A REVIEW AND LESSONS FOR MULTILATERAL ENVIRONMENTAL AGREEMENTS 12–14 (International Institute for Applied Systems Analysis, May 1996), *at* <http://www.iiasa.ac.at/Publications/Catalog/PUB_ONLINE.html>.

[58] *In Historic Vote, ILO Assembly Tightens Pressure on Myanmar*, ILO FOCUS, Summer/Fall 2000, at 1; *see 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). The amended provision changed the ILO Constitution from pointing to the potential use of "measures of an economic character" to the current provision pointing to action that the ILO Governing Body "may deem wise and expedient to secure compliance." *Compare* Treaty of Versailles, *supra* note 48, Art. 418, *with* ILO CONST. Art. 33, *at* <http://www.ilo.org>. The ILO Conference retains the competence to recommend measures of an *economic* character, but it has not done so. *See* Maupain, *supra* note 57, at 283–85.

[59] International Labour Conference, 88th Sess., Agenda Item 8, Implementation of Recommendations Contained in the Report of the Commission of Inquiry entitled *Forced Labour in Myanmar (Burma)*, Appendix, Prov. Rec. 6-4, at 21 (2000).

[60] Nicolas Valticos, *The International Labour Organization*, *in* THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 134 (Stephen M. Schwebel ed., 1971); Nicolas Valticos, *Once More About the ILO System of Supervision: In What Respect Is It Still a Model?* *in* 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 99 (Niels Blokker & Sam Muller eds., 1994).

[61] *See* MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 215–17 (1944).

[62] International Agreement Regarding the Regulation of Production and Marketing of Sugar, May 6, 1937, Art. 44, 4 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 5599. Such a decision was to be made by a three-quarters vote.

parties should prohibit the importation of sugar from the infringing country, the Agreement provided that this prohibition "shall not be deemed to be contrary to any most-favoured-nation rights which the offending Government may enjoy."[63]

In the decades since the founding of the GATT, dozens of regional trade agreements have established dispute mechanisms.[64] Many of these agreements provide for trade remedies analogous to those available in the GATT.[65] Only a small part of that experience is addressed in this article, which focuses on the WTO.

Although the League of Nations could invoke economic measures against countries that resorted to war, and although the UN Security Council can invoke economic measures against a country for a breach of the peace, such sanctions were imposed only three times between 1920 and 1990.[66] Since then, however, economic measures have been employed frequently.[67] The Security Council is authorized to use economic measures to enforce a decision of the International Court of Justice, but it has not done so.[68] The authors of the GATT recognized the potential conflict between United Nations-directed trade sanctions and GATT rules, and therefore provided a GATT exception for trade measures taken in pursuance of obligations under the UN Charter regarding the maintenance of peace and security.[69] Thus, the recent UN trade sanctions imposed on Sierra Leone regarding "conflict diamonds" do not violate the WTO.[70]

The GATT System

When drafted in 1947, the pithy dispute settlement provisions in the GATT were intended to be replaced by a more extensive chapter in the Charter for the International Trade Organization (ITO).[71] Even though the charter did not enter into force, its *travaux préparatoires* have often been used by panels to fill in some of the sketchy provisions of the GATT. In the ITO Charter, the conference had the authority to release an injured country from obligations (or its 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."[72] In GATT Article XXIII:2, following an investigation and ruling in a trade dispute, the Contracting Parties (i.e., the GATT parties acting together as a conference of the parties) were empowered to authorize a complaining country to suspend the application of such concessions or other obligations as the Contracting Parties

[63] *Id.*

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

[65] *Id.* at 156–57.

[66] GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES 24–25, 33–34, 285–86 (2d ed. 1990). The three cases were Paraguay/Bolivia and Italy in the 1930s and Rhodesia in the 1960s–1970s.

[67] THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 289–90 (1995); The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33, Annex 1 (reviewing the recent episodes).

[68] UN CHARTER ch. VII & Art. 94; Carl-August Fleischhauer, Remarks, *Compliance and Enforcement in the United Nations System*, 85 ASIL PROC. 428, 432–33 (1991).

[69] GATT Art. XXI(c).

[70] *See* Michael Littlejohns, *UN Backs Diamonds 'Blood Trade' Measures*, FIN. TIMES, July 6, 2000, at 8.

[71] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 169 (1969); *see* Havana Charter for the International Trade Organization [hereinafter ITO Charter], ch. VIII, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 83, 157 (2d ed. 2001). The ITO was designed to become a specialized organization of the United Nations, but the ITO treaty never entered into force. Instead, the GATT, which was intended to be temporary, served as the mode of international trade governance from 1948 to 1994.

[72] ITO Charter, *supra* note 71, Art. 95.3. Nullification or impairment refers to a situation in one country that undermines the expected benefits of the trade agreement to another country. In the ITO, nullification or impairment could result from a breach of the treaty, but a breach was not essential to engender nullification or impairment. *Id.* Art. 93.1; JACKSON, *supra* note 71, at 167–78. The GATT follows the same approach. GATT Art. XXIII:1(b).

determined to be appropriate in the circumstances.[73] One difference between the treaties is that the ITO provision specified an action that is "appropriate and compensatory," while the GATT uses the term "appropriate" without the term "compensatory." Neither the GATT nor the ITO Charter contains the terms "retaliation" or "sanction."

In his study of the GATT and ITO preparatory work, John Jackson quoted one of the drafters as explaining that "[w]hat we have really provided, in the last analysis, is not that retaliation shall be invited or sanctions invoked, but that a balance of interests once established, shall be maintained."[74] Nevertheless, Jackson stated 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."[75] He also noted that views differed on how far Article XXIII should go—that is, whether the suspension provision should be limited to permitting equivalence of the damage done, or should authorize action in the nature of a "sanction."[76] Some countries, such as the members of the Arab League, opposed recourse to sanctions.[77]

In his study of the ITO preparatory work, Robert Hudec pointed out that the issue of compensation versus sanctions proved to be controversial.[78] A working party agreed that even in the case of a legal violation, the remedy should be compensatory and no more. Yet the working party's language was not included in the ITO Charter 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 amounted merely to a duty to pay for damage done, rather than a duty to adhere to the rules.[79] Nevertheless, the drafters were unwilling to endorse a sanctionlike remedy.[80]

In a book about the ITO Charter written in 1948–1949, Clair Wilcox, a leading U.S. drafter, illustrated the dualistic role of the dispute resolution provisions. Wilcox explained that releasing the complaining government from its obligations was 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."[81] Yet Wilcox did not end his analysis there. He went on to predict: "But even though it is not so regarded, *it will operate in fact as a sanction and a penalty.*"[82]

The historical record is unclear as to when "retaliation" became the common term for denoting an action under GATT Article XXIII.[83] "Retaliation" connotes more belligerence than merely rebalancing the negotiated concessions. The repeated use of this descriptor in Kenneth Dam's book on the GATT in 1970 may have popularized "retaliation" as a GATT principle.[84] Dam explained that the act of retaliation constitutes "the heart of the GATT enforcement system."[85] Yet in using "retaliation," Dam distinguished it from a sanction.

[73] Suspension of concessions can mean raising tariffs. Note that the GATT approach is consistent with the law of treaties, which provides for suspending a treaty in whole or part as a response to a material breach of the treaty. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 60, 1155 UNTS 331.

[74] JACKSON, *supra* note 71, at 170–71.

[75] *Id.* at 169.

[76] *Id.* at 169–70.

[77] ALSO PRESENT AT THE CREATION: DANA WILGRESS AND THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA 145 (Michael Hart ed., 1995).

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

[79] *Id.* at 30.

[80] *Id.* at 34–35.

[81] CLAIR WILCOX, A CHARTER FOR WORLD TRADE 159 (1949) (emphasis added).

[82] *Id.*

[83] The word "retaliation" was used by the ITO negotiators. *See* text at note 74 *supra*. In 1952 the chairman of the GATT Intersessional Committee used the term "retaliatory action." 2 WTO, GUIDE TO GATT LAW AND PRACTICE 693 (1995).

[84] KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 357, 359, 364, 366–67 (1970).

[85] *Id.* at 364.

According to Dam, the GATT's remedy provisions "are not drawn in terms of sanctions," and in contrast to the Security Council, the GATT accords sanctions a "limited role."[86] Instead, the GATT's organizing principle "is a system of reciprocal rights and obligations to be maintained in balance."[87] Dam contended that even in instances of flagrant violations of trade rules, the role of the GATT Contracting Parties "as tribunal" was the "maintenance of a balance of concessions and other obligations."[88]

In the late 1980s, some GATT Secretariat officials floated the idea that because the Contracting Parties had authority to suspend concessions "as they determine to be appropriate in the circumstances," the quantum of concessions suspended need not be equivalent to the provocation.[89] How the governments responded to this idea is unclear from public records. No GATT-authorized suspensions occurred.

As the GATT matured, the word "sanction" was occasionally used by trade law experts in reference to Article XXIII. For example, a note by the GATT Secretariat in 1965 characterized withdrawing concessions under Article XXIII as "the final sanction."[90] That same year, Gerard Curzon wrote that the GATT had once permitted the Netherlands to apply "sanctions" against the United States.[91] In 1969 Jackson described Article XXIII as a "sanctioning procedure."[92] In 1975 Eric Wyndham-White explained that "[t]he contractual nature of GATT determines the nature of its provisions for enforcement and sanctions."[93] In 1984 Guy de Lacharrière stated that the GATT had once permitted the Netherlands to impose a "sanction" on the United States.[94] And in 1995 Abram and Antonia Handler Chayes suggested that GATT Article XXIII provides "true retaliatory sanctions."[95]

Nevertheless, GATT specialists typically avoided using the *S*-word.[96] The standard portrayal of Article XXIII was as a rebalancing of concessions after one government throws them out of kilter. I call this the "rebalancing paradigm."

The rebalancing paradigm can be seen in the GATT Agreement on Technical Barriers to Trade, concluded in 1979. Under the dispute settlement provisions of that Agreement, when a government failed to implement a panel's recommendation, the Committee on Technical Barriers to Trade could "authorize the suspension of the application of obligations . . . in order to restore mutual economic advantage and balance of rights and obligations."[97]

One reason why the rebalancing paradigm held on so long was that no GATT-authorized action under Article XXIII was ever taken. The GATT Contracting Parties approved an Article XXIII:2 suspension only once, back in 1952, when the Netherlands obtained authority to impose a wheat flour quota on the United States. The Netherlands, however, did not do so.[98] Thus, Clair Wilcox's prescient statement that a suspensive measure would operate as a sanction never got tested before the advent of the WTO.[99]

[86] *Id.* at 352.

[87] *Id.*

[88] *Id.*

[89] GUIDE TO GATT LAW AND PRACTICE, *supra* note 83, at 698–99; *see* GATT Art. XXIII:2.

[90] GUIDE TO GATT LAW AND PRACTICE, *supra* note 83, at 682.

[91] GERARD CURZON, MULTILATERAL COMMERCIAL DIPLOMACY 43 (1965).

[92] JACKSON, *supra* note 71, at 763; *see also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 110 (MIT Press 1992) (1989) (noting that the GATT operates mostly without sanctions).

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

[94] Guy de Lacharrière, The Settlement of Disputes Between Contracting Parties to the General Agreement 7–8 (1984) (unpublished manuscript, on file with author).

[95] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 30 (1995).

[96] JACKSON, *supra* note 71, at 166 (noting that the term "sanction" is usually avoided).

[97] Agreement on Technical Barriers to Trade, Apr. 12, 1979, Art. 14.21, 31 UST 405, 1186 UNTS 276.

[98] *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, *in* HUDEC, ESSAYS, *supra* note 78, at 77, 101 n.45; Letter to John D. Wickham from J. M. Posta, Dutch Ministry of Economic Affairs (Aug. 3, 1995) (on file with author).

[99] *See* text at note 82 *supra*.

The WTO System

The GATT dispute settlement system was completely renovated in the WTO. Defending governments lost their power to block both the formation of dispute panels and the adoption of panel reports. The establishment of the Appellate Body made the system more judicial. At the WTO's founding conference in Marrakesh, the trade ministers commended themselves for "the stronger and clearer legal framework they have adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism."[100]

The political flexibility exhibited in GATT Article XXIII was eliminated in the DSU.[101] The GATT provided that the Contracting Parties "*may*" authorize suspension of concessions if the circumstances were "serious" enough, and insofar as they determined it to be "appropriate."[102] By contrast, the DSU states that after the time periods for certain procedures have elapsed, the DSB "*shall* grant authorization to suspend concessions or other obligations."[103] In addition to being mandatory, the new procedures remove the discretion to resist a suspension in inappropriate or nonserious situations. The authorized level of such a suspension under the DSU is to be made "equivalent to the level of the nullification or impairment."[104] This remedy is prospective and does not provide for restitution for past injury.[105]

Another important alteration to the GATT was the change in paradigm from rebalancing to trade sanction. This change was not legislated explicitly. Indeed, the key phrase "suspend . . . concessions or other obligations" in GATT Article XXIII:2 is the same phrase as appears in DSU Article 22.6. Nevertheless, despite the symmetry between these provisions, the trading system has changed significantly. In the WTO, the suspension action has an externally directed purpose. By contrast, in the GATT rebalancing paradigm, the suspension had an internally directed purpose, namely to re-equilibrate the balance of concessions.

To support my thesis that an important change has occurred, I will offer several arguments drawn from treaty text, case law, state practice, and public discourse. A textual comparison of the DSU and the GATT shows a refinement in the purpose of a suspension of concessions. The case law of DSU Article 22 confirms that this remedy seeks to induce compliance. The state practice of the "sender" country shows aggressive behavior probably not contemplated by the GATT's drafters.[106] In the three Article 22 actions taken so far, the complaining governments have imposed *100 percent* ad valorem tariffs. My final argument is that WTO remedies are trade sanctions because that is how informed observers perceive them. The reason why so many people call suspension a "sanction" is that it operates as a sanction.

Perusal of the DSU treaty language demonstrates a change in orientation from the GATT.[107] The DSU process seeks "full implementation" and "compliance."[108] DSU Article 22.8 states that suspension actions "shall be temporary and shall only be applied until such time as the

[100] Marrakesh Declaration, *in* WORLD TRADE ORGANIZATION, *supra* note 3, at iii, para. 1.

[101] *See generally* Cherise M. Valles & Brendan P. McGivern, *The Right to Retaliate Under the WTO Agreement*, J. WORLD TRADE, Apr. 2000, at 63 (discussing the DSU rules).

