

## THE CASE AGAINST REFORMING THE WTO ENFORCEMENT MECHANISM

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*This essay states the public choice case against reforming the current WTO enforcement mechanism, which allows parties that prevail in an international trade dispute to retaliate against the scofflaw state by suspending equivalent trade concessions. Currently, there are two distinct kinds of proposals floating around to change this mechanism to make it more incentive-compatible for all member states and user-friendly to developing nations: the first is the use of collective or third-party sanctions; the second is the imposition of monetary compensation. This essay argues that both these proposed reform schemes introduce potential pathologies of their own that are likely to dwarf those of the current enforcement mechanism. First, it argues that under a collective or third-party sanction scheme, the administering third-party states will have no incentive to choose a retaliation strategy that maximizes compliance because they will not face any export group pressures to do so. Rather, such states will have an incentive to choose a retaliation strategy that maximizes the returns to their protectionist groups. In other words, collective or third-party sanctions are likely to increase the global level of protectionism without any offsetting compliance benefits. Second, it argues that the costs associated with monetary damages—including the likelihood they will lead to socially undesirable litigation levels—are likely to be higher than their putative benefits to developing countries. Finally, the essay suggests that proreform advocates tend to rely on empirical assumptions that might overstate the extent to which the current enforcement scheme actually hurts developing states' interests.*

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## I. INTRODUCTION

The World Trade Organization (WTO) enforcement mechanism permits states harmed by uncured violations to retaliate against the scoff-law state by suspending equivalent “concessions and other obligations under the covered agreements.”<sup>1</sup> Since the inception of the WTO in 1995, a broad array of states have successfully used this mechanism to resolve significant disputes over the legality of trade-inconsistent measures.<sup>2</sup> Reading much of the contemporary commentary on the WTO sanctions regime, however, one might be forgiven for believing the regime has become a qualified failure.

Two significant criticisms of the regime loom large in the literature. The first is that by focusing on rebalancing concessions, the regime has become incentive-incompatible because it hurts the welfare of the state administering the retaliation without punishing the protectionist groups that instigated the violation.<sup>3</sup> The second is that because developing countries, especially the least developed countries (LDCs), are at a disadvantage in administering effective retaliation, the entire WTO enforcement regime is biased in favor of developed states.<sup>4</sup> To counter these alleged pathologies in the current WTO enforcement regime, numerous commentators and various member states have suggested modifying the WTO agreement to embrace alternative sanctions, such as

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1. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) [hereinafter Dispute Settlement Understanding or DSU].

2. For background information on dispute settlement mechanisms under the GATT/WTO system, see Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996*, in 11 INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 3–122 (Ernst-Ulrich Petersmann ed., 1997).

3. See, e.g., Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 WORLD TRADE REV. 123, 128 (2002); Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 15, 28 (2001); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO*, 8 J. INT'L ECON. L. 101 (2005); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 814–24 (2001); Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 786–87 (2004); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763 (2000); Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9 J. INT'L ECON. L. 427 (2006); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 346 (2000); Joel P. Trachtman, *Building the WTO Cathedral*, 43 STAN. J. INT'L L. 127 (2007); Nuno Limão & Kamal Saggi, *Tariff Retaliation Versus Financial Compensation in the Enforcement of International Trade Agreements* (World Bank Policy Research, Working Paper No. 3873, 2006), available at [http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/03/24/000160016\\_20060324163518/Rend ered/PDF/wps3873.pdf](http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/03/24/000160016_20060324163518/Rend ered/PDF/wps3873.pdf).

4. See Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement Tariffs/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003); Gary N. Horlick, *Problems with the compliance structure of the WTO dispute resolution process*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 636, 641–42 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* (unpublished manuscript), available at [www.ictsd.org/dlogue/2003-02-07/Shaffer.pdf](http://www.ictsd.org/dlogue/2003-02-07/Shaffer.pdf).

monetary damages or collective retaliation.<sup>5</sup> Each of these alternative remedial schemes seeks to level the enforcement playing field between developing and developed states in international trade disputes and increase the likelihood that member states will fully internalize the costs of their violations.

However, member states operate in an institutional and political context in which the purported benefits of these proposed reform measures are likely to be outweighed by their costs. Significantly, these reform proposals do not sufficiently account for the motivations of political actors in member states, especially the likelihood that politicians will manipulate these remedial proposals to serve other interests that might be inconsistent with the reduction of international trade barriers. These proposals ignore the reality that political actors in most WTO member states (or in most democracies, at least) optimize across a range of issues to increase their electoral prospects, and do not necessarily seek to maximize consumer welfare.<sup>6</sup> Thus, if the ultimate goal is to encourage member states to lower trade barriers over the long run, these reform proposals might prove to be problematic, if not perverse.

Take, for instance, the proposal that retaliation or sanctions should be imposed on a collective or a third-party basis.<sup>7</sup> The problem with such a scheme is that the elected officials in the states administering the retaliation are likely to be more responsive to the needs of their own domestic political constituencies than the interests of the state hurt by the trade-inconsistent measure.<sup>8</sup> One cannot assume that third parties not directly affected by a trade violation will have any incentive to impose retaliation in a manner that will induce compliance by the scofflaw state. Indeed, by applying public choice models to the behavior of member

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5. Some developing countries have formally proposed a monetary remedies scheme. See Proposal by the LDC Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/17 (Oct. 9, 2002), available at [http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc\\_115337.pdf](http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_115337.pdf) (proposing monetary damages equal to injury suffered); see also Proposal by the African Group, *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/15 (Sept. 25, 2002) (proposing monetary compensation to be continually paid pending and until the withdrawal of the measures in breach of WTO obligations). Commentators have also made similar proposals. See, e.g., Claude Barfield, *WTO Dispute Settlement System in Need of Change*, 37 *INTERECONOMICS* 131 (2002); Bronckers & van den Broek, *supra* note 3, at 101; Chi Carmody, *Remedies and Conformity Under the WTO Agreement*, 5 *J. INT'L ECON. L.* 307, 307-09 (2002); Robert MacLean, *The Urgent Need to Reform the WTO's Dispute Settlement Process*, 8 *INT'L TRADE L. & REG.* 137 (2002); Trachtman, *supra* note 3, at 128-29.

6. See Phillip P. Frickey, *Legislative Processes and Products*, 46 *J. LEGAL EDUC.* 469, 471 (1996).

7. One such proposal was put forth by Mexico which argues that developing countries be allowed to trade their retaliation rights. See Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, Proposal by Mexico, TN/DS/W/23 (Nov. 4, 2002). For an analysis of this proposal, see Kyle Bagwell, Petros C. Mavroidis, & Robert W. Staiger, *The Case for Auctioning Countermeasures in the WTO* (Aug. 2004) (unpublished manuscript), available at <http://www.columbia.edu/~kwb8/auctionation080904.pdf>; see also Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 *BROOK. J. INT'L L.* 31, 65 (1992); Pauwelyn, *supra* note 3, at 335.

8. See generally PAUL B. STEPHAN ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY* (3d ed. 2004).

states, this essay seeks to demonstrate that such third parties will likely apply retaliation in a manner that maximizes benefits to their protectionist audiences—an approach that is likely to raise the global level of protectionist policies without any offsetting compliance benefits. Under the current bilateral retaliation scheme, by contrast, victim member states that prevail in an international trade dispute have an incentive to choose a retaliation strategy that maximizes compliance because of export group pressures.<sup>9</sup> But such pressures do not exist when a third party is imposing the sanction. In the current enforcement scheme, the interests of the relevant powerful interest group are largely aligned with those of the consumers who stand to benefit from the reduction of trade barriers.<sup>10</sup>

Similarly, the imposition of monetary damages is also likely to exhibit its own public choice pathologies. While monetary damages may impose some political costs on the regime in the scofflaw state, the regime will have every incentive to disperse the impact of such a sanction by spreading its burden across a diffuse and politically weak domestic constituency.<sup>11</sup> Furthermore, the regime in the victim state may have no incentive to use monetary damages to benefit the domestic groups affected by the trade-inconsistent measure. This latter concern is likely to be exacerbated in LDCs, where regimes are typically subject to high agency costs. Yet another potential disadvantage of adopting monetary remedies is that it might lead to inefficient or excessive levels of litigation, as it is likely to increase the divergence between the social and private costs of WTO litigation.<sup>12</sup> In other words, monetary compensation may enable developing countries to derive benefits from initiating WTO litigation that, while significant from the developing countries' viewpoint, may be detrimental to the WTO system as a whole. Such divergence is less likely when a state engages in bilateral retaliation because the benefits from litigation, which involve the opportunity to administer prospective sanctions against the scofflaw state, would be insignificant relative to the costs of litigating a claim.<sup>13</sup>

Finally, balanced against the costs (and benefits) of the reform proposals are the purported costs of maintaining the status quo. Here, this essay suggests that proreform proponents may overstate the extent to which the current system harms developing countries. First, these criticisms do not sufficiently recognize that developing states, including LDCs, receive significant spillover benefits from litigation by other

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9. Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organizations Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES LAW 215, 217 (2005).

10. See, e.g., *id.* at 235.

11. See Limão & Saggi, *supra* note 3, at 25.

12. Alan O. Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631, 656 (2005).

13. See generally *id.*

member states.<sup>14</sup> Second, reform proposals do not sufficiently distinguish the litigation capacities of the developing countries that host the world's poorest citizens from those of the poorest states.<sup>15</sup> Third, current empirical and theoretical models do not adequately capture the true cost-benefit calculus developing countries currently face,<sup>16</sup> which also involves the possible lack of political economy incentives to initiate WTO claims.<sup>17</sup>

In short, this essay seeks to clarify, then move beyond, the facile comparisons in the literature between the effect of domestic and international trade remedies, especially in the context where politicians in member states face significant pressures from powerful domestic groups. It suggests that any proposal to reform the WTO dispute resolution mechanism that ignores the incentives and motivations of relevant political actors is doomed to be self-defeating. In this picture, any proposal that purports to address the interests of consumers to the exclusion of any other consideration is likely to be hijacked by other more politically powerful interest groups in short order. Thus, the challenge is not how to eliminate altogether the influence of interest groups in the WTO enforcement scheme, but rather how to develop a strategy that effectively harnesses interest-group dynamics in the service of reducing trade barriers. In this regard, the current WTO enforcement scheme appears superior to the proposed alternatives. Admittedly, the normative claims developed in this essay are largely speculative, but the goal here is not to suggest that all these reform proposals are necessarily wrong headed. Rather, this essay asserts that the case for reform in the literature remains theoretically underdeveloped.

This essay proceeds as follows. Part II describes the relevant contemporary debates about reforming WTO sanctions and exposes some of the problematic assumptions lurking in them. Part III turns to the political logic that animates the current bilateral retaliation system and then tries to predict what to expect of a system that adopts either a collective retaliation or monetary damages approach. Significantly, this Part criticizes the monetary damages remedy on two main grounds. The first involves the possibility that politicians will not have sufficient incentives to make sure that monetary damages punish the groups that instigated the trade violation and benefit the groups that suffer from such a violation. The second, which has largely been ignored in reform debates, observes that WTO litigation involves a public good that is subject to free rider problems. In this picture, the free rider problem is likely to be exacerbated in a system where monetary damages are readily available to liti-

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14. Chad P. Bown, *Participation in WTO Dispute Settlement: Complaints, Interested Parties, and Free Riders*, 19 WORLD BANK ECON. REV. 287, 289 (2005).

15. Busch & Reinhardt, *supra* note 4, at 720.

16. Bown, *supra* note 14, at 290.

17. *Id.* at 293.

gants, especially if such litigants are developing countries that are unlikely to be sensitive to the costs of litigation on the WTO system. Part IV suggests that critics overstate the purported costs of the current enforcement system, especially its effect on developing states.

This essay is not the first to suggest that multilateral or collective sanctions might be problematic in an international context. For instance, Andrew Guzman has suggested that compared to bilateral sanctions, multilateral sanctions are prone to free rider problems because a country will only benefit from a portion of the sanction imposed.<sup>18</sup> He then speculates that, because of these free rider issues, any multilateral sanctions scheme will be subject to underenforcement problems. But even beyond the enforcement issues that Guzman points out in the multilateral context, this essay suggests that any collective or third-party sanctions scheme will be subject to a range of public choice pathologies.

