I. Introduction

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II. Law in the International Trade Context

II.1 Character of the Law

International trade law under the WTO Agreement, like other areas of international law, is characterized by national sovereignty. Nations are their own sovereigns; any trade obligations they hold are voluntarily undertaken, and any supranational body that governs those obligations is entirely of their own making. Thus, it may be helpful to think of the WTO Agreement as a contract between nations.[1] If viewed in this light, basic contract principles would tell us that Members to the WTO would jointly benefit from any improvements in contractual efficiency; that is, modifications that increase contractual surplus. This discussion suggests that the rules established under the WTO can and should be justified on grounds of efficiency.[2]

When doing such an analysis three key aspects of the international trade context should be kept in mind. First, is the value and importance of negotiation: as the WTO itself claims, "above all, [the WTO is] a negotiating forum."[3] If the WTO Agreement is a contract between nations, then the lack of an independent-formed supranational governing body makes the negotiation of that contract critically important. Whereas contracts between private parties are "completed" by statutes, treaties, and/or adjudicating bodies quite apart from the parties themselves,[4] this is not the case for trade obligations. Even considering that nations could submit disputes to arbitration or form a dispute settlement body, the primacy of the national sovereignty norm leaves less room for *ex post* "filling in the blanks."[5] Thus, the *ex ante* negotiation of

[1] The comparison can be found in the text of the GATT itself as well as the writings of numerous commentators. See e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947], Article XXV: Joint Action by the Contracting Parties. See also, e.g., Daly, Herman, and Robert Goodland. "An ecological-economic assessment of deregulation of international commerce under GATT." *Ecological Economics* 9.1 (1994): 73-92. (referring to the GATT as a contract).

[2] For example, the rule against quantitative restrictions can be justified based on their comparative higher transaction costs and the Most Favored Nation and National Treatment norms may be justified as preventing concession erosion. See Petros C. Mavroidis et al., The Law of the World Trade Organization (WTO): Documents, Cases & Analysis 61 (American Casebook Series, 2010) (providing economic justification for quantitative restrictions); *Id.* at 221 (providing economic justification for national treatment); Henrik Horn and Petros C. Mavridis, Legal and Economic Aspects of MFN, 17 European Journal of Political Economy 233-279, 251 (2001) (discussing economic justifications of MFN).

[3] World Trade Organization, What is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm

[4] For example, the UN Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code create default rules for contracts, and the traditional role of courts in contract law is to "fill in the blanks." See Clinton W. Francis, The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England, 83 Colum. L. Rev. 35, 137 (1983).

[5] Arbitrators, panels and the AB will be reluctant to infringe too heavily on a nation's sovereign interest, and the nation can always choose to not agree. Practice has shown that the WTO dispute settlement system has generally stayed within its authority and "shown sufficient deference to legitimate policy decisions made by WTO Member Governments." William

contingencies and renegotiation in the case of unexpected circumstances is relatively more valuable for nations than it is for private parties. Furthermore, it may be that negotiation is, in the first place, relatively more valuable for nations because trade externalities are commonplace in the global economy.[6] Then, since there is no supranational body to correct those externalities, the only way to cure them is via bartering.[7]

Second, is that the international relations context within which trade law exists creates a unique contractual setting in which much more than just trade matters. Like corporations, nations are going concerns. But unlike corporations, nations are few and their flexibility is limited; supply and demand are often not competitive, and non-competitive forces limit entry and exit. These two aspects of the international context make effective diplomacy critical, as a damaged international relation is likely to be costly for both parties. The existence of international relations has a direct impact on the incentives of nations. Quite apart from any *ex ante* agreed-upon sanctions for actions found to be untoward by other nations, each such action may have a costly impact on international relations. First, there is a real possibility that nations may use extra-contractual means to enforce or punish violations of their contractual rights under the WTO agreement. Second, violations of commitments may harm a nations reputation, making it more difficult to contract with third nations. Beyond adhering to commitments and effective diplomacy, the existence of unique international relations creates incentives to manage those very relations. The power that nations hold within their relationships affects the relational risk that they bear as well as their negotiating power. [8]

Third, is the unique relationship between national governments and their people. On one hand, nations act as agents for their people; thus, we might think of the WTO as a contract, not between nations, but between their peoples. This framing highlights the important fact that people are beneficiaries of the WTO agreement, and that each nation should be attempting to maximize some social welfare function. On the other hand, national action is influenced by internal political forces, which do not always correspond to that nation's social interest. Certain special interest groups might wield more political power than others, and this may lead to inefficient or seemingly irrational national action.[9]

J. Davey, Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques, 4 J. Int'l Econ. L. 1, 79-110 (2001).

[6] This aspect of the international trade landscape might be seen as forming the basis of the *terms of trade theory* for an international trade agreement: because unilateral setting of tariffs can lead to a *terms of trade* externality, an international trade agreement can achieve better outcomes for all parties involved. See Harry G. Johnson, Optimum Tariffs and Retaliation, 21 The Review of Economic Studies 2, 142-153 (1953-54) for the first formalization of this theory.

