NOTE

PIRATES OF THE CARIBBEAN (AND BEYOND): DEVELOPING A NEW REMEDY FOR WTO NONCOMPLIANCE

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I. INTRODUCTION

On December 21, 2007, the nation of Antigua and Barbuda received a surprising Christmas present from the World Trade Organization (WTO): the right to engage in piracy legally. In a November 2004 decision, the WTO ruled that a U.S. law barring online gambling violated certain WTO agreements.[1] The United States refused to comply with that ruling.[2] As a result, the WTO permitted Antigua and Barbuda to violate copyright protections on items like American films, music, and software.[3] A lawyer representing the small island nation touted the decision, saying it recognized "a very potent weapon."[4] Meanwhile, the U.S. Trade Representative grumbled that the ruling "establish[ed] a harmful precedent for a WTO Member to affirmatively authorize what would otherwise be considered acts of piracy" and admonished Antigua for seeking to do something that would "undermine Antigua's claimed intentions of becoming a leader in legitimate electronic commerce."[5] Tempers aside, one thing is clear: the WTO's decision to allow suspension of the Agreement on Trade-Related

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1. *See generally* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R (Nov. 10, 2004).

2. James Kanter & Gary Rivlin, *Ruling Lets Antigua Be Pirate to Punish U.S. in Trade Fight*, N.Y. TIMES, Dec. 22, 2007, at C3.

3. *Id.* The suspension could not exceed a value of $21 million. *Id.*

4. *Id.*

5. Press Release, Office of the U.S. Trade Representative, Statement on Internet Gambling (Dec. 21, 2007), http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/december/statement-internet-gambling.

Aspects of Intellectual Property Rights (TRIPS)[6] was a creative and bold effort to induce compliance with WTO rules.

Almost two years later, on August 31, 2009, the WTO took another bold step by allowing Brazil to suspend certain American intellectual property rights in retaliation for the United States' noncompliance with a previous WTO decision.[7] This time, however, the sanction carried a bigger bite. For the year 2007, for instance, Brazil would be permitted to legally pirate up to $409.7 million in U.S. intellectual property rights.[8]

The rights available to a victim country when an offending country refuses to comply with a WTO ruling have been the subject of long academic debate.[9] The decisions in *US—Gambling* and *US—Upland Cotton* provide an opportunity to reexamine that debate. Moreover, this discussion is no longer merely an academic one. As the Doha Round[10] flounders and support for free trade potentially wanes, the WTO must consider and pursue measures to secure its legitimacy with a new sense of urgency.[11]

The WTO now faces a critical question: are the traditional sanctions[12] for noncompliance working effectively and sustaining the WTO's legitimacy, or should the organization look to more unconventional means, like TRIPS suspension? This Note provides a partial answer to that question by presenting a new sanction mechanism. Part II explores the WTO's dispute resolution system

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6. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) "establishes minimum levels of protection that each government has to give to the intellectual property of fellow [World Trade Organization (WTO)] members." World Trade Organization, Understanding the WTO 39 (2008). Intellectual property rights (IPRs) include copyright rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and undisclosed information (including trade secrets). *Id.*

7. *See* Decision by the Arbitrators, *United States—Subsidies on Upland Cotton*, ¶ 6.3, WT/DS267/ARB/1 (July 12, 1999) [hereinafter *United States—Upland Cotton*].

8. *Id.* ¶ 5.231.

9. For a brief list of some of the current literature on Dispute Settlement Understanding (DSU) compliance, see Joost Pauwelyn, *Remedies in the WTO: 'First Set the Goal, then Fix the Instruments to Get There'*, *in* WTO Law and Process 185, 187 n.8 (Mads Andenas & Federico Ortino eds., 2005).

10. The Doha Round is a round of negotiations amongst WTO members originally intended to address issues related to poverty and economic development in the developing world. The "Doha Development Agenda" includes "trade liberalization for agricultural products . . ., trade liberalization for services . . ., and market access for nonagricultural products . . . ." Sungjoon Cho, *Doha's Development*, 25 Berkeley J. Int'l L. 165, 169-70 (2007).

11. *See, e.g.*, *The Future of Globalisation*, The Economist, July 29, 2006, at 11; *In the Twilight of Doha*, The Economist, July 29, 2006, at 63.

12. The "sanctions" addressed in this Note are sometimes called counter-measures, retaliation, and many other terms. All these terms describe the same remedial measures.

as it stands now, namely its current (somewhat confused) objectives and the mechanisms presently available to deal with noncompliance. Parts III and IV survey the existing literature, describing recognized problems with the existing system and discussing solutions offered by experts in the field. Finally, Part V offers a new approach to fill in some of the gaps found in both the existing system and reforms presented in the existing literature. Under this Note's proposed approach, the Dispute Settlement Body (DSB)[13] must make compliance its first and only objective. Upon recognizing this objective, the DSB must implement a powerful new sanction mechanism to ensure compliance with DSB rulings: punitive, tradable, TRIPS-based sanctions.

II. The WTO's Existing Dispute Settlement Mechanism: The DSU

To some, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is the "crown jewel" of the WTO.[14] Still, the "crown jewel" is worthless if the DSB renders a decision against a WTO member and that member declines to comply. In instances of noncompliance, an effective dispute resolution mechanism must clearly establish: (1) the objectives of enforcement; and (2) the means available to achieve those objectives.

A. *Current Objectives of the DSU in the Event of Noncompliance*

When a member state refuses to comply with a WTO ruling, the DSU is only somewhat clear on what the WTO's first objective should be, providing that "the first objective of the dispute settle-

13. The Dispute Settlement Body (DSB) is the WTO body responsible for administering the DSU. It is composed of representatives from every WTO member state, and has "the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 2.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also* WTO Secretariat, A Handbook on the WTO Dispute Settlement System 17-20 (2004).

14. Dencho Georgiev & Kim Van der Borght, *Introduction*, *in* Reform and Development of the WTO Dispute Settlement System 11, 11 (Dencho Georgiev & Kim Van der Borght eds., 2006). The DSU explains how to resolve disputes between WTO member states concerning how WTO agreements should apply. The DSU is unique because it provides clear procedures for resolving international disputes and, perhaps more unusual within the international sphere, includes immediate penalties for noncompliance with DSB rulings. *See* World Trade Organization, *supra* note 6, at 58.

ment mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."[15]

Many authors have taken the above statement at face value and concluded that the objective of the DSU is compliance.[16] Still, the use of the qualifying term "usually" in Article 3.7 suggests compliance is not always the DSU's first objective. Moreover, other provisions of the DSU imply that the ultimate objective is settlement, not necessarily complete withdrawal of offensive trade measures.[17] Article 3.4 of the DSU, for instance, states that the mechanism should be "aimed at achieving a satisfactory settlement of the matter."[18] Article 3.7 emphasizes the importance of securing a "positive solution to a dispute" that is "mutually acceptable to the parties."[19] Even the WTO admits that there is no agreement on whether "the purpose of the suspension of the obligations is to enforce recommendations and rulings, or merely to rebalance reciprocal trade benefits (at a new and lower level)."[20] Some WTO rulings also hint that compliance is not the central aim of the DSU process.[21]

Without clearly defined objectives, it is difficult to determine the best approach to noncompliance situations.[22] If the primary objective is mere settlement, for instance, bilateral agreements, compen-

15. DSU art. 3.7; *see also id.* art. 22.1 (making retaliation a temporary measure only allowed until compliance occurs).

16. *See* Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L.J. 337, 365 n.160 (2007) (providing examples of those authors who view compliance as the current goal of the DSU).

17. At least one author suggests that the DSU could have three potential purposes: compliance, rebalancing of concessions, and reparations for the complaining countries. *See* Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 822 (2001). The second two purposes, however, appear to be subsets of the "settlement" objective described above.

18. DSU art. 3.4.

19. *Id.* art. 3(7).

20. WTO SECRETARIAT, *supra* note 13, at 81. For a good example of the academic debate surrounding the nature of WTO sanctions, compare John H. Jackson, Editorial Comment, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 63 (1997) (arguing the chief intention of the WTO DSU process is to force compliance with DSB rulings) with Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 416-17 (1996) (arguing the WTO is primarily meant to compensate parties injured when a country reneges on a trade agreement, not to force compliance).

21. *See, e.g.*, Dispute Settlement Body, *Minutes of Meeting Nov. 24-26, 2004*, ¶ 73, WT/DSB/M/178 (Jan. 17, 2005) ("The United States also welcomed the Arbitrators' rejection of the argument that the 'ultimate goal' of the suspension of concessions or other obligations was to 'induce compliance.'").

22. *See* Pauwelyn, *supra* note 9, at 187.

sation, and permanent retaliation[23] can be satisfactory mechanisms.[24] If the end goal of the DSU is full compliance, however, the instruments must be somewhat coercive to achieve their intended effects.[25] Absent clarification of which objective takes priority, DSU mechanisms could yield inconsistent and ineffective results. As one author notes, "a single economic instrument cannot achieve more than one distinct purpose."[26]

B. *Current DSU Mechanisms Available to Address Noncompliance*

The question of how to achieve the objectives is equally complicated. Article 3.7 of the DSU allows for some degree of voluntary compensation[27] in the face of noncompliance, but "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement."[28] If a non-complying state refuses to provide even this compensation, the DSU only allows for "the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures."[29]

Article 22 of the DSU provides greater guidance on what suspension means. Simply put, the process allows the winning party in a WTO dispute to impose temporary trade sanctions on the losing party if that party refuses to comply with the DSB's ruling.[30] Even this right is not automatic. Before the DSB permits a country to impose any sanction, the two countries must enter negotiations to

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23. For a discussion of these approaches to noncompliance, see discussion *infra* Part IV.

24. Pauwelyn, *supra* note 9, at 188-90. Pauwelyn also provides an interesting analysis of the advantages and disadvantages of allowing such "settlements."

25. *See id.* at 194-96 (suggesting current instruments are not strong enough to induce compliance and arguing their weakness might prove that the WTO's intended goal was settlement).

26. Charnovitz, *supra* note 17, at 823.

27. Compensation here means the provision of a trade benefit, not simply a monetary payment. Compensation is rarely used, however, because any compensation must also conform to WTO agreements, including most-favored nation status. "Therefore, WTO Members other than the complainant(s) would also benefit, if compensation is offered e.g. in the form of a tariff reduction. This makes compensation less attractive to both the respondent, for whom this raises the 'price,' and the complainant, who does not get an exclusive benefit." World Trade Organization, Dispute Settlement System Training Module, The Process—Stages in a Typical WTO Dispute Settlement Case, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s9p1_e.htm (last visited May 6, 2010).