## II. THE DEBATE ABOUT SANCTIONS IN THE WTO

What factors might determine the optimal enforcement or sanctions regime in international trade? This question has become more salient recently given member states increased reliance on the WTO adjudicatory mechanism to protect bargained-for trade benefits.<sup>19</sup> Nonetheless, the answer to this question is far from self-evident. Many commentators who tackle this institutional design issue adopt what might be loosely termed an “optimistic” vision of political action, attempting to delineate a range of “first-best” remedial options that focus primarily on increasing equitable access to litigation by member states while enhancing global consumer welfare.<sup>20</sup> Another group of commentators takes a more cynical or politically cautious approach: they assume that the kind of remedial schemes member states embrace will often reflect an effort to maximize benefits for elected officials in such states, rather than an effort to increase global welfare.<sup>21</sup> This essay decisively embraces the latter approach and uses it as a framework for criticizing the various proposals made by “optimists” to remedy the WTO enforcement regime.

Subpart A suggests that many of these proposals rely on assumptions that do not adequately consider the motivations and constraints

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18. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1869 (2002).

19. See ROBERT Z. LAWRENCE, CRIMES AND PUNISHMENTS? RETALIATION UNDER THE WTO (2003); Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of Trade*, in THE WTO AS AN INTERNATIONAL ORGANIZATION 133, 144–46 (Anne O. Krueger ed., 1998); Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 2 (2003); Nzelibe, *supra* note 9, at 216.

20. See, e.g., the proposals and commentary referenced *supra* note 5.

21. See Goldstein, *supra* note 19, at 144–46; Movsesian, *supra* note 19, at 3; Nzelibe, *supra* note 9, at 215–17; Alan O. Sykes, *The Remedy for Breach of Obligations under the WTO Dispute Settlement Understanding: Damages or Specific Performance?*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW 340 (Marco Bronckers & Reinhard Quick eds., 2000).

faced by politicians in member states. Subpart B considers institutional design factors that might achieve a second-best outcome by focusing on veil of ignorance considerations as well as mechanisms for aligning the incentives of powerful interest groups with an effective sanctions regime.

#### A. *Alternative Sanctions and Questionable Assumptions*

The obvious starting point for this analysis is the language of the WTO Agreement itself. If a WTO member is found to violate a relevant WTO rule, the dispute settlement body (DSB) recommends that the scofflaw state “bring the measure into conformity” with the covered agreement.<sup>22</sup> If compliance is not forthcoming within a reasonable time and the scofflaw state refuses to offer any compensation that involves the elimination of trade barriers, the victim state can retaliate against the scofflaw state by suspending “[equivalent] concessions or obligations under the covered agreement.”<sup>23</sup> In other words, the victim state can raise tariffs or impose other trade barriers against the scofflaw state that are equivalent to the harm inflicted by the relevant trade violation.<sup>24</sup>

At first blush, the WTO enforcement scheme clearly seems in tension with the purported goal of eliminating trade barriers. By implicitly allowing member states to fight protectionism with protectionism, it seems to turn the trade liberalization objective of the WTO on its head. Moreover, the actual distribution of the impact of bilateral retaliation on domestic groups seems perverse: it tends to punish consumers in the victim state and exporters in the scofflaw state for the misdeeds of protectionists in the scofflaw state, while largely leaving unaffected the protectionists that instigated the violation.<sup>25</sup> Finally, if the threat of WTO retaliation is supposed to induce the scofflaw state to comply with its obligations, member states are likely to vary in their ability to inflict the level of retaliation that will induce compliance. Indeed, a growing and impressive number of empirical studies appear to vindicate the notion that developing countries are at a disadvantage in implementing retaliation under the current enforcement scheme.<sup>26</sup>

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22. DSU art. 19.1. For a discussion of second-order or second-best solutions in constitutional and statutory schemes generally, see Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003).

23. See DSU art. 22.2.

24. In many respects, how to measure equivalent harm has been a source of significant controversy in the literature. See Holger Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, 9 J. INT'L ECON. L. 31 (2006). But putting aside that debate for now, the goal of the enforcement mechanism has been to allow the injured member to rebalance its obligations by suspending concessions equivalent to the harm it suffered as a result of the violation.

25. Nzelibe, *supra* note 9, at 228.

26. Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 862 (2005); Henrik Horn, Petros C. Mavroidis, & Håkan Nordström, *Is the Use of the WTO Dispute Settlement System Biased?* 1 (Ctr. for Econ. Policy Research, Discussion Paper No. 2340, 1999), available at <http://venus.icre.go.kr/metadata/152052340.pdf>; Christina Davis & Sara Bermeo, *Who Files? Developing Country Partici-*

In response to these problems, scholars and practitioners of international trade, as well as politicians from developing states, have recommended moving to a system of multilateral retaliation or imposing monetary sanctions in lieu of retaliation on the scofflaw state.<sup>27</sup> Two variants of collective or third-party sanctions have been proposed. The first would have a collection of countries impose retaliation after a scofflaw state loses a WTO dispute.<sup>28</sup> The other, endorsed by Mexico and explored in detail by Kyle Bagwell, Petros Mavroidis, and Robert Staiger, would allow states to auction the right to retaliation to the highest bidder.<sup>29</sup>

At each critical juncture, however, the political dynamics and institutional mechanisms that would make such alternative remedies fulfill their promised goals are underspecified. Moreover, the assumptions underpinning these reform proposals fail to appreciate the underlying interest group dynamics that might make an enforcement scheme politically unsustainable over the long run.

For instance, the notion that monetary compensation can fill in the incentive gap caused by retaliation implicitly adopts a benign view of what motivates member states—at least in the realm of international trade disputes. This view assumes that politicians in member states will be motivated to make the necessary redistributive adjustments in a way that correctly punishes the domestic groups that instigated a breach of WTO commitments and rewards the groups harmed by the breach.<sup>30</sup> Thus, some commentators who advocate reform believe the government in the scofflaw state would diligently track down the protectionist groups that lobbied for the trade-inconsistent measure and make them pay the monetary penalty for their misdeeds.<sup>31</sup> Correspondingly, the politicians in the complaining state would be able to discern correctly the export groups harmed by the trade-inconsistent measure and award them the appropriate amount recovered from the scofflaw state.<sup>32</sup> At bottom, these reformers assume that politicians will work hard to create the appropriate incentive mechanisms that would make monetary compensation more incentive-compatible than the reigning retaliation mechanism.

Correspondingly, those who advocate group retaliation implicitly assume that the third-party states or groups of states administering the retaliation would be motivated to administer the retaliation in a manner that induces compliance by the scofflaw state.<sup>33</sup> For instance, if the

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pation in GATT/WTO Adjudication 7 (May 8, 2007) (unpublished manuscript), available at [www.princeton.edu/~cldavis/files/who\\_files.pdf](http://www.princeton.edu/~cldavis/files/who_files.pdf).

27. See commentators cited *supra* note 5.

28. See Abbott, *supra* note 7, at 65; Pauwelyn, *supra* note 3, at 337.

29. See Bagwell, Mavroidis & Staiger, *supra* note 7.

30. See Trachtman, *supra* note 3, at 158.

31. See *id.* at 166.

32. Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L. 383, 414–15 (2006).

33. See Pauwelyn, *supra* note 3, at 343–44.

United States, acting as a third party, administers retaliation on behalf of Ecuador in a dispute between Ecuador and the European Community (EC),<sup>34</sup> reformers assume that the United States will administer retaliation in such a way to induce compliance by the EC. Here, as in the monetary compensation context, the reformers assume that third-party states or groups of states that administer retaliation on behalf of a weaker plaintiff will be motivated to act to maximize consumer welfare.

Not only do these assumptions fail to capture the political reality of member state behavior in international trade, they also seem internally inconsistent with the logic of the current WTO regime. If states are assumed to be public regarding their international trade preferences, why would they need a dispute resolution scheme to resolve trade disagreements in the first place? For instance, if the politicians in the United States or EC were largely responsive to consumer preferences, they would presumably reduce trade barriers unilaterally without waiting for the punitive impetus of a WTO decision. Indeed, if the optimistic vision were at all an accurate description of member state behavior, any analysis of the entire trade sanctions scheme would be superfluous. Sanctions ought to be irrelevant because politicians will already internalize the true public welfare costs and benefits of trade policies in their political decisions.

Even if some reform proponents do not necessarily believe that governments in member states always behave in a public-regarding manner, their proposals often presume that such governments should.<sup>35</sup> But why would politicians in member states be motivated to adopt reforms that might be inconsistent with their preferences? Take, for instance, the oft-cited complaint that the current WTO enforcement system does not sufficiently address the welfare implications of retaliation to consumers in the victim state.<sup>36</sup> From a public choice perspective, this complaint is puzzling. To the extent that consumers remain poorly organized and face severe collective action problems relative to producer groups that favor greater market access or protectionism, it would seem that their welfare is likely to be underappreciated by politicians.<sup>37</sup> Put differently, it is unclear why politicians would ever have the incentive to marginalize interest groups that provide them substantial political benefits in favor of interest groups that do not. In this picture, one ought to be wary of any reform scheme that would have us believe that politicians will impose sanctions purely for high-minded reasons, especially when such reforms might require that they act in a one-sided manner against their own political interests. Importantly, we might expect that any of these alternative remedies might be easily manipulated by politicians to serve goals

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34. For an analysis of such a dispute, see the discussion *infra* text accompanying note 83.

35. See, e.g., Trachtman, *supra* note 3, at 164–65.

36. See, e.g., Anderson, *supra* note 3, at 129–30.

37. See Nzelibe, *supra* note 9, at 223.

that might be flatly inconsistent with strengthening the international trade regime.

In any event, as numerous commentators have pointed out, the factors that drive trade liberalization tend to have very little to do with what politicians think should be done from a consumer or society welfare maximization point of view.<sup>38</sup> First, public choice insights suggest that trade policy will be highly politicized in most member states because it is a generous and reliable source of campaign contributions.<sup>39</sup> Significantly, free trade has a significant redistributive effect on producers in member states and thus most agreements to reduce trade barriers reflect efforts by politicians to satisfy the needs of export producers at the expense of protectionist producers.<sup>40</sup> In sum, where export groups sufficiently exert greater political pressure than protectionist groups, politicians will feel more motivated to pass agreements to reduce trade barriers. But because the benefits and costs of trade policy on consumers are diffuse, consumers will often not factor directly into the calculus of politicians when they are considering passing trade agreements.

Even when some commentators acknowledge the political economy constraints member states face in administering sanctions,<sup>41</sup> they might ignore other institutional or environmental constraints member states face as actors in an international system. Consider the argument, often made in debates over the rationale for sanctions, that the current sanctions system might not be severe enough to deter potential scofflaw states from violating their trade commitments.<sup>42</sup> Indeed, some law and economics commentators suggest that the requirement that sanctions be equivalent to the harm suffered by the victim state reflects a conscious institutional choice to encourage states to breach their commitments when it is politically efficient to do so.<sup>43</sup> In this case, the assumption is that member states have the complete flexibility to institute sanctions that are sufficiently severe to deter any violation, but they have for some reason chosen not to do so. But this assumption, which is based on an analogy with the functional rationale of sanctions in the domestic realm, fails to recognize that states will face significant constraints in their ability to administer punitive-type sanctions because of the lack of a central-

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38. See, e.g., Nzelibe, *supra* note 9, at 219–21; Sykes, *supra* note 12, at 646–47; Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S194–95 (2002).

39. See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 25–26 (1999).

40. See Nzelibe, *supra* note 9, at 223.

41. See, e.g., Cho, *supra* note 3, at 785–86.

42. See Sykes & Schwartz, *supra* note 38, at 191–92.

43. See *id.* But see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62–63 (1997) (suggesting that “the overall gist of those clauses [of the DSU] . . . strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report”).

ized coercive mechanism in the international system.<sup>44</sup> In other words, in a realm where parties have to rely on self-help measures to encourage cooperative behavior, the parties have to seriously factor in the scope of sanctions that makes cooperation self-sustaining in repeat interactions. Often, the cooperative equilibrium might require that the parties only inflict sanctions equivalent to the harm suffered in a dispute.