[102] GATT Art. XXIII:2 (emphasis added).

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

[104] *Id.*, Art. 22.4. The level is calculated by arbitrators who determine how much trade with the defending country is being impaired because of the breach of WTO law.

[105] Pauwelyn, *supra* note 1, at 339 (suggesting that the WTO Agreements provide for less in this respect than the Statute of the International Court of Justice does).

[106] In the literature on sanctions, the "sender" state imposes the sanction on the "target" state. Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?* 54 INT'L ORG. 73, 75 (2000).

[107] Similar developments occurred in regional organizations at the same time. During the Uruguay Round negotiations, the Southern Common Market approved a Protocol for the Solution of Controversies, which provides for a suspension of concessions and notes that it "should tend to lead to compliance." Mercosur Protocol of Brasilia for the Solution of Controversies, Decision I/91, Art. 23 (Dec. 17, 1991), *at* <http://www.sice.oas.org/trade/mrcsrs/decisions/AN0191e.asp>.

[108] DSU Arts. 21.1, 22.1, 22.2.

measure found to be inconsistent with a covered agreement has been removed."[109] 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 a reasonable period of time. DSU Article 21.3 provides for setting a "reasonable period of time" for compliance.[110] The tenor of these provisions is that a suspension operates to drive compliance.

The GATT utilized the same remedial instrument, yet in a different context. Under the GATT (1947), the suspension of "concessions or other obligations" was a self-satisfying solution to the commercial problem. GATT Article XXIII provided for recommendations or rulings in a dispute, but did not explicitly link their issuance to whether the defending government had implemented the recommendation or removed the offending measure.[111] This GATT rule has now been superseded by the DSU.

Some WTO arbitrators expounding DSU Article 22 have held that its rationale is to induce compliance. (The role of the arbitrator is to approve or modify the complaining country's proposal for retaliation.[112]) In *Bananas* (United States), the arbitrators stated, "We agree with the United States that this *temporary* nature [of countermeasures] indicates that it is the purpose of countermeasures to *induce compliance*."[113] In *Bananas* (Ecuador), the arbitrators observed that the "desired result" of suspension is "to induce compliance" and to do so, the complaining governments may seek suspension that is "strong" and "powerful."[114] When a trade measure is used against a country to change its behavior toward conformity with international obligations, that is properly called a "sanction."[115]

The role of trade remedies was also addressed in an adjudication under the Agreement on Subsidies and Countervailing Measures. The SCM Agreement provides that the DSB may authorize "appropriate countermeasures" when a government fails to follow the DSB's recommendation to withdraw a subsidy that violates SCM rules.[116] Such countermeasures would substitute for a suspension of concessions pursuant to the DSU.[117] In the Brazil *Aircraft* subsidy dispute, the arbitrators declared that an appropriate countermeasure "*effectively* induces compliance."[118] In reaching this conclusion, the arbitrators referred to the draft articles on state responsibility, which declare that countermeasures can be used against a state that has committed a wrongful act in order "to induce" it to comply with its international obligations.[119]

The arbitrators' decision also reflected the externally directed role of countermeasures in holding that SCM countermeasures need not be based on the level of "nullification or impairment."[120] Thus, the arbitrators delinked the remedy from the amount of the trade injury, and implicitly abandoned rebalancing as the basis for setting the remedy. Instead,

[109] DSU Article 22.1 makes the same point.

[110] If the disputing parties cannot agree, then arbitration is used.

[111] *See* GATT Art. XXIII. The ITO Charter did not make this linkage, either. *See* ITO Charter, *supra* note 71, Arts. 94.3, 95.3.

[112] DSU Arts. 22.6, 22.7

[113] EC-U.S. Article 22 Decision, *supra* note 21, para. 6.3. The arbitrators added that the DSU could not be read to justify countermeasures of a punitive nature. *Id.*

[114] EC-Ecuador Article 22 Decision, *supra* note 23, paras. 72, 76.

[115] *See supra* note 15. Note that not all trade measures that government *A* might apply to the imports of country *B* are sanctions. If *A* bans imports of diseased meat, *A* is not necessarily trying to change the behavior of *B*. *A* is just keeping out the meat. Of course, *B* might respond by enacting tougher meat safety laws, but that would not turn the import ban into a sanction. A typical sanction bans an import unrelated to the underlying dispute. Thus, if *A* bans the importation of elephant ivory taken in the wild, that should not be considered a sanction because the ivory is related to the goal of elephant conservation.

[116] SCM 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."

[117] *See* DSU Art. 1.2.

[118] Brazil-Canada Article 22 Decision, *supra* note 31, paras. 3.44–3.45.

[119] *Id.*, para. 3.44 (referring to draft Art. 47, *supra* note 9, now renumbered as draft Art. 50).

[120] *Id.*, paras. 3.48, 3.54, 3.57, 3.59.

they permitted a countermeasure that would equal the amount of the subsidy so as to induce compliance.[121]

Those who are skeptical about my thesis could point to the *Aircraft* arbitrators' statement that the approved countermeasures are not intended to be "punitive" or "to sanction" the noncomplying state.[122] But by "sanction," the arbitrators had in mind "an additional dimension" beyond what is used to ensure that the state in breach brings its practices into conformity.[123] That element of the arbitral decision, however, does not refute my thesis because the arbitrators intended Canada to use a trade measure to put pressure on Brazil to conform.

At least one WTO panel has used the term "sanction." In *United States—Import Measures on Certain Products from the European Communities*, the panel referred to the U.S. action in the *Bananas* dispute as "trade sanctions."[124] Taking note of the DSU provision requiring WTO members to abide by DSU rules when they "seek the redress of a violation of obligations," the panel characterized a DSU Article 22 measure as "essentially retaliatory in nature."[125] Nevertheless, since this panel did not make an explicit connection between sanctioning and inducing compliance, it may have used the term "sanction" differently than I do.

The third justification for the thesis that rebalancing has given way to sanctioning is the practice of the governments that have imposed measures under DSU Article 22. Both the United States and Canada are using 100 percent ad valorem tariffs intended to be prohibitive. Yet imposing such a high tariff is unlikely to be a suspension of an actual trade concession given in the past. For example, in the United States none of the products hit in the *Bananas* and *Hormones* cases had a pre-GATT tariff level anywhere near 100 percent, so the U.S. measures did not reinstate a tariff lowered through GATT negotiations with European countries.[126] Of course, such a huge tariff increase is permitted under DSU rules because a suspension can undo "other [trade] obligations" as well as "concessions."[127]

In contemporary discourse about WTO dispute settlement, government officials, journalists, international trade law scholars, and practitioners commonly refer to DSU Article 22 as providing a "sanction." Consider these examples:

> In addition, the new WTO system will make the imposition of costly trade sanctions on recalcitrant defendants virtually automatic.
>
> *Richard Shell, 1995*[128]

> 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, 1997*[129]

[121] *Id.*, paras. 3.49, 3.51, 3.54, 3.57, 3.58, 3.60. The premise of rebalancing is that if Brazil reduces the value of market access by $x, then Canada responds by reducing market access by the same $x. What the *Aircraft* arbitrators said was that if Brazil promotes its production and sales of aircraft to the entire world through a subsidy of $x, then Canada is entitled to block $x worth of imports from Brazil.

[122] *Id.*, para. 3.55.

[123] *Id.*

[124] United States—Import Measures on Certain Products from the European Communities, WTO Doc. WT/DS165/R, paras. 5.13, 6.106 (July 17, 2000).

[125] *Id.*, paras. 6.21–6.23 (referring to DSU Art. 23.1). A footnote discusses the definition of "retaliation." *Id.*, para. 6.23 n.100.

[126] Author's own tabulations.

[127] *See* DSU Art. 22.2. A simple tariff suspension would raise the tariff back to what it was before the tariff negotiation. The WTO Agreements, however, permit more than such a simple suspension. A retaliating government may raise tariffs as high as it wants. In contrast, 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, Can.-Mex.-U.S., Art. 24, Annex 36B, para. 1, 32 ILM 1480 (1993).

[128] G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 901 (1995).

[129] SYLVIA OSTRY, THE POST-COLD WAR TRADING SYSTEM 183 (1997).

> Unlike the WTO, at present the WIPO [World Intellectual Property Organization] has no effective and deterrent dispute settlement mechanism; it is therefore only a norm-setting body, while the WTO is also a judicial body competent to impose sanctions for breach of norms laid down in its Agreement.
>
> *R.V. Vaidyanatha Ayyar, 1998*[130]

> [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*[131]

> A WTO Member can now be forced to change its domestic policies and become the object of economic sanctions, if the WTO adjudicating bodies uphold the request of another Member.
>
> *Gabrielle Marceau and Peter N. Pedersen, 1999*[132]

> 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*[133]

> The ultimate cost of disregarding WTO pronouncements is retaliatory sanctions that, if pressed far enough, can amount to economic ostracization.
>
> *Paul Stephan, 2000*[134]

> The WTO has an elaborate system of adjudication and sanctions in order to enforce trade norms.
>
> *Christopher McCrudden and Anne Davies, 2000*[135]

> 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*[136]

> 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*[137]

> 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*[138]

> We have a [WTO] dispute settlement system which provides for sanctions in the case of noncompliance.
>
> *European Commissioner for Trade Pascal Lamy, 2000*[139]

[130] R. V. Vaidyanatha Ayyar, *Interest or Right? The Process and Politics of a Diplomatic Conference on Copyright*, 1 J. WORLD INTELL. PROP. 3, 35 (1998).

[131] Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 3 (1999). Hudec characterizes the retaliatory power under the GATT as a sanction, too. *Id.* at 6 n.8.

[132] Gabrielle Marceau & Peter N. Pedersen, *Is the WTO Open and Transparent?* J. WORLD TRADE, Feb. 1999, at 5, 44.

[133] White House Fact Sheet on Enforcement of the U.S.-China Accession Deal (Mar. 8, 2000).

[134] Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 66 (2000).

[135] Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 57 (2000).

[136] *The Standard Question*, ECONOMIST, Jan. 15, 2000, at 79, 79.

[137] William H. Lash III & Daniel T. Griswold, *WTO Report Card II: An Exercise or Surrender of U.S. Sovereignty?* 4 (May 2000), Cato Institute Briefing Paper, *at* <http://www.cato.org>.

[138] International Institute for Sustainable Development, *Statement on Trade and Sustainable Development* (Oct. 2000), *at* <http://www.iisd.org/trade/default.htm>.

[139] Daniel Pruzin, *Lamy Says EU Will Pursue Sanctions If the WTO Rules Against U.S. on FSC Dispute*, DAILY REP. FOR EXECUTIVES (BNA), Nov. 22, 2000, at G–3.

> The agreement creating the WTO explicitly authorizes the use of trade sanctions, called "suspension of concessions," to enforce decisions of panels established under the WTO to resolve disputes regarding alleged breaches of GATT obligations. Hence, the WTO itself adopts the principle of using coercion to achieve trade goals.
>
> *David Driesen, 2001*[140]

> Nowadays, . . . commercial interests are no longer alone in recognizing what they can gain by employing WTO-authorized sanctions against imports. A rich assortment of activists have realized the potential value of the WTO's enforcement mechanisms for their own varied purposes.
>
> *Martin Wolf, 2001*[141]

> Another weakness of the WTO disputes process is that retaliation, through trade sanctions, has increasingly become the response of first resort to non-compliance.
>
> *Guy de Jonquières, 2001*[142]

Perhaps all these commentators have misspoken. Yet it is doubtful that so many observers, across such a wide political spectrum, could get it wrong.

This ordinary usage reflects the new reality of international trade law. The WTO does not contain sanctions merely because so many people say that it does. Rather, these people see the sanction because it is embedded in the WTO process.

A final point on ordinary usage is that "sanction" has now become part of the WTO lexicon. The WTO Web site describes a "trade sanction" as the "conventional form of penalty" in the WTO.[143] WTO Director-General Mike Moore has written, in regard to *Bananas* and *Hormones*, that "[i]t is regrettable that some of these complex cases did not find a satisfactory outcome by the end of the time-period foreseen for implementation of the Dispute Settlement Body's recommendations, thus leading to authorizations to impose commercial sanctions."[144] Recently, the secretariats of the WTO and the UN Environment Programme (UNEP) jointly authored a note comparing compliance and dispute settlement provisions in the WTO with those in multilateral environmental agreements.[145] In describing the DSU Article 22 process, the note explains that "[g]enerally, the sanctions should be imposed in the same sector as the dispute."[146]

The most remarkable feature of the transformation from GATT rebalancing to WTO sanction is that at no point did governments make a decided move from one paradigm to the other. It just happened through the application of WTO law. Although some governments and commentators may deny that a change has occurred, the evidence seems overwhelming that it has. It is time to draw conclusions from that evidence. To quote Hans J. Morgenthau, the "science" of international law must be able to revise "the traditional pattern of assumptions, concepts and devices" by looking at "the rules of international law as they are actually applied."[147]

In summary, my thesis is that although the remedy of suspending "concessions or other obligations" is the same in both the GATT and the WTO, the function of the remedy has

[140] David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 303 (2001) (citations omitted).

[141] Martin Wolf, *What the World Needs from the Multilateral Trading System*, *in* THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE 183, 195 (Gary P. Sampson ed., 2001).

[142] Guy de Jonquières, *How Can Transatlantic Trade Disputes Be Avoided?* *in* RESOLVING AND PREVENTING US-EU TRADE DISPUTES, *supra* note 16, at 33, 42.

[143] *Settling Disputes: The WTO's 'Most Individual Contribution,'* *at*<http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm> (visited Oct. 17, 2001).

[144] Mike Moore, *The WTO, Looking Ahead*, 24 FORDHAM INT'L L.J. 1, 3 (2000).

[145] WTO & UNEP Secretariats, Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements, WTO Doc. WT/CTE/W/191 (2001).

[146] *Id.*, para. 136.

[147] Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AJIL 260, 261 (1940).

changed from the original conception. In the original GATT, the Article XXIII trade measure was intended to rebalance.[148] In the WTO, the DSU Article 22 trade measure is intended to induce compliance. This alteration in function can be explained by the different legal structure of the DSU vis-à-vis the GATT. Yet some of the explanation is simply that the Article 22 measure is being used and the GATT Article XXIII measure was never used. Clair Wilcox's prediction that a rebalancing measure would operate as a sanction has hit the mark fifty years later.[149]

My thesis can be criticized from two perspectives. One view holds that nothing has changed from the GATT to the WTO, and that the GATT always included a sanction. The other view maintains that nothing has changed, and that neither the GATT nor the WTO employs a sanction. As demonstrated in part II, both of these objections miss the significant transformation that has occurred.