28. DSU art. 3.7.

29. *Id.*

30. *See* WTO Secretariat, *supra* note 13, at 81.

find some mutually acceptable compensation.[31] If those negotiations fail, only then may the winning party of the original action (the "plaintiff country") seek authorization from the DSB to impose sanctions.[32] The WTO member seeking to suspend concessions must submit a list of those concessions it wishes to suspend to the DSB.[33] If the losing member objects to the proffered concessions, the state seeking to impose retaliatory measures submits the issue to arbitration.[34]

Once the DSB receives a request for arbitration, arbitrators examine the winning party's proposed sanctions.[35] Article 22 provides the framework for determining which sanctions are most appropriate in a given case. Sanctions relating to the same sector as the dispute are preferred.[36] If these sanctions are not "practicable or effective," the arbitrators should next look to suspending concessions under the same agreement[37] as the one involved in the dispute.[38] If the arbitrators find that it is not "practicable or effective" to suspend concessions under the same agreement, and "the circumstances are serious enough," the arbitrators can look to other agreements as well.[39] In other words, a dispute that began over tariffs on corn could end with the suspension of copyright protections on polka music. While retaliation across agreements (also termed "cross-retaliation") seems *prima facie* to be an inven-

31. Steve Charnovitz, *Should the Teeth be Pulled?: An Analysis of WTO Sanctions*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 602, 602 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

32. *See id.* The DSU never specifically employs the word "sanctions." Rather, the agreement sticks faithfully with the phrase "suspension of concessions." DSU *passim.* In substance, they are one in the same. *See* Charnovitz, *supra* note 17, at 805-07 (providing examples of Article 22 being described as a "sanction" in contemporary discourse); Charnovitz, *supra* note 31, at 603.

33. *See* Jacques H.J. Bourgeois, *Sanctions and Countermeasures: Do the Remedies Make Sense?*, *in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 14, at 37, 39.

34. *See id.*

35. *See* DSU art. 22.6-.7.

36. *Id.* art. 22.3.a.

37. There are three separate categories of agreements: the agreements listed in Annex 1A of the WTO Agreement (goods); the General Agreement on Trade in Services (services); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (intellectual property). *Id.* art. 22.3.g.

38. *Id.* art. 22.3.b. Even this limitation can allow expansive sanctions. In a dispute regarding U.S. beef, for instance, the DSU allowed the United States to retaliate against E.U. noncompliance with tariffs on items including cut flowers, hair clippers, motorcycles, and yarn. *See* Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 81, WT/DS26/ARB (July 12, 1999) [hereinafter *EU—Hormones*].

39. DSU art. 22.3.c.

tive and powerful tool against noncompliance, in practice it has been used in only three cases: *US—Upland Cotton*,[40] *US—Gambling*,[41] and *EC—Bananas III*.[42] Generally, retaliatory measures take the form of a 100 percent tariff on a list of items submitted to the DSB, though countries have increasingly proposed other forms of sanctions.[43]

Finally, the sanctions must be proportionate to the act of noncompliance (or, in the language of the WTO, "equivalent to the level of the nullification or impairment"[44]). Prior DSB panels construed this requirement as a bar to punitive damages.[45] Such an interpretation is congruent with general international law, which usually requires that sanctions and counter-measures be proportional to the violation at issue.[46] For instance, in most cases, "[p]ast harm from the effective date of any regulations or policies until the date of final implementation of concession withdrawal is not included in the calculation."[47] A notable exception is the *Australia—Automotive Leather* dispute, in which the United States and others challenged a one-time fully disbursed subsidy given by Australia to its automotive leather producers. Australia, the United States, and the European Community all contended that the DSU does not permit retroactive remedies.[48] The panel nonetheless allowed retroactive relief, but based its decision primarily on a provision of another agreement, not the DSU.[49] Moreover, the panel only seemed willing to allow such a remedy because barring retro-

40. *United States—Upland Cotton*, *supra* note 7, ¶ 6.3.

41. Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.1, WT/DS285/ARB (Dec. 21, 2007).

42. *See* Yves Renouf, *A Brief Introduction to Countermeasures in the WTO Dispute Settlement System*, *in* KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 110, 112 (Rufus Yerxa & Bruce Wilson eds., 2005).

43. *Id.* at 115. Other possible sanctions include different levels of tariffs or suspension of agreements relating to intellectual property or services.

44. DSU art. 22.4.

45. *See* Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 6.3, WT/DS27/ARB (Apr. 9, 1999) [hereinafter *EC—Bananas*].

46. *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-third Session, art. 41(3), UN GAOR 56th Sess., Supp. No. 10, at 68, U.N. Doc. A/56/10 (Sept. 6, 2001).

47. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 557 (2003).

48. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*, ¶ 6.29, WT/DS126/RW (Jan. 21, 2000) [hereinafter *Australia—Automotive Leather*].

49. The panel relied on the Agreement on Subsidies and Countervailing Measures. *Id.* ¶ 6.31. Even this limited application of retroactive remedies received enormous criticism from WTO member states. *See* Petro Mavroidis, *Remedies in the WTO Legal System:*

active relief in this particular instance would bar relief entirely.[50] As a result, *Australia—Automotive Leather* was probably not an indication that retroactive remedies are universally possible, but rather "a one-time aberration of no precedential value."[51] As a result, the DSU's proportionality requirement sits shrouded in uncertainty.[52]

III. Problems of the Existing Mechanisms

The academic realm gives much attention to WTO remedies and sanctions.[53] Some of the writing is supportive, noting the WTO's good record of resolving disputes[54] and chastising the critics of the system. Professor John H. Jackson, for instance, notes that "[m]uch of the negative criticism of the dispute settlement system actually occurs in the United States, specifically in the Washington, D.C., area, and almost no place else in the world."[55] Moreover, much of the criticism is generated by "a small group of persons who are advocates" and may be acting on behalf of special interests (rather than offering disinterested analysis).[56] Even when considering those specific cases where compliance with a DSB ruling did not occur, one author dismissively observed that in no instance did he "notice the earth stop spinning."[57]

Between a Rock and a Hard Place, 11 Eur. J. Int'l L. 763, 790 (2000) (discussing the outcry after *Australia—Automotive Leather*).

50. The trade measure at issue was a one-time, fully-disbursed subsidy. The panel noted that if it barred retroactive relief in this case, the finding of a violation would have no effect because the subsidy was already paid, the harm was done, and the damage was complete. The panel therefore required the subsidy recipient to repay it. *Australia—Automotive Leather*, *supra* note 48, ¶ 6.38.

51. Dispute Settlement Body, *Minutes of Meeting, Feb. 11, 2000*, at 8, WT/DSB/M/75 (Mar. 7, 2000) (statement by Canada).

52. *See* Sebastian, *supra* note 16, at 379 ("[O]ne must conclude that the bulk of the WTO remedial regime relating to the permissible intensity of retaliation is simply bereft of any valid rationale . . . [and] the vast majority of arbitral awards concerning the permissible intensity will be arbitrary to a certain degree.").

53. *See* Pauwelyn, *supra* note 9, at 187 n.8.

54. One study concluded that, as of September 2005, the DSU rulings were implemented 83 percent of the time, "which is fairly successful for state-to-state dispute settlement." *See* William J. Davey, *Evaluating WTO Dispute Settlement: What Results Have Been Achieved Through Consultations and Implementation of Panel Reports?*, *in* The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia 98, 109 (Yasuhei Taniguchi et al. eds., 2007).

55. John H. Jackson, *The WTO Dispute Settlement System After Ten Years: The First Decade's Promises and Challenges*, *in* The WTO in the Twenty-First Century: Dispute Settlement, Negotiations, and Regionalism in Asia, *supra* note 54, at 23, 35.

56. *Id.*

57. John Magnus, *Compliance with the WTO Dispute Settlement Decisions: Is There a Crisis?*, *in* Key Issues in WTO Dispute Settlement: The First Ten Years, *supra* note 242, at 242, 249.

Nevertheless, the critics of the sanctions system do have some compelling arguments.[58] Primarily, critics of the sanctions mechanism fall into two categories: those who believe that the sanctions are not tough enough, and those who believe that the sanctions only create harms, not benefits.[59]

A. *Sanctions Do Not Induce Compliance*

Perhaps the most oft-heard criticism of the current system is that it fails to induce compliance with WTO agreements. It is undeniable that in at least some instances, sanctions (or the threat of sanctions) have not been enough to induce compliance.[60] The key consideration is why.

Some have argued that the prospective nature of the sanctions explains the lack of compliance.[61] The DSB does not award damages to compensate past harms, so countries have an incentive to continually implement WTO-violative measures and delay compliance when told they are in violation.[62] Given the time it can take for disputes to be resolved—sometimes two to three years—countries may happily enjoy the benefits of restricted trade practices for a number of years without any fear of paying a cost for them.[63] The WTO's refusal to implement sanctions during the period after the DSB finds a violation extends the time lag period even more.[64] In other words, even after the WTO deems a certain trade practice prohibited, the violating country may continue the practice for a period without suffering any penalty. While the rationale is that members need time to implement a panel's recommendations,

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58. A few authors have similarly agreed that, while "doom and gloom" criticism of the WTO's compliance record might be overstating the issue, there is still a need for reforms. For example, see Valerie Hughes, *The WTO Dispute Settlement System—From Initiating Proceedings to Ensuring Implementation: What Needs Improvement?*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 193, 228 (Giorgio Sacerdoti et al. eds., 2006), which provided the following:

> The compliance record in the WTO has been extremely high; there are a few famous cases of very slow compliance or noncompliance, which have left the impression that the problem is more widespread than it is in reality. However, the system does have shortcomings and members are seeking to address these in the context of DSU negotiations.

(footnote omitted).

59. *See, e.g.*, Charnovitz, *supra* note 31, at 603.

60. *Id.* at 619.

61. *See* Pauwelyn, *supra* note 9, at 194-95.

62. *See* Gary N. Horlick, *Problems with the Compliance Structure in the WTO Dispute Resolution Process*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC, *supra* note 31, at 636-41.

63. Pauwelyn, *supra* note 9, at 194-95.

64. *Id.* at 195.

countries can also use this period to squeeze further benefits from their illegal trade practices.[65] Moreover, the complaining country must bring the complaint to the DSU.[66] If a member does not immediately complain when another member implements an illegal trade measure, the offensive state will enjoy even more time to accrue unjust benefits. Troublingly, this process may encourage less scrupulous countries to take part in the WTO in order to induce other countries to open their markets and bear the costs of free trade. Unscrupulous countries can then take advantage of the time lag in settling disputes to implement disruptive trade practices for at least a few years, while other countries are trapped playing by the rules.

