Although often described as one of the most important features of the World Trade Organization (WTO) dispute settlement system, the possibility of authorizing a trade sanction against a scofflaw member government is a mixed blessing. On the one hand, it reifies the WTO rules and promotes respect for them. On the other hand, however, it undermines the principle of free trade, and provokes “sanction-envy” in other regimes. Undoubtedly, the implanting of “teeth” by the WTO negotiators was one of the key achievements of the Uruguay Round, and a very significant step in the evolution of international economic law. But after five and one-half years experience, WTO observers are right to reconsider whether making available retaliatory trade measures was such a good idea. The purpose of this paper is to provide a preliminary assessment of WTO trade sanctions.

To be sure, the WTO does not employ the word “sanction.” What the Dispute Settlement Understanding (DSU) of 1994 says is that if a government fails to bring a measure found to be inconsistent with a WTO rule into compliance, it shall enter into negotiations with the government invoking dispute settlement, but that if no mutually acceptable compensation is agreed upon, the plaintiff government may seek authorization from the WTO Dispute Settlement Body (DSB) “to suspend the application to the Member concerned of concessions or other obligations under the
covered agreements.”¹ This language was based on the provision in the General Agreement on Tariffs and Trade (GATT) of 1947 which provided that the Contracting Parties may give a ruling in a complaint regarding the failure of a party to carry out its obligations, and 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 as they determine to be appropriate in the circumstances.”²

Yet even without using the word, the WTO provides a sanction. As will be discussed below, the purpose of the trade action is to induce compliance, and such an action is properly described as a sanction. With the advent of the WTO, the trade policy community has recognized that the WTO system is quite different than the GATT system, and has increasingly employed the term “sanction” to describe what the DSB authorizes in Article 22.

Such authorizations do not occur often. Out of the 31 disputes in which a defendant government was judged in violation, only two have led to trade sanctions.³ The two cases involved the European Communities as the defendant -- the bananas and meat hormones disputes.

The refusal of the European Communities to comply following those sanctions has led to two critical perspectives on the DSU. One camp says that the sanctions have failed because the teeth are not sharp enough. In the United States, proponents of this view in the U.S. Congress recently succeeded in enacting a carousel provision to rotate the targets for trade sanctions. The other camp says that the bananas and hormones episodes demonstrate the futility and/or inefficiency of trade sanctions. An exemplification of this view in the United States was the Meltzer Commission which stated in March 2000 that “instead of retaliation, countries guilty of
illegal trade practices should pay an annual fine equal to the value of the damages assessed by the
panel or provide equivalent trade liberalization.”4

A less critical, and probably majority, perspective is that it is too soon to judge the success
of WTO sanctions. The bananas and hormones episodes are far from over. Moreover, in at least a
few cases (e.g., Australian salmon), the threat of WTO-authorized sanctions was probably
instrumental in securing compliance by the defendant country.5

But while it may be too soon to issue a conclusive judgment, it is not too soon to begin an
assessment of the experience of WTO sanctions. Such an assessment should center on the impact
of sanctions on achieving the goals of the trading system. Yet it should also go beyond that to
consider how such “hard” enforcement affects the public opinion about the WTO and trade itself.
Without the trade sanctions, surely no one would call the WTO the “World Takeover
Organization.” A balanced assessment should also consider the impact of WTO sanctions on other
international regimes that may want to mimic the WTO in introducing trade sanctions.

This paper attempts a preliminary assessment along these lines. It proceeds in four parts.
Part I discusses the role of trade sanctions in the trade regime. Part II presents the advantages and
disadvantages of the current use of trade sanctions in WTO dispute settlement. Part III explores
alternatives to trade sanctions, including “softer” compliance measures that one day may replace
trade sanctions. Part IV offers a recommendation and concludes.

I. Role of Trade Sanctions in the Trade Regime

This Part provides a brief history of the sanctioning idea in trade policy and discusses the
provisions in GATT and the WTO. It is contended here that the GATT concept of rebalancing
concessions was transformed by the WTO into a trade sanction. It is true, of course, that the
drafters of GATT recognized the sanction-like quality of GATT-authorized trade retorsion. But the sanction paradigm was resisted during the GATT years. Only after the WTO became operational did it become common to refer to WTO-authorized trade measures as a sanction.

*Background*

The idea of retaliation is an old one. The most famous injunction was the one given to Moses by the Old Testament God who said: “If anyone injures his neighbor, whatever he has done must be done to him: fracture for fracture, eye for eye, tooth for tooth.”6 This sentiment has continuing appeal to human emotion, but it is not a general principle of law.

Trade retaliation goes back many centuries, and was institutionalized in U.S. policy as early as the Antidumping Act of 1916. This provision, still in force, provides that “Whenever 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.7 One might call this the “tit-for-tat” provision.

The idea of a multilaterally-authorized trade sanction was first institutionalized in the Constitution of the International Labour Organization (ILO), as set out in the Treaty of Versailles in 1919.8 These rules are noteworthy because of their influence on subsequent international dispute mechanisms. The ILO rules provided that a government (or non-government delegate!) could initiate a complaint that a government was not observing an ILO convention that it had ratified.9 The ILO Governing Body would then have the option of appointing a Commission of Inquiry from rosters nominated by the governments.10 The Commission was to investigate the matter and make findings of fact and then offer recommendations of steps which should be taken to address the
complaint, and the time within which they should be taken. The Commission could also indicate “measures of an economic character against a defaulting Government which it considers to be appropriate . . . .” Any government could then appeal the matter to the Permanent International Court of Justice which was to make the final decision on the merits and on measures of an economic character that other governments would be justified in taking.

This elegant procedure was never fully utilized. No economic measures were ever recommended. It was not until 81 years later that the ILO Conference, pursuant to an amended constitutional provision, authorized measures against a government for refusing to adhere to a ratified ILO Convention. This occurred in June 2000 in the series of non-economic measures taken against Myanmar for continued failure to comply with the ILO Forced Labor Convention (No. 29).

The idea of an international trade tribunal also goes back to 1919. Huston Thompson, an American official, proposed to President Wilson that governments establish such a tribunal in the postwar treaty. That did not happen.

Twenty years later, Thompson gave an interesting talk at the American Society of International Law in which he elaborated on his ideas for a Tribunal that would review international complaints about quotas, price fixing, and theft of trademarks. Thompson proposed that the Tribunal issue findings and conclusions, send copies to all of the nations interested, and “give the widest possible publicity to the same.” He did not recommend any coercive measures.

No general multilateral trade treaty included dispute settlement until the advent of the GATT. But in the first half of the 20th century, some multilateral commodity treaties did so. For example, the Sugar Agreement of 1937 provided that the Sugar Council could hear complaints about a party’s compliance and recommend measures to other parties “in view of the
infringement.” If the Council decided that other parties should prohibit the importation of sugar from the infringing country, the Agreement provided that this “shall not be deemed to be contrary to any most-favoured-nation rights which the offending Government may enjoy.”