Thus, while treble damages or hefty fines might make sense in a domestic antitrust regime where the government has sufficient coercive power to throw noncompliant offenders in jail, it might make much less sense in a self-help system where only equally situated companies have the power to sanction each other. As Robert Axelrod observed over twenty years ago, a self-help scheme that permits a party to engage in a greater than tit-for-tat retaliation is highly susceptible to deteriorate into a free-for-all escalation in which all parties will be made worse off.<sup>45</sup>

To give a more concrete example of the institutional constraints logic, assume that two states enter into a trade agreement where both parties agree that violations will be punished by throwing the scofflaw state's ruling regime into jail for a period of three months. Indeed, similar penalties for criminal obligations by corporate officers are common in the domestic realm.<sup>46</sup> At first blush, this sanctions scheme seems severe enough to deter most violations of trade commitments. It is safe to assume that most politicians in a potential scofflaw state would prefer to disappoint their protectionist constituencies than go to jail. On the other hand, this enforcement scheme is not likely to be credible because the coercive mechanism that would make it work is likely to be prohibitively costly for both parties to implement. Moreover, even if any victim state seriously attempted to enforce this arrangement against a scofflaw state, it would likely to lead to a breakdown in cooperative behavior, especially if both states enjoy comparable military capabilities.

In sum, reform proposals that largely disregard the motivations and capacities of member states are doomed to fail or have unintended consequences. But this does not mean that all reform efforts will be necessarily self-defeating. As discussed in more detail below, the ambition to remain in power will often encourage politicians to behave reasonably if there are other independent political reasons for doing so.<sup>47</sup> For instance, enhancing the welfare of politically powerful constituents may enable politicians to withstand the onslaught of groups who might other-

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44. See Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INT'L ORG. 73, 74–75 (2000).

45. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 136–39 (1984); see also Nzelibe, *supra* note 9, at 252 (“[T]he utility of the [tit-for-tat] strategy is not that it any way compensates the injured party, but that it provides sufficient incentives to each party ‘not to try gratuitous defections.’”).

46. Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. REV. 247, 267–68 (1991).

47. See *infra* text accompanying notes 55–56.

wise be negatively affected by free trade or an effective sanctions scheme.

Of course, optimists who embrace a first-best approach to WTO remedies might argue that the second-best approach embraced here has its own weaknesses. For instance, reform proponents might suggest that if politicians face significant motivational and institutional constraints in their ability to vindicate free trade norms, the international community should simply take away the relevant decision-making authority from the politicians.<sup>48</sup> Rather than turning to politicians when there is a dispute over the violation of a free trade obligation, these reform proponents argue that member states should instead allow the affected consumers to seek vindication of international trade commitments directly before domestic courts.<sup>49</sup> Such reformers are likely to argue that relying on the politicians to address the pathologies they have created will only postpone the underlying problem to some distant future.

Such arguments have strong rhetorical appeal, but they fail to address the crucial first-order constraint. Given that member states (and the politicians) have clearly made a conscious choice to depart from the supposed institutional ideal of giving private parties a direct cause of action to vindicate WTO commitments before domestic courts,<sup>50</sup> the relevant question is to ask what compensating adjustments one can make to the existing system that will best approximate the desired outcome. Of course, in the distant future, some public-spirited politicians might decide to reverse course on this crucial institutional design issue, but until then one has to acknowledge this fundamental departure from the first-best scheme. In the current scheme, in which governments invariably act as political filters in deciding which claims to bring, bilateral retaliation might serve as the best available remedial mechanism for addressing international trade violations.

### *B. Interest Group Alignments and the Veil of Ignorance*

As discussed above, the political dynamics of international trade suggest that consumers are going to be given a short shrift by politicians.<sup>51</sup> Generally, since producers are likely to face lower collective ac-

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48. See Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 306–07 (2006); Christian Tietje & Karsten Nowrot, *Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law*, 5 EUR. BUS. ORG. L. REV. 321, 347–51 (2004).

49. See Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 LEIDEN J. INT'L L. 633, 633–35 (2006); Petersmann, *supra* note 48, at 278; Tietje & Nowrot, *supra* note 48, at 321–22. However, not all commentators agree that allowing private access to WTO litigation will best approximate a first-order ideal. See Sykes, *supra* note 12, at 646–52 (suggesting public choice intuitions that counsel against private rights of action in international trade disputes).

50. See Petersmann, *supra* note 48, at 278.

51. See *supra* text accompanying notes 35–37.

tion costs than consumers, they are also likely to exert greater influence on international trade policy, especially in democratic regimes.<sup>52</sup> Moreover, political economy factors suggest that consumers will have an incentive to be rationally ignorant about the benefits of international trade when they head to the polls.<sup>53</sup> In other words, since elections often involve a multitude of issues but only present the voter with a binary option of removing or keeping an incumbent, it might often be in the voter's best interest to remain relatively uninformed about secondary issues, such as international trade, which might not have much of an impact on his or her everyday life.

So what does this political dynamic entail for the future of trade liberalization, and more specifically, for effective trade sanctions? Does it necessarily imply that the prospects of achieving normatively desirable outcomes in international trade are futile? Is there a risk, as Brendan O'Flaherty and Jagdish Bhagwati once warned, that free trade tainted with politics "will put normative economists out of work?"<sup>54</sup> Not necessarily, because there are two reasons why free trade and effective sanctions might be an attainable goal despite the political impotence of consumers. First, if a public good such as free trade is aligned with the interest of a powerful interest group, it might be politically sustainable even when politicians might not generally be motivated to act in the public interest.<sup>55</sup> Second, politicians might occasionally find themselves negotiating trade agreements behind a thick veil of ignorance where they are uncertain about how particular provisions might affect them from a political perspective.<sup>56</sup> In such circumstances, the veil of ignorance can act as a moderating device and make it easier for politicians to choose policies that maximize public welfare.

Generally, the veil-of-ignorance factor is likely to be more pronounced when the policy issue is quite complex, involving tradeoffs across issues that make it more difficult to predict *ex ante* the likely political costs or benefits of the policy issue.<sup>57</sup> For certain categories of international trade issues, however, one might conjecture that the key political tradeoffs for politicians will involve a simple balancing of protectionist and export group interests. Of course, actual international

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52. See *supra* text accompanying note 37.

53. For a description of how rational ignorance affects consumers in international trade policy issues, see John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 524 (2000).

54. See Brendan O'Flaherty & Jagdish Bhagwati, *Will Free Trade with Political Science Put Normative Economists Out of Work?*, 9 ECON. & POL. 207, 207 (1997).

55. See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) (discussing how private actors influence the public enforcement of trade commitments).

56. For a discussion of how the veil of ignorance works in the design of constitutional or statutory regimes, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 419-24 (2001).

57. *Id.* at 419.

trade agreements often involve complex bargains that straddle environmental, human rights, health, national security, and labor concerns.<sup>58</sup> Nonetheless, the simplified assumption of a tradeoff between protectionist and export group interests is broadly consistent with the notion that international trade agreements are reciprocal bargains for market access by self-interested politicians.<sup>59</sup> In any event, because politicians are likely to know in advance the distributive effect of trade sanctions on domestic groups,<sup>60</sup> it is unlikely that the sanctions regime will be significantly affected by veil-of-ignorance considerations.

With the veil of ignorance out of the picture, the challenge for any effective trade-sanctions regime is to devise a framework that effectively harnesses the parochial preferences of powerful interest groups in the service of the public good of compliance. Understandably, politicians are not necessarily motivated exclusively by a desire to remain in power. Sometimes they might have principled preferences of their own on international trade policy. But when there is a conflict between their preferences and those of powerful interest groups, the prudent politician is likely to cave in to political reality. If, however, countervailing powerful political groups are also likely to support the principled position, the politically possible might coincide with what is in the public interest.<sup>61</sup>

### III. THE NORMATIVE GOALS OF TRADE SANCTIONS

Applying the political economy logic developed earlier, it would seem that any politically viable and effective sanctions regime would have to satisfy three criteria. First, the politicians in the complaining state should have an incentive to administer the sanctions in a manner that would induce compliance by the scofflaw state. Second, the politicians in the scofflaw state should not be able to easily avoid the political impact of the sanctions. Third, any institutional design feature of the sanctions scheme that is calibrated to punish certain groups and reward others should also be consistent with the beliefs and motivations of poli-

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58. See Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 68–74 (2002).

59. See *id.* at 75.

60. See generally NILÜFER ÇAGATAY, *TRADE, GENDER AND POVERTY* 32 (2001).

61. Sometimes domestic institutional design features can make it easier for these public regarding commitments to be politically sustainable. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 502 (2004); Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 287–88 (2005) [hereinafter Brewster, *Rule-Based Dispute Resolution*]; Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 727–28 (2006); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 595 (2005). Also, states will sometimes use formal dispute resolution mechanisms in international agreements as a precommitment device. See Brewster, *Rule-Based Dispute Resolution*, *supra*, at 502–03; Ginsburg, *supra*, at 733; see also Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 823 (2006) (“BITs allow governments to make credible commitments because they raise the *ex post* costs of noncompliance above those that might be incurred in the absence of a treaty.”).

ticians in member states. When measured against these criteria, both collective retaliation and monetary damages appear to be decisively inferior to the existing bilateral retaliation scheme. Subpart A spells out the problems with any proposed collective or third-party retaliation regime from a public choice perspective. Subpart B turns to monetary damages and argues that such a remedy is not only subject to greater public choice pathologies than the current bilateral retaliation scheme but is likely to increase the social costs of litigating WTO claims.

*A. The Problem with Collective or Third-Party Sanctions*

In many respects, international trade policy involves fundamental political tradeoffs for politicians in member states. Public choice insights suggest that such politicians will attempt to optimize across various dimensions in order to increase their chances of remaining in power.<sup>62</sup> In a bilateral retaliation scheme, such as the one currently employed by the WTO, the incentives of politicians who administer the retaliation are likely to be aligned with those of the export groups who would like to inflict the maximum political harm on the scofflaw state.<sup>63</sup> In a collective or third-party retaliation regime, however, it is reasonable to conjecture that the politicians in a state not harmed directly in a trade dispute will administer retaliation with the objective of maximizing the benefits to their protectionist constituencies. This latter strategy might actually have very little to do with inducing compliance; indeed, it is likely to increase the global level of protectionist policies without any offsetting compliance benefits.

For export groups in the complaining state, bilateral retaliation provides a distinct benefit—the increased prospect of compliance by the scofflaw state. Significantly, export groups in the complaining state will likely reward those politicians who adopt a retaliation strategy that induces compliance by the scofflaw state and punish those who do not.<sup>64</sup> In this picture, the political logic that makes retaliation effective depends on inflicting sufficient damage on the most politically powerful export groups in the scofflaw state to induce them to lobby their governments to withdraw the offending trade-inconsistent measure.

Of course, from a consumer welfare point of view, retaliation may seem politically costly for the complaining state since it may drive up the costs that consumers in the complaining state have to pay for goods imported from the scofflaw state. But in a bilateral retaliation model, one would expect politicians in the complaining state to give more weight to the preferences of the export groups harmed by the trade-inconsistent

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62. See Sykes & Schwartz, *supra* note 38, at 184.

63. See Nzelibe, *supra* note 9, at 220; Sykes & Schwartz, *supra* note 38, at 184.

64. Commentators have suggested that not only does retaliation provide an important benefit to export groups it also makes such groups agents of trade liberalization. See Goldstein, *supra* note 19, at 144–46; Movsesian, *supra* note 19, at 10; Nzelibe, *supra* note 9, at 222–28.

measure than the consumers likely to be harmed by retaliation.<sup>65</sup> Of course, the latter assumption might have to be relaxed where a member state only imports a narrow range of products from the scofflaw state. In that case, the consumers importing from the scofflaw state might actually be more powerful than the export groups harmed by the trade-inconsistent measure. A member state that has such an interest group configuration will face high retaliation costs and is unlikely to be able to threaten retaliation credibly against a scofflaw state.<sup>66</sup> While various developing countries might fit into this category, such as Ecuador in the EC Bananas dispute,<sup>67</sup> it is safe to assume that most advanced industrial member states will often not.