The proportionality limit of DSU Article 22.4 also undermines the ability of sanctions to induce compliance. Some have argued that this proportionality requirement prevents arbitrators (who determine the appropriate level of sanctions) from even considering compliance in the course of their analysis,[67] as the arbitrators can only properly consider the size of the WTO violation. Whether the limit bars arbitrators from considering compliance or not, the cap certainly constrains winning parties and "is unlikely to be enough to provide real leverage to the victim of the breach to end the breach."[68] A constraint on punitive damages makes the fear of sanctions less ominous, in that it provides nations that violate WTO rules some security in knowing that their punishment cannot exceed a certain level.[69] For that reason, "[a]n unconstrained right to retaliate is more likely to induce compliance than a constrained right to retaliate."[70]

Even if the proportionality cap was not in place, it is unclear whether complainant countries would be able to exert any kind of real influence. Many developing countries and smaller developed

65. *See, e.g.*, *id.*; Rosemary A. Ford, *The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions*, 27 Brook. J. Int'l L. 543, 570-71 (2002) ("Since suspension of concessions is not granted retrospectively, the losing country has no reason to speed up implementation even if good faith is assumed.").

66. *See* DSU art. 6.1.

67. *See* Sebastian, *supra* note 16, at 366 ("By insisting on a comparative assessment, Article 22.4 simply does not allow compliance into an arbitrator's calculus.").

68. Pauwelyn, *supra* note 9, at 195.

69. In cases where the profits of illegal trade practices are higher than the expected damages, "WTO members might often not have an incentive then to comply at all." *See* Mavroidis, *supra* note 49, at 807.

70. Sebastian, *supra* note 16, at 366. Admittedly, constraints may serve other purposes, like guarding against abuse and misuse. *See* Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. Pitt. L. Rev. 763, 779 (2004).

countries do not possess the market size needed to produce real economic pressure.[71] For instance, Antigua and Barbuda noted in *US—Gambling* that they could not determine how to exert any weight on the United States to induce compliance: "[C]easing all trade whatsoever with the United States (approximately US$180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere."[72]

The winning nation may choose not to implement sanctions at all if it is weaker than the losing party, as the winning party may fear retaliation outside the scope of the WTO. A strong losing party would certainly face consequences if it violated any WTO agreement in the course of retaliation. That party would be free to retaliate, however, by taking action outside the scope of the WTO.[73] Thus, if a large nation knows it has powerful inducements of its own to bar a weaker country from implementing sanctions, the larger party might be more willing to expose itself to sanction-worthy action.[74]

Because sanctions are not always implemented against the sector that gave rise to the dispute,[75] "retaliation, like compensation, is generally ineffective in terms of teaching specific interest groups the true cost of their protectionism."[76] Thus, even if a WTO action induces compliance, the sector that originally enjoyed protection could lobby the offensive protection right back into force. For

71. *See* Marco Bronckers & Naboth Van den Broek, *Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement*, *in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM, *supra* note 14, at 43, 46.

72. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 11, at 3, WT/DS285/22 (June 22, 2007). Such a situation is exactly what Peter Mavroidis envisioned in his argument that trade diversification substantially affects sanction effectiveness. *See* Mavroidis, *supra* note 49, at 807.

73. *See* Sean Feeney, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, 2 PEPP. DISP. RESOL. L.J. 99, 109 (2002) (providing an example wherein the United States stops providing international aid to Estonia after Estonia implements sanctions against the United States).

74. *See, e.g.*, Cho, *supra* note 70, at 786 (noting Ecuador, in a banana dispute with the European Community, eventually opted for negotiations rather than a legal battle because of "the price it would have paid by taking the latter route.")

75. For example, imagine Brazil brings a complaint to the DSU, alleging that the United States is paying illegal cotton subsidies. If the WTO agrees with Brazil that the subsidy is illegal, but the United States refuses to comply, Brazil will not necessarily impose retaliatory tariffs on the United States' cotton industry. For instance, the WTO could decide it would be more effective to impose tariffs on U.S. beef.

76. Horlick, *supra* note 62, at 641.

example, if U.S. cotton producers know the only international response to a cotton subsidy will be retaliatory tariffs on cheese, cotton producers still have an incentive to lobby for inappropriate subsidies repeatedly.

B. *Sanctions Create Self-Inflicted Harm*

Countries may hesitate to implement sanctions because the sanctions can harm the country taking action.[77] When a country places a tariff on a foreign good, it effectively increases the price of that good for its own consumers.[78] This increase can be particularly problematic if the good targeted for sanctions is an important intermediate good or raw material used in the creation of one's own goods.[79] The result of this economic backlash is that in many situations, "the implementation of trade retaliation leads to a decline in economic welfare of the retaliating country."[80] Moreover, application of counter-measures could cause inefficient trade diversion, as "importers of products subject to trade sanctions shift to other, possibly less competitive, sources of supply."[81] People have long recognized the self-harming nature of unilateral retaliation,[82] yet the WTO continues to employ the universally derided method as its fallback tool.

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77. *See* Chi Carmody, *Remedies and Conformity Under the WTO Agreement*, 5 J. Int'l Econ. L. 307, 315 (2002).

78. *See* Bronckers & Van den Broek, *supra* note 71, at 45. Angry consumers at the 1999 Seattle protest demonstrated their distaste for the WTO by eating Roquefort cheese—a target of U.S. sanctions. *See* Charnovitz, *supra* note 31, at 624.

79. In *US—FSC,* for instance, the European Union was permitted to impose more than $4 billion in sanctions on U.S. products. *See* Decision of the Arbitrators, *United States—Tax Treatment for "Foreign Sales Corporations,"* ¶ A.34, WT/DS108/ARB (Aug. 30, 2002). Yet, the European Union hesitated to exercise that right, "in part because of strong resistance by European industry concerned about losing its suppliers." Bronckers & Van den Broek, *supra* note 71, at 46; *see also EC—Bananas, supra* note 45, ¶ 8.1; *EU—Hormones, supra* note 38, ¶ 84; Charnovitz, *supra* note 17, at 814 ("In *Bananas* and *Hormones* [two disputes brought by the United States], the U.S. government imposed high tariffs on imports from the [European Community]. 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.").

80. Arvind Subramanian & Jayashree Watal, *Can TRIPs Serve as an Enforcement Device for Developing Countries in the WTO?*, 3 J. Int'l Econ. L. 403, 406 (2000).

81. Renouf, *supra* note 42, at 119.

82. See Charnovitz, *supra* note 31, at 621, which provided the following:

> [Adam] Smith wrote that unilateral retaliation may be a good policy if it works to secure repeal of foreign barriers. But when "there is no probability that any such repeal can be procured, it seems a bad method of compensating the injury done to certain classes of our people, to do another injury ourselves, not only to those classes, but to almost all the other classes of them."

(citation omitted).

Developing countries suffer the self-harming effects of trade sanctions more acutely. Smaller countries that are import-dependent effectively cut themselves off from the world when they impose trade sanctions on a scale large enough to cause any compliance effect.[83] In essence, they take action "at the peril of their own economic development and position in world markets."[84] Antigua and Barbuda, for instance, depends on the United States for 48.9 percent of its imports (a figure equal to about one-third of Antigua and Barbuda's Gross Domestic Product.)[85] Placing a tariff on U.S. goods in retaliation for its noncompliance in *US—Gambling* would have drastically altered Antigua and Barbuda's economy.

The self-harming nature of existing trade remedies may possibly explain the sanctions' weakness in inducing compliance. Two scholars, Arvind Subramanian and Jayashree Watal, observed that "'I will shoot myself to shoot you' is not a credible threat."[86] If a defendant country knows that the plaintiff country must swallow a bitter pill for the sake of winning the argument, the defendant might be willing to bet that the plaintiff will decline to do so. One scholar described the problem as follows:

> [A] scofflaw state is more likely to capitulate if it believes that there is an *ex ante* possibility—even if it is never brought to fruition—that it will suffer sustained non-compliance costs. . . . In the absence of uncertainty, potential scofflaw states will have an incentive to defect whenever the political costs of retaliation to the injured state are high enough to make sustained retaliation unlikely.[87]

C. *Sanctions Fail to Compensate Actual Victims of Illegal Action*

While the DSU encourages nations to apply sanctions to the same sectors that give rise to a dispute, there is no firm requirement that they do so in each case.[88] Thus, the DSU "completely ignores the complaining industry" and looks to any industry as a

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83. *See* Bronckers & Van den Broek, *supra* note 71, at 46.

84. *Id.*

85. Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *supra* note 72, at 2.

86. Subramanian & Watal, *supra* note 80, at 406. *But see* Charnovitz, *supra* note 31, at 622 ("[T]here is another theory of sanctions which suggests that the way to induce others to act is not to punish them, but rather *to punish oneself.* The hunger strike is one well-known manifestation of that view.") (emphasis in original); ROGER E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 198-200 (1990) (noting that shooting oneself in the foot can send a powerful political message).

87. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 244-45.

88. *See* DSU art. 22.3.a.

potential target.[89] Sectors sometimes earn the protection of tariffs because of simple good luck. In a dispute between the European Union and the United States regarding steel subsidies, for instance, the European Union "carefully targeted at products from crucial states for the Bush reelection campaign . . . ."[90] These products were not the industries harmed by U.S. steel safeguard measures, but rather a diverse group of sectors ranging "from clothing and orange juice to motor boats and sunglasses."[91] While Europe's orange juice industry was likely satisfied with the results, Europe's steel industry would receive no compensation for its injuries unless Europe decided to provide it with that compensation on its own. For developing countries, providing such compensation is not always financially possible.

Some argue that the lack of private compensation in the WTO is not a problem.[92] They reason that the WTO is necessarily an agreement between states because it is an international law agreement.[93] Furthermore, sanctions "are designed to be applied by subjects of international law against each other."[94] Therefore, the interests of the private parties are almost irrelevant; the promise broken by a party violating a WTO agreement is not a promise made to an industry, but rather a promise made to another nation.[95] The private industry also enjoys a benefit from the sanctions if those sanctions are successful in their goal of inducing compliance. Absent the WTO and the sanctions associated with it, the complaining industry would bear the burden of illegal trade practices with no legal recourse.

Yet even if one adopts this state-centric view, the WTO does not do an adequate job of compensating the complainant state. Compensation never comes because "the suspension of WTO obligations is unlikely to result in a *transfer* of assets from State V [violator] to State R [retaliator]."[96] Moreover, the self-inflicted wounds described above might overwhelm any potential benefits that would accrue to the sanctioning country.[97]

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89. Charnovitz, *supra* note 31, at 620.