Although the League of Nations could authorize economic sanctions against countries that resorted to war, and although the United Nations Security Council can call for military and economic sanctions against a country guilty of a breach of peace, such sanctions were not often employed between 1920 and 1990. While it is possible for the Security Council to act to enforce a decision of the International Court of Justice (ICJ), the Security Council typically takes action independently of judicial decisions. The authors of GATT (1947) recognized the potential conflict between U.N.-directed trade sanctions and GATT rules and therefore provided an exception for trade measures taken in pursuance of obligations under the U.N. Charter for the maintenance of peace and security. Thus for example, the recent trade U.N. sanctions imposed on Sierra Leone regarding “blood diamonds” do not violate the WTO.

The GATT System

Because the drafters of the Charter for the International Trade Organization (ITO) contemplated an entire chapter on the “Settlement of Differences,” the dispute settlement provisions in the GATT are bare bones. The remedies in the GATT and the ITO Charter were similar however. In the GATT, the Contracting Parties may authorize a complaining country to suspend the application of such concessions or other obligations as the Contracting Parties determine to be appropriate. In the ITO Charter, the Conference had the authority to release a government affected from obligations (or previously granted concessions) to any other government “to the extent and upon such conditions as it considers appropriate and compensatory, having
regard to the benefit which has been nullified or impaired.” One difference is that the ITO provision specifies an action that is “appropriate and compensatory,” while the GATT uses the term “appropriate,” but not the term “compensatory.” Neither agreement uses the terms “retaliation” or “sanction.”

In his study of the GATT and ITO preparatory work, John Jackson concludes that “it was clear that the draftsmen had in mind that [GATT] Article XXIII would play an important role in obtaining compliance with the GATT obligations.” He also points out that there were differing views on how far Article XXIII should go: that is, whether the suspension provision should be limited to the equivalence of the damage done, or whether it should authorize action in the nature of a sanction. For instance, as the Canadian Government report on the Havana Conference stated, the Arab League countries opposed recourse to sanctions.

In his study of the preparatory work, Robert Hudec points out that the issue of compensation versus sanctions proved to be controversial, and so it was sent to a working party; the working party agreed that even in the case of a legal violation, the remedy should be compensatory and no more. Yet as Hudec points out, the working party’s language was not included in the ITO or its Annex. In Hudec’s view, the drafters did not want to say that the offending country owed no more than compensation because that would have suggested that the ITO obligations were merely a duty to pay for damage done, rather than a duty to adhere to the rules.

Clair Wilcox, a key U.S. drafter, wrote a book about the Charter in 1949, which well captured the dichotomous role of the ITO dispute provisions. Wilcox explained that releasing the complaining government from its obligations is regarded “as a method of restoring a balance of benefits and obligations . . . . It is nowhere described as a penalty to be imposed on members who may violate their obligations or as a sanction to insure that these obligations will be observed.”
But Wilcox does not stop there. He goes on to say: “But even though it is not so regarded, it will operate in fact as a sanction and a penalty.”

It is not clear when the term “retaliation” began to be widely used to describe a GATT Article XXIII action, but the use of this term in Kenneth Dam’s book on the GATT may have popularized the concept as a GATT principle. Dam explained that the act of “retaliation” constitutes “the heart of the GATT enforcement system.” The term retaliation connotes more than a rebalancing of negotiated concessions, and thus contributed to the idea of GATT Article XXIII as a sanction.

Nevertheless, throughout the GATT years, the dominant portrayal of GATT Article XXIII:2 was to re-equilibrate the balance of concessions. One reason why the rebalancing paradigm lasted so long was that no GATT-authorized trade action ever occurred. The Contracting Parties authorized an Article XXIII suspension only once, in 1952, and the winning government (The Netherlands) did not impose the authorized quota. So Wilcox’s observation never ripened.

The WTO System

The GATT dispute settlement system was completely renovated in the WTO. Defendant governments lost their power to block the formation of dispute panels and to block the adoption of panel reports. The establishment of the Appellate Body made the system more judicial and therefore gave it more of a quasi-obligatory force. At Marrakesh, the trade ministers commended themselves for “the stronger and clearer legal framework they have adopted for the conduct of world trade, including a more effective and reliable dispute settlement mechanism.”

The discretion inherent in the GATT was eliminated in the WTO. The GATT said that the Contracting Parties “may” authorize suspension of concessions (1) if the circumstances were
serious enough and (2) as they determine to be appropriate. The DSU states that after certain procedures have elapsed, the DSB “shall grant authorization to suspend concessions” (unless there is a consensus to reject the request). In addition to being mandatory, the new procedures remove judicial discretion (within the trading system) to resist trade responses in inappropriate or non-serious situations.

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

The tenor of these provisions is that suspension of concessions is now an instrument of enforcement. The GATT provided for the same retaliatory instrument, but the context was different. It was possible in the GATT to view suspension of concessions as simply a bilateral re-equilibration of tariffs and quotas in the absence of a satisfactory adjustment effected bilaterally. But it is not possible to adhere to that simple picture in the WTO. DSU suspensions have a policy purpose, to induce compliance.

The idea that the DSU authorizes trade measures to induce compliance has been articulated in recent WTO decisions. For example, the Article 22.6 arbitrators in EC Bananas stated that “We agree with the United States that this temporary nature indicates that it is the purpose of countermeasures to induce compliance.” When trade measures (on unrelated products) are used against a country to induce its compliance with international obligations, that is properly called a sanction. This author knows of no specific authority on this point; it is just a matter of usage. (In general international law, the term “countermeasure” is used rather than sanction.) It is
interesting to note that the Agreement on Subsidies and Countervailing Measures employs the term “countermeasures” to describe the action that can be authorized by the DSB when a government fails to comply with a panel report.42

The nature of WTO obligations -- far broader than GATT’s -- is another reason why it is very difficult to maintain the view that DSU Article 22 measures are merely a rebalancing of concessions when the bargained-for terms of the contract are not fulfilled. This point can be made for both bananas and hormones, but it is clearer in hormones. In that dispute, the EU was regulating a risk without basing it on a risk assessment. This measure violated the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the panel was able to quantify the level of “nullification or impairment” to serve as the basis for the U.S. response.43 But the exact nature of SPS obligations is far from evident by looking at the text. They have been spelled out through a series of important decisions by the Appellate Body. SPS disciplines will continue to be clarified by the WTO judiciary and the WTO Committee on SPS. Because the law itself is so evolutionary, it is hard to view enforcing that law merely as maintaining the negotiated balance of concessions or restoring the Uruguay Round contract.

Another problem with the idea of rebalancing via suspensions of concessions is that in the two cases so far, the U.S. government did not technically suspend concessions, and the WTO arbitrators overlooked that point.44 The U.S. retaliation imposed 100 percent tariffs (intended to be prohibitive) on an array of goods. Yet none of the Hawley-Smoot tariffs on these goods even approached 100 percent, and so the U.S. countermeasures were not technically a withdrawal of a trade concession.45 Of course, DSU Article 22.6 also permits the suspension of “other obligations,” and so one can justify the U.S. countermeasures as a suspension of GATT Articles I and II. But the fact remains that the U.S. government imposed some discriminatory tariffs on targeted EU
countries much higher than the pre-GATT U.S. tariffs on those products. So it looks much more like a sanction than an undoing of previous trade concessions to EU countries.