In a bilateral retaliation scheme, the opportunity to impose sanctions may also provide benefits to protectionists, but the *ex ante* availability of these benefits will be highly probabilistic—depending not only on prevailing in WTO litigation but a host of other factors—while the up front costs will be certain if the protectionists have to divert resources to the litigation effort.<sup>68</sup> Moreover, there is a risk that any protectionist spoils from victory in WTO litigation may end up in the hands of some other producer group that did not contribute any resources to the litigation.<sup>69</sup>

To illustrate the general idea that protectionist groups face significant obstacles in hijacking the spoils of WTO litigation under the current bilateral scheme, let us imagine a concrete instance of protectionist intervention in the context of a WTO dispute. Suppose that a protectionist group in the complaining state is trying to decide whether to expend resources lobbying for the WTO litigation effort with the hope that it will benefit from retaliation. The problem is that none of the retaliation benefits will be available for distribution to the protectionist group until after the complaining state prevails in WTO litigation and the scofflaw state refuses to comply after a reasonable period of time.<sup>70</sup> Therefore, even after a party prevails in a WTO dispute, the scofflaw state still has a grace period to bring its policies into compliance after the WTO has

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65. Nzelibe, *supra* note 9, at 223.

66. *See id.* at 238–40 (discussing asymmetric retaliation costs in WTO disputes).

67. For the panel report on the EC Bananas dispute, see Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997). For the appellate body report, see Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997). For an in-depth and detailed review of the controversy underlying this famous dispute, see Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000). After the DSU granted Ecuador the right to retaliate in that dispute, Ecuador wrote to the DSU and complained that since it imported mostly capital inputs from the EC it could not afford to retaliate. *See* Communication by the Permanent Mission of Ecuador, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse by Ecuador to Article 22.2 of the DSU*, WT/DS27/52 (Nov. 9, 1999).

68. *See* Nzelibe, *supra* note 9, at 234.

69. *See id.* at 230.

70. *See* DSU art. 21.3.

ruled that such policies violate its WTO obligations.<sup>71</sup> If the violating policy is not withdrawn, the parties still have to negotiate over compensation to see if the claim can be settled.<sup>72</sup> In this picture, compensation usually involves the scofflaw state offering to reduce trade barriers on other goods exported to the prevailing state.<sup>73</sup> It is only after negotiations over possible compensation have failed that the prevailing party can then propose to the Defense Settlement Body (DSB) a suspension of concessions or retaliation, which must be equivalent to the current harm the victim state is suffering because of the trade-inconsistent measure.<sup>74</sup> Disputes over the level of suspension of concessions are resolved by arbitrators appointed by the DSB.<sup>75</sup>

Moreover, even if all these conditions take place, there is still a risk that the politicians in the complaining state will divert the protectionist benefits to another group that might seem more politically attractive at the time the WTO litigation concludes. The prospect that any single protectionist group in the complaining state might benefit from spoils of WTO litigation is so remote that we should not expect any such group to invest a significant amount of resources in lobbying for retaliation benefits.<sup>76</sup> Therefore, we should also expect that politicians in a bilateral retaliation model will not privilege the interests of protectionists over export groups in developing a retaliation strategy.

But if we turn to a collective or third-party retaliation model, the incentives of politicians in the third state administering the retaliation are likely to be quite different. First, since the administering state will normally assume its sanctioning role only after the case has been successfully litigated by the complaining state,<sup>77</sup> it need not factor in the costs of litigating a claim to its conclusion. Second, and more importantly, the export groups in the administering state would be indifferent to any sanctioning strategy because they would not have been affected by the trade-inconsistent measure.<sup>78</sup> Thus, protectionists are the only groups in the administering state that are likely to benefit from retaliation. Indeed, the entire logic of auctioning off retaliation rights to third-party states assumes that protectionists in the third-party state might be willing to pay for the benefit of increased trade barriers against the scofflaw state.<sup>79</sup> Of

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71. *See id.*

72. *See id.* art. 22.1–2 (“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.”).

73. *See id.* art. 22.3.

74. *See id.* art. 22.4.

75. *See id.* art. 22.6–7.

76. *See* Nzelibe, *supra* note 9, at 245.

77. *See* Pauwelyn, *supra* note 3, at 345.

78. *See* Nzelibe, *supra* note 9, at 230.

79. *See* Bagwell, Mavroidis & Staiger, *supra* note 7, at 2 (“The idea is that, if a country wins a ruling . . . and finds that it is unable or unwilling to retaliate itself, it should be able to trade the right to another country that would value and utilize the right of retaliation.”).

course, it is plausible that certain third-party states that have weak protectionist constituencies might use the opportunity to retaliate to extract more favorable trade concessions from the scofflaw state. But such a strategy is unlikely to work because any trade concessions made by the scofflaw state to the third-party state would have to be made on a most favored nation (MFN) basis to the scofflaw state's other trading partners.<sup>80</sup> Therefore, because using retaliation as a mechanism for extracting trade concessions would likely be cost prohibitive to the scofflaw state, the third party's interest in retaliation would likely be driven exclusively for protectionist reasons. But there is no reason to believe that the retaliation strategy favored by protectionist groups in the administering state will be likely to induce compliance by the scofflaw state. Indeed, there are significant political economy reasons to suspect that it will not.

As a preliminary matter, the retaliation strategy most likely to induce compliance by a scofflaw state is one that inflicts maximum costs on its most powerful export groups. Concentrated and exceedingly high trade barriers that focus on a narrow group of exporters will usually be more effective in mobilizing producers in the scofflaw state than diffuse and incremental barriers. Because most protectionists will only be interested in increasing trade barriers to a level that makes the import-competing goods noncompetitive, they are unlikely to have much of an incentive to lobby for prohibitively high tariffs against a narrow group of exporters. At some threshold level of trade barriers, the marginal value to a protectionist of additional barriers on an import-competing product decreases, suggesting that the optimal retaliation strategy for protectionists is unlikely to overlap with that of export groups seeking compliance. A politician in this framework that is only responding to protectionist pressures is likely to spread the retaliation spoils across as many protectionist groups as possible, rather than squander them on a narrow group of protectionists. Therefore, politicians in the administering state will have an incentive to expend only as much retaliation capital on any specific protectionist group as is necessary to keep it loyal, conserving the balance for other groups of varying political importance. Because the likely impact of such a retaliation strategy will be spread thinly across an increasingly larger group of exporters in the scofflaw state, there is a greater chance that such a compliance strategy will be ineffectual.

Furthermore, it is unlikely that politicians responding to protectionist and export groups will even target the same kinds of producer groups in the scofflaw state. Politicians responding to export groups that have been adversely affected by trade-inconsistent measures are likely to tar-

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80. Under WTO's MFN principle, trade concessions must extend equally to all WTO members. General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (mandating that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties").

get the most politically salient export groups in the scofflaw state. However, politicians responding to protectionist groups will likely target only those groups in the scofflaw state that export import-competing products. Again, there is no reason to assume a priori that these two groups will overlap.

To illustrate the role that adversely affected export groups play in mobilizing an effective retaliation strategy, one need look no further than the various retaliation lists compiled by prevailing parties in WTO disputes. For instance, in the recent dispute over United States tariffs on steel,<sup>81</sup> the EC published a retaliation list that targeted industries in battleground states in the 2004 presidential election.<sup>82</sup> In both the EC-Beef Hormones and the EC-Bananas disputes,<sup>83</sup> the United States adopted a similar retaliation strategy and imposed prohibitive rates of 100% on a narrow range of exports from key European countries.<sup>84</sup> In the EC-Beef Hormones dispute, the United States also factored in the political influence of the EC member states in deciding which goods to target for retaliation.<sup>85</sup> In another non-WTO dispute involving Ukraine's inadequate protections against media piracy, the United States imposed prohibitive duties of 100% that went into effect in 2002 and continued until the Ukrainian government passed legislation protecting such media in 2005.<sup>86</sup>

Although all these issues implicate a heterogeneous range of countries and products, the state administering the retaliation sought to provide the correct mix of incentives to induce compliance by the scofflaw state. Without such a retaliation strategy that focuses on applying punitive tariffs to a narrow range of export groups, the effects of retaliation would be spread across too many groups, and collective action problems

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81. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (Dec. 10, 2003).

82. See Nzelibe, *supra* note 9, at 224–25; see also James Cox, *Sparks Fly over U.S.-E.U. Trade*, USA TODAY, Nov. 11, 2003, at A3 (discussing political benefits to President George W. Bush of steel tariffs and the political sensitivity of threatened retaliation by the EC).

83. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormones*] (finding European prohibition on import of beef treated with growth hormones to violate SPS Agreement).

84. In the *Beef Hormones* dispute, after the WTO approved a level of tariff suspensions worth \$116.8 million, the United States imposed 100% retaliatory tariffs on a specific range of EC agricultural products. See *Final List of European Union Products on Which U.S. Will Impose 100% Ad Valorem Duties in Response to Beef Hormones Dispute*, 16 INT'L TRADE REP. 1231 (July 21, 1999). For the EC-Bananas dispute, the retaliation amount authorized was nearly \$192 million. See *U.S. Issues Final List of European Imports to be Hit with Higher Duties in Banana Row*, 16 INT'L TRADE REP. 621 (April 12, 1999). For the DSU arbitration decision authorizing the United States to suspend concessions, see Award of the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas European Communities—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB (Apr. 9, 1999).

85. See 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, 568 (2002) (observing that the United States decided to exclude from the retaliation list beef imported from Denmark because of Denmark's relative lack of influence in EC trade policy).

86. See U.S. INT'L TRADE COMM'N, Publication No. 3630, INDUSTRY REPORT, THE YEAR IN TRADE 2002: OPERATION OF THE TRADE AGREEMENTS PROGRAM 54TH REPORT 39 (2003).

would prevent such groups from organizing to lobby against the violation.<sup>87</sup> To be sure, some of the items on a complaining state's retaliation list might be intended to assuage protectionist constituencies, but it is unlikely that the list would be primarily protectionist in focus.

Furthermore, legislation in various member states reinforces the notion that bilateral retaliation should enforce compliance for the benefit of the export industries harmed by the trade-inconsistent measure. For instance, in the United States, the carousel provisions of the Trade and Development Act of 2000 require that the United States Trade Representative (USTR) view and rotate the items on a retaliation list every 180 days if the scofflaw state does not implement the DSB recommendation.<sup>88</sup> Ostensibly, this provision requires the USTR to revisit its retaliation strategy periodically if there is evidence that the strategy is not inducing compliance by the scofflaw state.<sup>89</sup> More importantly, the provision explicitly permits the USTR not to revise the list if, after consulting with the affected industry, the USTR concludes it is unnecessary to do so.<sup>90</sup> As worded, the carousel rotation mechanism explicitly operates for the benefit of the industry affected by the trade-inconsistent measure. Furthermore, a separate statutory provision provides for the automatic termination of retaliation after four years, unless a request is made by a representative of the domestic industry intended to benefit from the action that such retaliation continue.<sup>91</sup> Consistent with this requirement, members of the American beef industry explicitly asked the USTR to continue its retaliation against the EC in the Beef Hormones dispute after four years had lapsed without compliance.<sup>92</sup>

In sum, the bilateral retaliation mechanism currently endorsed by the DSB privileges the role of export groups harmed by a trade-inconsistent measure. By emphasizing export-group preferences over those of consumers and protectionists, the current mechanism ensures that retaliation against the scofflaw state will be focused on inducing compliance. As a matter of institutional design, however, a collective or third-party retaliation mechanism will likely privilege the preferences of protectionists over those of any other interest group.<sup>93</sup> Hence, a third-party or collective-retaliation mechanism is likely to increase the global

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87. See Nzelibe, *supra* note 9, at 223–26.