90. Joost Pauwelyn, *WTO Victory on Steel Hides Deficiencies,* JURIST, Jan. 23, 2004, http://jurist.law.pitt.edu/forum/Pauwelyn1.php.

91. Neil King, Jr. et al., *U.S. Steel Tariffs Ruled Illegal, Sparking Potential Trade War*, WALL ST. J., Nov. 11, 2003, at A1.

92. *See, e.g.*, Renouf, *supra* note 42, at 119.

93. *Id.*

94. *Id.*

95. *See id.*

96. Sebastian, *supra* note 16, at 368 (emphasis in original).

97. *See id.*

D. *Sanctions Conflict with the WTO's Underlying Norm: Free Trade*

International organizations, and the rules produced by them, can build legitimacy if they are "connected with more general norms, rhetoric, or mythologies that are accepted within the society."[98] While the WTO retains some degree of "mercantilist flavor,"[99] it nevertheless has an explicit normative purpose: reducing barriers to trade.[100] Yet the WTO's system of retaliation encourages protectionism, discrimination against particular sectors in particular countries, and generally lowers the level of trade openness.[101] A system of retaliation that contradicts that basic normative purpose therefore seems puzzling and calls into question the very foundation of the organization.[102]

This normative contradiction is more than just a quirk of the system. If it appears that sanctions are not motivated by (and perhaps work contrary to) international norms, nations may be more inclined to ignore those rules. This result stems from the persuasive power of norms, in that "[t]hey exert a profound impact on how people think about state roles and obligations, and therefore on state behavior."[103] By using an anti-trade retaliation mechanism, the WTO is in essence abandoning a weapon in its arsenal: norms.[104] States then make decisions based on pure interest calculations and power: "[I]n the absence of effective acceptance of and

98. Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 840 (1990).

99. Charnovitz, *supra* note 31, at 622.

100. *See* Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 (stating that a primary goal of the WTO is "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations"); *see also* Bronckers and Van den Broek, *supra* note 71, at 44.

101. *See* Charnovitz, *supra* note 31, at 622-25. *But see* Daniel R. Murrary, *Foie Gras?: Making Economic Sense of the 1999 U.S. Tariffs on Gourmet European Goods*, 5 J. INT'L LEGAL STUD. 243, 256-57 (2000) (arguing tariffs imposed by the United States on European gourmet goods were not protectionist because the United States had no similar domestic industries to protect, the market for the goods was very small, the tariff was not set up to subsidize other industries, and other "better" protectionist measures were available).

102. As a result, at least one commentator has characterized the WTO's retaliation system as "bizarre." Charnovitz, *supra* note 31, at 622.

103. Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 492 (1997); *see also* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 113 (1995) ("[Norms are] prescriptions for action in situations of choice, carrying a sense of obligation, a sense that they ought to be followed.") (emphasis omitted).

104. *See* Keohane, *supra* note 103, at 502 ("Institutions also need to be consistent with the basic normative commitments of their members, so that having a reputation for supporting the institution has intrinsic, as well as instrumental, value.").

compliance with such a norm, the global trading system would soon be paralyzed, being relegated to the status of a jungle in which only power politics tends to determine its destiny."[105]

The basic normative contradiction created by trade-constricting remedies also undermines the WTO's position as an "interpretive community," an institution in which "challenges [to] and defenses of state behavior, relative to rules, take place."[106] If member states begin to doubt that the WTO is truly about opening trade, they may abandon the organization as a place of discussion. The loss of that "interpretive community" would be disastrous, as these communities "constrain subjective interpretations, promote habitual compliance, and impose reputational costs on violators of norms, as interpreted by these communities."[107]

The WTO's decision to use contradictory trade sanctions could do more than simply harm its own legitimacy and effectiveness—it might spread to other sectors of international law as well. If the WTO shows a willingness to use trade sanctions, other organizations may advocate use of trade sanctions.[108] In addition, as the WTO begins to tackle other, less traditional trade-related issues—such as intellectual property, the environment, and labor—the number of instances in which trade sanctions may be called upon will grow.[109] In short, "activists are not going to be swayed by the argument that trade sanctions can only be employed by the one organization where their use is self-contradictory."[110]

E. *Sanctions Harm "Innocent Bystanders"*

As previously discussed, there is often little connection between the industry that initially complains and the industry (or industries) that benefits from the sanctions.[111] Conversely, commentators note that industries not involved in the dispute could be

105. Cho, *supra* note 70, at 792-93.

106. Keohane, *supra* note 103, at 491.

107. *Id.* Indeed, at least one author believes the WTO's only role is to serve as such a community, and "a norm, not a contract, should be the operating code for the global trading system . . . ." Cho, *supra* note 70, at 792 (footnote omitted).

108. *See* Charnovitz, *supra* note 31, at 626-27.

109. *See id.* at 626.

110. *Id.* at 627.

111. For example, see *EU—Hormones*, *supra* note 38, Annex II, wherein U.S. motorcycle manufacturers, among others, could have benefited from an action initiated on behalf of the cattle industry.

subject to new, enormous tariffs.[112] That is the point of the sanction: by subjecting certain sectors to new tariffs, one expects these sectors will pressure their government to comply with the WTO's ruling.[113] These additional victims join the list of those already mentioned: consumers who enjoy the products subject to sanctions (who will find it more difficult—or at least more expensive—to continue their enjoyment) and producers who use sanctioned goods as inputs for their own products.

IV. Proposals for Change: Alternative Remedies for Noncompliance

In light of the problems with the current system, experts offer a number of alternative proposals to fix the system. Each approach provides at least partial answers to the issues with the current system, but also brings new questions.

A. *Financial Compensation, Settlements, and Fines*

One alternative to the current system is financial compensation, an idea first raised in the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor organization in 1966.[114] Fines and other mandatory compensation already exist as remedies in other trade agreements.[115] Proponents of this alternative claim that financial compensation is more in line with the basic premise behind the WTO (for instance, not restricting trade), provides direct reparations for economic injury suffered, works to induce compliance, is more congruent with public international law in general, and introduces an element of fairness.[116] There may be other benefits as well: states may be more inclined to agree to rules if they know settlement is an option, compensation may allow the continuance of politically volatile, but necessary, trade practices, and compensation may be more economically efficient while pro-

112. *See* Bronckers & Van den Broek, *supra* note 71, at 45-46 n.4 (providing an example wherein Italian battery makers suffer from a U.S. tariff imposed as a result of a dispute over European bananas).

113. *See id.* at 46.

114. Experts are also currently considering this option in the course of the DSU review process. Bronckers & Van den Broek, *supra* note 71, at 52-53.

115. *See* Charnovitz, *supra* note 31, at 628 (noting NAFTA side agreements include the possibility of a fine—and further noting these provisions have never been exercised); William J. Davey, Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations 96 (2006) (noting the Chile-United States Free Trade Agreement and the Singapore-United States Free Trade Agreement both include fine provisions).

116. *See* Bronckers & Van den Broek, *supra* note 71, at 53-54.

viding greater flexibility.[117] Compensation could also go to the injured sector, providing direct relief. Opponents list a similarly long list of problems: the compensation would be difficult to calculate, could be unenforceable, could never reach the right recipients, and could allow wealthy nations to take advantage of buying themselves out of their trade problems.[118] Moreover, settlement could undermine efforts to build a "legal community of international trade."[119] Compensation might also violate a number of WTO provisions, including the principle of most-favored nation status and provisions barring illegal subsidies.[120] Finally, developing countries, the continuing victims of the DSU's implementation phase, arguably suffer under a system of financial compensation as well. Developing countries might struggle to pay financial compensation, and any special provision allowing them to avoid paying would discourage developed countries from paying awards to developing ones.[121]

Perhaps the biggest problem is that there is no way to compel countries to pay any monetary award.[122] If a country declines to comply with a certain WTO provision, it should not be shocking when it declines to pay a fine. When that happens, the complainant would then have to resort to *another* remedy.[123] Financial compensation is dangerous in that it returns at least some of the power to the party who has already shown a willingness to flout the rules.[124]

B. *Carousel Sanctions*

In May 2000, because of a dispute with the European Union over cattle tariffs (*EC—Hormones*), the U.S. Congress passed a law creating a new sanction, called a carousel sanction. This sanction applies when the United States, as a winning party, faces noncompliance by another nation. The law allows the United States to

117. *See* Pauwelyn, *supra* note 9, at 191-92.

118. *See* Bronckers & Van den Broek, *supra* note 71, at 57-63.

119. Cho, *supra* note 70, at 791.

120. *See* Bronckers & Van den Broek, *supra* note 71 at 63-64.

121. *See id.* at 64-65. *But see* DAVEY, *supra* note 115, at 96 (arguing developing country problems could be solved via "sliding scale" compensation, whereby "[compensation is tied] to the size of a Member's economy," or periodic assessment).

122. *See* Charnovitz, *supra* note 31, at 629.

123. If another remedy became necessary, financial compensation would no longer be the "last resort" envisioned by the DSU. *See* DSU art. 3.7.

124. Possible solutions to this problem include requiring each country to deposit a sum of money in a fund for international obligations or seeking enforcement through domestic courts. *See* Charnovitz, *supra* note 17, at 826.

rotate products targeted for retaliatory sanctions every six months.[125] While the United States has never exercised this power to rotate sanctions, former U.S. Trade Representative Robert B. Zoellick intimated that carousel sanctions are a powerful tool for inducing compliance.[126] Zoellick could be right, as the DSU does not explicitly bar carousel sanctions,[127] and no panel decision addresses their legality.[128] Other commentators argue these sanctions are more effective than traditional sanctions because they exploit the disruptive effects of trade uncertainty.[129] Rotation could also prevent the creation of vested interests in the maintenance of retaliatory tariffs.[130] Opponents, including the European Union, have claimed that "the rotated products create an additional cumulative harm that exceeds equivalence."[131] Frustratingly, the sanctions also still conflict with the norm of free trade.

C. *TRIPS Suspension*

In 1999, Ecuador sought to exercise cross-retaliation for the first time, in response to the European Union's discriminatory banana policies.[132] Ecuador contended it was too small to sanction the European Union effectively and was therefore required to resort to suspension of TRIPS "in order to lessen significantly the adverse economic impact which the country cannot and should not have to bear."[133] While the panel noted suspension of obligations under TRIPS sometimes interferes with "private rights owned by natural

125. Trade and Development Act of 2000 § 407, 19 U.S.C. § 2416(b)(2) (2006); *see also* Ford, *supra* note 65, at 547. For example, if France refused to comply with a ruling favorable to the United States, the United States might place tariffs on French beets for six months, aircraft for the next six months, and dental equipment for the next period.