In contemporary discourse about the WTO dispute settlement system, analysts commonly refer to DSU Article 22 measures as sanctions. Consider a few examples:

The much more stringent dispute settlement procedure of the WTO ensures compliance -- that is, withdrawal of the measure -- in the case of a positive finding or sanctions for noncompliance . . . . *Sylvia Ostry, The Post-Cold War Trading System, 1997.*

[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.*

The ILO’s rules operate like the rules of Multilateral Environmental Agreements (MEAs). . . . This is in sharp contrast to the WTO, where the failure of one country to follow the mutually-agreed-upon rules can be challenged by another WTO Member country in WTO dispute panels, which are empowered to authorize trade sanctions for violations. *Lori Wallach and Michelle Sforza, Whose Trade Organization?, 1999.*

Indeed, 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. *Secretariat of the World Trade Organization, 1999.*

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.*

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

The economic cost of the United States failing to comply with the [FSC] Panel ruling could be considerable. The DSB would probably permit the EC to retaliate by imposing punitive tariffs on US imports equivalent to the sheltered earnings, just as the US imposed sanctions worth US $308 million on the EU for not complying with WTO rulings against its banana regime and its ban on hormone-treated beef. *Oliver Stehmann, 2000.*

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.*

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.*
Perhaps all these commentators get it wrong. But I would submit that this ordinary usage reflects
the transformation between GATT Article XXIII and DSU Article 22.

Many commentators view the possibility of sanctions as a very positive feature of the WTO
in making its rules “enforceable.” With a robust dispute settlement system and potential recourse
to sanctions, the WTO is portrayed as an exceptional international organization that comes closer
than most to propounding real law. Whatever the truth to that observation, it seems clear that
Uruguay Round negotiators were able to obtain deeper governmental commitments than they would
have without the move to make GATT-authorized trade measures automatic.

Let me recap the discussion so far: What is being contended here is that although the policy
instrument of suspension of concessions remains constant from the GATT to the WTO, there has
been a shift in the dualistic quality of this act. In the GATT, responsive trade measures were
conceived primarily as rebalancing (although analysts recognized the latent sanction). In the WTO,
the trade measure is conceived primarily as a sanction, while the rebalancing idea also remains
strong.

As economists have long observed, one instrument cannot serve two distinct purposes.
Thus, one would not expect WTO-sponsored trade measures to serve equally well the purposes of
rebalancing and inducing compliance. The fact that retaliation is limited in the DSU to the level of
“nullification or impairment” suggests that it is unlikely to be effective at inducing compliance. It
is ironic then that the trading system has embraced the idea of a compliance sanction even though it
lacks authority to authorize actions tough enough to accomplish the job.

The mismatch between instrument and purpose gets even more complex upon considering
two other possible purposes for Article 22 trade measures. One refocuses attention on the idea of
“compensation,” but in the contract-law-sense of making the injured party whole. If that is the yardstick for Article 22 measures, then they will be inadequate unless they provide for backward-looking reparations or restitution. The other possible purpose is to deter WTO violations. Because they are limited to undoing the “nullification or impairment,” Article 22 trade measures are inadequate to deter misbehavior.\(^{57}\) Thus, when governments obey international trade rules, fear of Article 22 teeth is probably not a big explanatory factor.

In summary, although the form of countermeasures remained substantially the same in the GATT and the WTO, the motivation behind the measures changed. Wilcox’s prediction that rebalancing measures would be perceived as sanctions seems on the mark fifty years later. Ironically, the WTO has now achieved a sanction-based dispute settlement system similar to the one intended for the ILO in 1919, but never embraced by the ILO and, indeed, rejected as being counterproductive and coercive. In Part II of this paper, we will consider the question of whether trade sanctions are a good fit for the WTO.

### II. Assessing Trade Sanctions as a WTO Instrument

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

#### A. Advantages of WTO Sanctions
This section will list seven distinct advantages in making trade sanctions available to the plaintiff government when a defendant government fails to comply with a DSU recommendation. Advantages 1-2 are to the parties to the dispute. Advantages 5-7 are advantages to the WTO. It should be noted that Advantages 1-3 occur as a result of the DSU trade action regardless of whether it is perceived as rebalancing or as a sanction.

1. **Venting and Closure for Plaintiff.** Perhaps the most important purpose served by recourse to trade sanctions is that the plaintiff government can signal its outrage, placate the injured domestic constituency, and close the chapter so that it can move on.\(^58\) If the bananas and hormones retaliation is viewed from this perspective, the trade sanctions may seem sensible. The U.S. government made it clear to the EU and to the U.S. public that it was taking strong action against the EU; it gave the domestic industry some vindication; and it defused the issues to some extent.

The problem with this advantage is that the closure isn’t staying closed. The EU gave no thought to counter-retaliation and so to that extent, the U.S. action could be final. But DSU Article 22.1 states that suspension is a “temporary” measure and therefore the question of EU compliance will always be an issue for the U.S. Trade Representative (USTR). Moreover, as the recent enactment of the carousel retaliation provision shows, the affected domestic interests are not satisfied with the current level of retaliation. So while venting and closure could be an advantage, the evidence suggests it may only be a temporary one.

2. **Gaitsu for Defendant.** Being retaliated against can also be useful for the defendant government by giving it leverage at home to change the law. The phenomenon of foreign pressure to promote internal change is often called “gaitsu,” the Japanese term for it. This hypothesis
assumes that the government wants to comply with WTO rules but can’t because of domestic politics. The threat of sanctions changes the domestic political calculus, however, by catalyzing the forces who would be hurt by the retaliation and who therefore lobby for the required policy change.

This would be a clever technique if it worked. It hasn’t in bananas or hormones. Yet one can see evidence of it in a few cases such as U.S. gasoline, Australia salmon, and Canada periodicals.

3. **Safeguards.** A refusal to comply with a panel report and a consequent willingness to accept sanctions can be viewed as a form of flexibility or safeguard. The trading system has always recognized the need for a safety valve to let governments continue to protect seriously injured sectors (and to allow an affected country to respond with discriminatory trade measures unless it has been adequately compensated).59 If safeguards are available for protectionist purposes, then why not make them available for other political purposes?

Because of its state-centric orientation, the WTO pays no attention to democratic processes in member countries. WTO Members are obligated to comply with rules, but no thought is given to whether the Congress or Parliament of a Member will approve such action. Thus, it may well be that a dispute panel recommends that a WTO Member take action that its Congress simply will not approve. Indeed, a panel can dictate compliance action that would be a Constitutional violation for a country to comply with.

Given this potential disconnect between WTO obligations and the political ability of democratic governments to comply with them, perhaps there should be space in the WTO for “political safeguards” in instances where disputed measures are backed by strong public support. Hormones could be an example of this.60 No one denies that the European Commission would
have a difficult political chore in repealing the measure. But right now, the EU has no WTO-legal way to refuse meat produced with artificial hormones. (The Commission offered compensation to USTR, but this offer was rejected.61)

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

5. **Avoids Unilateralism.** Although the U.S. Section 301 law was criticized by many trade experts in the 1980s, Robert Hudec took the more nuanced position that Section 301 was justified disobedience given how dysfunctional the GATT dispute settlement system was.62 Hudec suggested that Section 301 could lead to systemic reforms, and indeed it did. The taming of USTR’s aggressive unilateralism might be viewed as a very positive development even if the trade results are the same. USTR had already retaliated against the European Communities on hormones in 1989 (which it withdrew in 1996) and so in assessing the WTO hormones retaliation, one cannot really compare it to inaction. If it is better that retaliatory actions be supervised rather than carried out unilaterally, then the availability of sanctions in the DSU can be viewed as an advantage.