[7] That negotiation cures externalities a point famously made by Ronald Coase in his essay, The Problem of Social Cost, 3 J. L. Econ. 1 (1990).

[8] For example, a nation that is dependent on another for a vital resource holds relatively little power in that relationship. Dependence can also be on inaction; for example, weapons of mass destruction give a nation power by making others dependent on its inaction. For a thorough account of the relationship between trade, international relations, and national power see Albert O. Hirschman, National Power and the Structure of Foreign Trade (Berkeley, University of California Press, Vol. 18 1945).

[9] This aspect of the international trade landscape might be seen as forming the basis of the *commitment theory* for an international trade agreement: committing to a trade agreement grants a government domestic support for political action (or perhaps, creates an excuse for that action). See Jan Tumlir, Protectionism: Trade Policy in Democratic Societies (Washington, DC: American Enterprise Institute 1985); Kyle Bagwell and Robert W. Staiger, The Economics of the World Trading System, 32-4 (MIT Press: Cambridge, Mass 2002).

II.2 On Rights, Remedies, and Enforcement

A contract, by definition, is a mutually agreed upon exchange of obligations.[10] Each of the obligations exchanged has a corresponding right.[11] Thus, it may be said rights define a contract. But, because rights are limited by the likelihood and gravity of breaches, remedy and enforcement are also at the core of every contract. Remedy directly impacts the gravity of breaches; a greater remedy lowers the harm caused by a breach of a right, and if great enough, can even make breach preferable to the right itself. Moreover, because remedies often take the form of sanctions on the breaching party, remedies also affect deterrence, lowering the number of breaches.[12] Enforcement can mean two things. It can mean *ex ante* enforcement, which relates to the prevention of violations. For example, a fence can prevent trespassing. It can also mean *ex post* enforcement, which relates to the probability of remedy when rights are breached. For example, video cameras would identify trespassers more often, thereby increasing the probability that a remedy would be realized. Remedies and enforcement are related; no remedy is required if there is perfect *ex ante* enforcement, and remedies and *ex post* enforcement are often interchangeable.[13] Thus, rights, remedies, and enforcement are very much interdependent and very much critical to the definition, and therefore efficiency, of any international trade agreement.

It is natural to ask then, what should the structure of rights, remedies, and enforcement look like in an efficient international trade agreement? The characteristics of the international trade landscape might make certain combinations preferable to others. For example, it follows immediately from the strength of the national sovereignty norm that any kind of *ex ante* enforcement would be very hard to achieve, because *ex ante* enforcement requires some sort of direct control over the obligors. Other bright line rules are more difficult to prescribe.

A good starting place and important question is to ask whether it is better to protect international trade rights via property rules or liability rules, as distinguished in the law and economics literature.[14] Under a liability rule, a party to a contract can unilaterally breach its contract obligations, but must pay damages, usually equal to the harm caused, upon breach. Under a property rule, a party cannot unilaterally breach its contract obligations—to deviate from the contract, a party must buy the right to deviate from other contracting parties through

[10] Black's Law Dictionary (9th ed. 2009) ("contract, *n.* (14c) 1. An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.")

[11] As an example, when acceding to the WTO, nations undertake the fundamental Most Favored Nation (MFN) obligation. GATT 1947, Art. I. This obligation gives other Members the right to be accorded any advantage that nation gives to any third party.

[12] Petros C. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11 EJIL 4, 763-813, 763-64 (2000) (stating that remedies perform two functions, the ex post redressing of illegality (reparation) and ex ante threat against potential violators (deterrence), and that there is a direct link between the two)

[13] The classic statement of interchangeability between sanctions and enforcement effort is found in Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169-217 (1968).