Ironically, the WTO has now achieved a sanction-based dispute resolution system similar to the one intended for the ILO in 1919, but never embraced because of its poor fit to the ILO's cooperative mission. Coercive sanctions were seen as contradicting the basic norm of the ILO, which is that raising labor standards is in every country's own interest. In the next part of this article, I consider whether trade sanctions are a good fit for the WTO's mission.

III. Appraising WTO Trade Sanctions

An appraisal of WTO trade sanctions should address several questions. Are such sanctions effective? Do they strengthen the WTO or weaken it? What is the economic impact of sanctions on target and sender nations? How do sanctions affect international law outside the WTO? Part III will attempt to address these questions in a preliminary way.

Effectiveness of Sanctions

Determining whether a trade sanction is effective requires specification of its objectives. In international trade policy, however, motives are often mixed. The important tension between inducing compliance and rebalancing has already been noted. Other objectives can include satisfying a domestic interest group and giving credence to future threats of sanctions.

The initial question to consider is whether WTO trade sanctions succeed in inducing compliance. To date, full compliance has not occurred in either *Bananas* or *Hormones*.[150] In *Bananas*, the European Communities agreed thirteen months after being sanctioned to adopt a tariff-only system in 2006, and in the interim to introduce a system of managed trade acceptable to the Bush administration. Yet these measures do not achieve compliance since the EC will need a waiver from the WTO. In *Hormones*, the EC has budged even less, except insofar as it is undertaking new risk assessments in line with WTO requirements. Consequently, in the two disputes where sanctions were employed, they have not significantly promoted compliance.

[148] *But see* text at note 75 *supra* (Jackson analysis).

[149] *See* text at note 82 *supra*.

[150] Judging compliance is somewhat subjective because few WTO disputes end in an authoritative determination of whether compliance has occurred. In some cases where violations have been found, the dispute has ended when the defendant government takes action to comply, and the plaintiff government drops the matter. The U.S. *Gasoline* case, *supra* note 10, is an example. *U.S. Meets WTO Deadline on Fuel Regulation; Foreign Refiners Can Get Individual Baselines*, 20 Int'l Env't Rep. (BNA) 838 (Sept. 3, 1997). In other cases, the dispute has ended in settlement with no formal review of how much compliance exists. Canada—Certain Measures Concerning Periodicals, WTO Doc. WT/DS31/R (Mar. 14, 1997), is an example. Rossella Brevetti & Peter Menyasz, *Averting Cultural Trade War, U.S., Canada Settle Long Feud over Split-Run Magazines*, DAILY REP. FOR EXECUTIVES (BNA), May 27, 1999, at A–32. In a few cases, the compliance review panel made a determination that the allegation of noncompliance was not proven. The Canada *Civilian Aircraft* case is an example. Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU, WTO Doc. WT/DS70/AB/RW (July 21, 2000).

Nevertheless, one should not draw too negative a conclusion from *Hormones* and *Bananas*. Although every WTO dispute poses difficult issues, these two cases involved deep-seated policy choices by the EC on health, culture, and historical trade preferences. Moreover, the EC is less dependent on export trade than the typical WTO member government. Thus, these cases may be unrepresentative of the diversity of disputes on which sanctions might be tested.

Looking only at the use of sanctions constitutes too narrow an assessment. A better 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* dispute, for example, where Australia reached a settlement with Canada that largely corrected the violations found by the panels.[151] The U.S. *Foreign Sales Corporations* dispute may be another episode where a threat worked.[152] The U.S. Congress passed a free-standing tax bill via a suspension of the rules in the House, unanimous consent in the Senate, and another rule suspension in the House. The final action occurred three days before the deadline set by the EC for when it would request an Article 22 measure from the DSB. Congress watchers agree that this streamlined handling of tax legislation, in a year when no other significant tax legislation was signed into law, would never have taken place without the threat from Europe.

Looking only at the connection between sanctions and compliance may also be too narrow. Although the DSU points to the goal of "compliance," its title reflects the sometimes competing objective of "settlement of disputes."[153] Moreover, the settlement objective is endorsed in the DSU in a variety of ways.[154] Thus, an appraisal might give the WTO credit when sanctions help promote settlement.

After only a few episodes, it is too soon to judge the efficacy of WTO trade sanctions in inducing compliance. It may be that sanctions will prove effective in certain situations. Other than the *Bananas* and *Hormones* cases, there are no instances of obvious defiance of a DSB recommendation that a government bring its policies into compliance. At present, then, the efficacy of sanctions should not be a deciding factor in appraising the trade sanction tool.

Impact on the WTO

A more important point to evaluate is how sanctions affect the WTO. Giving the WTO sanctioning authority has improved its stature among international organizations and governments. Had these teeth not been implanted, few would call the organization the "powerful WTO," as it is often referred to today.[155] The possibility of WTO sanctions is welcomed as a way of making trade rules "enforceable."[156] Nevertheless, these institutional pluses for the WTO may be outweighed by several negatives.

[151] *Trade War with Australia Averted*, VANCOUVER SUN, May 17, 2000, at D3. The Australia-Canada *Salmon* dispute, *supra* note 39, was about an Australian sanitary regulation that prevented the importation of uncooked salmon allegedly carrying harmful pathogens. Canada sought WTO approval for retaliation in July 1999.

[152] U.S. CONG. REC. H7428 (daily ed. Sept. 12, 2000) (warning by the chairman of the Ways and Means Committee that sanctions would ensue if Congress did not change U.S. tax law); U.S. Treasury, Press Release LS–1018, Statement by Treasury Deputy Secretary Stuart E. Eizenstat (Nov. 14, 2000) (stating that the pending "legislation is absolutely essential to avoiding the potential imposition by the European Union of significant sanctions on American industries and to satisfying the United States' obligations in the WTO"); *U.S. Congress Approves Export Tax Bill to Avoid E.U. Sanctions*, Deutsche Presse-Agentur, Nov. 14, 2000, LEXIS, News Library.

[153] DSU Art. 21.1 (noting that prompt compliance with rulings of the DSB is essential in order to ensure resolution of disputes), Art. 22.2 (using the terms "compliance" and "comply").

[154] DSU Art. 3.3 (prompt settlement), Art. 3.4 (satisfactory settlement), Art. 3.6 (mutually agreed solutions), Art. 3.7 (positive solution), Art. 12.7 (reporting on settlement), Art. 22.8 (mutually satisfactory solution). DSU Art. 3.7 suggests that a mutually acceptable solution should be consistent with WTO Agreements.

[155] On May 17, 2001, the LEXIS News Library showed 246 entries for "powerful" WTO.

[156] Miquel Montañà i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993); 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 approving trade sanctions for commercial purposes, the WTO subverts the goal of open trade by allowing governments to ban trade in response to violations by others. International agencies do not generally sponsor actions that contradict the agency's purpose.[157] For example, the World Health Organization does not authorize spreading viruses to countries that do not cooperate in international health efforts. The World Intellectual Property Organization does not fight piracy with piracy. Hence, the WTO's endorsement of a trade restriction to promote free trade seems bizarre.

Of course, this line of reasoning assumes that the purpose of the WTO is to promote free and open trade, but that is only partially true. The preamble to the Marrakesh Agreement establishing the WTO points to the objective of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[158] This objective is noteworthy for what it does not say; it does not condemn tariffs and other barriers. Instead, it suggests that governments cooperate to reduce tariffs and other barriers, but only when such liberalization is "reciprocal and mutually advantageous."

While all treaties manifest some reciprocity among parties, the trading system is different in making reciprocity the central shared value. Every commitment is contingent. By contrast, the typical multilateral treaty includes a set of normative commitments that are not selectively retracted in response to noncompliance. For example, human rights and humanitarian treaties do not provide authorization to abuse nationals from countries whose governments do not respect human rights or humanitarian norms.[159]

Another negative feature of WTO sanctions is that they encourage trade discrimination. An economic sanction is perforce discriminatory against the country being sanctioned.[160] Yet it is one thing to use a blunt sanction on a scofflaw, and another to single out particular companies or subnational governments. It is unclear whether the U.S. government's trade strike in *Bananas* or *Hormones* targeted companies. The U.S. actions did target specific EC member states, however, with the intent of influencing internal Community decision making.[161] In *Hormones*, the United States varied the countries for several products on the sanction list; none of the import bans is EC-wide.[162]

Still another problem with sanctions is that trade restrictions violate human rights in both importing and exporting countries.[163] The freedom to engage in voluntary commercial

[157] Here is one anomaly: Under the World Heritage Convention, a site can be removed from the international list if a government violates its commitments to protect the site. Operational Guidelines for the World Heritage Convention, para. 46 (Dec. 1998), *at*<http://www.unesco.org/whc>; Rüdiger Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 RECUEIL DES COURS 25, 57 (1999). Nevertheless, the World Heritage Committee does not encourage additional destruction.

[158] WTO Agreement pmbl.

[159] *See* Oscar Schachter, *United Nations Law*, 88 AJIL 1, 15 (1994) (suggesting that reprisals cannot include reciprocal acts such as denying human rights because the offending state did so); Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT'L L. 111, 131, 134 (noting that countermeasures in the human rights regime must not be reciprocal in the sense that they would affect other human rights obligations).

[160] DSU Art. 3.7 states that the suspension of concessions or other obligations is to be discriminatory.

[161] *EU Unlikely to Lift Beef Hormone Ban; U.S. Set to Retaliate*, INSIDE U.S. TRADE, July 23, 1999, at 9–10 (quoting a U.S. trade official as saying that the United States targeted its retaliation against France, Germany, Italy, and Denmark because they have the largest voices in the EC). In the past, the EC has also considered targeted trade sanctions. A former legal adviser to the European Commission has noted that in the GATT *Superfund* dispute with the United States, the Commission drafted a retaliation list with many products produced in Texas in order to discomfit Sen. Lloyd Bentsen. Kuyper, *supra* note 10, at 255.

[162] Implementation of WTO Recommendations Concerning EC—Measures Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 40,638–41 (July 27, 1999). Resort to this same practice occurred in Ecuador's dispute against the European Communities regarding bananas. Ecuador exempted the Netherlands and Denmark from the request for a suspension of concessions.

[163] Marc Lacey, *Bush Declares Freer Trade a Moral Issue; Chides Critics*, N.Y. TIMES, May 8, 2001, at A7; Robert W. McGee, *Trade Embargoes, Sanctions and Blockades—Some Overlooked Human Rights Issues*, J. WORLD TRADE, Aug. 1998, at 139, 143 (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 other public goals.

intercourse is a basic human right.[164] Yet at every point in its compliance process, the WTO fails to consider how sanctions hurt innocent economic actors in both the sender state and the target state. Because trade sanctions are a blunt instrument, they are likely to cause collateral damage to innocent victims.[165] In 2000 European victims of U.S. sanctions in *Bananas* sued the European Union for damages.[166] This lawsuit is not expected to succeed.[167]

The WTO's willingness to approve trade sanctions is in tension with the economic reality that it is people who trade, not states.[168] If states did all the trading, then there would be no normative problem in approving a state's request for a trade sanction under DSU Article 22 in response to a violation by a trading partner. When it is individuals who trade, however, a WTO approval of a trade sanction interferes with voluntary consensual arrangements of individuals on both sides of the transaction who may want to complete an exchange without regard to whether their governments are obeying WTO rules. Such an action by the WTO stands apart from everything else the WTO does and from its focus on mutually gainful trade.

Defenders of a sanction may seek to legitimize such WTO action by arguing that when the complaining government asks for a trade sanction, it is speaking for its citizens, and when a defending government fails to comply with WTO rules, it is speaking for its citizens. Those contentions may be true to some extent, even though the WTO does not require its members to be democratic. But the consumer victimized by a WTO-approved sanction is likely to feel that no one in the WTO is voicing her concerns.

Imposing trade sanctions against noncompliance is out of step with the emerging doctrine that international trade law responds not only to the needs of states but also to those of individuals. An important exposition of this doctrine came in the judgment of the WTO panel in the United States *Section 301* case. In articulating why a national law not yet implemented could violate trade rules, the panel pointed out that although the WTO did not create a new legal order with both states and individuals as subjects, "it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix."[169] The needs of individuals should be considered in interpreting WTO rules, the panel reasoned, because many of the benefits to governments from WTO membership depend on private economic activity. Thus, a law that would violate WTO rules if implemented can constitute a breach of WTO rules even before it is implemented, because of its "chilling effect" on the economic activity of individuals.[170]

[164] In making this point, I am not suggesting that the individual's right to trade is currently ingrained in the international law of human rights. That fundamental norm is missing from the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. So the WTO's embrace of trade sanctions does not contradict widely accepted human rights norms. *See* ZOLLER, *supra* note 8, at 102 (noting that the international community would not give credence to a human rights claim by an individual in the state that committed the wrongful act about an economic countermeasure against his state).

[165] Malini Mehra, *Human Rights and the WTO: Time to Take on the Challenge* (Heinrich Böll Foundation, July 2000) (noting that the WTO trade sanction model can lead to violations of human rights); *Operation Vineyard Storm*, ASIAN WALL ST. J., Nov. 10, 1992, at 10 (editorial stating, "There are no smart bombs in a trade war.").

[166] Geoff Winestock, *European Firms Seek EU Damages for Banana War*, WALL ST. J., Aug. 30, 2000, at A22. More recently, a U.S. company filed a lawsuit on the principle that the EC owes damages for blocking access to its market. Anthony DePalma, *Chiquita Sues Europeans, Citing Banana-Quota Losses*, N.Y. TIMES, Jan. 26, 2001, at C5.

[167] *See* Allan Rosas, *Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective*, 4 J. INT'L ECON. L. 131, 140 (2001) (explaining why such claims are unlikely to be successful).

[168] State trading entities and government procurement are exceptions, but usually there is a private actor on the other side of the transaction.

[169] United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R, paras. 7.72–7.73 (Dec. 22, 1999) [hereinafter Section 301 Panel Report]. This dispute involved a challenge by the European Commission to provisions in the Trade Act of 1974, as amended, that permit the U.S. Trade Representative to retaliate against foreign countries that violate trade agreements, deny U.S. benefits under those agreements, or unjustifiably burden U.S. commerce. The disputed provision is found in 19 U.S.C. §2411 (Supp. II 1996). The panel ultimately concluded that the U.S. law did not violate WTO rules.