88. This “carousel” sanctions plan was part of the Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000) (codified in scattered sections of 19 U.S.C.). The 180 days provision is codified in 19 U.S.C. § 2416 (2000).

89. 19 U.S.C. § 2416.

90. 19 U.S.C. § 2416 (b)(2)(B)(ii) (“The Trade Representative is not required to revise the retaliation list or the action described in clause (i) with respect to a country, if . . . the Trade Representative together with the petitioner involved in the initial investigation under this subchapter (or if no petition was filed, the affected United States industry) agree that it is unnecessary to revise the retaliation list.”).

91. 19 U.S.C. § 2417.

92. See *Gilda Indus., Inc. v. United States*, 353 F. Supp. 2d 1364, 1370–72 (Ct. Int'l Trade 2004), *aff'd in part, and vacated in part*, 446 F.3d 1271 (Fed. Cir. 2006).

93. Nzelibe, *supra* note 9, at 230.

level of trade barriers without necessarily inducing compliance by scoff-law states.

In many respects, the point made above holds whether one believes the actual purpose of the WTO is to encourage free trade or to achieve a political-economic objective for member states that falls short of achieving free trade. For instance, much of the political economy literature on international trade seems to embrace the notion that the purpose of international trade agreements is to reduce the externalities that trading countries might inflict on one another. In this picture, policies that benefit protectionist groups are not inherently problematic.<sup>94</sup> Because retaliation stands to enhance the political economic welfare of the third-party state administering the retaliation, providing benefits to protectionist groups might make international trade agreements more politically attractive to prospective third-party states over the long run. But there are reasons to question whether the third party or collective retaliation model provides such an *ex ante* boon to politicians in the administering state.

The problem here is that the conditions in a collective retaliation model that produce a real threat to the objective of increasing the overall level of free trade will also, for similar reasons, tend to negate the objective of achieving mutually beneficial reciprocal trade liberalization. In other words, governments that have strong political economy reasons for wanting to enhance the welfare of their protectionist groups are likely to realize that using retaliation is an inefficient mechanism for achieving those goals. Because the prospects that the DSB will agree to allow retaliation in any single dispute is so probabilistic and contingent on so many factors that are outside the control of any member state, it will almost always make more sense for states to incorporate protectionist benefits directly into trade agreements in the form of safeguards and trade remedy provisions.<sup>95</sup> In other words, given the inherent unpredictability and unreliability of retaliation as a mechanism for generating protectionist benefits, it is unlikely that protectionist groups will find much solace in its application. But the threat of retaliation by a victim state—no matter how probabilistic—would still be of value to export groups in a bilateral retaliation model.<sup>96</sup> Indeed, for export groups in the injured

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94. See Robert W. Staiger, *International Rules and Institutions for Trade Policy*, in HANDBOOK OF INTERNATIONAL ECONOMICS (Gene Grossman & Kenneth Rogoff eds., 1995); Sykes & Schwartz, *supra* note 38, at 180–82; Kyle Bagwell, Remedies in the WTO: An Economic Perspective (Jan. 9, 2007) (unpublished manuscript, on file with author).

95. As a preliminary matter, the DSB has to authorize the retaliation before it can occur. But first, the issue of noncompliance with the panel's original recommendation has to be resolved. See DSU art. 21.5 ("Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."). Also, even after authorization has been approved, the scofflaw state can still object to the amount or the level of the suspension. See DSU art. 22.6.

96. See Bagwell, Mavroidis & Staiger, *supra* note 7, at 3–4.

state, the ideal outcome would involve the scofflaw state complying even before the victim state actually employs the retaliation mechanism.

*B. The False Promise of Monetary Sanctions*

In the recent debates about reform of the WTO enforcement mechanism, commentators tend to emphasize the advantages of monetary damages over the current bilateral retaliation scheme.<sup>97</sup> Recently, the monetary damages option has been advocated by developing countries, although the remedy envisioned by these countries seems to be closer to a scale of fines that is fixed according to factors such as Gross Domestic Product (GDP) and per capita income rather than a conventional monetary damages regime.<sup>98</sup> Nonetheless, most of the debate regarding alternative remedies in international trade has largely avoided subjecting the proposal for monetary damages to the same rigorous cost-benefit analysis often used to evaluate most institutional reform proposals.<sup>99</sup> For instance, how do we know whether the availability of monetary damages will generate more benefits than costs for the international trading system? This Subpart explores that question in the context of the political economy constraints faced by politicians and the social costs of WTO litigation, and concludes that it most likely will not.

*1. The Political Economy Constraints*

Compared to the current enforcement scheme in international trade, one obvious drawback of monetary compensation as a remedy is that it is completely fungible.<sup>100</sup> Thus, politicians in a scofflaw state can presumably draw the money used to compensate a prevailing complaining state from any source and the politicians in the prevailing complaining state can distribute the funds awarded in a dispute to any particular political group. Ostensibly, if we assume that politicians are self-interested, it would make sense for them to draw the funds in the scofflaw state from the weakest and most vulnerable groups and distribute the funds in the prevailing state to the most politically salient groups. In either case, it is not clear that the group forced to pay the damages in the scofflaw state will be the protectionists that instigated the violation or that the group that benefits from the damages award in the prevailing state will be the export groups harmed by the trade-inconsistent measure. Thus, a reform program that is supposed to mitigate the problem of misaligned incentives in the current enforcement scheme might actually

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97. See William Davey, *The WTO Dispute Settlement Mechanism* 36–37 (Ill. Pub. L. & Legal Theory Research Paper No. 03-08, 2003), available at <http://ssrn.com/abstract=419943>.

98. See *id.* at 1.

99. See, e.g., Claude Barfield, *WTO Dispute Settlement System in Need of Change*, 37 *INTERECONOMICS* 131, 134–35 (2002).

100. See generally Joseph S. Nye, Jr., *Soft Power*, *FOREIGN POL'Y*, Autumn 1990, at 159.

exacerbate the problem by encouraging politicians to make even more inefficient and politically charged allocations when enforcing WTO obligations.

By contrast, retaliation in the form of rebalancing concessions is not a fungible remedy. For instance, it would not make sense for politicians in a complaining state to award retaliation rights to a politically powerful religious group or a teacher's union—such groups would have no use for it. Moreover, politicians in the scofflaw state cannot ensure that retaliation will not affect specific powerful export groups; indeed, they have no choice in the matter. At bottom, the only politically salient groups likely to be affected directly by retaliation are a discrete group of exporters, consumers, and protectionists in the prevailing state and the targeted exporters in the scofflaw state.<sup>101</sup> Of course, the protectionists in the scofflaw state are also affected indirectly from the political pressure they are likely to face from export groups that want the trade-inconsistent measure removed. On balance, however, the mix of interest groups affected by retaliation is quite narrow, and thus it is easier to calibrate the remedy to punish and benefit a discrete range of political actors.

Significantly, by only affecting a narrow range of producer groups, it is reasonable to conjecture that bilateral retaliation will make it more possible to target specific politically powerful groups in a manner most likely to deter politicians from implementing trade-inconsistent policies.<sup>102</sup> As a matter of institutional design, the most powerful constituency benefiting from bilateral retaliation in a complaining state will often be the export groups affected by the trade-inconsistent measure.<sup>103</sup> Similarly, the groups likely to be affected in the scofflaw state will also be the most powerful export groups.<sup>104</sup> The export groups in the scofflaw state can then apply political pressure on the politicians to remove the trade-inconsistent measure.

A system of monetary damages would eviscerate this carefully calibrated mechanism and create what amounts to open-season competition among interest groups in the complaining state for the money generated from WTO litigation. Correspondingly, it would create a comparable competition among interest groups in the scofflaw state to avoid bearing the brunt of any monetary damages awarded to the complaining state. Thus, rather than encourage member states to internalize the costs of their violations, monetary damages will likely encourage politicians to engage in behavior that is even more suboptimal from the perspective of discouraging trade-inconsistent behavior.

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101. ROBERT Z. LAWRENCE, CRIMES AND PUNISHMENTS? RETALIATION UNDER THE WTO 49–51 (2003).

102. See Bown, *supra* note 14, at 291, 300–01.

103. See *id.*

104. See *id.* at 289.

Against this background, let us examine briefly the assumption by reform advocates that monetary damages will cause member states to better internalize the costs of violations. More specifically, reform advocates argue that unlike monetary damages, retaliation does not target the party that caused the violation and does not benefit the export groups that suffered from the violation.<sup>105</sup> As discussed earlier, this latter assumption is wrong.<sup>106</sup> Retaliation does benefit export groups in the plaintiff state because it makes it more likely that potential scofflaw states will comply with their market access obligations.<sup>107</sup> Furthermore, because the export groups in the scofflaw state targeted by retaliation have an incentive to lobby against trade inconsistent measures, they indirectly raise the political costs for protectionists in the scofflaw state who are likely to support such measures.<sup>108</sup>

In any event, let us presently indulge the assumption that monetary damages have the potential of providing direct benefits to the groups harmed by trade-inconsistent measures in a manner that retaliation does not. What reform advocates do not explain is how this compensation scheme is likely to operate in practice. Are there reasons to think that monetary damages will actually be an effective remedy to the problem it purports to solve?

Take, for instance, the argument made by scholars such as Joel Trachtman that export groups can be compensated directly with monetary damages for the harm inflicted by a trade-inconsistent measure.<sup>109</sup> But that argument ignores the question of motivational inconsistency: why would we think that a government would necessarily have an incentive to hand the money over to those export groups that have been affected by the trade-inconsistent measure? What possible explanation of political behavior would ensure that the politicians in the prevailing state would be motivated to follow such a course of action? Assuming that politicians in member states are intent on maintaining themselves in power, is it not more plausible to assume that they will use any monetary compensation that they receive from the WTO in a manner that helps to accomplish that end? Sometimes, the politicians might decide that awarding the money to an export group harmed by a trade violation might help them achieve their political objectives, but it is reasonable to assume that in many circumstances they will reach a contrary conclusion. For instance, if the politicians in a prevailing state conclude that a trade union has become particularly powerful during a close national election, why would they not divert the monetary damages awarded in a WTO dispute to that group? Or in the case of a state that is facing significant

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105. See *supra* note 5 and accompanying text.

106. See *supra* text accompanying notes 4–9.

107. See Nzelibe, *supra* note 9, at 217.

108. See *id.*

109. See Trachtman, *supra* note 3, at 40–41.

political unrest, how do we know that the politicians will not divert any monetary damages to suppressing an insurrection? In either case, one searches in vain for any theory in the reform proposals for why the government would consistently privilege the interests of export groups when it is awarded monetary damages in a WTO dispute.

Perhaps the proponents of monetary damages might argue that the solution is to establish an explicit legal or regulatory framework that only allows affected export groups to receive monies recovered by the government from WTO litigation. Bracketing out for a moment the significant political economy factors that make this outcome unlikely, how would a government of a member state go about determining which export groups were harmed by a particular trade-inconsistent measure? One possible answer is that we should leave it to the courts or a fact-finding agency like the International Trade Commission to decide. But this approach is likely to further complicate the interest group dynamics underlying the international trade regime. For instance, why would any export group invest the political capital and resources to encourage its government to litigate against a trade-inconsistent measure if it knows that in the end there is a chance a court or an agency might award the spoils of victory to another export group? In many respects, the proposed monetary compensation to export groups raises more questions than it answers.

But even if we assume away the political economy constraints described above, it is still unclear why courts or any other class of decision makers would have the ability to effectively isolate the export groups that have suffered the most political harm from a trade-inconsistent measure. Indeed, in many contexts, it might not even be sufficient to identify the groups harmed most by the trade-inconsistent measures in financial terms. For instance, assume that both Company A and Company B are United States corporations that export bags to China, and China imposes illegal trade measures that harm Company A to the tune of \$5 million and Company B to the tune of \$1 million. If Company A's export market to China is very significant, for example around \$600 million, it might be relatively indifferent to the effect of the trade-inconsistent measure that affects less than 1% of its Chinese revenues. But if Company B's entire export market to China is \$2 million, the trade-inconsistent measure would affect 50% of its Chinese revenues. Company B might be willing to invest more in the political capital to secure China's compliance than Company A, even though Company A suffers more monetary harm from China's trade-inconsistent measure.