126. Ford, *supra* note 65, at 548-49.

127. *See id.*

128. *See EU—Hormones*, *supra* note 38, ¶ 22 ("[T]he U[nited] S[tates] submitted that '[a]lthough nothing in the DSU prevents future changes to the list [of products subject to suspension] . . ., the United States has no current intent to make such changes'. . . . We therefore do not need to consider whether such an approach would require an adjustment in the way in which the effect of an authorized suspension is calculated.")

129. *See* Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT'L L. 417, 419-20 (2001).

130. In other words, if Country A imposes a retaliatory tariff on Country B's corn, corn producers in Country A may begin to greatly enjoy (or depend) on that new protection, encouraging them to lobby for its continuance. *See* Horlick, *supra* note 62, at 641. Carousel sanctions hope to avoid this.

131. Ford, *supra* note 65, at 567.

132. *See* Recourse by Ecuador to Article 22.2 of the DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, para. 3, at 1, WT/DS27/52 (Nov. 9, 1999).

133. *Id.* para. 11, at 2.

or legal persons[,]" it proceeded to grant Ecuador limited permission to engage in what was, in essence, intellectual property right piracy.[134] When the TRIPS Agreement is suspended, Country A (the winning country) may suspend intellectual property rights stemming from Country B (the losing country). Thus, Ecuador could have ignored European copyrights and reproduced European music for sale within Ecuador. This cross-retaliation is a natural product of the early bargaining of the Uruguay Round, wherein developing countries agreed to TRIPS and the General Agreement on Trade in Services (GATS) in exchange for market access for "traditional goods" like textiles.[135]

Some commentators were excited about the new possibilities opened by suspension of TRIPS. Suspending TRIPS protections makes intellectual property less expensive for the winning party, raising economic welfare.[136] Compliance might also be more likely, as "small-scale denial of intellectual property protection could cause considerably more political discomfort than the usual small-scale case of trade retaliation."[137] Indeed, intellectual property owners have already proved themselves effective lobbyists, as their lobbying was a primary reason for the creation of the TRIPS agreement to begin with.[138]

Professor Arvind Subramanian and Jayashree Watal, a counselor with the WTO, undertook an extensive review of the strengths and weaknesses of TRIPS suspension as a retaliatory measure.[139] In their study, the authors concluded that TRIPS suspension is "feasible, effective, [and] legal," while avoiding some of the "shoot in the foot" effects (and other problems) of traditional trade sanctions.[140]

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134. Charnovitz, *supra* note 31, at 629. The DSU permitted Ecuador to retaliate using three forms of intellectual property: music copyrights, geographical indications, and industrial designs. The arbitrator limited retaliation to $201.6 million; as a result, Ecuador proposed implementation via a system of limited, revocable licenses to domestic firms, in which the firms would only be permitted to violate TRIPS to certain levels. While Ecuador did release a "target list,"—a list of products against which Ecuador expected to impose sanctions—it never actually imposed sanctions. James McCall Smith, *Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute*, *in* NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 257, 269 (John S. Odell ed., 2006).

135. Sebastian, *supra* note 16, at 374.

136. *See* Horlick, *supra* note 62, at 641-42.

137. Robert E. Hudec, *The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective*, *in* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 81, 90 (Bernard Hoekman et al. eds., 2002); *see also* Mavroidis, *supra* note 49, at 808 ("[A]ny effort to undermine the reach of the TRIPs agreement will not be easily tolerated by domestic TRIPs-connected lobbies in Brussels and Washington DC.").

138. *See* Subramanian & Watal, *supra* note 80, at 406.

139. *See generally id.*

140. *See id.* at 415.

At the same time, they identified four potential problem areas: "the private nature of rights; the exclusivity of the rights conferred; the . . . constraints imposed by WTO [DSU] rules; and the possible conflict with other international treaties."[141] The private nature of intellectual property rights was perhaps the most controversial element, as individuals who may not be able to bear the costs of TRIPS suspension hold many intellectual property rights. Pieter Kuyper, the WTO's Director of Legal Affairs, warned against the suspension of obligations under TRIPS because the remedy would be "too close to a discriminatory confiscation of property to be easily acceptable."[142]

Subramanian and Watal's study concluded that a carefully designed TRIPS suspension program could address each of the four problem areas.[143] Specifically, they find that systems like revocable licenses for a targeted country's intellectual property or denial of patent protection for nationals of the targeted country could avoid potential problems. Yet, the authors concluded that a final obstacle remains: "[T]he domestic IP [intellectual property] legislation . . . of developing countries [does] not presently provide for this possibility [of suspension]."[144] They optimistically noted that one could solve the problem by incorporating provisions that allow for intellectual property right suspension into the domestic legislation of developing countries, creating a strong sanction mechanism.[145] Nonetheless, despite the apparent strength of TRIPS suspension as a compliance mechanism, commentators remain skeptical.[146]

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141. *Id.* at 408.

142. Charnovitz, *supra* note 17, at 821. While Subramanian and Watal addressed this problem themselves, *infra* note 143, it is also worth noting that the private nature of intellectual property rights might make rights-holders who suffer the force of sanctions vocal advocates for compliance in their own countries.

143. *See* Subramanian & Watal, *supra* note 80, at 411-15.

144. *Id.* at 415.

145. *See id.*

146. *See, e.g.*, Hudec, *supra* note 137, at 90 ("Developing countries would be . . . wrong to think that practicable TRIPs retaliation will bring about a decisive change in the political fundamentals of WTO enforcement."); Mavroidis, *supra* note 49, at 808 ("It is highly unlikely that the European Community will change its banana-import regime because of Ecuadorian countermeasures in TRIPs.")

D. *Compulsory Trade Barrier Removal (Mandatory Non-Financial "Compensation")*

Some believe the solution lies in making the compensation mechanism already found in the DSU compulsory.[147] In other words, the DSB would force non-complying nations to lower trade barriers in other sectors. In many ways, this system would suffer from the critical flaw of financial compensation: non-complying countries could simply refuse to offer trade compensation.[148] Such an approach still harms innocent bystanders, as the compensation exposes more industries to competition within the non-complying country.[149] Forcing these industries to expose themselves to increased competition could raise sovereignty and fairness concerns.[150] Additionally, the compensation would not necessarily provide any reparation to the injured sector that originated the dispute.[151] More generally, such a system "creates a disincentive for state members to reduce barriers completely in the expectation that at some point, each state member may be required to reduce barriers further in response to a complaint."[152] While forced trade barrier removal is more congruent with the fundamental aims of the WTO than the existing system,[153] this alternative essentially fails to rectify any of the other problems presented by the current tariff-based remedies.

E. *Collective Retaliation and Tradable Sanctions*

Collective retaliation allows nations to "join forces and jointly exercise pressure on a non-complying developed WTO Member."[154] Collective retaliation addresses the current reality wherein a complainant nation must bear the costs of the legal proceeding and the subsequent countermeasures.[155] This approach would allow developing nations to exert real influence on the affairs of larger nations (by drawing on the economic influence of other countries) while dispersing the ill effects of the sanction.[156] Trad-

147. *See* discussion *supra* Part II.B.
148. *See* Bronckers & Van den Broek, *supra* note 71, at 50.
149. *See id.*
150. *See id.* at 50-51.
151. *See id.* at 51.
152. Roberts, *supra* note 47, at 560.
153. *See* Bronckers & Van den Broek, *supra* note 71, at 50.
154. *Id.* at 49.
155. *See* Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Towards a More Collective Approach*, 94 Am. J. Int'l L. 335, 345 (2000).
156. *See id.*

able rights rely on the same principle: one country could sell its right to retaliate to another country, earning the seller an immediate payoff while passing the right to retaliate to a potentially more powerful party.[157] The critical consideration, however, is whether other countries would be willing to bear the burden of countermeasures for the sake of resolving a dispute in which they play no part. At least one commentator thinks they would not.[158] Moreover, passing the right to sanction to a more powerful party could raise proportionality concerns.

F. *Loss of WTO Rights*

A final proposal involves stripping violating members of certain institutional rights, including voting rights, rights to participate in WTO meetings, rights to seek technical assistance, and rights to employ the DSU for their own interests.[159] Some offer that these institutional punishments could escalate if a losing party continues to refuse to comply. For instance, three months after noncompliance, a party could lose its right to act as a third party in DSU disputes; after a year, it could lose the right to initiate cases against other parties.[160] Loss of vote is not unprecedented in international law; the sanction is already a punishment for noncompliance in at least one international organization, the (Chicago) Convention on International Civil Aviation.[161]

Nonetheless, a number of problems with this remedy will probably prevent its use. While this remedy does not encourage trade contraction, it is troubling in that it isolates members of the organi-

157. *See* Bronckers & Van den Broek, *supra* note 71, at 49. Mexico proposed a system of tradable sanctions in 2003 during the course of DSU reforms. Communication from Mexico, *Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes Proposed Text by Mexico*, art. 3(7), TN/DS/W/40 (Jan. 27, 2003).

158. *See* Bronckers & Van den Broek, *supra* note 71, at 49. This criticism is likely a bit misguided. Countries sometimes have an interest in a dispute, but have no right under the current system to impose sanctions because they are not the complainant; these countries might be interested in taking advantage of a tradable rights system. Moreover, collective obligations might not be that revolutionary: most organizations demand investments of time, money, and other resources from their members. *See* Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT'L L.J. 553, 575 ("[T]here is already a broad consensus in international law and practice imposing liability on Member States for costs incurred by an international organization."). Collective enforcement, therefore, might be considered one more "cost" of sustaining the organization.

159. *See* DAVEY, *supra* note 115, at 96-97.

160. *See id.* at 97; Alejandro Jara, *WTO Dispute Settlement: A Brief Reality Check*, *in* THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, *supra* note 58, at 81, 84.

161. *See* Charnovitz, *supra* note 31, at 628.

zation.[162] These responses could result in a permanent reduction of the involvement by the exiled party.[163] Little voting occurs in the WTO, so the sanction lacks power.[164] Suspending technical assistance would only work for developing countries and may only serve to frustrate implementation.[165] Stripping a member of its DSU rights would require careful delineation of which rights are suspended.[166] In the end, such a proposal might be politically unrealistic, as members may well hesitate to allow for the suspension of rights they worked so hard to obtain. A suspension of rights would also weaken the international trading system by withdrawing participants from the system.