[170] Section 301 Panel Report, *supra* note 169, paras. 7.74–7.81.

In taking note of the *Section 301* panel report, I am not contending that the panel based its judgment on human rights law. The panel's point seems to be that in applying WTO rules, tribunals need to consider how governmental behavior affects markets and individuals. It is a utilitarian, not a deontological, point.

Although the *Section 301* panel's holding that "legislation as such" may violate trade rules was not by any means a new development in trade law, the panel's careful consideration of the place of the individual in the trading system was new and progressive. If future WTO jurisprudence builds on this point, and if negotiations strengthen WTO rules regarding the individual trader, then the use of trade sanctions as an instrument of enforcement may increasingly be viewed as contradictory to the WTO's purpose. Recently, Pierre Lemieux critiqued the WTO's action in the *Aircraft* case from the individual rights perspective. He wrote 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."[171]

Another form of appraisal of a WTO sanction is to examine whether it is consistent with the law of state responsibility.[172] Article 50 of the draft articles says that a state may take a countermeasure against a state that is responsible for an internationally wrongful act only to induce that state to comply with its obligations.[173] DSU arbitral decisions have been consistent with this rule. Draft Article 50 further says that countermeasures are "limited to" suspension of performance of international obligations of the injured state taking the measures against the responsible state.[174] DSU practice matches this rule well. Article 51 of the draft articles provides that countermeasures shall not involve any derogation from the protection of fundamental human rights.[175] DSU practice could be in tension with this rule whenever economic rights are viewed as fundamental human rights. Article 52 of the draft articles states that countermeasures "must be commensurate with the injury suffered."[176] Since DSU Article 22 actions are sized to the amount of nullification or impairment (or to the amount of the subsidy in a prohibited subsidy case), such action will not be out of proportion to the injury suffered.[177] Yet the lack of a retrospective remedy may prevent WTO countermeasures from being commensurate with the injury suffered.[178] Under Article 55 of the draft articles, countermeasures shall be terminated as soon as the responsible state has complied.[179] The DSU has no provision designed to achieve a rapid termination should the sender state resist lifting its sanctions.[180]

[171] 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 MINN. J. GLOBAL TRADE 9, 21 (1992) (explaining that liberal trade promotes democratic values by respecting the individual).

[172] *See* Pieter Jan Kuyper, *International Legal Aspects of Economic Sanctions*, *in* LEGAL ISSUES IN INTERNATIONAL TRADE 145 (Petar Šarčević & Hans van Houtte eds., 1990) (summarizing the law of economic sanctions); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 766–74 (2000) (discussing the draft articles); Reisman & Stevick, *supra* note 15. Note that the draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. Draft Articles on State Responsibility, *supra* note 9, Art. 56.

[173] Draft Articles on State Responsibility, *supra* note 9, Art. 50(1).

[174] *Id.*, Art. 50(2).

[175] *Id.*, Art. 51(1)(c).

[176] *Id.*, Art. 52.

[177] Brazil-Canada Article 22 Decision, *supra* note 31, paras. 3.44, 3.55. The *Aircraft* arbitrators took note that SCM Articles 4.10 n.9 and 4.11 n.10 suggest that "disproportionate" countermeasures are not permitted. *Id.*, para. 3.51.

[178] For example, the measure of retaliation in *Hormones* is the projected ongoing loss of trade on an annual basis. The United States was not permitted to make up for trade lost in previous years.

[179] Draft Articles on State Responsibility, *supra* note 9, Art. 55.

[180] DSU Arts. 21.7, 22.8. As noted above, the 1919 Constitution of the ILO contained such a provision. *See* text at note 56 *supra*.

Political and Economic Advantages of Sanctions

Having pointed out how sanctions affect the WTO, part III will now consider several implications of sanctions for complaining and defending countries. I will start with advantages and then discuss disadvantages.

One important purpose fulfilled by a trade sanction may be that the complaining government can signal its outrage, placate the injured domestic constituency, and then move on.[181] In the *Bananas* and *Hormones* episodes, the U.S. government made clear to European and American publics that it was taking strong action against the noncompliance. Furthermore, this action gave the complainant U.S. domestic industry some vindication, and consultations with industry on the selection of the sanctioned products may have given those companies a feeling of ownership in the process.

Nevertheless, even though a trade sanction allows the complaining country to vent steam, it does not end the dispute. The DSU states that a suspension of concessions is "temporary," which means that the question of compliance will remain salient.[182] Thus, a WTO trade sanction cannot truly close the chapter.

Another advantage for complaining governments is that a sanction can be easily imposed 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.[183] This may seem an obvious point. Yet it makes a trade sanction more practical than alternative approaches to enforcement.

For defending governments threatened by sanctions, the WTO provides some due process. In its role of authorizing sanctions, the DSB becomes the gatekeeper.[184] The DSU requires that sanctions be approved (even if pro forma) by the DSB, and enables the defending government to seek arbitration of their amount.[185] In all five instances in which Article 22 arbitrators have reviewed suspension requests, the panel pared down the action proposed by the complaining government.[186] Because it is better that Article 22 actions be preauthorized, the supervision of sanctions through the DSU is a big advantage.[187] This is so even when the WTO-authorized sanction replaces a unilateral one. For example, in *Hormones* the United States retaliated against the European Communities in 1989, and then withdrew the retaliation in 1996 at the outset of the WTO litigation.[188]

Another advantage for defending governments is that they can use the threat of sanction to gain the political support needed to comply with the WTO's dictates. The phenomenon

[181] *See Thinking About the New Section 301: Beyond Good and Evil, in* HUDEC, ESSAYS, *supra* note 78, 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).

[182] DSU Arts. 22.1, 22.8. Even after the suspension of concessions, the DSB keeps the matter under surveillance so long as the recommendation to bring the measure into conformity has not been implemented. *Id.*, Art. 22.8.

[183] Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 590–91 (1996). Compensation in this context means an agreement by the defending government to lower its trade barriers in exchange for willingness by the complaining government to forgo raising its trade barriers.

[184] DSU Arts. 23.2(c) (obliging governments to follow DSU Article 22 procedures).

[185] *Id.*, Arts. 22.2, 22.6, 22.7.

[186] In *Bananas*, the United States proposed sanctions sized at $520 million and got $191 million, and Ecuador proposed $450 million and got $202 million. *See* EC-U.S. Article 22 Decision, *supra* note 21; EC-Ecuador Article 22 Decision, *supra* note 23. In *Hormones*, the United States proposed U.S.$202 million and got U.S.$116 million, and Canada proposed Can.$75 million and got Can.$11 million. See the Article 22.6 arbitration reports referenced in note 28 *supra*. In *Aircraft*, Canada proposed Can.$700 million and got Can.$344 million. *See* Brazil-Canada Article 22 Decision, *supra* note 31.

[187] Taming unilateral retaliation was one of the purposes of the dispute settlement system established in the ITO Charter. During the drafting of the charter, Clair Wilcox stated, "We have sought to tame retaliation, to discipline it, to keep it within bounds . . . . to convert it from a weapon of economic warfare to an instrument of international order." GUIDE TO GATT LAW AND PRACTICE, *supra* note 83, at 692. Wilcox's point should serve as a reminder that trade reprisals would exist even without the WTO.

[188] European Communities—Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS26/R/USA, para. 2.35 (Aug. 18, 1997).

of foreign pressure to promote internal change is often called *gaiatsu*, the Japanese term for it. The presumption in the *gaiatsu* thesis is that defending government officials want to comply with WTO rules yet cannot because of domestic political opposition.[189] By introducing the external threat of sanction, the WTO empowers reform-oriented politicians and administrators in the defending country.[190] As Robert Hudec explains, "Hopefully, the economic pain caused by the retaliation will enlist the support of the affected economic interests."[191]

The evidence for *gaiatsu* is mixed. The *Bananas* and *Hormones* sanctions did not lead to significant reforms.[192] Yet one can see support for *gaiatsu* in a few cases, such as Australia *Salmon*, where the threat of Canadian sanctions pressured Australia into reversing weakly justified health policies that had been championed by domestic fishery interests.

Political scientists are now beginning to do models of such "games": The sender government seeks to catalyze foreign economic actors into influencing the target foreign government. Even more realistically, frustrated exporters in the sender country convince that government to target foreign economic actors. The tempest may lead exporters in both countries to communicate with a view to accomplishing their shared interest in preventing trade restrictions.

The U.S. process of selecting tariff categories for trade retaliation gains the attention of foreign economic actors.[193] A hit list of target product categories is promulgated with the threat that 100 percent tariffs will be imposed.[194] The list is made larger than the anticipated retaliation in hopes of worrying more foreign exporters and in recognition of the inevitable dropping of some products. Publication of the draft hit list serves the double function of rattling foreign actors and giving domestic actors an opportunity to lobby for their interests.

Political and Economic Disadvantages of Sanctions

The biggest problem with WTO sanctions is that the teeth bite the country imposing the sanction. Barring trade in order to promote it might lead to long-term economic gains, or might not. In the short term, however, a sanction will exact costs. In *Bananas* and *Hormones*, the U.S. government imposed high tariffs on imports from the EC. This action frustrated domestic users in the United States, who suffered a loss of choice and probably had to pay higher prices for substitute products.[195] Of course, some of these costs are just transfers from domestic consumers to domestic producers (and their lobbyists). Nevertheless, the sender

[189] *Cf.* Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France, 18 R.I.A.A. 417, para. 91 (1978) ("Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party.").

[190] Judith Goldstein takes this theory one step further by arguing that the possibility of retaliation helps to prevent reneging on WTO commitments because export groups will gain a greater incentive to organize in defense of free trade and against particularistic protectionism within their country. Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 133, 144–45 (Anne O. Krueger ed., 1998); *see also* 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 U.S. unilateral retaliation threats).

[191] Robert E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, *in* IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS 369, 388 (Friedl Weiss ed., 2000).

[192] *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).

[193] THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 82 (1994) (stating that threats identifying potential targets of retaliation may spur previously inactive interest groups to enter the debate, tilting the political balance toward agreement).

[194] Implementation of WTO Recommendations Concerning EC—Measures Concerning Meat and Meat Products (Hormones), Request for Comment; Notice of Public Hearing, 64 Fed. Reg. 14,486–92 (Mar. 25, 1999); William Chisholm, *Cashmere Gloom as US Prepares to Publish Its Hit-List*, SCOTSMAN, June 21, 2000, at 5.

[195] DAM, *supra* note 84, at 357 (noting that although industry may receive greater protection, consumers have to pay more for the item chosen for retaliation).

country does entail some overall efficiency losses, and can end up getting hurt as much as the target country.

This inherent problem with trade retaliation has long been noted. In *The Wealth of Nations*, Adam Smith wrote that unilateral "retaliations" 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."[196]

Subsequent analysts have built on Smith's insights to point out the self-punishing nature of trade retaliation. For example, in 1921 Theodor E. Gregory explained that a retaliatory trade war causes losses in both parties.[197] In recent commentary, Bernard Hoekman and Petros Mavroidis lamented 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."[198] In the *Bananas* dispute, the WTO arbitrators admitted that a suspension of concessions "may also entail, at least to some extent, adverse effects for the complaining party seeking suspension."[199]

This author is not aware of any study of the full domestic economic impact of the sanctions imposed by the U.S. government in *Hormones* and *Bananas*.[200] Such a study would have to look at the cost of securing replacements for the sanctioned products in the United States and at whether U.S. meat exports were successfully redirected to other countries. (The United States is not a banana exporter.) According to the U.S. Department of Commerce, the government's retaliation committee "makes every effort to minimize the harmful effects on U.S. businesses and consumers."[201] The success of that effort should be evaluated.

The criticism that WTO sanctions cause self-harm is based on the assumption that the sanctions are intended to hurt foreigners, not denizens. But another theory of sanction suggests that the way to induce others to act responsibly is not to punish them but, rather, *to punish oneself*. The hunger strike is one well-known manifestation of that view.[202] Thus, if the United States intended the *Bananas* and *Hormones* sanctions to hurt Americans, this disadvantage would not exist.

Another problem with trade sanctions is that they foment the sort of domestic protectionist pressure that the WTO was set up to constrain. Because the complaining government enjoys wide latitude on what imports to exclude, and because the instrument of choice so far has been 100 percent tariffs, domestic industries may seize the opportunity to secure greater protection from imports. They did so with pork in the *Hormones* dispute.[203] As it observes this process of special interest lobbying, the public is unlikely to gain greater enthusiasm for

[196] SMITH, *supra* note 41, at 296.

[197] T. E. G. GREGORY, TARIFFS: A STUDY IN METHOD 248 (1921).

[198] Bernard M. Hoekman & Petros C. Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, *in* DEVELOPING COUNTRIES AND THE WTO: A PRO-ACTIVE AGENDA 131 (forthcoming 2001).

[199] EC-Ecuador Article 22 Decision, *supra* note 23, para. 86.

[200] A report by the U.S. 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 24 (Doc. GAO/NSIAD–00–210, Aug. 2000). But this conclusion was reached without doing any analysis of the impact of the U.S. *Bananas* and *Hormones* sanctions on the U.S. economy.

[201] *About Section 301* (May 2000), *at* <http://www.ita.doc.gov/legal/301.html>. The department maintains a "301 Alert" service to notify potential U.S. victims of U.S. retaliation so that they can "protect their economic interests by participating in the public comment process," *at* <http://www.ita.doc.gov/td/industry/otea.html> (visited Oct. 18, 2001). After the WTO/DSB approves the suspension of concessions, the U.S. government uses §301 (of the Trade Act of 1974) as legal authority to carry out the sanction.

[202] DORIS STEVENS, JAILED FOR FREEDOM 184–85 (1976). According to Stevens, this tactic 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.

[203] *Pork Industry Pushing for Pork-Only Hormone Retaliation List*, INSIDE U.S. TRADE, May 21, 1999, at 14.

national trade policy. This side effect of retaliation was noted by the Meltzer Commission, which found that "[r]etaliation 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."[204]

One way to select sanction targets is to assist domestic exporters hurt by foreign trade barriers. In his study of GATT retaliation, Dam noted 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."[205] Yet securing a protective effect need not be left to fortuity.[206] For disputes regarding trade in services, the DSU provides that retaliation be considered first in the same sector as the dispute.[207] In the United States, the new carousel law directs the U.S. Trade Representative (USTR) to include "reciprocal goods of the industries affected" on the original and subsequent retaliation lists.[208] So far, however, this law has not been fully implemented.