At bottom, short of giving export groups a private cause of action against a scofflaw state, it is hard to imagine how any system of monetary compensation would consistently benefit the export groups harmed by trade-inconsistent measures. Ironically, some of the member states that tend to favor a monetary damages regime often tend to be the most skept-

tical of giving private actors standing to litigate claims before the WTO. Indeed, developing states like India have often voiced the greatest concerns about giving nonstate parties access to the WTO dispute resolution mechanism.<sup>110</sup>

Similarly, one might wonder why politicians in the scofflaw state would have any incentive to make sure that those protectionists who instigate a violation bear the brunt of the monetary damages awarded by the WTO. In other words, if in violating their WTO commitments, politicians in the scofflaw state have decided to privilege the interests of protectionist groups over other competing groups, why then would the same politicians be motivated to make sure that protectionist groups bear the brunt of monetary sanctions? In this picture, it would make sense for politicians to spare the powerful protectionists the trouble and make consumers bear the brunt of any monetary damages award, because politicians in the scofflaw state have every incentive to impose the costs of monetary damages on the least politically powerful groups.

Some commentators, such as Alan Sykes, suggest that even if an equivalent measure of monetary damages is unlikely to inflict significant political costs on the scofflaw state, it might be possible to calibrate monetary sanctions that are high enough to induce scofflaw states to comply with their WTO commitments.<sup>111</sup> While this observation may be theoretically true, such punitive monetary sanctions are likely to undermine the cooperative dynamic that makes international commitments possible in the first place.<sup>112</sup> In other words, an international sanctions regime that authorizes a remedy in excess of the tit-for-tat model might be prone to devolve into a trade war in which all parties will be worse off.<sup>113</sup> Given the fragile political environment in which many international trade agreements are negotiated, it is unlikely that an enforcement mechanism that awards sanctions in excess of equivalency would be politically sustainable.

Sykes also suggests that if politicians in the scofflaw state could more easily avoid the impact of monetary compensation than retaliation, we should expect to see more states opting to offer monetary compensation in lieu of retaliation.<sup>114</sup> To be sure, in at least one dispute the scofflaw state agreed to pay compensation in lieu of facing retaliation.<sup>115</sup> But

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110. Generally, developing countries argue that the WTO Membership is comprised solely of national governments and allowing amicus briefs would give undue rights to private entities that would otherwise have no standing. See Communication from India, *India's Questions to the European Communities and Its Member States on Their Proposal Relating to Improvements of the DSU*, 4-6, TN/DS/W/5 (May 7, 2002).

111. See Sykes, *supra* note 12, at 654-66.

112. See *supra* text accompanying note 45.

113. See *supra* text accompanying note 45.

114. See Sykes, *supra* note 12, at 655-66.

115. For instance, a monetary settlement was reached in a dispute between the EC and United States regarding copyright royalties. For a discussion of this dispute and the monetary settlement, see

the observation that politicians in a scofflaw state can more easily avoid the impact of monetary sanctions than retaliation does not imply that monetary sanctions are going to be politically cheaper for the scofflaw state to administer than facing retaliation. The payment of monetary sanctions by the scofflaw state to a state prevailing in a WTO dispute can have significant audience costs that are unrelated to the way such sanctions are likely to be used. For instance, paying monetary compensation would require politicians in a scofflaw state to admit to their domestic audiences that they were wrong in the dispute, or at least that the WTO has forced their hand. Politicians may be especially reluctant to concede to their domestic audiences that they are reacting to an adverse WTO decision, even when they are ostensibly doing so. On the other hand, because retaliation is self-enforcing,<sup>116</sup> politicians in the scofflaw state can still argue to their domestic audiences that the WTO's decision is wrong on the merits and they are not going to comply.

Alternatively, even when they are forced to comply under the threat of retaliation, politicians in the scofflaw state may try to convince their domestic audiences that they are withdrawing the trade inconsistent measure for reasons unrelated to the outcome of the dispute. For instance, after the EC threatened significant retaliation after prevailing in the steel tariff dispute with the United States,<sup>117</sup> the Bush administration capitulated and withdrew the measures just before retaliation took effect.<sup>118</sup> However, the Bush administration claimed that the rationale for withdrawing the offending measures was because the tariffs had fulfilled their purpose,<sup>119</sup> refusing to acknowledge to its domestic audience that its decision to withdraw the contentious steel tariffs was connected to the adverse WTO decision.

## 2. *The Social Costs of Monetary Sanctions on WTO Litigation*

Beyond the potential political economy problems that might afflict the use of monetary compensation in international trade disputes, the availability of monetary compensation is also likely to raise significantly the social costs of litigating WTO disputes.<sup>120</sup> In this case, the authorization of monetary damages is likely to lead to an increase in the demand

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Bernard O'Connor & Margareta Djordjevic, *Practical Aspects of Monetary Compensation*, 8 J. INT'L ECON. L. 127 (2005).

116. *See id.* at 131 n.22.

117. A provisional retaliation list was released by the EC in the Summer of 2002. *See* Council Regulation 1031/2002, 2002 O. J. (L 157) 8 [hereinafter Council Regulation 1031/2002].

118. *See Bush Ends Steel Safeguard Tariffs in Face of Threat by EU to Retaliate*, 20 INT'L TRADE REP. 2021 (2003).

119. *See id.*

120. *See Sykes, supra* note 12, at 656–67 (discussing the problem of social costs of litigation in the context where private parties are litigating claims). For a detailed analysis of the divergence between private incentives to litigate claims for damages and the social value of such litigation, see Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

for litigation by a particular group of countries—namely LDCs—that are unlikely to internalize the social costs of excessive litigation.<sup>121</sup>

At bottom, the purpose of the WTO and its dispute resolution mechanism is to help facilitate the smooth flow of trade among member states in a system that is ostensibly based on rules.<sup>122</sup> In other words, the WTO produces a public good for all of its member states, just as these member states might provide public goods to their own citizens. But like most public goods, international trade cooperation is also subject to free rider problems.<sup>123</sup> In the particular context of the WTO dispute resolution mechanism, the free rider problem can take the form of certain parties bringing claims without necessarily taking into account the social costs their litigation might inflict on the international trade system.<sup>124</sup>

In certain contexts, the varying objectives of private and social enforcement may produce socially undesirable levels of litigation. In this picture, once one introduces the prospect of monetary damages into the WTO dispute resolution mechanism, the prospects of divergence between the private and social benefits of litigation increase dramatically.<sup>125</sup> In the international trade context, the socially optimal level of litigation should minimize states' incentives to breach their WTO obligations to other states. But with the introduction of monetary damages, member states stand to gain benefits from litigation that may not all be related to the social benefits of increased compliance.<sup>126</sup> As discussed earlier, cash is fungible and politicians in member states stand to benefit from monetary damages in ways that might have very little to do with the reduction of international trade barriers.<sup>127</sup> In this picture, member states that bring suits might often desire to obtain monetary relief for the harm suffered—not necessarily to deter scofflaw states from violating their international trade obligations.

More importantly, there are significant costs associated with litigation that individual states might have very little incentive to consider, such as the disruption it might have on diplomatic negotiations and the likely political repercussions it might have on global cooperation on both trade and nontrade issues. In the politically sensitive environment in which many international trade disputes arise, states that increasingly become targets of suits because of the attraction of monetary damages may also have more incentives to engage in “slap back” suits to discourage other prospective plaintiffs. In sum, the availability of monetary damages may encourage member states to focus even more on the adversary

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121. Shavell, *supra* note 120, at 334–36.

122. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 339 (1999).

123. See Shavell, *supra* note 120, at 336–37.

124. See *id.*

125. Sykes has also made this point in more detail elsewhere. See Sykes, *supra* note 12, at 655–58.

126. *Id.* at 657–58.

127. *Id.* at 654–55.

dynamic of litigation at the expense of other cooperative approaches, regardless of the stakes of the dispute. All of these prospective outcomes might entail significant social costs for the world trade system.

The excessive litigation problem is likely to be compounded by the attractiveness that a monetary damages remedy is likely to pose to cash-strapped developing states. In this regard, developing states might stand to gain benefits from litigation claims that, while significant from the developing states' perspective, might not justify the costs to the WTO system. Moreover, because developing states likely will not have the incentive to exercise the same kind of discretion as industrialized states in deciding which kinds of claims to bring, allowing monetary damages may increase the overall level of politically loaded claims adjudicated by the WTO.<sup>128</sup> Of course, large industrialized states may sometimes also be insensitive to the social costs of excessive litigation,<sup>129</sup> so the problem described here is not necessarily one that will only be attributable to developing states. However, there are reasons to believe that the problem will be more pronounced with developing states, given that developing states are less likely than developed states to be repeat players at WTO litigation with an incentive to make sure that the system is not weighted down by politically loaded claims.

One important difference between the litigation positions of developing and industrialized countries relates to the differential burdens of maintaining international trade cooperation. Like the public good of alliance security that Mancur Olson and Richard Zeckhauser famously described in their 1966 paper,<sup>130</sup> the burden carried by each member of the WTO in the production of trade cooperation is unlikely to be symmetrical. Given that some WTO member states, such as the United States and the EC, wield more influence in the WTO and are the most active consumers of the WTO dispute resolution mechanism,<sup>131</sup> they are likely to be more willing to bear a disproportionate share of the burden of sustaining the global trade order. By contrast, because the LDCs are likely to play a minimal or insignificant role in structuring the international trade regime, they will have an incentive to be less sensitive to the political and economic costs of certain enforcement actions. Indeed, empirical studies of the apportionment of expenses across a spectrum of international organizations suggest that developing countries consistently fail to bear their proportionate share of the burden of such expenses.<sup>132</sup>

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128. Trachtman, *supra* note 3, at 152–53.

129. Sykes, *supra* note 12, at 658.

130. Mancur Olson, Jr. & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. & STAT. 266 (1966).

131. See WTO.org, Disputes by Country, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Aug. 25, 2007).

132. See, e.g., Lawrence H. Officer, *An Assessment of the United Nations Scale of Assessments from a Developing-Country Standpoint*, 13 J. INT'L MONEY & FIN. 415 (1994) (showing that developing countries fail to shoulder a proportionate burden of their UN financing).

Applying the logic of disproportionate burden sharing to WTO dispute resolution, there is reason to believe that a developing state is likely to behave like the typical small shareholder in a publicly traded large company when it litigates international trade claims. In other words, like the small shareholder that has a trivial stake in a large company, a developing country will have less of an incentive than a major stakeholder (such as a major industrialized state) to factor in the costs and benefits of litigation from the perspective of the entire system.<sup>133</sup> For the developing country, once the expected monetary recovery from litigating a claim exceeds the costs of litigating the claim, the developing country will have an incentive to bring the claim. But the advanced industrialized state that is a repeat player at WTO litigation is more likely to conclude that a better outcome might sometimes be achieved by not litigating certain claims. Indeed, as some commentators have observed, industrialized economies such as the United States and the EC have sometimes avoided bringing politically loaded claims before the WTO where compliance with an adverse decision would seem politically costly for the scofflaw state.<sup>134</sup>

In any event, unlike under a monetary damages remedy, the risks under a bilateral retaliation scheme of a substantial divergence between the private and social costs of litigation would be insignificant. First, because the prime beneficiaries of retaliation are usually the export groups in the complaining state, the primary objective of a party bringing a suit under a retaliation framework will usually be to deter trade-inconsistent behavior by a scofflaw state. In other words, the motive of the state in bringing a lawsuit under a bilateral retaliation scheme is likely to overlap with the social goals of the WTO enforcement mechanism, which is to deter undesirable protectionist behavior.<sup>135</sup> Of course, in certain circumstances where protectionist groups in the complaining state also benefit from retaliatory action there is a risk that the private benefits of litigation might deviate from the social benefits. As discussed previously, however, politicians in the complaining state will usually have significant incentives to privilege the preferences of export groups over protectionist groups in choosing retaliation targets.<sup>136</sup>

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133. See, e.g., Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 *CORNELL L. REV.* 261, 271 (1986) ("Shareholders with tiny investments can bring derivative actions on behalf of a corporation. Because of his small stake in the venture, the complaining shareholder (or his attorney) has very little incentive to consider the effect of the action on other shareholders, the supposed beneficiaries, who ultimately bear the costs.").