Another way of expressing this advantage is that the DSU meets the requirements of Section 301 which, one way or the other, will be carried out by the hegemonic United States. If the DSU were rewritten to eliminate the possibility of trade sanctions, then international trade law would no longer be consistent with U.S. domestic law.
6. **Improves WTO Stature.** Giving the WTO teeth improves its stature among international organizations and engenders respect for it. Had the teeth not been implanted, few would have called the WTO the “powerful WTO” as it is routinely called today. The availability of trade sanctions may be a key factor in the high number of complaints that have been brought to the DSB. Several of these complaints have involved GATT rules which did not change in the Uruguay Round.

The corollary to this point is that if somehow the trade sanctions were surgically removed from the DSU, the WTO would suffer a loss of stature. This suggests that if sanctions are to be eliminated, they must first be replaced with an alternative that maintains respect for the WTO.

7. **Promotes Compliance.** In listing this Advantage last, I try to point out that the case for WTO sanctions should not rise or fall on whether it truly induces compliance. As noted earlier, in the two cases so far where sanctions were employed, no compliance ensued. But that is too limited an evaluation. The true test is whether the threat of WTO sanctions promotes compliance so that the sanctions do not have to be used. There is some evidence for a potent threat in the Australian Salmon and Leather disputes, where Australia took much of the action demanded by Canada and the United States in the face of impending sanctions.63

A conclusion that WTO sanctions do not induce compliance would be in line with the literature on multilateral trade sanctions which suggests that they often do not work.64 But WTO sanctions are not really multilateral (since only the plaintiff can retaliate) so it is not clear how much that literature applies. More importantly, multilateral sanctions are typically employed for
multiple objectives and used in very difficult circumstances, and so one should not expect a very high success rate from them.

**B. Disadvantages of WTO Sanctions**

This section will list 10 distinct disadvantages of WTO-authorized trade sanctions. Disadvantages 1-3 are to the parties to the dispute. Disadvantages 4-10 are disadvantages to the WTO. It should be noted that Disadvantages 2–7 and 9 occur as a result of the DSU trade action regardless of whether it is perceived as rebalancing or a sanction.

1. **Sanctions Don’t Work.** As noted above, sanctions have failed in the two instances where they were used. But both cases were against the EU -- an intractable target -- and both cases involved difficult, non-trade issues -- foreign policy in bananas and health in hormones. So those cases may lack predictive value.

   If the sanctions do not work, the common response will be to give them more bite. Instead of a 1:1 relationship between retaliation and “nullification or impairment,” one could imagine a punitive sanction with a higher ratio. The U.S. Congressional carousel is one step toward making sanctions more costly. The new legislation would rotate the carousel every six months. One could imagine it turning even faster. Another proposal is to multilateralize the sanction by allowing all WTO governments to impose Article 22 measures. Pauwelyn has suggested such a “collective” approach.\(^{65}\) It is interesting to note that GATT Article XXIII:2 might have provided for such a collective approach, but the DSU does not.\(^{66}\)
2. **No Relief to Injured Private Economic Actors.** 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.”\(^{67}\) Of course, the tariff category could be intentionally selected to be related and hence grant some protection. But that may be lead to a separate disadvantage (see Disadvantage 7 below).

The DSB has no requirement that the sanctioning country choose categories that will help the complaining private economic actors. Indeed the DSU (unlike some other WTO Agreements\(^{68}\)) completely ignores the complaining industry. One could imagine a requirement that any import duties collected in trade sanctions be paid to the complaining industry, but the DSU does not do that.

This author is not aware of any study of how much import relief was provided to livestock hormone users in the United States and Canada as a result of the hormones retaliation. A large portion of the products included in each government’s hormone retaliation list were animal products, but it is unclear to what extent they match the companies that wanted to export hormone-treated meat to the EU.\(^{69}\)

3. **The Teeth Bite Back.** Perhaps the biggest disadvantage of WTO sanctions is that they are badly aimed. In the bananas and hormones cases, the United States and Canada imposed high tariffs on EU exports which frustrates domestic users who suffer a loss of choice and probably have to pay higher prices for substitute products. It is true that some of these costs are simply transfers from domestic consumers to producers. But the sanctioning country does entail some overall efficiency losses, and could end up getting hurt as much as the target country (or even more).
This inherent problem with trade retaliation has long been noted. Perhaps the earliest analyst was Adam Smith in *The Wealth of Nations* who addressed the utility of unilateral “retaliation” to open foreign markets. Smith wrote that retaliation may be a good policy if it works to secure repeal of foreign barriers. But when “there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them.” In his landmark tariff study of 1921, T.E.G. Gregory pointed out that a retaliatory trade war causes losses among both parties.

Analysts continue to point out the self-defeating nature of trade retaliation. For example, in his discussion of the GATT, Dam explains that “it often becomes painfully obvious that no one gains by retaliation . . . .” Bernard Hoekman and Petros Mavroidis remark 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 . . . .”

This author is not aware of any study of the incidence of the U.S. retaliation in hormones and bananas. Such a study would have to look at the cost of securing replacements to the sanctioned products in the United States and on whether US meat exports were successfully diverted to other countries. At this point, it seems a reasonable supposition that the sanctions have led to significant costs to Americans. According to the U.S. Department of Commerce, the U.S. Government’s retaliation committee “makes every effort to minimize the harmful effects on U.S. businesses and consumers.”

The characterization of these WTO sanctions as a disadvantage is based on the assumption that USTR’s sanctions were intended to hurt Europeans, not Americans. But there is another philosophy of sanctions which suggests that the way to induce others to act is not to punish them,
but rather to punish oneself. The hunger strike is one well-known manifestation of that view. This idea originated in Ancient Ireland where the injured party inflicted further punishment on himself as a way of inducing the perpetrator to make amends for his misdeeds. (The injured party would “fast on” the injuring party.) So if USTR intended the banana and hormones sanctions to hurt Americans, Disadvantage 3 would be inoperative.

4. Sanctions Undermine the WTO and Free Trade. In approving trade sanctions for commercial reasons, the WTO undermines its own principles in favor of trade. Of course, this is not a complete repudiation since the WTO retains much of the mercantilist flavor of the GATT. Yet in endorsing trade sanctions, the WTO seems to suggest that the sanctioning government can improve its economy by imposing sanctions. Circumstances might be different if the WTO itself imposed the trade sanction by levying a small export tariff on all of the exports of a scofflaw nation (the collected duties to be used perhaps for technical assistance). But when the importing nation is voluntarily imposing the tariff, it is making a statement that such tariffs are welfare-enhancing.