[14] This distinction, which was first drawn in Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972), has been extended by several authors to analyzing the WTO Agreement. See e.g., Joel P. Trachtan, The WTO Cathedral, 43 Stan. J. Int'l L. 127 (2007) and Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization, 31 The Journal of Legal Studies No. S1, S179-S204, S182 (2002).

renegotiation. To prevent unilateral breaches, property rules must be enforced via *ex ante* enforcement, injunctive force, or punitive damages.[15] Because of the strength of the national sovereignty norm, as discussed above, only punitive damages are a realistic remedy and enforcement mechanism for property rules in international trade. Punitive damages act as a property rule by creating a very large disincentive for unilateral breach, thereby incentivizing bilateral negotiation. Thus, an alternative way of phrasing the question is: do punitive damages have a place in an efficient international trade agreement?

The rest of this paper will first examine the history and current state of the WTO law: are rights under the WTO agreement protected by property rules, liability rules, or something in between? It will then examine the desirability of a punitive damages remedy in light of current WTO law and the characteristics of the international trade context outlined above.

III. The Law of the WTO

Given the prior discussion on the centrality of remedies and enforcement, it makes sense that the WTO itself views its Dispute Settlement Understanding (DSU) as the "central pillar of the multilateral trading system."[16] The DSU was one of the key contributions of the Uruguay Round of multilateral trade negotiations, the conclusion of which established the WTO in the 1994. It is helpful to review the history leading up to the DSU, so that the rules can be examined in context.

III.1 The GATT Years

Prior to the conclusion of the Uruguay Round and the WTO agreement, the General Agreement on Trade and Tariffs (GATT 1947) governed international trade. During the GATT years, dispute settlement procedures did exist: disputes could be submitted to GATT panels, which would issue rulings in much the same way as they do today. However, in the GATT years, there was no standing Appellate Body to review panel rulings, and any WTO Member, even the loser of the dispute, could block rulings from being adopted.[17] Moreover, unlike the WTO, the GATT did not contain any specific provisions dealing with remedies or enforcement; like most other international treaties, remedies were left up to the adjudicating body, the GATT panels.[18] GATT panels, when faced with the issue of remedies in a violation complaint, almost always recommended cessation of the violation—a forward-looking remedy.[19]

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[15] *Cf.* David D. Haddock Fred, An Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 Cal. L. Rev. 1, 20 (1990) ("Enforcing property rules requires stripping all gain (or more) from a taking.")

[16] World Trade Organization, A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

[17] World Trade Organization, Historic development of the WTO dispute settlement system, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm

[18] Petros C. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11 EJIL 4, 763-813, 774 (2000)

[19] *Id.* 775. It was only in one line of cases that GATT panels deviated from this and recommended backward-looking compensatory damages. The five panels that deviated all dealt with antidumping and countervailing duties, and recommended revocation and reimbursement of the illegally imposed duty. *Id.* Even though there were other panels in

If remedies under the GATT seem odd, that's because they aren't really remedies—at least not in the sense that this paper has used the term thus far. The ability of the losing party to block a panel ruling took away any legal force that the GATT had.[20] It's clear then, that the remedies recommended by GATT panels weren't legal remedies at all—rather, it may be helpful to think of GATT panels as a non-legal bargaining chip within a larger process of trade relations. Recall the discussion in subsection II.1 that identified negotiation, international relations, and political action as three salient characteristics of the international trade space. In light of these three points, GATT dispute resolution could be thought of as serving three non-legal functions. First and foremost, the reports played a key role in the negotiation process when parties reached an impasse. A domestic analog is non-binding arbitration, an alternative dispute resolution process that allows negotiating parties to get a neutral opinion on the dispute. Though such a non-binding procedure may not seem like much, it is evidently effective.[21] The vast majority of decisions during the GATT years were both adopted and implemented by the losing parties in spite of their non-binding nature, probably at least in part due to the next two points.[22] GATT panel reports also helped member nations impose diplomatic sanctions to obtain performance on promises while being in the "right", thereby not damaging their international relations to the same extent that unilaterally taking the same actions would. Finally, GATT panel reports provided a means of gathering domestic political support for taking such diplomatic action. To the extent that imposing diplomatic sanctions would have harmful effects on some domestic constituents, having a panel report helps a government commit, politically, to a course of action that is net beneficial.