134. See Nzelibe, *supra* note 9, at 249 (suggesting that the EC adopted the litigation avoidance strategy in its dispute with the United States over the Helms-Burton legislation); Geoffrey Garrett & James McCall Smith, *The Politics of WTO Dispute Settlement* 14 (UCLA Int'l Inst., Occasional Paper Series, 2002), available at <http://repositories.cdlib.org/international/ops/wtogarrettsmith> (describing a variety of adjudication avoidance approaches adopted by industrialized states in politically loaded claims).

135. See Nzelibe, *supra* note 9, at 218.

136. See *supra* text accompanying notes 38–41.

Second, because the current bilateral retaliation mechanism only allows member states to sanction violations of WTO obligations prospectively,<sup>137</sup> member states are unlikely to invest the significant resources in litigating a claim unless they believe that the litigation effort is likely to deter a scofflaw state from continuing an ongoing violation. Indeed, if anything, the lack of remedies for past violations under the current bilateral scheme might suggest a possible risk of underdeterrence rather than overdeterrence.<sup>138</sup> But even if one could demonstrate decisively that member states' incentives to use the current WTO enforcement mechanism are inadequate, there is very little reason to think that the introduction of monetary damages will correct this imbalance in a constructive manner. Because the monetary damages remedy provides an independent benefit to the party bringing a claim that is largely divorced from the social goal of deterring future violators, the introduction of such a remedy will likely amplify, rather than reduce, the disconnect between the private and social benefits of WTO litigation.

#### IV. THE PURPORTED COSTS OF BILATERAL RETALIATION

This Part turns to a more speculative critique of the variety of arguments suggesting that the structure of the current bilateral retaliation system is stacked against developing countries. Needless to say, a comprehensive assessment of the costs and benefits of the bilateral retaliation system for developing countries is beyond the scope of this essay. However, a cursory review of the rationales for reform of the WTO enforcement scheme suggests that the equity and efficiency objections to the current bilateral retaliation mechanism might be overstated. More specifically, these rationales often rely on questionable empirical and conceptual assumptions about the motivations of developing states and the nature of WTO litigation. Often, the conclusion is reached that because the poorest countries do not bring claims proportionately as often as their more industrialized counterparts, they are worse off.<sup>139</sup> But as sketched out below, there is much to suggest that the asymmetric nature of WTO litigation might sometimes accrue to the benefit of LDCs. More importantly, the obstacles to the participation of developing countries very likely extend beyond capacity issues and might also reflect domestic political economy constraints in such countries.<sup>140</sup>

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137. See *supra* text accompanying notes 13, 68–69.

138. See Bronckers & van den Broek, *supra* note 3, at 103; Robert E. Hundec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES—ISSUES AND LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS AND TRIBUNALS* (2000).

139. See, e.g., Bown & Hoekman, *supra* note 26, at 862.

140. In many respects, it may be the case that WTO dispute resolution may be an inappropriate institutional mechanism for inducing developing countries to comply with international trade norms. As Bown and Hoekman have recently observed elsewhere, LDCs are rarely targeted for litigation by advanced industrialized economies. See Chad Bown & Bernard Hoekman, *Making Trade Agreements*

A. *The Spillover Benefits from Litigation by States That Can Credibly Retaliate*

The most common criticism leveled against the bilateral retaliation regime is that it introduces an uneven playing field in WTO litigation between developing and developed states.<sup>141</sup> According to this argument, because developing countries lack the capacity to exert sufficient pressure on export groups in developed countries through retaliation, they are going to be unwilling to participate in WTO proceedings as much as developed countries.<sup>142</sup> Marshalling evidence that developing countries rarely initiate complaints in WTO proceedings, many commentators claim that this undermines the legitimacy of the entire WTO framework.<sup>143</sup> For instance, this refrain from Chad Bown and Bernard Hoekman is typical: “If poor developing countries believe they cannot enforce their market access rights through dispute settlement, they may be less willing to follow through with implementation of their own WTO commitments or undertake new commitments in the ongoing Doha Round.”<sup>144</sup> Commentators often suggest that systemic reform is necessary to level the playing field in WTO litigation between developing and developed states.<sup>145</sup>

The “lack of a level playing field” argument rests largely on the premise that developed and developing countries will routinely have independent and dissimilar litigation interests in WTO disputes. But there are reasons to question whether the conventional dichotomies often

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Relevant for Developing Countries: Why Dispute Settlement is not Enough (Nov. 2006) (unpublished manuscript, on file with author). If the political economy obstacles to active developing country participation in the WTO are significant enough, it may be worthwhile looking to other multilateral institutions for mechanisms to induce developing country compliance, such as conditionality requirements in multilateral lending programs. See Roderick Abbott, *Are Developing Countries Deterred from Using the WTO Dispute Settlement System?* (Eur. Ctr. Int'l Political Econ., Working Paper No. 01/2007, 2007), available at [http://www.ecipe.org/pdf/WPno1\\_07%20Abbott.pdf](http://www.ecipe.org/pdf/WPno1_07%20Abbott.pdf). For a discussion of multilateral coordination across the International Monetary Fund, the World Bank and the WTO, see Christian Tietje, *Global Governance and Inter-Agency Co-operation in International Economic Law*, 36 J. WORLD TRADE 501, 506–07 (2002).

141. See Busch & Reinhardt, *supra* note 4, at 719–20.

142. Gregory Shaffer has elaborated on the disadvantages that developing countries face as follows:

[Developing countries] face three primary challenges if they are to participate effectively in the WTO dispute settlement system. These challenges are: (i) a relative lack of legal expertise in WTO law . . . ; (ii) constrained financial resources, including for the hiring of outside counsel . . . ; and (iii) fear of political and economic pressure. We can roughly categorize these challenges as constraints . . . of law, money and politics.

Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177, 177 (2006).

143. See, e.g., Bown & Hoekman, *supra* note 26, at 862–63; Horn, Mavroidis & Nordström, *supra* note 26, at 7; Davis & Bermeo, *supra* note 26, at 1–2.

144. Bown & Hoekman, *supra* note 26, at 862–63.

145. Bown and Hoekman have suggested that we accept the current bilateral system as given and try to devise ways to decrease litigation costs for developing countries without overhauling the WTO enforcement mechanism. See *id.* at 864. Other empirical studies have questioned the retaliatory disadvantage of developing countries. See Busch & Reinhardt, *supra* note 4, at 720.

made between the export interests of developed and developing states really make much sense in an increasingly integrated global economy. Indeed, given the way production and marketing processes have become increasingly fragmented between emerging and mature economies, it is often difficult to isolate the “real” interested parties in WTO disputes.<sup>146</sup> Because there is going to be a significant overlap of export interests and industry linkages among member states, litigation by developed countries may often create spillover benefits for developing countries.

Take the EC-Bananas dispute, for instance. In that case, the United States agricultural firm Chiquita spearheaded much of the litigation effort challenging the EC’s Banana import process that extended preferential treatment to certain African, Caribbean, and Pacific states (ACP), many of which were former European colonies.<sup>147</sup> The main parties in the dispute before the WTO turned out to be the United States and the EC, neither of which exported bananas. Nonetheless, some of the most significant beneficiaries of this famous dispute were those banana exporters that did not benefit from the EC’s preferential regime, most notably Ecuador.<sup>148</sup> In many respects, the EC-Bananas dispute illustrates the difficulty of attempting to pigeonhole specific exports as being of primary interest to only developing countries. In this case, Chiquita—an American company—turned out to have significant commercial interests in the bananas exported from developing countries that did not benefit from the EC import regime, and it successfully lobbied the USTR to bring the dispute against the EC before the WTO.<sup>149</sup> Ecuador actually ended up piggy-backing on the EC-Bananas claim and eventually won the right to suspend the largest amount of concessions awarded in the dispute—\$202 million.<sup>150</sup>

In other circumstances, less developed countries may obtain spillover litigation benefits because they share the same export base with other states that can more easily afford to bring claims before the WTO. Take, for instance, Brazil’s recent challenge to United States subsidy programs on upland cotton, which is the first WTO decision that found subsidy programs in violation of the Agriculture and Subsidies and Countervailing Measures (SCM) Agreement.<sup>151</sup> The target of Brazil’s

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146. See *infra* notes 147–52 and accompanying text.

147. For an in-depth and detailed review of the controversy underlying this famous dispute, see Bhala, *supra* note 67.

148. See *id.* at 961–63; see also Shaffer, *supra* note 4, at 25–26.

149. See Bhala, *supra* note 67, at 968.

150. Award of the Arbitrators, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, ¶ 170, WT/DS27/ARB/ECU (Mar. 24, 2000); see also Daniel Pruzin, *Intellectual Property: Hailing Final WTO Decision in Banana Case, Ecuador Sees Landmark for Poorer Countries*, INT’L TRADE DAILY (BNA), Mar. 30, 2000 (observing that the ruling “is . . . the first time that the WTO has authorized ‘cross-retaliation’ by allowing Ecuador to suspend intellectual property protection and wholesale distribution rights for EU goods and service providers”).

151. Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 8.1, WT/DS267/R (Sept. 8, 2004).

challenge—the generous export subsidy program that the United States government accords its cotton farmers—has also been the source of concern for cotton producers from poorer African countries, such as Benin, Burkina Faso, Mali, Chad, and Senegal.<sup>152</sup> Indeed, Benin and Chad actually intervened as third parties in the cotton subsidy dispute and a crucial aspect of Brazil's submission to the WTO was evidence on how the cotton industry in Benin was harmed by the American subsidy regime.<sup>153</sup> After the United States initially declined to bring its cotton subsidy into compliance, Brazil threatened to retaliate by suspending concessions to the tune of \$1 billion a year. In late 2005, Brazil agreed to suspend retaliation in return for the United States' promise to pass legislation changing its subsidy regime.<sup>154</sup> Thus far, the United States and Brazil are still trying to work out the details of this agreement. In any event, African cotton producers obviously stand to benefit if Brazil eventually succeeds in getting the United States to modify its cotton subsidy regime, especially if it does so on a MFN basis.

Of course, one would want to be cautious about predicting the extent of positive spillovers that can be generated from WTO litigation by more powerful states. As some commentators have suggested, sometimes the hopes of some countries to free ride and enjoy the market access benefits created by the litigation efforts of other countries have not been realized.<sup>155</sup> More specifically, in certain instances, the scofflaw state does not lift the trade offending measure on a MFN basis but instead only provides a discriminatory increase in access to the state that brought the claim.<sup>156</sup> While this practice seems inconsistent with the scofflaw's obligations to grant access on a nondiscriminatory basis under the General Agreement on Tariffs and Trade (GATT),<sup>157</sup> it might nevertheless reflect the practical realities of how parties might seek to resolve bilateral disputes when other interested third-party states have decided to forego intervention. Nonetheless, even in these circumstances, states with weak retaliation capacity can choose to participate formally in the dispute as third parties and then hope to benefit from the compliance leverage of those states that have sufficient retaliation capacity.

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152. See Hilton E. Zunckel, *The African Awakening in United States—Upland Cotton*, 39 J. WORLD TRADE 1071, 1076–89 (2005).

153. *Id.*

154. For extensive analysis of this case, see Karen Halverson Cross, *King Cotton, Developing Countries and the 'Peace Clause': The WTO's US Cotton Subsidies Decision*, 9 J. INT'L ECON. L. 149 (2006).

155. See Bown, *supra* note 14, at 290. For instance, Bown observes that in a dispute in which South Korea challenged United States safeguards on welded pipes, the nonparties in the dispute that hoped to free ride on South Korea's litigation efforts were disappointed because the settlement the United States negotiated with South Korea yielded a discriminatory increase in market access to South Korea alone. See *id.* at 290–91.