Therefore, such sanctions lead to a conundrum: If the United States improved its welfare after USTR imposed the 100 percent tariffs in the bananas and hormones cases, then why should USTR wait for the WTO to authorize such actions? On the other hand, if the welfare benefits of the sanctions are dubious, then why engage in them? At the very least, the use of sanctions confuses the public as to whether tariffs are good or bad.

It should also be noted that international agencies do not generally transgress their own norms or counteract their own purpose. For example, the World Health Organization does not authorize one party to spread viruses to another. The World Intellectual Property Organization does not encourage compliance by threatening to engage in piracy.
Many commentators have pointed to the contradiction of having the WTO authorize trade sanctions. For example, the International Confederation of Free Trade Unions worries that the trading system “is threatened by trade sanctions because well-connected multinationals have pushed governments into a battle for market share in consuming countries.”\(^7\) Gary Horlick says: “Simply stated, the purpose of the WTO is not to impose 100 percent duties on importers of Roquefort cheese, or other innocent bystanders.”\(^9\) Joost Pauwelyn has noted the irony that the world body preaching the liberalization of trade depicts countermeasures as offering some kind of favor that should neutralize the effect of illegal trade restrictions imposed by others.\(^8\)

5. **Sanctions Undermine Intellectual Property Rights.** In approving trade sanctions against intellectual property owners, the WTO undermines itself as a champion of intellectual property “rights.” This occurred in the EU bananas dispute, where Ecuador won authorization to ignore its WTO obligations to the EU on copyrights, geographical indications, and industrial designs.\(^8\) The WTO arbitrators noted that the suspension of obligations under the TRIPS Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights) interferes with private rights owned by natural or legal persons.\(^8\) Still, the arbitrators approved the unprecedented sanction because Ecuador claimed that sanctions against goods would hurt it more than the EU because imported goods are used as inputs in manufacturing.\(^8\)

Although some commentators have applauded Ecuador’s request for TRIPS sanctions,\(^8\) there is a difference between a WTO/DSB authorization for higher tariffs and an authorization for piracy. The elimination of tariffs is not required by the WTO, and free trade is not designated as a “right.” But the WTO does require governments to honor and protect intellectual property,
presumably because innovation generates high social gains. So in authorizing part-time piracy, the
WTO reduces respect for the anti-piracy norm.

The insistence on upholding intellectual property rights by the WTO is controversial because
the subsequent monopolization imposes social costs, and because TRIPS may widen the gap
between rich and poor countries. By allowing Ecuador to flout TRIPS, the WTO degrades it from a
universal (or Constitutional) norm to a horse-trading deal that Ecuador gave the EU and can now
take back. If every WTO norm can be betrayed in the selection of trade sanction, then the WTO
does not stand for anything other than reciprocity, and if that is all there is, the WTO will garner
little public respect.

6. **Sanctions Trample Human Rights.** Legitimization of trade sanctions by the WTO
tramples human rights in both countries.⁸⁵ The freedom to engage in voluntary commercial
intercourse is a basic human right that the WTO/DSB pays no attention to in authorizing trade
sanctions. Indeed, because sanctions are automatic, the DSB does not even take into account the
impact on innocent individuals.

7. **Sanctions Encourage Protectionism.** As noted above (B2), a tension exists between
providing relief to exporters hurt by the foreign trade barriers and helping those same actors avoid
foreign competition. The DSU bows a little toward protection by providing that retaliation be
considered first in the same sector as the dispute.⁸⁶ Of course, shielding the domestic market from
foreign competition does not necessarily undo the damage caused by closed foreign markets.

In May 2000, the U.S. Congress instituted the so-called carousel provision which requires
USTR to rotate the retaliation products every six months.⁸⁷ In addition, the new law requires
USTR to include “reciprocal goods of the industries affected” on the original and subsequent retaliation lists.88 This amendment may make future U.S. sanctions more protectionist.

In some instances, retaliation will occur in unrelated sectors chosen by a government at the behest of lobbyists who recognize sanctions as an opportunity to secure import protection.89 This occurred in the U.S. hormone case with pork even though the EU hormone ban does not apply to pork products.90 Although the Clinton Administration was expected to announce the new carousel sanctions in mid-June 2000, it was delayed for over two months because USTR received over 400 suggestions by the private sector.91 One shudders to think about how these decisions are being made and whether solicitation of campaign contributions plays a corrupting influence. As it observes this process of rent-seeking, special interest lobbying, the American public is unlikely go gain greater enthusiasm for U.S. trade policy. Indeed, the dangers of this process were noted by the Meltzer Commission which said that

Retaliation is contrary to the spirit of the WTO. Sanctions increase restrictions on trade and create or expand groups interested in maintaining the restrictions. Domestic bargaining over who will benefit from protection weakens support for open trading arrangements.92

Furthermore, the availability of trade sanctions may lead to a new form of process protectionism. Industries may look for WTO violations by foreign countries (not too hard to find) and encourage the USTR to file cases against deep-seated foreign laws for the express purpose of using retaliation to secure new protection.

8. **Sanctions Encourage Discrimination.** An economic sanction is discriminatory against the country being sanctioned. But it is one thing to sanction the scofflaw entity as a whole, and another to single out particular companies or subnational units. It is unclear whether the U.S.
retaliation is targeting companies. Countries are definitely being targeted with the intent of influencing internal EU decisionmaking.\textsuperscript{93} In hormones, USTR varied the countries for several items on the hit list; none of the sanctions are EU-wide.\textsuperscript{94} This sort of discrimination contradicts the most-favored-nation principle. But the DSB does not apply a least-WTO-inconsistent principle to govern the selection of targets to sanction.\textsuperscript{95}

9. **Asymmetry of Benefit.** It is sometime suggested that the sanctioning power favors larger economies over smaller ones.\textsuperscript{96} If true, this would be a disadvantage of sanctions in the WTO because there would be discipline for poorer countries but not the richer ones. Yet it is not clear that the assumption is true. A small country may cause a small amount of “nullification or impairment” and therefore the sanction against it would be small. As a plaintiff, a smaller country would not be able to inflict much harm upon a larger country, but it might not take much to effectuate a policy change if the affected exporters gripe. The broomcorn case is instructive on this point. In November 1996, President Bill Clinton imposed a tariff-rate quota on Mexican brooms, but canceled the protectionist action in 1998 several months after a North American Free Trade Agreement (NAFTA) panel ruled that Clinton’s action had violated NAFTA.\textsuperscript{97} One factor in the retreat was that Mexico had maintained retaliation against several U.S. products being exported to Mexico.\textsuperscript{98} (Mexico did not await the NAFTA panel decision before commencing retaliation in December 1996.)

10. **WTO Sets Bad Example.** In employing trade sanctions, the WTO sets a bad example for other international organizations. The WTO example is not followed literally; as noted above,
no other organization would contravene its own norms the way that the WTO does. But other organizations might want to copy the trade sanctions as an instrument for enforcing obligations.