Despite GATT "remedies" not having legal force, it may still be useful to ask how rights under the GATT agreement were protected—was it through a property-like rule or a liability-like rule? The answer to this question is hardly obvious, and it's more of an empirical question than anything else. However, we can say this: when member nations violated their GATT commitments, they could expect to suffer some sort of sanction as a result.[23] That sanction would be unilaterally imposed by other nations, and its expected strength would depend on the power of the breaching party relative to the parties affected by its breach. Recall that property rules can be enforced by very large sanctions—i.e., punitive damages. Despite not being able to specify the actual magnitudes of expected sanctions, it is possible that certain diplomatic sanctions could be punitive in nature. Furthermore, since more powerful nations could impose larger sanctions, we can say that the protection of their rights under the GATT was relatively more property-like and the protection of the rights of less powerful nations was relatively more

other contexts that found the forward-looking remedy unsatisfactory, they refrained from recommending damages. See, e.g., the Trondheim case, discussed in Mavroidis 2000 at 776.

[20] This paper uses legal force to denote force originating from a source of law, e.g., force originating from the GATT Agreement itself; in reality, the line between legal and nonlegal force is difficult to define, especially in the international space where there is no governing "state" to exert legal force in the way governments do domestically.

[21] See Thomas Schultz, Online Arbitration: Binding or Non-Binding? in ADR Online Monthy (November 2002), available at SSRN: http://ssrn.com/abstract=898622 (noting that non-binding arbitration is significantly more popular for online disputes that binding arbitration, and arguing that the lack of legal obstacles may make non-binding arbitration superior to traditional binding arbitration).

[22] World Trade Organization, Historic development of the WTO dispute settlement system, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm

[23] Note that merely *expecting* a sanction is enough to affect incentives to breach; the sanction does not need to be experienced every time a breach occurs.

liability-like. What role did the GATT panels play? On one hand, their existence could have increased this disparity between powerful and not-so-powerful nations, by making it easier to impose diplomatic sanctions. On the other hand, by encouraging negotiation, GATT panels could have reduced this disparity, since negotiation—albeit *ex post* negotiation—would happen regardless of whether the expected diplomatic sanction was liability-like or property-like.

III.2 Enter the WTO

With the conclusion of the Uruguay Round of negotiations, the WTO Agreement and the DSU came into force.[24] The DSU overhauled the international trade dispute process. Among its innovations are the establishment of a standing appellate body ("AB"),[25] and a unanimity requirement for blocking rulings.[26] The former made trade dispute litigation more credible: as a standing body composed of seven geographically and politically diverse individuals, the AB's rulings carry considerably more weight than would a GATT-era panel ruling. The latter unanimity requirement essentially made rulings binding, imbuing them with legal force. In combination, these two changes make it clear that the DSU was a move away from the nonlegal remedies of the GATT years and toward a multilateral trade system governed by legal force. That codification of legal remedies under the DSU is found in articles 19 and 22.

Article 19 provides that if a panel or the AB finds a party's measure inconsistent with that party's obligations, the panel or AB shall recommend the measure be brought into conformity with those obligations. Article 19, by emphasizing *conformity* with WTO obligations, suggests that rights under the WTO are protected by a property rule: there is no room for breach without renegotiation.[27] At the same time, Article 19 has been read to suggest that only forward-looking remedies are allowable under the DSU.[28] Case law and the interpretations of parties themselves have endorsed this reading.[29] This implies that the DSU holds no legal force over temporary

[24] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]; DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[25] DSU Article 17.1 (establishing the Appellate Body)

[26] DSU Article 16.4 (consensus requirement for non-adoption of panel reports); DSU Article 17.14 (consensus requirement for non-adoption of AB reports)

[27] Renegotiation might happen through a waiver for non-tariff barriers, WTO Agreement Article IX.3, or through tariff renegotiations, GATT 1947 Article XXVIII, which is discussed *infra*.

[28] Petros C. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, 11 EJIL 4, 763-813, 779 (2000)

[29] See e.g., *Australia—Automotive Leather II*, WT/DS126/RW (panel report, 21 January 2000), which is the only WTO case to recommend a retroactive. In this case, the US as complainant, Australia as respondent, and the EC as a third party all agreed that Article 19 demanded prospective remedies. See paragraphs 6.9, 6.14, and 6.23 for the US, AU, and EC views respectively. The panel viewed Article 4.7 of the SCM as distinct and independent from Article 19 of the DSU, and recommended retroactive withdrawal of an export subsidy on the basis of Article 4.7 SCM and not Article 19 DSU. See paragraph 6.22.