This author is 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. Animal products constituted a large portion of the products included in each government's retaliation list, but the extent to which they were produced by the companies that were frustrated in exporting hormone-grown meat to the EC is unclear.[209]

Nowhere does the DSU require the sender government to help the private economic actors injured by the WTO violation. Indeed, the DSU completely ignores the complaining industry. In 2000 U.S. Senator Max Baucus introduced a bill to establish a Beef Industry Compensation Trust Fund that would channel the tariffs collected from U.S. retaliation in the *Hormones* dispute into "relief" for the U.S. beef industry.[210] This bill was not enacted.

As many analysts have noted, sanctions favor larger economies over smaller ones.[211] Besides the size of an economy, other important determinants of success include the import dependency of the sender and the export dependency of the target, especially regarding trade between the two countries.[212] A highly import-dependent country may find it hard to use sanctions. A highly export-dependent country (like Australia) may find itself vulnerable to

[204] International Financial Institution Advisory Committee, *supra* note 37.

[205] DAM, *supra* note 84, at 357.

[206] Alan Sykes explains that government officials may pursue a protectionist objective because, having lost the political support of aggrieved exporters, the government hopes to reap new political support from an import-competing industry. Alan O. Sykes, *The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?* in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 347, 354 (Marco Bronckers & Reinhard Quick eds., 2000).

[207] DSU Art. 22.3(a), (f).

[208] 19 U.S.C.A. §2416(b)(2)(F) (West Supp. 2000). The central provision in the carousel law directs USTR to rotate retaliation targets every six months. Rotation could reduce the dangerous potential for WTO trade sanctions to provide long-term protection to particular companies. At present, the industry enjoying shelter from foreign competition has an incentive to fight against removing sanctions even after the defending government takes steps to comply. *See U.S. Beef Industry Unswayed by EU Offer on Compensation Plan*, INSIDE U.S. TRADE, Dec. 1, 2000, at 3.

[209] *See* USTR, Press Release 99-60, USTR Announces Final Product List in Beef Hormones Dispute (July 19, 1999); Government of Canada, News Release 174, Canada Retaliates Against the EU (July 29, 1999).

[210] S. 2709, 106th Cong. (2000). Of course, with prohibitive tariffs there would be no money to collect or redistribute.

[211] Pauwelyn, *supra* note 1, at 338; Pierre Pescatore, *The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects*, J. WORLD TRADE, Feb. 1993, at 9, 15; BREAKING THE LABOR-TRADE DEADLOCK 4 (Inter-American Dialogue and Carnegie Endowment for International Peace, Working Paper No. 17, Feb. 2001) (contending that trade sanctions are a huge club in the hands of industrial giants and a splinter in the hands of developing countries). In pointing out how major and smaller economies are not similarly situated when it comes to imposing WTO "sanctions," David Palmeter recalls H. L. A. Hart's point that the inequality between the units of international law is one of the things that has given it a different character from municipal law, and has limited the extent to which it is capable of operating as an organized coercive system. David Palmeter, *The WTO as a Legal System*, 24 FORDHAM INT'L L.J. 444, 472–73 (2000).

[212] Mavroidis, *supra* note 172, at 807.

the threat of sanctions. By favoring larger economies, the sanctioning instrument in the WTO may further tilt the north-south power balance in favor of the North.

Impact on Other International Organizations

The final area of appraisal is how WTO trade sanctions affect other international organizations or treaty systems. The use of trade sanctions in the WTO sets a bad example. The WTO example is not followed literally; as noted above, no other international organization would contravene its own norms as the WTO does. But other organizations might want to utilize trade sanctions as an instrument for enforcing obligations.

Drawing on WTO practice, commentators increasingly portray WTO-like trade sanctions as a sine qua non for an effective international organization.[213] For example, Robert Wright opines that while the GATT "had no teeth," the WTO, "by adjudicating trade disputes and authorizing sanctions against violators, arguably constitutes the most effective body of world governance in the history of the planet."[214] Clyde Summers laments that "[t]here is no international agency other than the WTO able to effectively exert pressure for observance of rights on a global basis."[215]

If the WTO employs trade sanctions in dispute settlement, there is no principled reason why other international treaties should not do so, too. The unprincipled reason for having trade sanctions in the WTO, but not elsewhere, is that using a DSU Article 22 procedure in other international regimes would violate WTO rules. Yet it is questionable whether WTO rules were meant to superintend the instruments that other treaties use to achieve compliance.[216] Moreover, the public policy exceptions in WTO rules may be flexible enough to accommodate the use of trade enforcement in other treaty systems.[217]

Although some proposals have been made for legislating WTO-style trade sanctions in other treaties in order to strengthen compliance, most commentators have suggested the opposite—bringing the norms of other treaties into the WTO for enforcement.[218] That is what happened with intellectual property in the Uruguay Round, and many commentators urge the same approach for labor.[219] Such initiatives have resulted in a political challenge

[213] Robert Paehlke, *Environment, Equity and Globalization: Beyond Resistance*, 1 GLOB. ENVTL. POL. 1, 9 (2001); Bruce Ramsey, *No Power to Sanction, but ILO Hopes to Be Taken Seriously in Trade Talks*, SEATTLE POST-INTELLIGENCER, Nov. 29, 1999, at A6.

[214] Robert Wright, *Clinton's One Big Idea*, N.Y. TIMES, Jan. 16, 2001, at 23.

[215] Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 89 (2001).

[216] The intention not to do so was clearer in the ITO Charter of 1948, which contained a clause stating that "[t]he Members also undertake, *without prejudice to any other international agreement*, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter." ITO Charter, *supra* note 71, Art. 92.2 (emphasis added).

[217] *See* GATT Art. XX (General Exceptions); General Agreement on Trade in Services, Art. XIV (General Exceptions), WTO Agreement, Annex 1B.

[218] *See, e.g.*, High-Level Panel on Financing for Development, Report, UN Doc. A/55/1000, annex (2001) (noting that with its capacity to impose sanctions, the WTO has been an attractive target for pressures); HUMAN RIGHTS WATCH, WORLD REPORT 2001, at xvi, xviii (2001), *at* <http://www.hrw.org> (discussing the "enforcement gap" between the WTO and the ILO and suggesting the possibility of a link between the two organizations); Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995); David Robertson, *Civil Society and the WTO*, 23 WORLD ECON. 1119, 1130 (2000) (noting that the WTO dispute process is attractive to nongovernmental organizations because it provides for trade sanctions); 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, Note, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659 (1998).

[219] 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); Lindsey et al., *supra* note 2, at 31 (explaining that the drive to use the WTO process to impose new international rules on labor and the environment derives in part from the prospect of using trade sanctions to enforce those rules); *see also* Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, *supra* note 206, at 15, 22

for the trading system, and were one factor behind the failure at Seattle to launch a new WTO round.[220] A few weeks before the Seattle ministerial meeting, the WTO released a special study noting that "one reason why the WTO has become the focal point for environmental disputes is that the WTO has an integrated adjudication mechanism backed by trade sanctions as the ultimate enforcement tool."[221]

The use of trade sanctions in the WTO, but not in other international agencies, is politically unsustainable. So long as the WTO retains trade sanctions, they will have an allure to activists who want to use similar enforcement in other treaties.[222] These activists are not going to be swayed by the argument that trade sanctions should be reserved for the international organization where their use is most self-contradictory.

Rebalancing Versus Sanctions

Although I have presented the above advantages and disadvantages as an appraisal of trade sanctions in the WTO, almost all of these points retain salience even if DSU Article 22 measures are perceived as rebalancing rather than sanctioning. The multiple problems of undermining WTO principles, encouraging discrimination, deprecating human rights, damaging the economy of the sender country, facilitating protectionism, and favoring larger countries continue regardless of how one characterizes Article 22 measures. Similarly, the advantages of signaling outrage, providing usability, boosting efforts of reformers in the target country, and affording procedural due process are present either way.

For a few points, however, the tension between the sanction and rebalancing paradigms makes a difference. If rebalancing is the goal, it hardly matters whether the defending government corrects the WTO violation because the wrongfulness is undone by a calibrated reciprocal suspension. Relatedly, under the rebalancing paradigm, the WTO may not be setting a bad example for other intergovernmental organizations because it would not be using a trade measure to induce compliance.

Article 22 as Safeguard

A variant of rebalancing would be to view DSU Article 22 as an informal "political safeguard." In other words, rather than being so critical of Article 22 trade measures, the analyst could look at the bigger picture and appreciate the fact that the targeted country accepts the remedy, does not counter-retaliate, and stays in the WTO. This acquiescence is a notable achievement in the march toward world public order. In GATT Article XXIII, written in 1947, the Agreement provided for authorization of the complaining party to suspend "concessions or other obligations," and then ominously declared that the targeted government shall then be free to give written notice of its intention to withdraw from the GATT and to withdraw in sixty days.[223] By the time the WTO Agreements were written, the drafters saw no need for the organization to offer this rapid exit.

The trading system has always recognized the need for a safety valve to let governments derogate from trade rules. Pursuant to GATT Article XIX, if unforeseen developments lead to increased imports that cause or threaten to cause serious injury to a domestic industry,

(stating that the WTO will continue to be the predominant power in the field of intellectual property so long as it retains the sole power to authorize trade sanctions for a breach of intellectual property rights).

[220] *See generally* SEATTLE, THE WTO, AND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM (Roger B. Porter & Pierre Sauvé eds., 2000); THE WTO AFTER SEATTLE (Jeffrey J. Schott ed., 2000).

[221] HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 57 (WTO Special Studies No. 4, 1999).

[222] Peter Sutherland, John Sewell, & David Weiner, *Challenges Facing the WTO and Policies to Address Global Governance*, *in* THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE, *supra* note 141, at 81, 105 (noting that "[b]ecause of its ability to levy trade sanctions, the WTO frequently has been the venue of choice.").

[223] GATT Art. XXIII:2. The GATT also provided a general withdrawal option with a six-month notice. *Id.*, Art. XXXI.

the importing country may lawfully suspend trade obligations.[224] When that occurs, an affected country can rebalance with a discriminatory trade measure unless it has been adequately compensated.[225] Under the WTO Agreement on Safeguards, this right to rebalance is given up for three years.[226]

Looking at GATT Article XIX and the GATT's provisions addressing unfair trade, John Jackson in 1978 developed the concept of trade law "interface."[227] Jackson postulated that interface provisions "allow different economic systems to trade together harmoniously."[228] According to Jackson, different economic systems will always exist, so an interface or buffer mechanism is needed to defuse trade tensions.[229]

Given the substantially greater regulatory and deregulatory ambitions of the WTO vis-à-vis the more limited objectives in the GATT, it may be time to update the concepts of safeguard and interface. The GATT and the WTO Agreement on Safeguards permit a release from trade obligations in response to a commercial injury from increased imports (or even a *threat* of injury). This is not a peripheral exception. After all, a major purpose of the trading system was to allow increases of imports, so the right to escape is a central WTO feature. Yet while the GATT had, and the WTO keeps, this escape clause to gratify protectionist inclinations, the WTO Agreements do not contain similar forbearance for governments that have nonprotectionist reasons for violating WTO rules.

Because of its state-centric orientation, the WTO pays little attention to democratic processes in member countries.[230] Each government is obliged to comply with WTO rules, but no thought is given to whether politicians will approve such action.[231] Thus, a dispute panel can recommend action to a defending government that its lawmakers simply will not approve. Indeed, a panel could dictate action that would be a constitutional violation for a government to perform.[232] In the controversial Australia *Leather* dispute, Australia complained that the remedy dictated by the DSB was "at odds with democratic governance."[233]

[224] *Id.*, Art. XIX:1(a).

[225] *Id.*, Art. XIX:3(a).

[226] Agreement on Safeguards, Art. 8.3, WTO Agreement, Annex 1A. To qualify for the three-year immunity, a safeguard measure must respond to an absolute increase in imports and conform to the provisions of the Agreement.

[227] *See* David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 671, 708 (1995) (calling the interface concept a significant and original contribution).

[228] JACKSON, *supra* note 92, at 218 & n.5.

[229] *Id.* at 305.

[230] For example, consider a recent arbitration to set the "reasonable period of time" for compliance in a WTO dispute regarding Canadian patent law. The arbitrator explained that the contentiousness of domestic implementation was not a factor to be taken into account, and so Canada could not seek more time because of the "likely divisiveness of the debate in the Canadian Parliament." Canada—Term of Patent Protection, Arbitration Under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Doc. WT/DS170/10, para. 58 (Feb. 28, 2001).

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

[232] One WTO Agreement does contain explicit deference to a domestic constitution. The General Agreement on Trade in Services, *supra* note 217, Art. VI:2, requires governments to establish procedures enabling service suppliers to seek review of administrative decisions regarding services. But this article further provides that it 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."

[233] Dispute Settlement Body, Minutes of Meeting Held on 11 February 2000, WTO Doc. WT/DSB/M/75, at 5, 6 (2000). The Australia-U.S. *Leather* dispute was about an Australian subsidy to an automobile leather producer that exported a large share of its production. The United States won the case, and gained a settlement before seeking retaliation. Daniel Pruzin, *Compromise Averts U.S.-Australia Dispute over Subsidies to Automotive Leather Maker*, DAILY REP. FOR EXECUTIVES (BNA), Aug. 1, 2000, at A-19. The decision of the compliance panel was especially controversial. That panel had directed Australia to force a company to repay a subsidy that violated SCM rules. Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States, WTO Doc. WT/DS126/RW, para. 6.48 (Jan. 21, 2000) [hereinafter Australia—Leather]. Australia's complaint was that the DSB was asking it to confiscate the company's assets when the company had

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 a "political safeguard" in circumstances where the disputant governments have inconsistent regulatory systems. *Hormones* could serve as an example. No one denies that the European Commission would have a difficult political chore in repealing the ban in the face of current public sentiment in Europe.[234] 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.[235]

Imagining DSU Article 22 to be a de facto political safeguard might put that provision in a more charitable light. If a government simply cannot stomach compliance with a DSB recommendation because of public objections, then that government need not do so. The complaining government can then undertake Article 22 measures. But any suggestion that the WTO (or the sender country) is using the withdrawal of concessions to induce compliance would be merely pro forma.