If the WTO employs trade sanctions in dispute settlement, there is no principled reason why the ILO, the Organization for Economic Co-operation and Development (OECD), or environmental treaties should not employ trade sanctions too. The unprincipled reason for having trade sanctions in the WTO but not elsewhere is that the WTO is the arbiter of when trade sanctions can be used. In this view, WTO rules are constitutional in the sense that they superintend other treaty negotiations and treaty compliance processes insofar as they might authorize trade countermeasures. This view is odd for many reasons: one is that the WTO is hardly a universal membership organization; another is that many world causes, like eliminating forced labor, would seem to provide better justifications for trade sanctions than maintaining commercial reciprocity.

Although some proposals have been made for legislating WTO-like trade sanctions in other regimes in order to strengthen compliance, most commentators have suggested the opposite -- bringing the rules of other regimes into the WTO for enforcement there. That is what happened with intellectual property in the Uruguay Round, and many civil society organizations have urged the same tack with environment and labor. Such initiatives have been a big problem for the WTO, and were one factor in the failure of the new WTO round.

So long as the WTO retains trade sanctions, they will be an allure to activists who want to use similar enforcement for other international law. These activists are not going to be persuaded by the argument that trade sanctions can only be employed by the one organization in which their use is self-contradictory.

C. Summary
The case against WTO trade sanctions is strong, particularly Points 3-7 and 10. The case for sanctions is weaker, but Points 1, 2, and 4 do have salience. It is not obvious how to weigh these points against each other.

Five years from now, with more episodes to study, the overall picture may become clearer. Even if trade sanctions are shown to be counterproductive, they will likely remain WTO policy unless there is something to replace them with. So governments should begin now to find and test alternatives to trade sanctions.103

III. Alternatives to WTO Trade Sanctions

Part III of this paper explores alternatives to the use of trade sanctions in the WTO. Section A looks at sanctions not involving trade restrictions. Section B considers the option of direct effect. Section C looks at the option of trade compensation. Section D explores softer compliance approaches focusing on transparency and dialogue.

A. Models for Sanctions Other Than Trade

Most episodes of multilateral sanction have involved trade restrictions. The U.N. Charter provides for “interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”104 But the U.N. Security Council wisely has not attempted to isolate outlaw countries beyond trade sanctions. Thus, experience with non-military multilateral sanctions is largely limited to trade sanctions.
Nevertheless, a few alternatives are worth noting. Below is a list of three measures that are either specifically provided for in treaties or have been used by an international organization pursuant to general authority. (The list is surely incomplete; hopefully more episodes will come to light.)

1. **Monetary Fine.** The environmental side agreement to the NAFTA provides for dispute settlement on the question of whether a government is effectively enforcing its domestic law.\(^{105}\) If inadequate enforcement is found by a panel and the defendant government does not fully implement the agreed-upon action plan, the panel has the obligation of imposing a “monetary enforcement assessment” on the defendant government.\(^{106}\) The panel would determine the size of the assessment (within a range).\(^{107}\) The assessment would be paid to a tri-national fund to be used to improve enforcement in the defendant country. These pecuniary provisions have seen no use since the agreement went into force in 1994.

2. **Loss of Vote.** The (Chicago) Convention on International Civil Aviation provides for dispute resolution by the ICAO Council established by the Convention.\(^{108}\) An appeal is provided, but the resulting decision is final.\(^{109}\) Any government found in default under these provisions will have its voting power suspended in ICAO.\(^{110}\)

3. **Ineligibility for Technical Assistance.** Governments violating a treaty can risk losing technical assistance. In 1998, the ILO Conference barred Myanmar (Burma) from receiving any further technical assistance from the ILO until Myanmar takes action to come into compliance with the ILO Forced Labour Convention.\(^{111}\) Such a sanction is not explicitly provided for in the ILO
Constitution. Myanmar remains out of compliance. Another example of this type of sanction is in the Montreal Protocol for the Protection of the Ozone Layer which has an active process to judge non-compliance that can lead to a suspension of “rights and privileges” under the Protocol, such as the financial mechanism. As of 2000, several countries have been reviewed, but no privileges have yet been suspended.

**Conclusion.** Of these alternatives, the imposition of monetary fines would seem to be the most useful technique to try in the WTO. As noted above, this was recently recommended by the Meltzer Commission. A key advantage of a fine is that it properly targets the pain to the scofflaw country. Furthermore, a fine has the potential advantage of being used to compensate the exporters in the plaintiff country in order to secure trade “justice.” The key disadvantage of a fine is that there may be no way to compel payment. It is interesting to note that as early as 1906, the World Peace Congress recommended to the Second Hague Peace Conference a set of steps to assure the execution of arbitral awards -- including, for example, prohibiting loans to a country refusing to pay and requiring a deposit of funds at the commencement of litigation. Neither step was taken by the world community at the Hague Conference, or for that matter since then.

The absence of experience with fines in the NAFTA regime makes that method impossible to evaluate. But the NAFTA approach suffers two seeming quirks. One is that the fines are not varied by gross domestic product which makes them potentially tougher on Mexico. The other is that the fine is in effect paid to oneself, which does not present much of an incentive for compliance.

Having the WTO withdraw technical assistance is not a useful idea. The WTO does not do much technical assistance in the first place, and needs to do more. Moreover, in the two cases so
far in which sanctions have been used, the scofflaw defendants are the nations of the European Communities which do not need WTO technical assistance. Indeed, they tend to be the donor countries for WTO assistance programs.

Having the WTO disqualify a country from voting does not at present seem a good idea because the WTO does not conduct any voting. Yet withdrawing other membership rights may have possibilities. One key right that could be withdrawn from a scofflaw country is its right to invoke WTO dispute settlement. This could be done under current DSU rules because the DSU is a “covered agreement” for purposes of authorizing retaliation. Another option would be to disqualify any party in non-compliance from recommending any of its delegates to serve as chairperson of a WTO body. The “beauty” of such non-traditional, shaming sanctions is that they can be crafted to be irritating to the scofflaw party.

B. Direct Effect of WTO Decisions

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

How direct effect would work is unclear. In any WTO dispute, there could be numerous plausible ways to come into compliance. How is a domestic court to know which one to order?
Thus, bringing a government into compliance will be a more proper legislative or administrative function than a judicial one.  

Two recent regional trade agreements have provided for direct effect of panel decisions, but none of these provisions has yet been tested. The NAFTA environmental side agreement exempts Canada from trade sanctions and instead provides that the North American Commission for Environmental Cooperation may file a dispute panel report in Canadian courts which then becomes an “order” of the court, and furthermore that the Commission may lodge proceedings to enforce the panel determination. The Canada-Chile Environmental Cooperation Agreement is modeled on the NAFTA side agreement, and provides for filing a panel report in the courts of either Chile or Canada. No trade sanctions are provided.

C. Trade Compensation

The DSU expresses a preference for compensation over suspension of concessions, but notes that compensation is voluntary. Compensation in this context means action by the defendant government to reduce trade barriers in a non-discriminatory way. One “problem” with compensation is that in providing greater market access to the plaintiff country (commensurate with what is being denied in the instant dispute), the defendant will also be providing greater market access to third parties, and the sum total will likely be higher than the “nullification or impairment” to the plaintiff.

Many trade analysts favor compensation. Pauwelyn has suggested that the DSU could be changed to make compensation compulsory. Horlick has improved the proposal by suggesting that the winning plaintiff be allowed to choose the products for compensation.
addresses how to make the defendant comply. As noted above, one of the few virtues of WTO sanctions is that they can be implemented unilaterally.