breaches—since there is no legal remedy, there is no contractual obligation to abstain from breaching WTO commitments in the short run.[30]

While this remedy structure may seem strange at first glance, it is not without economic justification. If we think that most breaches occur by accident and in good faith then allowing temporary breaches prevents an undue burden on legitimate state lawmaking.[31] Moreover, a no liability rule for temporary breaches encourages optimal precautions by injured parties; under a damages rule, they would have a lesser incentive to quickly communicate the perceived illegality.[32] Finally, it may be that nonlegal sanctions (a la the GATT years) are an adequate remedy for bad faith breaches, so that even the proportion of good faith breaches is relatively low, designing the system in this manner is justified.[33] To sum up the discussion on Article 19: it is suggestive of a property right that is legally protected only in the long run; temporary breaches are not legally punished.

Whereas Article 19 states that the objective of dispute settlement is to achieve compliance, Article 22 sets out the means by which to achieve that objective.[34] Article 22.1 identifies compensation and the suspension of concessions as the "temporary" remedies available in case of non-compliance, writing that neither is preferable to compliance. By the same provision, compensation is voluntary, leaving suspension of concessions as the sole legal remedy for not non-compliance. Article 22.4 specifies the amount of suspension of concessions that is allowable under the agreement to be "equivalent" to the damage.[35]

Article 22.4 creates a little bit of a puzzle: suspending concessions is clearly intended to induce compliance, a property-like rule, but if the level of suspension is equivalent to the damage, this becomes a liability-like rule, and there is insufficient legal incentive to comply in all cases. This apparent inconsistency within the DSU has led commentators to take diverging positions as to the nature of WTO obligations; some have concluded that the DSU creates a liability rule,[36] whilst others have argued that it creates a binding obligation.[37] Both viewpoints

[30] But see example in previous footnote: retroactive remedies may be possible under other agreements, such as the SCM, where a separate and additional provision allows panels to make a different recommendation. *Id.* at paragraph 6.41.

[31] In cases where the issue of good faith has come up, the defendant has been found to be acting in good faith despite violating their WTO obligations. See *EC—Pipe Fittings* (panel) §7.307 and *US—Offset Act (Byrd Amendment)* (AB) §298.

[32] *Cf.* Steven Shavell, Strict Liability versus Negligence, 9 The Journal of Legal Studies 1-25, 6 (1980). An alternative rule that would encourage optimal precautions (but not self-imposed exposure to harm) by injured parties would be a strict liability with comparative negligence-like rule. *Cf. Id.* at 7. The problems with such a rule in the international trade context are obvious: how could a panel possibly determine whether a complaining party was negligent?

[33] An example of a breach taken in bad faith would be to intentionally implement a temporary local content subsidy that would force foreign producers who wanted access to the market to open domestic factories. By the time compliance with the no local content subsidies rule of the SCM had been achieved, investment would have already occurred.

[34] Arbitrators and panels have adopted this interpretation time and time again. *See* Decision by the Arbitrator, *US—Upland Cotton* (Article 22.6 – *US*) (WT/DS267/ARB/1, 31 August 2009), §4.109 and 4.110.

[35] This provision has never been interpreted as anything more than equivalent. See e.g., Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

[36] See generally, Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization, 31 The Journal of Legal Studies No. S1, S179-S204 (2002).

[37] See John H. Jackson, Editorial Comment, The WTO Dispute Settlement Understanding—

have some merit: *legally* speaking, this is a liability rule. But the view that the parties intentionally created a liability rule whilst also putting so much emphasis on compliance is difficult to digest and doesn't explain the compliance observed in practice.

A better answer is reminiscent of the reasoning for not having legal remedies during the GATT years: while formally a liability rule, the law is functionally acting as a property rule by leaving room for non-legal, diplomatic sanctions. Whereas it was unclear whether rights under the GATT were protected by a liability-like or a property-like rule, it's very clear here. If formal sanctions are equivalent to the harm caused, and diplomatic sanctions are positive, the total sanction felt by parties found to be violating commitments is super equivalent to harm: i.e., punitive. This explains the compliance observed in practice as well as Article 22.1's clear preference for compliance to compensation and suspension of concessions in light of the obviously liability-like legal rule.

III.3 From GATT to the WTO and beyond: Why formalize?