Non-Tariff WTO Sanctions

This appraisal of WTO trade sanctions is colored by the fact that in the two cases so far, the sanction deployed was a tariff of 100 percent. Yet the DSU also permits nontariff sanctions. Under Article 22.6, the sender government may seek "authorization to suspend concessions or other obligations." Concessions can be tariff bindings in GATT, market access commitments in the Agreement on Agriculture,[236] or commitments in the General Agreement on Trade in Services. "Other obligations" is a much broader category that encompasses the hundreds of rules in the WTO Agreements.

The DSB has authorized nontariff sanctions in two instances. In the *Bananas* dispute between the EC and Ecuador, the Article 22 arbitrators approved not only a suspension of GATT concessions, but also a suspension of commitments in the Agreement on Services and a suspension of obligations in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[237] In the *Aircraft* dispute between Brazil and Canada, the Article 22 arbitrators approved not only a suspension of GATT concessions, but also a suspension of one GATT obligation and various obligations in the Agreement on Textiles and Clothing and the Agreement on Import Licensing Procedures.[238] Neither Ecuador nor Canada carried out these actions.

DSU rules provide for a close review of the proper level of suspension but then give the complaining country considerable discretion to craft a plan for retaliation. The DSU says that the arbitrators "shall not examine the nature of the concessions or other obligations to be suspended."[239] Yet arbitrators are directed to review the proposal with respect to the

done nothing wrong. For criticism of the panel's decision, see Steve Charnovitz, *The WTO and the Rights of the Individual*, 36 INTERECONOMICS 98, 106–07 (2001).

[234] Jagdish Bhagwati, *An Economic Perspective on the Dispute Settlement Mechanism*, *in* THE NEXT TRADE NEGOTIATING ROUND: EXAMINING THE AGENDA FOR SEATTLE 277 (Jagdish Bhagwati ed., 1999) (suggesting that trade retaliation makes little sense in cases such as *Hormones* where the EC legislation is consumer driven and cannot simply be dismantled).

[235] 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, 455–62 (2000).

[236] Agreement on Agriculture, WTO Agreement, Annex 1A.

[237] EC-Ecuador Article 22 Decision, *supra* note 23, para. 173(d). The TRIPS suspension was permitted to the extent that the GATT and Services Agreement suspensions were insufficient to reach the full level of nullification or impairment. Regarding copyrights, Ecuador was permitted to suspend rights of performers, producers of sound recordings, and broadcast organizations. For the TRIPS Agreement, see WTO Agreement, Annex 1C.

[238] Brazil-Canada Article 22 Decision, *supra* note 31, para. 4.1. Canada sought approval for a 100% surtax on the customs duties for listed products. Communication from Canada, WTO Doc. WT/DS46/16 (May 11, 2000). For the Agreements on Textiles and Clothing and on Import Licensing Procedures, see WTO Agreement, Annex 1A. With regard to GATT, Canada gained approval to ignore a discipline in GATT Article VI regarding antidumping.

[239] DSU Art. 22.7.

use of cross-retaliation and the selection of target sectors.[240] Cross-retaliation is retaliation under one WTO Agreement (e.g., TRIPS) in response to a violation of another WTO Agreement (e.g., GATT). The arbitrators are to permit broader retaliation if narrower retaliation "is not practicable or effective."[241] The arbitrators "may" also determine if the proposed suspension is allowed under the covered WTO Agreement.[242]

Most of the WTO Agreements contain provisions for a suspension, but four of them do not. They are the Agreement Establishing the WTO, the Agreement on Implementation of Article VI of the GATT 1994 (known as the Antidumping Agreement), the Agreement on Implementation of Article VII of the GATT 1994, and the DSU itself.[243] Thus, DSU Article 22 arbitrators could disapprove a request to suspend provisions in those four Agreements,[244] which means that some potential sanctions may be impermissible. For example, the complaining country would not be able to demand that the voting rights of the defending country be suspended, or that the defending country lose its right to invoke the WTO dispute process.

The availability of sanctions beyond a suspension of concessions affords some advantages to the WTO membership. At this point, they are all hypothetical. Because of the possibility of suspending TRIPS, small WTO countries might gain greater leverage over larger countries.[245] Because of the broad array of possible sanctions, the sender country might be better able to induce compliance. Still another advantage is that the sender country might be able to formulate a sanction that minimizes damage to its own economy.

On the other hand, allowing complaining governments to suspend basic WTO rules has several disadvantages. To start with, it undermines the WTO as a rule-based system.[246] If the WTO-illegal act of one party is met by an authorization for another party to reciprocate with a WTO-illegal act, then the WTO walks away from the rule of law. During the Uruguay Round, Pieter Kuyper (now the WTO's director of legal affairs) wrote: "It is barely imaginable that violations of this [TRIPS] agreement would be remedied by a selective suspension of certain intellectual property rights in respect of nationals of a particular State" because this remedy "is too close to a discriminatory confiscation of property to be easily acceptable."[247] Yet something analogous happened in the EC-Ecuador *Bananas* dispute where the arbitrators approved a selective suspension of TRIPS because of a violation of other WTO Agreements. Suspending WTO rules could also result in disadvantaging third parties. Authorizing a countersubsidy would be an example.

The perversity of DSU Article 22 suspensions can be seen in a clever example suggested by Joost Pauwelyn.[248] The United States has gained the right to retaliate against the European Communities in *Hormones* because the EC has not complied with the Sanitary and

[240] The criteria for review are in DSU Article 22.3, which provides the definitions of sector and agreement.

[241] DSU Art. 22.3(b), (c).

[242] DSU Art. 22.7. It is interesting to note that DSU Article 22.5 states that the DSB shall not authorize a suspension if a WTO Agreement prohibits such a suspension. One example is found in the Agreement on Government Procurement, *amended* Apr. 15, 1994, WTO Agreement, Annex 4. That Agreement (Art. XXII:7) prohibits cross-retaliation between it and other WTO Agreements. In other words, the DSB cannot authorize a suspension of government procurement disciplines because of noncompliance with other WTO Agreements. The Agreement on Government Procurement is a plurilateral agreement that is not an obligation of WTO membership.

[243] DSU Article 22.3(g) excludes the DSU in explaining how suspensions are carried out under the various agreements. For the Antidumping Agreement and the Agreement on Implementation of GATT Article VII, see WTO Agreement, Annex 1A.

[244] This is the author's own analysis. WTO arbitrators only sometimes address this criterion. *See, e.g.*, EC-Ecuador Article 22 Decision, *supra* note 23, para. 150.

[245] *See* Cristian Espinosa, *The WTO Banana Dispute: Do Ecuador's Sanctions Against the European Communities Make Sense?* BRIDGES, May 2000, at 3, *at* <http://www.ictsd.org> (visited Oct. 18, 2001).

[246] Pauwelyn, *supra* note 1, at 341–42.

[247] Kuyper, *supra* note 10, at 253.

[248] Pauwelyn, *supra* note 1, at 344–45.

Phytosanitary Agreement. Yet if the Europeans win a high-value WTO dispute against the United States, the EC could ask the DSB to suspend its sanitary obligations to the United States regarding goods with hormones. This result would have the WTO align itself with the principle that two wrongs make a right.

An additional problem with permitting the DSB to authorize a suspension of TRIPS is that the WTO may then undermine WIPO. It is one thing for the WTO to flout its own norms. But it is another thing, and worse, for the WTO to unglue the obligations of longtime multilateral treaties on intellectual property. The *Bananas* arbitrators admitted that they could not release Ecuador from its treaty obligations outside the WTO, and pointed out that a suspension of TRIPS obligations interferes with private rights owned by natural or legal persons.[249] Nevertheless, the arbitrators declared that it was not within their mandate to consider whether they were giving Ecuador the go-ahead to violate intellectual property treaties.[250]

Despite these problems, two trade economists, Arvind Subramanian and Jayashree Watal, have advocated using TRIPS as a "retaliatory weapon" in WTO dispute settlement.[251] The main difficulty these analysts perceive is that national laws protecting intellectual property may not authorize suspension in a discriminatory way against target countries.[252]

The Empty Toolbox

DSU Article 22 measures may be designed to serve three functions.[253] First, such measures could re-equilibrate the balance of concessions between the disputing countries. Second, the measures could provide reparation for the state (or its habitants) injured by persistent noncompliance. Third, the measures could serve as inducement to comply with the WTO rule being violated.

Article 22 trade measures achieve the first function, but do so in a self-defeating way. Using such measures is difficult to rationalize in economic terms because the ensuing trade disruption reduces national economic welfare.[254] Therefore, the first function is insufficient to sustain the use of WTO sanctions.

The second function, reparation, is absent from the DSU.[255] Trade rules give no attention to those injured by a WTO violation. A complaining government can try to use a DSU Article 22 measure to award economic rent to the sufferers, but this approach will be hit or miss. A government using only the instrument of a trade restriction will find it very difficult to craft a tariff or quota to make the frustrated exporters whole, and if that could be done, it would wreak a great deal of damage on other sectors of the economy.[256] Thus, a more efficient approach might be for the government to use tax dollars to recompense the frustrated exporters. Indeed, a government could levy a low tariff on all imports from the target country and use the proceeds to compensate the victims.

[249] EC-Ecuador Article 22 Decision, *supra* note 23, para. 157.

[250] *Id.*, para. 152.

[251] 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).

[252] *Id.* at 415.

[253] Compare Kirgis, who points to three functions of sanctions—compulsion, deterrence, and retribution. FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 554 (2d ed. 1993). Compulsion is inducing compliance with a WTO panel report or inducing cessation of the WTO rule violation. Deterrence has only a faint presence in WTO concepts. Retribution is absent from the WTO.

[254] When countries *A* and *B* agree to lower trade barriers reciprocally, then politicians in *A* and *B* can explain the net benefits of the package deal. But when country *A* raises trade barriers and country *B* does so in response, no package exists. The two events are independent. The politicians in *B* will have to argue either that import protection is a good policy in itself, or that the short-term costs of retaliation will be recovered by getting country *A* to change its policy in the long run, or by maintaining a credible threat for future clashes with country *C*.

[255] Even the compliance panel in the Australia *Leather* dispute—which had directed Australia to take back a subsidy from a private actor—denied that this remedy was intended "to provide reparation or compensation in any sense." Australia—Leather, *supra* note 233, para. 6.49.

[256] SMITH, *supra* note 41, at 296–97.

The third function, inducing compliance, is a central feature of the DSU, yet the remedy may be too weak for that purpose. By prescribing retaliation at a dose equal to the value of the "nullification or impairment," the DSB will at best neutralize the ongoing gain that the defendant country is receiving from violating WTO rules.[257] Even those taking "countermeasures" against prohibited export subsidies under the SCM Agreement are directed by the Agreement that such countermeasures should not be "disproportionate."[258]

As analysts have long pointed out, a single economic instrument cannot achieve more than one distinct purpose.[259] Thus, we cannot expect the remedy in DSU Article 22 to serve multiple purposes of re-equilibration, reparation, and compliance. The problem is even worse than that, however, because the WTO trade sanction does not serve any purpose well. An instrument designed for rebalancing trade can fail to induce compliance and to reimburse those injured by the WTO violation.[260] Furthermore, in rebalancing trade, the sanctioning country shoots itself in the foot.

Although the WTO is lauded for its strong compliance system, the reality is that the WTO's toolbox is nearly empty.[261] Recognizing this problem, some stakeholders want to develop better techniques for using the existing sanction tool. Other stakeholders hope that the WTO can acquire a different set of tools.

The carousel is supposedly a better technique. Everyone agrees that carousel will raise the pain, but it has not been used because it raises the pain *on both sides*, and because it may violate WTO rules. Another response is to amend the WTO/DSU rules so that all countries may retaliate against the WTO lawbreaker.[262] In 1992 Kenneth Abbott suggested that the GATT consider a multilateral suspension of concessions, which he called a "true community sanction."[263] More recently, Pauwelyn has advocated a "collective" approach to trade retaliation that would enable every country (not just the complaining country) to "suspend concessions equivalent to the damage it has suffered."[264]

Pauwelyn's collective approach still retains the 1:1 relationship between retaliation and "nullification or impairment," but this constraint could be relaxed. The DSU could be amended to permit a punitive sanction with a disproportionate ratio. In other words, a WTO violation inhibiting $100 million worth of trade could be met with a $200 million trade sanction. Testing whether such punitive sanctions induce compliance would be an interesting experiment in political economy, but it is unlikely to occur.

IV. TOWARD A BETTER WTO COMPLIANCE SYSTEM

Because the WTO has adopted the tool of trade sanctions (see part II) and their disadvantages seem to outweigh their advantages (see part III), a significant problem has emerged for which corrective action may be needed. Part IV of this article will present a preliminary

[257] *See* Sykes, *supra* note 206, at 351 (stating that the DSU lacks coercive penalties aimed at inducing compliance when equivalent retaliation proves to be inadequate).

[258] SCM Arts. 4.10 n.9, 4.11 n.10.

[259] *See* J. TINBERGEN, ON THE THEORY OF ECONOMIC POLICY 39–41 (1963).

[260] Mavroidis, *supra* note 172, at 801, 807.

[261] Kathleen A. Ambrose, *Science and the WTO*, 31 LAW & POL'Y INT'L BUS. 861, 867–68 (2000).

[262] As noted above, the original ILO Constitution provided for a collective sanction. *See* text at note 55 *supra*. Although the ITO Charter was not explicit on that point, the conference report of the Canadian delegation suggested that a flagrant disregard of an important obligation of the charter might nullify or impair the benefits to *all* members and therefore lead to authorization of a "sanction" by them. Report of the Canadian Delegation to the United Nations Conference on Trade and Employment in Havana (July 13, 1948), *reprinted in* ALSO PRESENT AT THE CREATION, *supra* note 77, at 73, 145.

[263] Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31, 64–65, 78–79 (1992). The idea of collective retaliation in the GATT goes back to 1965 when developing countries sought this remedy for violations by large countries.

[264] Pauwelyn, *supra* note 1, at 345.

sketch of the options available to replace WTO sanctions. At present, the elimination of such sanctions is inconceivable. To quote European Commissioner for Trade Pascal Lamy:

> It would be good to think that we could find a way of ensuring WTO conformity without getting into the business of distorting trade flows which stems from sanctions. That said, the current system is all we have to enforce compliance, and I certainly cannot and will not tell you today that we renounce the instrument in the absence of better ideas.[265]

Happily, some better ideas already exist.