V. Developing a More Effective WTO Sanction System

The existing sanction system works well in many ways, but certainly still has problems. Alternate proposals are an encouraging step towards solving these difficulties, but no proposal addresses *all* of them. In short, the failure of current proposals likely stems from a failure by each to commit fully to a single objective. As discussed in Part II, a successful sanction system requires a clear objective and a strong mechanism to effectuate that objective. Real reform should begin with the objective.

A. *A New Focus: Inducing Compliance with WTO Trade Agreements*

1. The Need for a New Objective

Those who argue that the DSU does not require a new objective ignore a tough reality: the WTO is in a precarious position, perhaps unlike any it has faced since its creation. The Doha Round of trade talks has stalled, with India's trade minister describing the Round as somewhere "'between intensive care and the crematorium.'"[167] The effects of Doha's failure have reached far beyond the frustrations of developing countries. At the very least, its failure slows "the momentum behind the accomplishments of the first decade of the WTO and its expansion into new sectors and nations . . . ."[168] The failed multilateral negotiations could also

162. *See* Bronckers & Van den Broek, *supra* note 71, at 51.
163. *See id.*
164. *See* Davey, *supra* note 115, at 97.
165. *See id.*
166. *See id.*
167. Phoenix X.F. Cai, *Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO*, 15 Tulane J. Int'l & Comp. L. 465, 467 (2007) (quoting *In the Twilight of Doha*, *supra* note 11, at 63).
168. *Id.*

encourage nations to engage in more bilateral and regional negotiations, which could harm the WTO "because of overlapping competencies, conflicting substantive and procedural standards, and the risk of forum shopping."[169] The DSU itself could suffer if developing nations, frustrated with the stagnation in the Doha Round, decide to bring more complaints to the DSU in an effort to eliminate farming subsidies and other agricultural trade barriers.[170] Such an influx would do more than simply clog the system; it could lead important participants to question the DSU's worth entirely.[171]

In addition, the recent financial crisis presents new challenges to the WTO's legitimacy (and, more generally, the legitimacy of the norm of free trade). As WTO Director-General Pascal Lamy admitted, "protectionist temptations abound" during times of economic crisis.[172] As late as mid-2009, countries have continued to engage in many of the trade-restricting practices put in place in many countries at the beginning of the crisis.[173] If this spirit of global protectionism remains strong, members may view the WTO as an antiquated relic of the former "free trade" world.

In short, the WTO's legitimacy could be in danger, and Doha's failures and the financial crisis are not the only signs of an emergency. Experts have noted for some time now that "[p]ublic acceptance of the authority and decisions that emerge from the World Trade Organization can no longer be taken for granted in many countries."[174] This general weakening of legitimacy could stem from a shift in focus from economic benefits to other concerns that do not fit as well within the WTO framework, like environmental or labor interests.

Legitimacy is more than just an abstract notion in international law. One scholar, Thomas Franck, posited that legitimacy is a critical element of any effort to secure compliance with any international rule, arguing the following:

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169. *Id.* at 468.

170. *See id.*

171. *See Global Trade Talks: Potsdam's Price*, ECONOMIST, June 30, 2007, at 51 ("If many judgments go against America, Congress would surely question the WTO's legitimacy.").

172. Pascal Lamy, WTO Director-General, Vision Statement to the General Council (Apr. 29, 2009), http://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm.

173. *See* Pascal Lamy, WTO Director-General, Introductory Remarks Regarding His Third Monitoring Report (July 13, 2009), http://www.wto.org/english/news_e/news09_e/tpr_13jul09_e.htm.

174. Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7, 9 (2002).

> [I]n a community organized around rules, compliance is secured . . . at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time. It becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms.[175]

Franck identifies four "indicators of rule legitimacy": determinacy, symbolic validation, coherence, and adherence to a normative hierarchy.[176] Determinacy speaks to the rule or institution's ability to draw a clear line between acceptable and unacceptable conduct.[177] Symbolic validation involves the use of particular symbols, ritualized processes, and official structures to give rules an air of authority.[178] Coherence comes with uniform application of the rules and procedures in all applicable circumstances.[179] Adherence demands that a rule must be congruent with certain fundamental ultimate rules of recognition or peremptory norms of international law,[180] such as *pacta sunt servanda*.[181] Absent each of these four elements, the WTO—and particularly the DSU—will struggle to induce compliance with rules and edicts. The problems resulting from WTO illegitimacy and noncompliance could extend into other areas beyond international trade.[182]

The rules that constitute the DSU lack many of Franck's indicators of legitimacy. Determinacy is the existing system's biggest problem, resulting from the complete inability of any party (including the WTO) to identify a primary goal of the existing pro-

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175. Thomas M. Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705, 706 (1988).

176. *Id.* at 712.

177. *See id.* at 713-26.

178. *See id.* at 726-35.

179. *See id.* at 735-51.

180. Franck's fourth indicator of legitimacy might be an attempt to capture the international law principle of *jus cogens*. Treaties that contradict such norms are invalid, as stated in the Vienna Convention on the Law of Treaties. *See* Mavroidis, *supra* note 49, at 766-67.

181. Franck, *supra* note 175, at 751-58. *Pacta sunta servanda* is defined as "[t]he rule that agreements and stipulations, esp[ecially] those contained in treaties, must be observed." Black's Law Dictionary 1140 (8th ed. 2004).

182. The *Washington Post* noted one such deleterious effect felt beyond the trade realm as follows:

> Before the WTO was created in 1995, there was no neutral place to resolve trade disputes, which consequently degenerated into fights that poisoned international relations. Even an instinctive free-trader such as Ronald Reagan bashed Japan repeatedly with unilateral trade weapons, with the result that, by the early 1990s, the U.S.-Japan military alliance looked shaky.

Sebastian Mallaby, *Free Trade: Pause of Fast-Forward?*, Wash. Post, Apr. 2, 2007, at A15.

cedures.[183] As a result, it is arguable that a bright line does not define acceptable and unacceptable conduct within the WTO system. For instance, a country may knowingly violate a WTO agreement, believing that such conduct is acceptable so long as it later provides concessions to the offended country.[184] The inability of the developing countries to induce compliance from larger states also calls into question the system's coherence, as larger nations know they may use their economic supremacy to compel inequitable decisions.[185] Finally, Franck's adherence indicator seems absent. While the principle of free trade may not be a traditional rule of recognition,[186] it is certainly the fundamental basis for the creation of the WTO.[187]

During this time of weakness, the WTO must obtain what legitimacy it can. Confusing objectives for the DSU imperil the organization's legitimacy while making it difficult to shape narrowly tailored, effective sanction mechanisms.[188] Ineffective mechanisms are particularly troubling for the WTO because the organization's legitimacy is "derived almost entirely from its perceived efficacy and value as part of the international economic management struc-

183. *See* WTO SECRETARIAT, *supra* note 13, at 81.

184. Warren Schwartz and Alan Sykes maintain that the lack of a "bright-line" is intentional and allows for addressing unanticipated circumstances. These authors argue that the sanction mechanism is constructed to allow for "efficient breaches" (in other words, incomplete compliance) where the political benefits to a violating country are greater than the losses suffered by the harmed member. *See* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 180-81 (2002). *But see* Nzelibe, *supra* note 87, at 249-50 (listing trade disputes that indicate states do not pursue efficient breaches).

185. There is some indication that this compulsion is already happening. Following the *EC—Bananas* dispute decision, for instance, Ecuador never exercised the right to suspend the TRIPS agreement it received when the European Union did not comply. *See* HENNING GROSS RUSE-KHAN, SUSPENDING IP OBLIGATIONS UNDER TRIPS: A VIABLE ALTERNATIVE TO ENFORCE PREVAILING WTO RULINGS? 2 (2008), *available at* http://ssrn.com/abstract=1317304.

186. At least one author, Ernst-Ulrich Petersmann, believes that there are indeed "universal rules in recognition of trade as a human right . . . ." Dongsheng Zang, *Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate*, 33 SYRACUSE J. INT'L L. & COM. 393, 440 (2006).

187. The goals of the WTO include "expanding the production of and trade in goods and services." Marrakesh Agreement Establishing the World Trade Organization, *supra* note 100, pmbl.

188. In chasing multiple objectives, the DSU attempts to do the impossible: satisfy all of them. See Charnovitz, *supra* note 17, at 823, which provides the following:

> [W]e 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.

ture."[189] A renewed commitment to a single objective is therefore necessary to restore the WTO's "reputation for efficacy" and ensure its legitimacy.[190]

2. The New Objective: Total Compliance

The new objective should be total compliance. At the outset, total compliance avoids the normative contradiction created by settlement and rebalancing. Using tariffs to "rebalance" amounts to a net increase in trade barriers; when offending Country A implements violative measures and victim Country B is permitted to implement tariff-based countermeasures, the only result is trade that is more limited generally. The trade measures may now be "balanced," but the world trade system has taken a step backward. The WTO would best advance its ideals by using whatever power it holds to effect *immediate* compliance from Country A. The constraints on the sanctions currently available under the DSU make it clear that the WTO has not made immediate compliance its first priority.[191]

Rebalancing and settlement also seem rather empty goals under the current system, given that the private actors who suffer the harm of trade barriers receive no compensation.[192] The only individuals that enjoy any gain from a rebalancing or settlement approach are those protected by the illegal trade barrier in the violating country and those incidentally protected by the countermeasures in the victim country. A settlement approach does nothing to correct this injustice.

Finally, a total compliance approach takes advantage of information asymmetry in international trade. Before a settlement or rebalancing occurs, states have no ability to predict the costs of retaliation for the winning or losing party.[193] Rebalancing or settlement reveals those costs, encouraging compliance in only certain instances. In other words, sanctions are most effective when

189. Esty, *supra* note 174, at 10.

190. *Id.*

191. *See* Sebastian, *supra* note 16, at 366 ("An unconstrained right to retaliate is more likely to induce compliance than a constrained right to retaliate. Nevertheless, the drafters chose to constrain this right. Likewise, punitive retaliation is more likely to result in compliance than non-punitive retaliation. Still, it is presumed that that the DSU rules out punitive retaliation.") (footnote omitted); *see also* discussion *infra* Part II.A.

192. *See* Nzelibe, *supra* note 87, at 245.

193. *Id.*

offending members are unable to weigh the costs of compliance or noncompliance effectively.[194]

B. *A New Sanction Mechanism: Punitive, Tradable, TRIPS-Based Sanctions*

The current sanction mechanism, which primarily focuses on tariff-based sanctions, is inadequate to achieve the above-stated objective. The DSU needs a new mechanism that permits punitive, tradable, TRIPS-based sanctions.