Despite the lack of a legal remedy for GATT violations, the GATT years were wildly successful. Global trade growth averaged 8% throughout the 50s and 60s,[38] and it has been argued that the GATT's impact on the strong post-war economic growth was larger than that of both the World Bank and IMF.[39] This begs two questions. First, what function did partial formalization of remedies under the DSU play? Second, should further formalization occur, and in particular, should punitive damages be formalized?

To answer the first question, recall the three functions of GATT panel reports discussed in section III.1: they helped surmount negotiation impasses as a form of non-binding arbitration; they acted as a green light for imposing diplomatic sanctions; and they provided a domestic excuse to rally political support for those sanctions. With respect to the first function, it is unclear how much has changed; there is nothing stopping parties to the WTO from having their own non-binding arbitration.[40] Indeed, it has been argued that most disputes are resolved before the panel process by bargaining in the "shadow of the law."[41] With respect to the latter two functions, they have been formalized and focused by Articles 19 and 22 of the DSU. Where there is a legally approved method of redressing rights violations, the methods not approved lose their appeal, and perhaps even become wrongful. The idea this formalization represents, which might be termed the legal delineation of self-help remedies, is not new; it is prevalent in many areas of areas of the law, from property to corporate law.[42] The case for legally delineating self-

Misunderstandings on the Nature of Legal Obligations, 91 Am. J. Int'l L. 60, 63 (1997).

[38] World Trade Organization, The GATT years: from Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm

[39] See e.g., Douglas A. Irwin, The GATT in historical perspective, 85 The American Economic Review No. 2, 323-328, 328 (1995)

[40] Mutually agreed solutions are "clearly preferred" to the legally binding panel process. DSU Article 3.7.

[41] Marc L. Busch and Eric Reinhardt, Bargaining in the shadow of the law: early settlement in GATT/WTO disputes, 24 *Fordham Int'l Law Journal* 158-172, 161 (2000) ("in a substantial majority of disputes [initiated] (roughly 55%), no panel is ever established.")

[42] See Henry E. Smith, Self-Help and the Nature of Property, 1 J.L. Econ. & Pol'y 69, 80 (2005) (identifying self-help as a legal right or privilege); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1354 (Del. 1985) (providing the following as a

help has several notable points. First, self-help can often be destructive.[43] For example, if left to self-help, parties to the WTO might spark a vicious cycle of retaliation, a trade war that could eliminate years of trade concessions. Second, self-help is often unprincipled, creating substantial risk that is easy to eliminate via standardization of remedies.[44] A corollary of this point is that formal remedies reduce information costs by being known and predictable. The DSU recognizes these first two points quite nicely in Article 3.2:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. …

A third common justification is that the a lack of a sufficient *ex post* remedies (whether by formal remedy or self help) can lead to inefficient *ex ante* self help.[45] Finally, self-help can lead to a might makes right regime, whereas formalization can achieve a more efficient distribution of remedial power. Within the context of the WTO, these final two points might lead to developing countries having insufficient power to implement *ex post* remedies, which might in turn result in them taking of *ex ante* precautions via inefficient underinvestment.[46] It's not clear that the DSU did much, if anything, to change this balance of remedial power. As several commentators have noted, developing countries are at a significant disadvantage under the current dispute settlement rules.[47] While this has led to several proposals to change the rules so as to more fairly distribute retaliatory power, it's not clear that such a proposal is practical given national sovereignty and the current distribution of international power.[48]

Formalization is not without its costs. Beyond the practical difficulties of finding a unified structure that works, and the costs of specifying and enforcing such a structure,[49] formalization has a notable "soft" cost in the international trade arena. Recall from section II.1 that the importance of international relations creates a unique contractual context. In some ways, this context may resemble familial arrangements more than it resembles an arms-length

reason for allowing the poison pill defense: "it does less harm to the value structure of the corporation than do the other mechanisms."). For a thorough account of how the law evolves in a world originally governed by "pure self-help," and particularly relevant to the case of the evolving international trade law, see generally Richard A. Epstein, The Theory and Practice of Self-Help, 1 J.L. Econ. & Pol'y 1, 4 (2005).

[43] Epstein at 24 (noting that almost everyone agrees that some State is necessary to "stop the cycle of private vengeance before it starts").

[44] Cf. Epstein at 27 ("the use of force as a self-help remedy carries with it two important risks [that might be avoided via formalization]")

[45] Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1785 (2004) ("[W]ithout property protection, those in possession will take self-help measures to prevent the theft of their assets. Such efforts are inefficient if they are less cost-effective than government-supplied protection"). One form of such self-help might be underinvestment, which is discussed in subsection IV.2.