In a recent essay on international compliance processes, Edith Brown Weiss distinguishes three strategies for encouraging countries to comply with international environmental agreements: transparency (or sunshine) methods, positive incentives, and coercive measures.[266] Weiss points out that while environmental agreements use the first two strategies, the GATT/WTO relies "on the threat (or occasional use) of sanctions to enforce obligations."[267]

Writing from a comparative perspective, Weiss suggests that the extensive experience in achieving national compliance with international environmental agreements has direct relevance to the WTO.[268] She observes that "the WTO relies little on the sunshine methods associated with environmental, human rights, and other international agreements."[269] Her essay ends with the important insight "It is time to consider strengthening a culture of compliance in the public with trade agreements."[270]

The remainder of this article explores alternatives to WTO trade sanctions.[271] Building on Weiss's analysis, I will consider several options for improving compliance with WTO panel decisions. The first section looks at giving direct effect in domestic legal systems. The next section examines the imposition of monetary fines on scofflaw governments. The third section evaluates membership sanctions within an international organization. In the fourth section, I assess the ongoing attempt in the ILO to catalyze a community response to the heinous behavior of Myanmar. The fifth section looks at new tools for improving the interaction between the WTO and domestic political processes.

Finally, the last section explores the option of requiring compensation. Unlike the preceding sections, which consider ways to induce compliance, the compensation approach has a different purpose: to rebalance trade between the litigating countries. Requiring compensation fits a conception of the DSU as a bilateral process, while some other options, such as a membership sanction, would fit a conception of the DSU as a multilateral noncompliance process. The DSU in actuality blends both dispute settlement and noncompliance processes.

Direct Effect of WTO Decisions

Although the WTO Agreement states that "[e]ach 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.[272] Enforcing treaties in a national court

[265] Pascal Lamy, *US-EU: The Biggest Trading Elephants in the Jungle—But Will They Behave?* Speech to the Economic Strategy Institute (June 7, 2001), *at* <http://www.europa.eu.int/comm/trade/index_en.htm>.

[266] Edith Brown Weiss, *Strengthening National Compliance with Trade Law: Insights from Environment*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, *supra* note 206, at 457, 459–60.

[267] *Id.* at 463.

[268] *Id.* at 471.

[269] *Id.* at 463.

[270] *Id.*

[271] For all of the options discussed, the target is the scofflaw government. WTO rules apply to governments, not to private economic actors. In contrast to the GATT, which was fixated on governments, there are several WTO Agreements (e.g., TRIPS) where a private actor might violate the spirit of the agreement. This article does not address how WTO rules might be amended to have greater applicability to private actors.

[272] WTO Agreement, Art. XVI:4; 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, 119–20 (Ernst-Ulrich Petersmann ed., 1997).

is called giving them "direct effect," and that term can also be used for domestic judicial enforcement of a WTO decision. To my knowledge, no court has ordered a government to comply with a WTO panel decision. Indeed, in recent litigation, courts have suggested that a country manifesting direct effect would be at a disadvantage if its trading partners did not do so.[273] Thus, WTO member governments are certainly not moving toward direct effect.

How direct effect would work in a WTO context is unclear. In any trade dispute, there could be numerous plausible ways to come into compliance with WTO rules. Given how vague some WTO provisions and panel reports are, a national court might have a hard time deciding what domestic provisions to strike down to achieve conformity with international rules. Courts would need to consider when to defer complex questions to the legislative or executive branch.[274]

A few regional agreements provide for some direct effect of panel decisions. The North American Agreement on Environmental Cooperation (NAAEC) exempts Canada from being made the target of trade enforcement, and instead provides that the North American Commission for Environmental Cooperation may file a dispute panel report in Canadian courts that then becomes an "order" of the court, following which the commission may lodge proceedings to enforce this order.[275] The parallel labor agreement contains similar provisions. The Canada-Chile Environmental Cooperation Agreement is modeled on the NAAEC and provides for filing a panel report in the courts of either Chile or Canada.[276] It should be noted, however, that the obligation to be enforced in a domestic court is a shallow one; it merely requires that poor administration of domestic environmental law be corrected or that a monetary assessment be paid.[277] So far, these provisions have not been used.

Imposing Monetary Fines

The idea of charging a monetary fine needs to be distinguished from other involuntary monetary transfers. A fine is a penalty for violating a law, which differs from a monetary judgment on a tortfeasor. Little experience exists with the use of fines in international agreements. On the other hand, considerable experience exists with a monetary payment or financial compensation awarded by an arbitral tribunal or with reparations agreed to by treaty.

The most prominent use of fines is found in the Treaty Establishing the European Community, where a penalty payment can be imposed against a member state that fails to comply with a judgment of the European Court of Justice.[278] This step was taken for the first

[273] Regina v. Sec'y of State for Env't, Transp. & Regions, *ex parte* Omega Air Ltd. (Q.B. Nov. 25, 1999), *at* LEXIS, Enggen Library, Cases File; Geert A. Zonnekeyn, *The Status of WTO Law in the EC Legal Order: The Final Curtain?* J. WORLD TRADE, June 2000, at 111, 118 (discussing *Portugal v. Council*); *see also* Frieder Roessler, *The Constitutional Function of International Economic Law*, AUSSENWIRTSCHAFT, Sept. 1986, at 467 (suggesting that a government having enforcement by individuals would be handicapped in its efforts to defend the national interest vis-à-vis those governments that do not have such enforcement).

[274] Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 112–13 (1998).

[275] North American Agreement on Environmental Cooperation, *supra* note 127, Annex 36A, para. 1(b). The Agreement establishes a commission governed by a council of environmental ministers from Canada, Mexico, and the United States.

[276] Agreement on Environmental Cooperation, Feb. 6, 1997, Can.-Chile, Art. 35, 36 ILM 1193 (1997). The Canada-Chile Labor Cooperation Agreement has similar provisions.

[277] North American Agreement on Environmental Cooperation, *supra* note 127, Art. 33.

[278] TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Art. 171. This provision originated in the Maastricht Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1. Another example of this technique is the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA). This Treaty provides that the Authority (composed of the heads of state or government) can, by consensus, decide to impose a financial penalty on a member state. Such a penalty can be imposed following a default of obligations or because of conduct prejudicial to the Common Market. *See* Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, Arts. 8, 171, 33 ILM 1067 (1994). According to the COMESA Secretariat, the penalty process has been used, but the episode is confidential.

time in July 2000, when the Court agreed to a penalty of 20,000 euros per day against Greece.[279] The case involved failure by the Greek government to implement waste disposal directives.[280] Several months after Greece was fined, the French government changed a labor law in response to action by the Commission to seek a penalty payment against France.[281]

In 1993 the NAAEC provided the possibility of a "monetary enforcement assessment" as a remedy in dispute settlement.[282] The NAAEC offers dispute settlement on whether a government is effectively enforcing its domestic law.[283] If inadequate enforcement is found by a panel and the defending government does not fully implement the agreed-upon action plan, the panel is obliged to impose a "monetary enforcement assessment" on the defending government.[284] The panel would set the size of the assessment.[285] This is a *sui generis* remedy. It is neither a fine nor a damages judgment because the money is paid to the commission to be used to enhance environmental law enforcement in the country paying the assessment.[286] This pecuniary provision has seen no use since the NAAEC went into force in 1994.

The NAAEC also contains remedies aimed at collecting the monetary assessment. Canada agreed to a provision for a court order that it pay an assessment.[287] Mexico and the United States did not agree to such direct enforcement. Yet they did agree that the complaining party's government could suspend trade benefits if the losing party did not pay an assessment.[288]

The collection of state-to-state monetary payments has always been a challenge in an international legal system lacking central authority. In 1915 Frank Noel Keen proposed that states deposit a sum of money proportioned on population or financial resources that would be available to answer international obligations.[289] Under modern practice, the best approach would be to seek enforcement through domestic courts, recognizing that some leeway will always exist for nonenforcement.[290] In the accords establishing the Iran–United States Claims Tribunal, each government agreed to enforce any award against it in the courts of any nation.[291]

During the past two years, provision for fines instead of trade sanctions in new trade agreements has been discussed at some length. The Meltzer Commission proposed 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."[292] Kimberly Ann Elliott has analyzed how fines could be used in trade agreements

[279] Case 387/97, Commission v. Hellenic Republic (ECJ July 4, 2000), *at* <http://www.curia.eu.int>. The Commission sought a penalty of 24,600 euros per day. The Court set the penalty at a level that would give it "coercive force." *Id.*, para. 92.

[280] *Greece Hit for Waste Dumping as ECJ Sets First Fine for Law Compliance Failure*, 23 Int'l Env't Rep. (BNA) 558 (July 19, 2000). Greece made its first payment in December 2000.

[281] *France Scraps Ban on Women in Night Jobs*, CHI. TRIB., Dec. 13, 2000, at 2.

[282] North American Agreement on Environmental Cooperation, *supra* note 127, Art. 34(4). The Labor Cooperation Agreement contains parallel provisions.

[283] *Id.*, Art. 24.

[284] *Id.*, Arts. 31–34.

[285] *Id.*, Annex 34. Several factors are suggested to determine the size of the monetary assessment. The annex also provides for a cap linked to trade.

[286] *Id.*, Annex 34, para. 3.

[287] *Id.*, Annex 36A, para. 1(a).

[288] *Id.*, Art. 36(1). The ensuing higher tariffs are used to collect the assessment.

[289] FRANK NOEL KEEN, THE WORLD IN ALLIANCE 58 (1915), *quoted in* J. A. HOBSON, TOWARDS INTERNATIONAL GOVERNMENT 94–95 (1915).

[290] *See, e.g.*, Eloise Henderson Bouzari, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence*, 30 TEX. INT'L L.J. 205 (1995).

[291] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, Art. IV, 20 ILM 230 (1981); *see* Anuj Desai, Case No. A27: *The Iran–United States Claims Tribunal's First Award of Damages for a Breach of the Algiers Declaration*, 10 AM. REV. INT'L ARB. 229 (1999) (discussing practice under this provision).

[292] International Financial Institution Advisory Committee Report, *supra* note 37 (emphasis omitted).

to promote labor law enforcement.[293] Marco Bronckers has suggested that monetary damages may induce compliance more effectively than trade retaliation because governments would have to pay the costs, rather than shift them.[294] Whether or not a fine succeeds in inducing compliance, a fine may still be a better instrument than a trade sanction because if the miscreant government pays it, the burden of the fine falls on the target nation. Of course, a government law-abiding enough to pay an internationally imposed fine is unlikely to engage in behavior that warrants a fine.

Membership Sanctions

Another approach to sanctions is to withdraw a benefit from being a member of the international organization. Surveying treaty practice as of the early 1990s, Abram and Antonia Chayes concluded that "[a]lthough many regulatory treaties contain membership sanctions that limit or deny privileges of membership for failure to comply with the provisions of the treaty, they are only rarely invoked, and almost invariably in support of broad foreign policy aims rather than simply for the enforcement of international legal obligations."[295] Among the membership benefits that can be withdrawn are the right to vote and the ability to obtain financial or technical assistance.

International organizations can withdraw a right to vote for violating the norms of the organization. In the International Monetary Fund, a government that persists in failing to fulfill its obligations can have its voting rights suspended.[296] The (Chicago) Convention on International Civil Aviation also provides for a loss of vote.[297] This can occur through dispute resolution carried out by the Council of the International Civil Aviation Organization. In over fifty-five years of practice, this sanction has never been applied.[298]

Governments violating a treaty may risk losing financial or technical assistance. For example, under the Montreal Protocol for the protection of the ozone layer a process to judge noncompliance can lead to a suspension of "rights and privileges," such as benefits from the financial mechanism.[299] To date, several countries have been reviewed, but no privileges have been suspended.[300] In 1999 the ILO Conference barred Myanmar from receiving any further technical assistance until that government takes action to comply with the Forced Labour Convention.[301]

Disenfranchising governments or withdrawing financial or technical assistance would be useless in the WTO because votes are rare and very little assistance is delivered. Instead, commentators have suggested another membership sanction—namely, making a scofflaw country ineligible to invoke WTO dispute settlement. Providing this remedy would require

[293] Kimberly Ann Elliott, *Fin(d)ing Our Way on Trade and Labor Standards?* INT'L ECON. POL'Y BRIEFS, Apr. 2001, *at* <http://www.iie.com>.

[294] Marco C. E. J. Bronckers, *More Power to the WTO?* 4 J. INT'L ECON. L. 41, 62 (2001).

[295] CHAYES & CHAYES, *supra* note 95, at 32; *see also id.* at 81.

[296] Articles of Agreement of the International Monetary Fund, July 22, 1944, and *as amended*, Art. XXVI §2, *at* <http://www.imf.org/external/pubs/ft/aa/index.htm>; J. Gold, *The IMF Invents New Penalties*, *in* TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS, *supra* note 60, at 127, 138–43.

[297] Convention on International Civil Aviation, Dec. 7, 1944, Arts. 84, 88, TIAS No. 1591, 15 UNTS 295.

[298] Correspondence with John V. Augustin, Senior Legal Officer, ICAO (Jan. 15, 2001).

[299] Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, *as adjusted and/or amended*, Arts. 8, 10, 1522 UNTS 293; Decisions of the Meeting of the Parties Regarding the Non-Compliance Procedure and Decisions of the Implementation Committee, *in* UNEP, HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 153–75 (2000) [hereinafter UNEP, HANDBOOK], *at* <http://www.unep.ch/ozone/Handbook2000.shtml>; Karl Zemanek, *New Trends in the Enforcement of* erga omnes *Obligations*, 2000 MAX PLANCK Y.B. UN L. 1, 16, 48.

[300] UNEP, HANDBOOK, *supra* note 299, at 153–75, 255–59; David G. Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147, 166–70 (1999).

[301] International Labour Conference, 87th Sess., Resolution on the Widespread Use of Forced Labour in Myanmar (June 1999), *at* <http://www.ilo.org>; 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.

a change in the DSU. In April 2001, a staff paper of the Office of the U.S. Trade Representative suggested that in future free trade agreements, a government failing to pay a fine might forfeit its right to initiate a panel proceeding.[302]

International Mobilization

A softer approach for promoting compliance is to mobilize a broad campaign against the scofflaw government. The ILO began an important experiment with this technique in 2000 through a resolution criticizing Myanmar.[303] The ILO Conference called on governments, employers, and workers to review their relations with Myanmar and to undertake "appropriate measures" to ensure that Myanmar could not take advantage of such relations to perpetuate forced labor.[304] Another action was to invite the ILO director-general to call on the relevant bodies of other international organizations to reconsider any cooperation with Myanmar. In still another action, the ILO Conference invited the director-general to request that the UN Economic and Social Council place the item on its agenda in July 2001.