1. Allowing Punitive Sanctions

As discussed above,[195] the instruments currently available to the WTO do a poor job of inducing total compliance. Total compliance is not possible given that the current instruments available "to achieve that ambitious goal are rather meager."[196] For this reason, common sense dictates that the WTO must strengthen its mechanisms. After all, "[a]n unconstrained right to retaliate is more likely to induce compliance than a constrained right to retaliate."[197] In the same manner, "punitive retaliation is more likely to result in compliance than non-punitive retaliation."[198]

The WTO needs punitive sanctions[199] to achieve full compliance. With such sanctions, the WTO can further exploit information asymmetries, like those described above,[200] so deterrence will grow. In essence, punitive damages serve to "bridge the gap between actual damage incurred and the appropriate remedy that would ensure no repetition of the unwanted behaviour in the future."[201] Encouragingly, punitive sanctions would force noncomplying nations to account for the costs they impose not just on the complaining country, but also on the system as a whole (such as weakened legitimacy). The improved results from using puni-

194. *See* Colin Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 102 (1979) ("A madman's threat is convincing precisely because his opponent cannot be sure that he will not pursue a mutually damaging course of action.").

195. *See* discussion *supra* Part III.A.

196. Pauwelyn, *supra* note 9, at 194.

197. Sebastian, *supra* note 16, at 366.

198. *Id.*

199. Again, "punitive sanctions" are sanctions greater than the actual harm suffered by the complaining country. These quasi-criminal sanctions serve to deter and punish wrongdoing. BLACK'S LAW DICTIONARY 418-19 (8th ed. 2004) (citing BMW of N. Am. v. Gore, 517 U.S. 559 (1996)). .

200. *See* discussion *supra* Part V.A.2.

201. Mavroidis, *supra* note 49, at 771.

tive sanctions in DSU disputes would do more than strike down troublesome trade practices; they would also directly supplement the WTO's struggling legitimacy.[202]

Noncompliance situations in the WTO seem closely analogous to other applications of punitive damages, like those found in U.S. domestic law. In the United States, courts can award punitive damages where an individual has demonstrated "[r]eckless indifference to the rights of others and conscious action in deliberate disregard of them."[203] In the United States, punitive damages serve to deter powerful actors from continuing their offensive conduct.[204] U.S. courts do not award punitive damages because of "mere inadvertence, mistake, errors of judgment and the like."[205] In the WTO, each situation requiring sanctions involves deliberate disregard by the offending country. By the time sanctions become an option, the WTO has adjudicated the issue and given specific instructions. As such, non-compliant countries are deliberate offenders who can appropriately face punitive sanctions.[206]

Careful interpretation could permit the use of punitive damages without creating conflict with existing international law (or WTO provisions). To be sure, some experts argue that it is not possible to find "a rationale of the U.S. style punitive damages either in the WTO or in public international law in general."[207] Nevertheless, such an assertion is likely an overstatement. One must admit that international law generally imposes a requirement of proportionality,[208] but international law also contains some examples of punitive assessments.[209] Foreign court aversion to punitive damages

202. *See* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 Am. J. Int'l L. 596, 612 (1999) (noting that an organization's success in producing desired outcomes is one aspect of institutional legitimacy).

203. Restatement (Second) of Torts § 908 cmt. b (1977).

204. *See* 22 Am. Jur. 2d *Damages* § 542 (2008) (listing punishment, general deterrence, and specific deterrence as the objectives of exemplary damages).

205. Restatement (Second) of Torts § 908 cmt. b (1977).

206. At least one commentator believes punitive coercive sanctions should only be used to protect "essential interests of the international community . . . ." Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12. Eur. J. Int'l L. 889, 909 (2001). One might argue that trade is not such an interest.

207. Cho, *supra* note 70, at 779.

208. *See* Cannizzaro, *supra* note 206, at 889.

209. *See, e.g.*, Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 228, Oct. 2, 1997, 1997 O.J. (C 340) 1; Lori Fisler Damrosch, *Retaliation or Arbitration—Or Both?: The 1978 United States-France Aviation Dispute,* 74 Am. J. Int'l L. 785, 792 (1980) (quoting an international tribunal resolving an international aviation dispute: "[Sanctions can have] 'an exemplary character directed at other countries': in other words, 'the character of a

stems from a belief that "[p]unishments . . . should be meted out only by the criminal justice system, with its elaborate due process protections and disinterested prosecutors."[210] The WTO respects those concerns by providing a disinterested arbitrator and affording nations the protection of a complex procedural system. In addition, DSU Article 22.4's requirement that sanctions be equivalent to the "level of nullification or impairment" need not be an absolute bar to punitive damages. The WTO could impose punitive sanctions, with certain limits, by reassessing how equivalency is measured.

The WTO could merely reinterpret its proportionality requirement to mean that the sanctions must be in proportion to their "objective function," which is, within the proposed new system, total compliance.[211] Indeed, if sanctions are viewed "as a means of implementing legal obligation, we should conclude that proportionality should be measured by the coercive aim of the response."[212] Constructing a punitive sanction system that looks to the final goal of compliance avoids abusive judgments, as "otherwise unbounded discretion" is limited by a requirement that "the aim pursued is not manifestly inappropriate to the situation, considering the structure and content of the breached rule."[213] In short, the DSB would be required to articulate clearly how the degree of sanctions selected served to induce compliance with the breached rule.

Reformers may be hesitant to propose a punitive sanction scheme given the numerous ill effects of the current sanction scheme described above.[214] Punitive sanctions would serve to multiply those ill effects, something that could be particularly troubling for the nations that implement the sanctions. Because of the "self-inflicted harming" effect of the current mechanism, countries

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sanction.'"); Mavroidis, *supra* note 49, at 771 n.25 (explaining the International Court of Justice case *Rainbow Warrior* resulted in damages of $7 million, with no articulation of how those damages were reached).

210. Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1.

211. Mavroidis, *supra* note 49, at 802. Such an approach was at one point envisaged for the International Law Commission's Draft Articles on State Responsibility. *See id.* *But see* Daniel Bodansky et al., *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 822 (2002) ("[N]o discussion by the Commission gives any hint that the commensurability analysis should focus on the level of response required to induce a responsible state to conform its conduct to international obligations.").

212. *See* Cannizzaro, *supra* note 206, at 892.

213. *Id.* at 897.

214. *See* discussion *supra* Part III.

would effectively increase their own pain. The WTO should avoid using tariffs in a punitive sanction scheme to avoid such effects.

2. Adopting TRIPS as the Preferred Agreement for Sanctions

Allowing nations to suspend the TRIPS Agreement, rather than limiting them to tariffs, would permit punitive enforcement without self-inflicted harm. TRIPS suspension further amplifies the compliance effects of punitive sanctions by targeting those sanctions towards powerful political actors who will likely lobby their countries for compliance.[215] Allowing nations to retaliate by suspending intellectual property rights does more than aid in compliance and solve the self-harm problem posed by the present sanctions; the approach also avoids the normative conflict that currently exists with tariff-based sanctions. Intellectual property rights could themselves be considered trade barriers,[216] so it follows that reducing them (even temporarily) would *open* trade. Whereas the current system deals with noncompliance with a mercantilist constriction of trade, TRIPS suspension opens the markets to more goods. As a result, TRIPS suspension allows the WTO to harness the persuasive power of norms once again. As an added benefit, victims of the illegal trade practice that spurred the dispute could receive more benefits via TRIPS suspension than under the current system, taking a step towards the direct victim compensation many currently call for.[217]

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215. For example, see Subramanian & Watal, *supra* note 80, at 406, which states the following:

> TRIPS confers enormous benefits to the large, research-based pharmaceutical and life science companies, to software and other IT companies, to the famous film and music producers, to performers and distributors, and to owners of famous marks and other IP owners based in developed countries . . . . Axiomatically, withdrawing TRIPS benefits must be costly and painful for them.

216. *See* Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, *Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together*, 37 VA. J. INT'L L. 275, 280 (1997) ("The TRIPS Agreement, intended mainly to promote global competition, treats patents, copyrights, trademarks, and trade secrets as pro-competitive. Similarly, [the WTO's precursor, the General Agreement on Tariffs and Trade] disfavors protectionism—a word the intellectual property community has long used to describe precisely the copyright, patent, trademark, and trade secret policies that the TRIPS Agreement mandates.") (footnote omitted); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 303-04 (2004) (concluding TRIPS has no "important connection to liberalized trade"); Katja Weckström, *When Two Giants Collide: Article 17 and the Scope of Trademark Protection Afforded Under the TRIPS Agreement*, 29 LOY. L.A. INT'L & COMP. L. REV. 167, 167 (2007) ("While international trade law focuses on removing trade barriers, intellectual property rights are territorially limited and hence, by definition, barriers to trade.").

217. Imagine, for example, that Australia brings a DSU action against the United States relating to breakfast cereal. If the DSB rules against the United States and it refuses to comply, Australia would then seek to suspend TRIPS with regard to the United States.

Admittedly, such a remedy is likely to be more effective in situations in which a developing country brings a complaint against a developed nation. Developed nations have the largest stake in intellectual property rights and thus have the most to lose. Nevertheless, the limited usefulness of TRIPS-based sanctions is not troubling because instances of noncompliance arise most in those exact circumstances.[218] While a tariffs-based sanction may need to remain a viable option for use by the DSB in limited instances, the approach described herein would likely address most of the instances of noncompliance.

One potential difficulty of TRIPS suspension is determining the proper scale of retaliation. Using a system of punitive sanctions like that described above mitigates this difficulty. In essentially raising the cap on permissible sanctions, it becomes less essential to determine the value of intellectual property rights. Such valuation, necessary under the current system in order to ensure "proportionality," need not happen to any extensive degree under the punitive system. In assessing the scope of sanctions under such a system, arbitrators would only need to scale the TRIPS suspension to achieve a purpose of compliance.

Subramanian and Watal, who were likely the first to propose TRIPS suspension as a sanction mechanism, never addressed an important issue regarding such suspension in their analysis: how TRIPS suspension will affect the TRIPS Agreement. To be sure, allowing TRIPS suspension will likely undermine the Agreement in the same manner that current tariff-based sanctions undermine trade liberalization. Nevertheless, such a cost is acceptable. TRIPS protections clash with the trade protection ideas that are the foundation of the WTO.[219] Moreover, when the WTO acts on issues that lack a sufficient political consensus, "damaging backlash" from member states can result.[220] In order to preserve legitimacy, the

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Australian cereal producers might use suspended patents to "pirate" an American cereal production process. Thus, the TRIPS suspension provides a benefit to the injured party.