[46] Note that these are two separate costs to having self-help remedies and that taking inefficient *ex ante* precautions might also affect the most powerful parties if *ex post* remedies are insufficient.

[47] See, e.g., Chad P. Bown and Bernard M. Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8(4) J. Int. Econ. Law 861-890, 861 (2005)

[48] Without a supranational force, the rules governing the WTO contract are made the parties themselves; in exchange for the contractual right of better remedies, developing countries would have to offer some consideration. That consideration may not be worth it for them, or even possible to offer in some cases.

[49] Henry E. Smith, Self-Help and the Nature of Property, 1 J.L. Econ. & Pol'y 69, 76, 80 (2005) (noting that entitlements have positive delineation costs and identifying self help as an entitlement)

contracting setting. Domestic courts have long been wary to infringe upon the sovereignty of the home in contractual disputes.[50] In the home, as in the international space, agreements are generally formed and performed out of mutual trust, not teeth. As between family, one cost to formalizing dispute resolution between nations is that both the *ex ante* negotiation of the contingency and the *ex post* resolution can damage the relationship.

In section III.2 we observed that at least two areas in which the DSU left remedies to the parties themselves. The first of these was temporary breaches taken in bad faith. The second was the punitive element of compliance property rule. Both of these areas have received a significant amount of academic attention. An excellent account of the former, which has been termed the "remedy gap," can be found in a 2011 paper authored by Professor Rachel Brewster.[51] On the latter, there has been little agreement among academics. The rest of the paper deals with this issue. Part IV of this paper discusses the following question: if the compliance rule were to be fully formalized, should it take the form of formal punitive damages, or a fully formalized liability rule?[52] Whether or not it *should* be formalized is a slightly separate question. If the analysis in Part IV comes out in favor of a liability rule, then surely it should be formalized if possible (since the current system is in the form a property rule). But since Part IV comes out in favor of a property rule, the question of formalization is very relevant, and is explored in Part V.

IV. The Merit of Punitive Damages in WTO Law

This section compares the normative desirability of protecting rights under the WTO with a property rule to protecting those rights with a liability rule. It is assumed that the type of protection is fully formalized within the WTO law; that is, breach and non-breach have no diplomatic or reputational effects.[53] A formalized property rule would involve punitive damages for failure to comply with WTO rulings; other methods of enforcing property rules are not considered, since it is supposed that they will infringe too greatly upon the national sovereignty norm. A formalized liability rule would involve recognition of the right to unilaterally breach WTO obligations within the language of the Agreements. Such a rule already exists within Article XXVIII GATT, which formally gives Member nations the right to unilaterally raise tariffs above the bound rate, given that certain procedural requirements have been met.[54] Note that because members have the right to unilaterally breach their obligations, it is far more difficult for other members to resort to self-help and impose diplomatic sanctions than it would be had the agreement been silent on the issue. In effect, a right to unilateral breach found in the text of the agreement plays the opposite role that panel rulings did during the GATT years: it will be harder

[50] *Cf.* Balfour v. Balfour, 2 K.B. 571 (1919) (holding that a husband and wife did not intend a domestic agreement to be legally enforceable); Restatement (Second) of Contracts § 21 (1981) (comment c., stating that "some unusual manifestation of intention is necessary to create a contract" between members of the family group)

[51] Rachel Brewster, The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement, 80 George Wash. L. Rev. 102-158 (2011). [See also?]

[52] A fully formalized liability rule would make non-compliance diplomatically acceptable if compensation is paid or concessions are suspended. Although it is not obvious to see how this option could achieved, it will be shown infra that it may already exist for violations of tariff commitments

[53] Whether or not the rules should be fully formalized is discussed in Part V, infra.

[54] See GATT, Article XXVIII.

to rally domestic political support for retaliatory action, and the reputation of the breaching party remains intact as they are not in the "wrong".

This section is organized into the three areas traditionally examined by the law and economics literature on contract remedies: incentives for efficient breach, incentives for efficient investment, and risk.

IV.1 Incentives for Efficient Breach

Efficient breach occurs when breach of an obligation is net beneficial; that is, when the total benefit parties gain from the breach exceeds the total cost of that breach. Since the surplus or net benefit created by the breach can be divided amongst the parties to the contract, all parties can be made better off if an efficient breach happens. This division can happen at the time of contracting through a change in the initial distribution of rights or it can happen at the time of breach through a renegotiation of contractual rights. Therefore, it is the best interests of all parties to incentivize efficient breach. Under ideal circumstances, both a liability rule and a property rule will result in efficient breach.