Obviously, the flouting of ILO obligations by Myanmar is much more reprehensible than the flouting of WTO obligations by the European Union. Thus, the Myanmar episode constitutes a good test of whether one international organization can rally governments, international organizations, and private individuals to take actions against the violation of a fundamental human rights norm. So far, no government has imposed additional sanctions against Myanmar.[305]

Managing a Compliance Process

In their study of compliance with international regulatory instruments, Abram and Antonia Chayes conclude that "[c]oercive sanctions are more infeasible for everyday treaty enforcement than as a response to crisis. Treaties with teeth are a will-o'-the-wisp."[306] They explain that compliance, in contrast to sanctions, is promoted through managerial processes that utilize a "dialectic" of norm assent, transparency of information, reporting, monitoring, capacity building, and review procedures.[307] The authors also point to the potential usefulness of participation by nongovernmental organizations (NGOs) in the compliance process.[308]

The insight that national compliance is promoted through softer approaches has been reached by analysts looking at many different regimes, such as those on human rights and the environment.[309] As Richard N. Cooper advises: "If we want others to give the same weight

[302] *Draft USTR Paper on Monetary Fines*, INSIDE U.S. TRADE, Apr. 27, 2001, at 19–21.

[303] *See* Aaron Bernstein, *Labor Standards with Teeth?* BUS. WEEK, June 19, 2000, at 14; Yasushi Fujii, *ILO Takes First Step in Implementing Myanmar Sanctions*, Japan Econ. Newswire, Dec. 8, 2000, *at* LEXIS, News Library, Curnws File; text at note 59 *supra*.

[304] International Labour Conference, *supra* note 59.

[305] Frances Williams & Edward Alden, *Forced Labour in Burma Tests ILO's Will to Uphold Global Standards*, FIN. TIMES, Mar. 27, 2001, at 10.

[306] CHAYES & CHAYES, *supra* note 95, at 67.

[307] *Id.* at 28, 109, 230 (managerial process), 112 (norm dialectic), 135 (transparency), 154 (reporting), 174 (monitoring), 229 (review procedures).

[308] *Id.*, ch. 11.

[309] *See, e.g.*, INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas, Robert O. Keohane, & Marc A. Levy eds., 1993); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 1999); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997); *see also* Richard Blackhurst & Arvind Subramanian, *Promoting Multilateral Cooperation on the Environment*, *in* THE GREENING OF WORLD TRADE ISSUES 247, 262 (Kym Anderson & Richard Blackhurst eds., 1992) (noting that no multilateral environmental agreements contain trade sanctions and explaining that sanctions affect unrelated products); Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AJIL 623, 643–47 (2000) (discussing the advantages of the noncompliance mechanism over dispute settlement); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION 95, 114 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (stating that, "[u]ltimately, GATT

to diverse human values as we do, we must persuade them, not coerce them, to shift the relative weights they choose."[310] Rather than coercing governments, international treaty systems tend to operate 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.

In a study of the implementation of international environmental commitments, David Victor, Kal Raustiala, and Eugene Skolnikoff analyze the features of a "system for implementation review."[311] The authors document use of the managerial approach to compliance, but also some use of formal enforcement.[312] One overall conclusion is that a "wide array" of responses is needed to address failures in implementation.[313]

The WTO/DSU employs both the managerial approach and the possibility of coercive enforcement, but the DSU puts too much weight on coercion. As Weiss suggests, it is time for the WTO to strengthen its "culture of compliance."[314] The "sunshine" strategy used in environmental agreements could prove fruitful for the WTO. The sunshine strategy relies on the "reputation" factor to induce states to comply.[315] Sunshine methods utilize NGOs, expert communities, corporate actors, individuals, and, of course, states to promote compliance with international obligations.[316]

The use of trade sanctions in the WTO is based on the assumption that *external commercial* pressure will lead to compliance. While that may sometimes work, it neglects a wide array of opportunities to generate *internal political* pressure for reform. To be sure, the idea behind the hit list is that the threat of trade sanctions will catalyze internal opposition to the obstinacy of the target country's government. But motivation through fear is hardly the most inspirational way for democratic societies to influence each other.[317]

Even without sanctions, the WTO has a comparatively sophisticated system for implementation review. Reports of panels and the Appellate Body are made public at the same time they are given to all WTO member governments. Within thirty days after the DSB adopts a report, the defending government must "inform the DSB of its intentions in respect of implementation."[318] In *all* instances so far, the defending government has affirmed the intention to comply.[319] The DSB keeps national implementation under "surveillance" and on its agenda until the dispute is resolved.[320] Should a disagreement arise as to whether compliance has been effected, a panel can be appointed to issue a judgment.[321] That report is also quickly made public on the WTO Web site.

law works because governments want it to work, not because they are bullied into compliance by trade sanctions.") (footnote omitted).

[310] Richard N. Cooper, *Trade and the Environment*, 5 ENV'T & DEV. ECON. 501, 501 (2000).

[311] THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 47 (David G. Victor, Kal Raustiala, & Eugene B. Skolnikoff eds., 1998).

[312] *Id.* at 683.

[313] *Id.* at 694.

[314] *See* text at note 270 *supra*.

[315] Weiss, *supra* note 266, at 459–60.

[316] *Id.* at 460.

[317] *See* Rambod Behboodi, *Legal Reasoning and the International Law of Trade—The First Steps of the Appellate Body of the WTO*, J. WORLD TRADE, Aug. 1998, at 55, 65 (noting that the binding force of international law must reside in something other than the threat of force or economic sanction).

[318] DSU Art. 21.3.

[319] *See Overview of the State-of-Play of WTO Disputes* (May 2, 2001), *at* <http://www.wto.org>; *see also* CHAYES & CHAYES, *supra* note 95, at 112 ("The essence of the international legal process is a dialectic that, by emphasizing assent at every stage, operates to generate pressure for compliance.").

[320] DSU Arts. 21.6, 22.8. One scholar and practitioner calls this "continuous finger-pointing against recalcitrant WTO members." Mavroidis, *supra* note 172, at 793. The language of DSU Article 21.6 was drawn from the 1989 improvements to the GATT dispute settlement system. Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61, 67.

[321] DSU Art. 21.5.

The prompt release and easy availability of WTO panel reports facilitates a sunshine strategy, but still more transparency is needed. DSB meetings should be open to the public. Right now, multilateral review of national implementation has only limited utility because the electorates to which democratic governments are accountable are left out of the process. When he addressed the American Society of International Law in 1911, President William Howard Taft declared, "International law has no sanction except in the conscience of nations, and nations have not anywhere near the conscience that individuals have."[322] Yet when the DSB reviews the status of each dispute, only the "nations" are in the room. If DSB meetings were open to concerned individuals, then more pressure could be brought to bear on governments that fail to comply.

In addition to the current internally focused DSB procedures, the WTO should experiment with ways to link its compliance processes with domestic politics. One tool would be to hold postadjudication public hearings in each dispute, and invite testimony from injured private actors in the complaining country and from reformers in the defending country. If the defending government justifies the maintenance of its WTO-illegal policy on dubious economic or scientific grounds, those excuses could be controverted in the public hearing.[323] Another tool would be to encourage a dialogue between NGOs and the business community in the complaining country and similar groups in the defending country. As Rosalyn Higgins pointed out several years ago, the ILO worked well because it developed a "home-directed" mobilization of shame through its tripartite system.[324]

WTO experimentation is surely warranted, yet one can imagine ways in which public shaming techniques could backfire.[325] The public in the target country might get defensive about the WTO oversight. NGOs in both disputing countries might convince each other that the underlying WTO rule is faulty and that the defending country should be allowed to continue its WTO violation. Nevertheless, these risks are worth bearing because ultimately the WTO cannot succeed without public support earned through robust debate.

The WTO can also explore ways to facilitate national legislative action when that is needed to effectuate compliance. After a WTO decision is handed down, a losing defending government will need to face down domestic vested interests that are likely to oppose change and glorify "sovereignty." To pave the way for new legislation, the WTO could encourage governments to embed a fast-track process in domestic law. For example, a government might set up a special commission to draft a compliance plan that would be voted on within a prescribed period. By committing themselves to such a process in advance, WTO members might elicit the participation of other members.

The idea of a special procedure for implementing WTO decisions is not new. It already appears in national law. For example, U.S. law restricts the exports of unprocessed timber from certain lands but authorizes the president to suspend this restriction if the WTO rules against it.[326] The Uruguay Round Agreements Act provides special procedures for implementing WTO recommendations finding fault with determinations by the U.S. International Trade Commission or the Department of Commerce.[327] In implementing the GATT's Tokyo Round in 1979, the U.S. Congress provided a fast track for changing federal law to implement

[322] *Response of President Taft*, 5 ASIL PROC. 340, 341 (1911).

[323] *See* Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 22 (2000) (noting the civilizing effect of public discourse).

[324] Rosalyn Higgins, Remarks, *in* THE EFFECTIVENESS OF INTERNATIONAL DECISIONS, *supra* note 60, at 447.

[325] *See* Gary H. Perlow, *The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?* 75 AJIL 93, 124 (1981) (positing that too much publicity can have an effect contrary to that intended).

[326] 19 U.S.C. §620c(g) (1994).

[327] 19 U.S.C. §3538 (1994). For a discussion of some of these provisions, see David Palmeter, *United States Implementation of the Uruguay Round Antidumping Code*, J. WORLD TRADE, June 1995, at 39, 74–76.

recommendations under those agreements.[328] Hence, the novelty of the suggestion above is not a fast-track process per se but, rather, getting the WTO to encourage governments to institute such a process.

Requiring Compensation

The DSU expresses a preference for compensation over suspension of concessions but notes that compensation is "voluntary."[329] Compensation in this context means action by the violator government to reduce trade barriers. It does not refer to financial compensation (although that outcome is not precluded).[330] Trade compensation in the WTO would have to be given consistently with the most-favored-nation rule.[331] Thus, one "problem" with compensation is that in lowering tariffs for the benefit of the complaining country, the defending government will also provide greater market access to other countries, and the quantum of liberalization will probably be higher than the "nullification or impairment."

Many trade law analysts favor compensation. Pauwelyn has suggested that the DSU be changed to make compensation compulsory.[332] Gary Horlick has urged that the winning plaintiff government be allowed to choose the products for compensation.[333] Allan Rosas has pointed to the possibility of using arbitration to determine the appropriate compensation.[334]

So far, however, no one has devised a way to make the defending government consummate the compensation by lowering its tariffs. As noted above, one of the virtues of WTO sanctions is that they can be implemented unilaterally. Thus, while compensation is a much better outcome than a trade sanction, it is not interchangeable from the perspective of a complaining government.

V. CONCLUSION

This article makes three main points. First, the WTO is using the possibility of trade sanctions to enforce compliance with WTO obligations. This practice clashes with traditional GATT doctrine, which was that this trade remedy is used to rebalance concessions, not to sanction. Second, the availability of a trade sanction offers some advantages to the WTO. But trade sanctions also incur many disadvantages, and these outweigh the advantages. Among the most serious problems are that trade sanctions confuse the public about the benefits of imports, and that sanctions give import-competing industries a chance to solicit new trade barriers. Third, the WTO needs to design better ways to get governments to follow WTO rules. This exercise can be informed by studying the practices of other international organizations that promote compliance without trade sanctions. The experience of the ILO is particularly noteworthy because it has made no use of the economic sanction available in its compliance procedure.

[328] 19 U.S.C. §2504(c)(1), (4) (1994).

[329] DSU Arts. 3.8, 22.1, 22.2.

[330] Compensation is not defined in DSU Art. 22.1. Monetary compensation has never been employed, although the idea was debated in the GATT in the early 1960s. Brazil and Uruguay proposed that panels be given authority to propose an "indemnity of a financial character" in complaints by developing countries against developed countries. DAM, *supra* note 84, at 368 (quoting Report of the Ad Hoc Group on Legal Amendments to the General Agreement, *reprinted in* GATT, Expansion of Trade of the Developing Countries 112, 119 (Dec. 1966)). Many objections were raised to this proposal, including that "it was inconceivable that national legislatures would be willing to vote budgetary provisions for this purpose." *Id.* at 369 (quoting Report of the Ad Hoc Group, *supra*, at 115). Recently, Jagdish Bhagwati has proposed that the defending country provide cash compensation to the complaining country, which could then be donated to the exporting industry. Bhagwati, *supra* note 2, at 28.

[331] Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AJIL 477, 486 n.14 (1994).

[332] Pauwelyn, *supra* note 1, at 345–46.

[333] Gary N. Horlick, Problems with the Compliance Structure of the WTO Dispute Resolution Process, Paper Prepared for Conference at the University of Minnesota Law School (Sept. 15–16, 2000).

[334] Rosas, *supra* note 167, at 144.

Rethinking WTO trade sanctions is vital because this tool is destabilizing international governance. Like the bright light that attracts insects on a warm night, the lure of WTO sanctions has enticed numerous activists to the WTO to try to add their issues for trade enforcement. This influx is harming the WTO by distracting attention from the task of economic liberalization. Furthermore, these developments have an unhealthy effect on other international organizations, which are made to feel less important than the WTO because they have not been granted the power to impose sanctions.

Pulling out the WTO's teeth is not going to happen until governments see workable alternatives. Right now, the large industrial countries are comfortable with tariff sanctions because they can threaten them against each other and against developing countries. Now that arbitrators have affirmed that the TRIPS Agreement can be used as a sanction, many developing countries might believe that sanctions can work for them, too. In the private sector and in civic society, some opposition to WTO sanctions has developed over the past two years. Yet the predominant view remains prosanction. Business groups want WTO rules to be "enforceable." Among NGOs, there is a vein of support for using trade sanctions to enforce other areas of international law.

To achieve better compliance with international trade law, the WTO should explore ways to promote internal domestic change. The WTO may have the best dispute settlement system of any international organization, but it does not have the best compliance system. The current WTO approach is too coercive and state-centric. Other international organizations have grappled with compliance problems for many years and have developed a number of positive instruments like publicity, education, capacity building, and stakeholder participation. These techniques are slowly being adopted by the WTO. Yet much more can be done to use public opinion as a means to influence scofflaw governments.[335] Rather than the low road of economic coercion, the WTO should take the high road of building public support for international trade law.

[335] W. Michael Reisman, *Sanctions and Enforcement*, *in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 381, 399, 419 (1981) (explaining that the activation of world public opinion can be a sanctioning technique and noting that private groups can be influential as part of an international enforcement program).