156. *Id.*

157. See GATT, *supra* note 80, art. I.1. (requiring a WTO Member to accord “any advantage, favor, privilege or immunity” it grants to any product of any other country to the “like product” of all other WTO Members).

*B. Distinguishing the Interests of the World's Poor from Those of the Least Developed Countries*

If the core beneficiaries of the market access goals of WTO litigation among developing countries are supposed to be the world's poor, not necessarily the states that represent them, it is not clear that the litigation output of the least developed states is a good proxy for the litigation interests of the world's most vulnerable and poorest populations. Indeed, about two-thirds of the world's poor—defined by the World Bank as those who subsist on less than \$1 per day—live in India, China, and Brazil, which all enjoy significant market leverage and are active consumers of the WTO dispute resolution mechanism.<sup>158</sup> Emphasizing the lack of litigation generated by the least developed states gives inadequate recognition to the massive improvements in litigation access achieved by those states that still represent a significant proportion of the world's poor.

Simply put, the benefits of WTO litigation for the world's poor, both within and between countries, depend not only on the actions of the least developed countries, but more importantly on the litigation output of the most populous developing countries. Thus far, a significant range of populous developing countries have initiated and won important litigation disputes against major export economies.<sup>159</sup> Indeed, Brazil is the fourth most active initiator of disputes under the WTO—after the United States, the EC, and Canada—with twenty-two disputes initiated to date.<sup>160</sup> Although China has not played that much of an active role in WTO litigation, having only initiated one dispute since it joined the WTO four years ago, it is poised to become an influential player if it eventually decides that a litigation strategy will help advance its interests.<sup>161</sup> Indeed, China has become one of the most active third-party intervenors in WTO disputes since it joined the WTO in 2001.<sup>162</sup> India has also been very active in WTO litigation, having successfully challenged EC and United States trade policies in areas ranging from the administration of antidumping policies to the implementation of generalized system of preferences.<sup>163</sup> Indeed, India's successful challenge to the EC's zeroing

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158. According to recent data on the worldwide distribution of the world's poor, India has 41.01% of the world's poor, China has another 22.12%, while Brazil has 1.82%. See Janice M. Poling, *Country Responsibilities in Achieving the Millennium Development Goals* 77 (Ctr. Energy & Envtl. Studies, Working Paper No. 0304, 2003), available at <http://www.bu.edu/cees/research/workingp/pdfs/MDGCountryResp.pdf>.

159. See WTO.org, *supra* note 131.

160. See *id.*

161. See Jing Gu, *China and WTO Dispute Settlement: Three Years On 29–30* (2005) (unpublished manuscript), available at <http://www.nottingham.ac.uk/iaps/GuJing%20paper.pdf> (suggesting that China has resisted direct participation in litigation for cultural reasons but observing that China had participated as a third party in many disputes).

162. See *id.* at 6, 29–30.

163. See WTO.org, *supra* note 131.

practice in calculating antidumping margins<sup>164</sup> spurred a series of WTO lawsuits that has effectively marginalized the practice of zeroing by advanced industrial economies.<sup>165</sup>

Beyond their litigation successes before the WTO Appellate Body, the most populous developing states are also using their newfound leverage to influence the course of trade negotiations, especially in the ongoing but currently dormant Doha round. For instance, the G-20—an alliance of developing countries led by India and Brazil—has been instrumental in getting WTO members to agree to review the criteria for “green box” subsidies under the Agriculture Agreement.<sup>166</sup> In these and other circumstances, these countries have used the threat of WTO litigation to spur the inclusion of agricultural subsidies as a key issue on the Doha negotiation agenda.

### C. *The Political Economy Constraints to WTO Litigation*

The commentary analyzing the nonparticipation of developing countries usually stresses capacity and resource constraints, such as the lack of money and legal expertise as well as the inability to retaliate against other major trading partners. What is conspicuously absent from much of this literature is the possibility that developing countries, especially LDCs, might also face a different set of political economy incentives from their developed country counterparts in bringing WTO claims.<sup>167</sup>

The motivations of member states in bringing WTO litigation depend in large part on how interest groups exert pressure on domestic politicians. Central to this framework is the assumption that elected officials have to react to pressures by the most influential groups in the society in order to ensure their political survival. Thus, when politicians in mature economies like the United States and the EC seek to initiate WTO litigation, they are usually responding to demands of powerful export groups that have been adversely affected by a trade-inconsistent measure.<sup>168</sup> But key to this dynamic are two factors that are often lacking in many LDCs: (1) the ability of export groups to overcome collective action problems and devote sufficient resources to lobbying for litigation,

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164. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/AB/R (Mar. 1, 2001).

165. See, e.g., Panel Report, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (Jan. 30, 2007).

166. Matthew S. Dunne et al., *International Trade*, 39 INT'L LAW. 209, 211 (2005).

167. Of course, these political economy factors suggest that many of these developing countries might join the WTO regime for reasons that are completely unrelated to access to dispute resolution. See Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 969–70 (2005) (“Although states continue to join the WTO and to seek entry to the European Union, we do not know whether those states do so to obtain the benefits of the adjudicatory institutions themselves, or simply the substantive benefits of the treaty regime in question.”).

168. GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 3–9 (2003).

and (2) the existence of domestic political institutions that can effectively channel domestic interest group preferences to public officials.<sup>169</sup>

The latter factor, which involves the presence of responsive political institutions, is familiar.<sup>170</sup> At bottom, the need for public officials to respond to domestic interest group pressures will vary depending on whether interest groups and citizens can monitor and punish such officials for failing to deliver on their campaign promises. In representative democracies with well-developed institutions, interest groups will have a greater ability to influence their politicians.<sup>171</sup> The existence of competitive elections combined with a free and open press will ensure that interest groups will be informed about changes in domestic economic conditions caused by trade barriers and will be better able to monitor the actions of public officials. In this picture, if politicians fail to address an increase in trade barriers by a trading partner, they face the prospect of being turned out of office by the efforts of the export groups adversely affected by the trade barrier. Correspondingly, those politicians who are willing to challenge the WTO-inconsistent policies of their trading partners will be rewarded by export groups with generous campaign donations.

By contrast, autocratic or nondemocratic regimes are likely to be less vulnerable to the political consequences of disregarding export group pressures for market access.<sup>172</sup> But the distribution of nondemocratic regimes in the world tends to be concentrated in developing countries, especially LDCs.<sup>173</sup> The lack of electoral accountability and institutions that help channel interest group preferences gives nondemocratic regimes less of an incentive to respond to pressures from export groups. Of course, I do not mean to suggest that autocratic regimes are not influenced at all by domestic interest groups. Rather, in autocracies, the relevant set of interest groups is likely to be much narrower than in a democracy. More likely than not, the relevant configuration of powerful interest groups in an autocracy will often depend on factors disconnected from promoting market access. In any event, since many developing countries have weak or nonexistent democratic institutions that can channel interest group preferences effectively, the political logic driving the demand for WTO litigation will often be absent.

Furthermore, the way the current international trade regime treats developing countries is likely to discourage the mobilization of export

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169. *Id.* at 20–27.

170. For an argument that democracies are more likely to conclude liberalizing trade agreements than nondemocracies because they tend to be more responsive to domestic political pressures, see Edward D. Mansfield et al., *Free to Trade: Democracies, Autocracies, and International Trade*, 94 AM. POL. SCI. REV. 305 (2000).

171. *Id.*

172. *Id.*

173. See Jaroslav Pietras, *The Role of the WTO for Economies in Transition*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 353, 353–61 (Annie O. Krueger ed., 1998).

groups in LDCs that will lobby for WTO litigation. Generally, mobilizing export groups that will pressure politicians to initiate litigation against illegal trade barriers will often be difficult.<sup>174</sup> Export groups will have to believe that the promise of litigation is worth overcoming significant collective action costs. Even in advanced democratic countries, these collective action problems can be severe enough to thwart the effective mobilization of export groups. But a number of factors are likely to make mobilizing groups in LDCs even more problematic than in more mature economies. First, since many LDCs already receive special tariff treatment under the Generalized System of Preferences (GSP), the export sector in many of these LDCs has less of an incentive to lobby for litigation.<sup>175</sup> Second, export groups in the LDCs may lack the necessary institutional infrastructure and resources to overcome collective action problems when compared to their more developed counterparts. As some commentators have observed, export groups in developing countries like Brazil were able to overcome collective action problems by pooling together resources and forming umbrella industrial coalitions that identified adverse trade policies and lobbied for a litigation response.<sup>176</sup> But many developing countries will lack an export sector as sophisticated and responsive to international economic developments as that of Brazil and hence will face less of an incentive to process and bring claims.

Finally, despite much argument to the contrary, retaliation within the GATT framework is not the only remedy available to developing countries in trade disputes. As observed earlier, the DSB expressly allowed Ecuador to cross-retaliate in the EC-Bananas dispute by withdrawing concessions granted to the EC under the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>177</sup> Since suspension of intellectual property commitments under the TRIPS agreement is likely to be a boon to developing countries regardless of the nature of the dispute, we should expect more developing countries to seek to use the cross-retaliation remedy. Yet, without exception, no WTO dispute has been settled in this fashion since the EC-Bananas dispute. Thus, by revealed preference, many developing countries seem to suggest that the lack of an effective remedy is not the primary obstacle to their bringing more complaints before the DSB.

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174. See generally Mansfield, *supra* note 170.

175. See, e.g., Çağlar Özden & Eric Reinhardt, *The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000*, 78 J. DEV. ECON. 1 (2005) (discussing how GSP preferences distort incentives of export groups to lobby for trade liberalization in LDCs).

176. See Gregory Shaffer et al., *Brazil’s Response to the Judicialized WTO Regime: Strengthening the State through Diffusing Expertise* (June 22, 2006) (unpublished manuscript, on file with author).

177. See *supra* text accompanying notes 147–50. For a more extensive discussion of this dispute and its ultimate resolution, see Bhala, *supra* note 67, at 839–43. See also Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union*, INT’L LEGAL PERSP., 2001–2002, at 1, 1.

## V. CONCLUSION

The notable expansion of international trade litigation since the conclusion of the 1994 Uruguay Round has spawned an important literature on trade remedies, much of which stresses the need to embrace monetary damages or collective retaliation as an alternative to the current bilateral retaliation approach. This literature, however, has largely ignored how certain domestic factors interact with the current bilateral WTO enforcement mechanism. Significantly, domestic interest groups often play a critical role in lobbying for sanctions against scofflaw states in the aftermath of international trade disputes. However, the extent to which these interest groups can be harnessed effectively against trade-inconsistent measures will depend on the configuration of available remedies under the WTO dispute resolution mechanism.

In this picture, the introduction of monetary damages or collective retaliation is likely to undermine the political dynamics that make the current bilateral retaliation scheme effective. First, an effective retaliation strategy depends heavily on pressures from export groups negatively affected by a trade inconsistent measure. A third-party state administering collective retaliation will be largely immune from export group pressures; indeed, such a third-party state will likely only implement retaliation in a manner designed to benefit its protectionist constituency. Second, because of agency costs the availability of monetary damages will likely skew the incentives of politicians away from reducing trade barriers. Because such money can be used easily to accomplish other politically worthwhile goals that are unrelated to the reduction of international trade barriers, it is difficult to envisage why politicians will be motivated to structure the monetary sanctions regime to reward adversely affected exporters or punish protectionists who instigated the violation. Moreover, the availability of monetary damages is likely to lead to a divergence between the social and private benefits of WTO litigation.

Finally, critics of the current WTO retaliation regime have largely been unwilling to confront the possibility that domestic political economy factors might be partly responsible for the low level of litigation brought by developing countries. Significantly, trade barriers might have a more significant influence on politicians in mature democratic states because electorally accountable officials are likely to be more responsive to interest group pressures than officials in nondemocratic countries. Since many LDCs have weak or nonexistent democratic institutions, the lack of WTO litigation brought by some countries might simply reflect the reality that political officials in those countries face less societal demands to bring such claims.