**D. Softer Compliance Approaches**

In their extensive study of compliance with international regulatory instruments, Abram and Antonia Handler Chayes conclude that “Coercive sanctions are more infeasible for everyday treaty enforcement than as a response to crisis. Treaties with teeth are a will-o’-the-wisp.” Instead, the authors explain that compliance strategies are needed that involve norms, transparency, policy review, more effective international organizations, and activities of non-governmental organizations (NGOs).

The insight that compliance is promoted through softer approaches -- such as publicity, shaming, and monitoring -- has been independently reached by analysts looking at many different regimes including, most notably, human rights and environment. Moreover, it is not a new idea. As indicated above, in Thompson’s proposal for an International Trade Tribunal, he favored “the widest possible publicity” of the tribunal’s decisions.

It is noteworthy that the one early international organization given trade sanctions in a dispute settlement process, the ILO, made no use of them. Coercive sanctions were viewed as contradicting the basic norm of the Organization, which is that raising labor standards is in every country’s own interest. Instead, the ILO sought to induce compliance through independent review procedures and social dialogue. The power of persuasion would work, it was thought, not the persuasion of power.
The value of the DSU itself should not be underestimated. The WTO has the most sophisticated dispute settlement system of any international organization. By contrast, the environmental regime generally lacks independent dispute settlement (with the exception of the new Law of the Sea Tribunal). For example, the International Whaling Commission has no way to investigate whether Japan’s recent expansion of “scientific” whaling is legitimate or just junk science.

It is possible that greater publicity of the WTO’s factfinding and judgments might catalyze public opinion in the countries under review. At present, the typical WTO panel report is dry, abstruse, and lengthy, as perhaps befits an international law decision. But one could imagine each panel preparing a short internet version for the public. For example in hormones, the panel could have told Eurocitizens why the hormone ban fails international rules.

The DSU rules regarding surveillance are sophisticated. The DSB retains jurisdiction until the issue is resolved, and no later than six months following the setting of the period of time for compliance, the issue of implementation goes on the agenda for each DSB meeting. In addition, the defendant government must provide a written status report before each meeting. Unfortunately, the DSB meetings are not open to the public so many of the potential benefits of this surveillance are being lost.

**IV. Recommendations and Conclusion**

The DSU affirms that “full implementation of a [DSB] recommendation to bring a measure into conformity with the covered agreements” is preferred over compensation or suspension of concessions. But the DSU does not do enough to secure such implementation. New modalities are needed to promote compliance within national decisionmaking processes.
One possibility would be to establish a DSU Optional Protocol whereby WTO member governments could sign on to the following procedure:

1. Governments would agree that in any WTO dispute settlement, panels would be requested to use their authority to “suggest ways in which the Member concerned could implement the recommendations.”

2. In cases where new legislation would be needed to implement a panel report, governments would agree to establish a Domestic Body to consider the panel report and to draft legislation to meet WTO obligations. The Body would not have to follow the panel’s suggestion as to implementation, but would be obligated to recommend, within four months, new legislation to correct the WTO-inconsistent features of current law. This Body would give interested foreign and domestic private economic actors an opportunity to provide public comments. The rules of the Body would need to preclude consideration of whether the DSB decision was correct.

3. Governments would agree to hold a vote on the recommendation of the Body on a fast-track basis within three months. The Parliament or Congress would be free to reject the recommendation, and if that occurs, the issue would be returned to the WTO for Article 22 sanction procedures. Of course, the defendant government could always use its normal legislative procedures to achieve compliance.

4. The process would begin immediately after the DSB adoption of the panel report. The full Optional Protocol time period would be deemed the “reasonable period of time” for compliance.
While this Optional Protocol certainly does not assure a WTO-consistent outcome, it has the potential of making it easier for a defendant country to comply. In establishing a Domestic Body, a government makes an institution responsible for transforming a panel recommendation into statutory language. By having specific suggestions from the panel, the Domestic Body will start with an option on the table. By giving private economic actors (e.g., consumer NGOs) the right to make statements, the body will seek to elevate public discourse about the dispute. By providing fast-track consideration, endless delays are headed off. By underlining the role of the national legislature, the Protocol avoids the politically untenable approach of direct effect of the DSB decision.

It is true that this procedure might delay the authorization of trade sanctions by a few months. But the attractiveness of this procedure to potential signatories of the Optional Protocol is that it may render sanctions unnecessary. Certainly, some governments might frustrate the design of this Protocol by composing the Domestic Body with individuals who will resist serious efforts at compliance. Indeed, a cynical government might join the Optional Protocol merely for the purpose of delaying compliance. Nevertheless, a well-intentioned government that wants to comply, yet faces objections from strong domestic interests, might find the Optional Protocol useful.

The Optional Protocol seeks to influence the defendant government’s decisionmaking from within, rather than to change it from without by external economic pressure. Recently, Robert Hudec pointed out that “The process of creating any legal system, where none existed before, can only come about slowly and incrementally. The ideas and institutions that make a legal system ‘effective’ have to grind themselves into the political attitudes of the society -- here, the society of governments -- over time.”\textsuperscript{137} By contrasting WTO-sponsored sanctions with softer compliance measures, this paper shows the need to grind new attitudes into the WTO. Similarly, in
recommending a new domestic procedure that would be interpenetrated by a WTO panel, this paper offers a proposal for influencing political attitudes within countries about achieving compliance. If better replacements can be found, the WTO could become much more effective by dropping trade sanctions.
Wilmer, Cutler & Pickering, Washington, D.C. The views expressed are those of the author only. Thanks to Joost Pauwelyn for his helpful comments.


3 Author’s tabulation based on data on WTO website. The WTO may soon authorize sanctions against Brazil in the Aircraft case. Jennifer L. Rich, WTO Allows Canada Records Sanctions Against Brazil, N.Y. TIMES, Aug. 23, 2000, at C4; Frances Williams et al., Canada Given Go-ahead for Sanctions Against Brazil, FIN. TIMES, Aug. 23, 2000, at 6.


6 Leviticus 24:19-20.


9 Treaty of Versailles, art. 411.

10 Id. arts. 411-12. The Commission is tripartite with government, employer, and worker members.

11 Id. art. 414.

12 Id.

13 Id. arts. 415-18.

In Historic Vote, ILO Assembly Tightens Pressure on Myanmar, ILO FOCUS, Summer/Fall 2000, at 1. The article notes that under the post-war amendments to the ILO Constitution, the power to recommend action was shifted from the Commission of Inquiry to the ILO Governing Body.


Huston Thompson, An International Trade Tribunal, 34 ASIL PROC. 1, 34 (1940).

Thompson, supra note 17, at 7–9.

International Agreement regarding the Regulation of Production and Marketing of Sugar, May 6, 1937, art. 44, 4 Malloy 5599, 5611. Such a decision was to be made by a three-quarters vote. The sugar treaty of 1902 made provision for countervailing duties against sugar from non-complying countries. Both sugar treaties provide for countermeasures only against sugar.

Id. art. 44.