218. When developed nations bring cases against developing countries, the cases have always been resolved. On the other hand, as of 2005, six cases involving a developing country complaint against a developed nation remained unresolved despite the DSU's finding that a WTO violation occurred. *See* Kyle Bagwell et al., *The Case for Tradable Remedies in WTO Dispute Settlement*, *in* ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 395, 399-402 (Simon J. Evenett & Bernard M. Hoekman eds., 2006).

219. *See supra* note 216.

220. Susan K. Sell, *The Quest for Global Governance in Intellectual Property and Public Health: Structural, Discursive, and Institutional Dimensions*, 77 TEMP. L. REV. 363, 380 (2004); *see also* Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 24 (2004) ("[T]he TRIPs implementa-

WTO should "trim its sails and reserve its strength for core trade liberalization activities."[221] Therefore, it is not out of the question to cease intellectual property protection within the WTO entirely.[222] As such, weakening of the TRIPS Agreement is not especially troubling.

A weakened TRIPS Agreement would not destroy international intellectual property. In fact, it is possible that moving away from TRIPS will strengthen intellectual property rights if other organizations with greater resources move to protect them.[223] The World Intellectual Property Organization (WIPO) is one such organization that stands ready to reassume the task of defining international intellectual property rights, as it did for many years before the negotiation of TRIPS.[224] The current existence of numerous competing forums can create problems that could be resolved by shifting the focus from TRIPS to WIPO. When different organizations tackle the same issue, multiplicity can "[spawn] cooperation among intergovernmental bodies[,]" but it can also "spawn inefficient rivalries among actors or attenuate mechanisms for holding international institutions accountable to affected constituencies. And it increases the likelihood of conflicting or incoherent legal obligations for states and private parties—an especially grave concern for an international system with few hierarchical rules for resolving such inconsistencies."[225]

In sum, the benefits that accrue from using TRIPS suspension as an enforcement mechanism, combined with the collateral benefits of shifting the international focus away from TRIPS, overcome the costs of weakening the TRIPS Agreement.

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tion process did not generate the consensus in favor of higher intellectual property protection standards that some observers had predicted. Instead, it fostered a growing belief . . . that TRIPs was a coerced agreement that should be resisted rather than embraced.") (footnote omitted).

221. Esty, *supra* note 174, at 17.

222. Jagdish Bhagwati argues that TRIPS should not be a part of the WTO. See Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 Am. J. Int'l L. 126, 127 (2002), in which Bhagwati argues:

> [TRIPS] does not belong to the WTO. It facilitates, even enforces with the aid of trade sanctions, what is in the main a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it). By putting TRIPS into the WTO, in essence we legitimated the use of the WTO to extract royalty payments.

(footnote omitted).

223. The WTO has a staff of only 500 (including 300 translators) and an annual budget of $77 million. In contrast, the World Bank has a staff of 6,000 people and a budget of about $8 billion a year. *See* Sell, *supra* note 220, at 381.

224. *See* Helfer, *supra* note 220, at 24.

225. *Id.* at 82 (footnote omitted).

3. Making Sanctions Tradable

One last difficulty remains with a punitive TRIPS-based remedy: "the domestic [intellectual property] legislation, or drafts in process, of developing countries do not presently provide for this possibility."[226] Consequently, the revised enforcement scheme needs one more element: tradable sanctions. Tradable sanctions would allow those countries that do not have domestic laws permitting intellectual property suspension to enjoy the benefits of countermeasures. A trading system of TRIPS-based sanctions would also be more successful than any tradable sanction system under the current process, as TRIPS-based sanctions provide benefits to the imposing country (rather than imposing costs as tariffs do). The compensation a complainant country could earn by auctioning the right to sanction, for instance, would put money in the hands of that complainant.[227] The country could then use that money to compensate victims of the WTO-violating action directly. Such an approach provides all the benefits of a financial compensation approach,[228] with none of the difficulties that come with compelling nations to pay.

The tradable element adds a degree of uncertainty for the violating country that should serve to encourage compliance even more. As noted above in Part V.A.1, sanctions are more effective when the violating country is unable to calculate the potential costs of noncompliance accurately. By making the sanctions tradable, violating countries are less able to make that calculation, because they can no longer project the ability of a losing party to impose countermeasures. Tradable, TRIPS-based, punitive measures could come from anywhere. For example, if the United States loses a dispute to Ethiopia, the United States may expect that few of its intellectual property rights would be at stake there. Yet, if Ethiopia has the right to sell the retaliatory measure to Canada, the sanction becomes more ominous. Uncertainty should breed willingness in the United States to negotiate.

C. *Difficulties with the Proposed System*

A punitive, TRIPS-based tradable sanction system is not a panacea for noncompliance in the WTO. While this form of sanction

226. Subramanian & Watal, *supra* note 80, at 415.

227. This Note does not endeavor to identify the best sale process for tradable sanctions. *See generally* Bagwell et al., *supra* note 218 (evaluating the merits of potential auction systems for tradable WTO remedies).

228. *See* discussion *supra* Part IV.A.

would solve many of the problems of the current system addressed above, it would also bring with it some new challenges. These challenges are essentially political, and their political nature makes it difficult to project with any reasonable degree of certainty how these obstacles would play out upon actual implementation.

The most substantial problem with the proposed system is quite simple: by increasing potential penalties, a sanction could encourage escalation of the conflict or even lead to withdrawal from the organization by one of the parties. If the WTO allows Country A to sanction Country B, Country B might choose to retaliate via other avenues. One could then expect Country A to act, escalating the conflict to a higher degree. As countries use more and more coercive retaliation, "[t]he ultimate result is likely to be a costly spiral of retaliation and ultimately a breakdown of the entire cooperative arrangement."[229] Indeed, such escalation occurred in prior trade disputes when states imposed their own sanctions.[230]

Even if full breakdown of the WTO did not occur, other troubles could theoretically arise because of the conflict escalation. Conflict can split an organization into factions, as "conflict with the outgroup tends to increase solidarity in the ingroup."[231] If the DSB permits a developing nation to impose a punitive TRIPS-based sanction, developed nations may come together to condemn the sanction, while developing nations coalesce to applaud it. The result would be a North-South schism through the entire organization. The tradable sanction encourages involvement of third parties,[232] further complicating the conflict and encouraging member states to stand against one another. A divided WTO would likely stifle the communication that the WTO is supposed to foster, which in turn could spread the conflict to other areas.[233]

Despite these possibilities, it seems unlikely that the new sanction mechanism described above would destroy the WTO or escalate tensions to an extreme degree. The above concerns mostly arise between two independent parties acting against one another, with no "central authority to do the enforcement . . . ."[234] Because the DSB acts as a neutral third-party arbiter, however, any real dan-

229. Sebastian, *supra* note 16, at 379-80.

230. *See id.* at 380.

231. Connie Peck, The United Nations as a Dispute Settlement System: Improving Mechanisms for the Prevention and Resolution of Conflict 29 (1996).

232. *See id.* at 36; Dean G. Pruitt & Jeffrey Z. Rubin, Social Conflict: Escalation, Stalemate, and Settlement 65 (1986).

233. *See* Peck, *supra* note 231, at 31.

234. Robert Axelrod, The Evolution of Cooperation 138 (1984).

ger of damage is limited, as "[t]he fact that the permissible intensity of retaliation is assessed by a neutral third party probably matters far more than the theoretical cogency of any individual arbitral award."[235] In other words, a legitimate mediator applying objective standards (for example, scaling a sanction to its objective function) will serve as a barrier to conflict escalation.[236] The DSU process itself also forces careful consideration of the problem at issue, as it requires parties to present their concerns in coherent, apolitical arguments to the DSB. Even the time it takes to file a complaint, argue the complaint, receive a favorable ruling, and receive permission to impose a sanction can prevent states from acting hastily to impose an ill-conceived sanction. The fear of conflict escalation itself can discourage a non-complying state from acting aggressively following an unfavorable WTO ruling.[237] Common membership in the organization creates bonds and encourages norms that will discourage conflict as well.[238] In sum, structural characteristics of the DSU provide adequate assurance that escalation (or, even more pessimistically, member state withdrawal) will not result from the proposed mechanism.

Even so, the DSB should employ careful language in utilizing this sanction mechanism. Escalation could theoretically result if the parties involved simply wish to punish each other in order to satisfy a thirst for revenge.[239] While this Note has described the proposed mechanism as "punitive" in order to indicate a sanction greater than mere equivalent compensation, the purpose of the sanction should not be retributive. Rather, an increase in the scale of the sanction should induce compliance, and the DSB should be careful to make that purpose clear.[240] The objective of compliance

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235. Sebastian, *supra* note 16, at 379.

236. *See* PRUITT & RUBIN, *supra* note 232, at 67-68.

237. For instance, imagine losing Country B is unhappy when the WTO permits winning Country A to implement TRIPS-suspension sanctions. If Country B recognizes that retaliatory action on its part will substantially harm the WTO, it might avoid retaliation to preserve the gains it enjoys from the Organization's well-being. *See id.* at 68 (describing how fear of escalation can serve to discourage state aggression).

238. *See id.* at 70 (explaining that shared norms and bonds to parties that would oppose conflict dampen escalation).

239. *See id.* at 96.

240. In this sense, the sanction should be somewhat analogous to the coercive contempt remedy found in many domestic systems. The initial WTO decision (requiring compliance) is like a court's issuance of an injunction. When a nation refuses to comply, it essentially violates the injunction. A contempt remedy can then be ordered to force compliance, and the remedy ceases operation once compliance occurs. See, for example, State v. Roll, 298 A.2d 867, 728 (Md. 1973), providing as follows:

outlined above should not be poisoned with a spirit of simple retribution.

VI. Conclusion

It would be an overstatement to say that the DSU is a failure. The system has enjoyed a number of successes and taken many important steps towards freer and fairer international trade. Even so, the WTO should continue to strive towards better results. In instances of noncompliance, the purposes behind the current sanction mechanism are unclear. As a result, the existing sanction mechanism apparently aims at a hodgepodge of goals, achieving some but missing the mark on others. This confusion needs to end. The WTO should announce, once and for all, that the DSB will use countermeasures to induce total compliance. With that goal in mind, the WTO must adopt a new approach that gives the DSB the tools to achieve that goal: a system of punitive, tradable, TRIPS-based sanctions. With a new sense of purpose and a new tool to achieve it, the WTO can begin buttressing its recently challenged legitimacy.

A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance. Thus, a penalty in a civil contempt must provide for purging.