See Charter of the United Nations, ch. 7 & art. 94.

GATT art. XXI(c).

See Michael Littlejohns, UN Backs Diamonds “Blood Trade” Measures, FIN. TIMES, July 6, 2000, at 8; GATT art. XXIII:2, GATS art. XIV bis 1(c).


GATT art. XXIII:2.

ITO Charter, art. 95:3.


ALSO PRESENT AT THE CREATION, supra note 24, at 145.


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


[33] Dam, supra note 32, at 364.


[35] Marrakesh Declaration, in The Results of the Uruguay Round of Multilateral Trade Negotiations, supra note 1, at iii.


[37] GATT art. XXIII:2.

[38] DSU art. 22.6. See also art. 3.7 (describing such action as a last resort).


[40] 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, Report of the Arbitrators, April 9, 1999, WTO Doc. WT/DS27/ARB, at para. 6.3.


[42] Agreement on Subsidies and Countervailing Measures, arts. 4.10, 7.9.

[43] Retaliation is based on the level of nullification or impairment. See DSU art. 22.4.

[44] The arbitrators were aware of the anticipated 100 percent tariff and apparently thought any qualitative analysis of it was outside their jurisdiction because of DSU Article 22.7. See European Communities - Measures Concerning Meat and Meat Products (Hormones), Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, Decision by the Arbitrators, July 12, 1999, WTO Doc. WT/DS26/ARB, at paras. 19, 21. But it could be contended that the arbitrators should first determine whether the proposed retaliation would actually suspend a concession.

[45] Author’s own tabulations. One item on the banana retaliation has a Column 2 tariff of 75 percent.

47 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. See id. at 6 n. 8.


49 World Trade Organization, Trade and Environment, Special Studies 4, 1999, at 7. The same point is made at 57.


52 Oliver Stehmann, Foreign Sales Corporations under the WTO, 34 J. WORLD TRADE 127, 155 (June 2000). The author is on the staff of the European Commission.


57 Pauwelyn, supra note 56, at 344.

58 See Robert Hudec, Thinking about the New Section 301: Beyond Good and Evil, in ESSAYS, supra note 29, 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).

59 See GATT art. XIX. The WTO Agreement on Safeguards, art. 8, provides for a three-year waiting period before suspension in certain instances.

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


For example, see *United States Resolves WTO Dispute Over Australia’s Prohibited Export Subsidies on Automotive Leather*, USTR Press Release 00-48, June 2000.

*See, e.g.*, GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* (3rd ed., forthcoming 2001). *See also Questioning Sanctions*, ASIAWEEK, Aug. 11, 2000, at 61 (quoting Kofi Annan saying that the people suffer under sanctions, not the political elite).

Pauwelyn, *supra* note 56, at 338, 341, 344–45. His proposal maintains the requirement that retaliation be set equal to the trade damage that a prospective retaliator has suffered.

GATT Article XXIII:2 states that the CONTRACTING PARTIES may authorize a contracting party or parties to suspend concessions.

DAM, *supra* note 32, at 357.

For example, the Antidumping Agreement is solicitous of the import-competing industry. It requires governments to initiate antidumping investigations upon an application by the industry. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, art. 5.1.


*Id.* at 296.


DAM, *supra* note 32, at 364.


A recent 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, GAO/NSIAD-00-210, August 2000, at 3, 24. But the GAO study reaches a superficial conclusion because it undertook no analysis of the impact of the U.S. bananas and hormones sanctions on the United States.

“About Section 301,” available at www.ita.doc.gov/td/industry/otea301alert/about.html.
DORIS STEVENS, JAILED FOR FREEDOM 184–85 (1976). This is a biography of Alice Paul, who led the first picketing of the White House.


Pauwelyn, supra note 56, at 343.

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, Mar. 22, 2000, WTO Doc. WT/DS27/ARB/ECU, at para. 173(d). Ecuador was also authorized to suspend the GATT and the General Agreement on Trade in Services. Id. at para. 173.

Id. at para. 157.

Id. at para. 89. The arbitrators approved a package of sanctions to include some tariff-based retaliation.

For example, see Cristian Espinosa, The WTO Banana Dispute: Do Ecuador’s Sanctions Against the European Communities Make Sense?, BRIDGES, May 2000, at 3 (written by a representative of Ecuador at the WTO).


DSU art. 22.1 (referred to as a general principle).


Id.

Sanctions might be deployed with the objective of maximizing the protective effect on a favored industry. Other objectives could include minimizing the harm to the domestic economy and maximizing the pain to targeted foreign economic actors. Sanctioned items could also be chosen at random to minimize the corrupting influence of asking the government to pick winners and losers.

Pork Industry Pushing for Pork-Only Hormone Retaliation List, May 21, 1999, at 14; USTR Announces Final Product List in Beef Hormones Dispute, supra note 69.

International Financial Institutions Advisory Committee Report, supra note 4, at 57–58.

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

USTR Announces Final Product List in Beef Hormones Dispute, supra note 69.

See DSU art. 22.7 (arbitrator does not examine the nature of the concessions suspended).

Espinosa, supra note 84, at 3; Petros C. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, EUR. J. INT’L L. (forthcoming 2000).


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


U.N. CHARTER art. 41.


North American Agreement on Environmental Cooperation, supra note 105, at arts. 31–34.

North American Agreement on Environmental Cooperation, supra note 105, Annex 34. Several factors are suggested to determine the size of the monetary assessment.
Convention on International Civil Aviation, Dec. 7, 1944, art. 84, 15 U.N.T.S. 295. No party to a dispute may take part in such decisions.

Convention on International Civil Aviation, supra note 108, arts. 85–86.

Convention on International Civil Aviation, supra note 108, art. 88.


DSU art. 22.2 & App. 1.

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


It is interesting to note that the U.S. Uruguay Round Agreements Act provides procedures for implementing WTO recommendations by the U.S. International Trade Commission and the Department of Commerce. 19 U.S.C. § 3538.

North American Agreement on Environmental Cooperation, supra note 105, annex 36A. The Labor Cooperation Agreement has similar provisions.


DSU arts. 22.1, 22.2.
123 Pauwelyn, supra note 56, at 345–46.

124 Horlick, supra note 79, at 6–7.

125 Abram Chayes & Antonia Handler Chayes, The New Sovereignty 67 (1995). In their view, GATT retaliation was not a sanction because the underlying theory was compensatory. Id. at 30.

126 Thompson, supra note 17, at 9.


128 Bruce Ramsey, No Power to Sanction, but ILO Hopes to be Taken Seriously in Trade, Seattle Post-Intelligencer, Nov. 29, 1999, at A6.


131 DSU art. 21.6.

132 DSU art. 22.1

133 See DSU art. 19.1. Pauwelyn notes that panels make such recommendations in less than one-fifth of the cases. Pauwelyn, supra note 56, at 339.

134 During its implementation of the Uruguay Round, the U.S. Congress considered establishing a panel of U.S. judges to review the correctness of WTO decisions that held against U.S. laws. There could be some benefit in such a process, but that is not the role of the Domestic Body proposed here.

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

136 See DSU art. 21.3.

137 As cited in Pauwelyn, supra note 56, at 347.