As a liability rule entails unilateral breach, the efficiency of that breach will be determined by the consequences the breaching party expects. Traditionally these consequences amount to damages owed, but sometimes, as in the trade context, they might take other forms, such as suspension of concessions. It is well known that if the consequences expected to be borne by the breaching party are equal to the expected harm of the breach, then unilateral breaches will be efficient.[55] This measure of consequences, or damages, that equals the expected harm of breach is commonly referred to as the expectation measure of damages.[56] Under the expectation measure, a potential breaching party will only breach when its benefit outweighs the expected harm from breach—thus, as long as the breaching party correctly gauges the damages it will have to pay, and those damages equal the damage actually caused, expectation damages incentivize efficient breach.[57]

As a property rule entails bilaterally agreed upon breach (i.e., renegotiation), the efficiency of breach will be determined by the ease and cost of renegotiation. A party wishing to deviate from its obligations will pay no more for that right than its expected benefit from breach, and the other parties will accept no less than the expected harm. Thus, the potential breaching party will only buy the right to breach when its benefit outweighs the damage caused, and a long as the parties can come to an agreement, a property rule will also incentivize and result in efficient breach.

Both liability rules and property rules can result in efficient breach, but as discussed, they each require different conditions to do so. For a liability rule to work effectively, both the breaching party and the adjudicating body will need to have good information about the damage caused by breach. Under a property rule, renegotiation occurs, and so the effect of informational

[55] See e.g., Steven Shavell, Foundations of Economic Analysis of Law 343-351 (2004)

[56] Id.

[57] Note that even though they incentivize efficient breach, this may not be the optimal measure of damages because of risk bearing and investment

asymmetries is reduced. However, renegotiation will occur only if the expected benefit from renegotiation is greater than the transaction costs. Because liability rules allow for unilateral breach, the effect of transaction costs is reduced.

Generally speaking then, with respect to the incentives for efficient breach, the normative comparison of property rules and liability rules rests on two dimensions. First, the more information potential breaching parties and adjudicating bodies have about the harm caused by breach, the better a liability rule is relative to a property rule. Second, the lesser the transaction costs of renegotiation, the better a property rule is relative to a liability rule.

With respect to the harm caused by breaches of trade obligations, several factors make it incredibly difficult to gauge precisely, or even approximate. First, in the international trade context, harms are almost always forward looking. They take the form of lost future profits and reinvestment costs, which are often impossible to measure. Second, harms are rarely targeted at a single nation and are often spread among many parties. A breach that harms foreign producers of widgets affects all nations that produce widgets. Third, breaches with respect to one product will affect not only the like product, but also its substitutes and complements, and all of their respective inputs and outputs. Furthermore, the impact on these industries will differ: whereas some will be harmed, others might experience a benefit to offset that damage. Fourth, damage to an industry, on an international scale, cannot be measured absolutely, without considering welfare consequences. Two breaches that create the same absolute level of harm cannot be said to be equal if one of them causes an unwanted economic redistribution in the territory of another WTO member. This last point suggests that political consequences matter: a breach, if made unilaterally, can result in a negative externality in the form of damaged international relations and lowered domestic political support for the WTO. Thus, a breach can cause harm that is quite apart from the direct impact it has on industry.

Another point having to do with damages and efficient unilateral breach is the impact of enforcement on the equivalence between the expected consequence the breaching party experiences and the expected harm caused by the breach. If every breach were sanctioned with consequences equivalent to harm, then efficient unilateral breach would occur. But if only half of all breaches were sanctioned with equivalent consequences, then many inefficient breaches would occur since the expected consequences for a breach would be halved. In order to maintain efficient breach with half the enforcement effort, the consequences for breaching parties must doubled. This is particularly relevant in the international trade context where enforcement is definitely less than certain. However, formal damages are limited to equivalence by Article 22(4) of the DSU. This suggests that some level of super equivalence is necessary to incentive efficient breach, even under a liability rule, whether it comes in the form of punitive damages or non-legal sanctions. However, the precise level of super equivalence necessary for a properly functioning liability rule is just as difficult, if not more difficult, to know that the level of harm.

The difficulties associated with properly measuring the harm caused by breaches of obligations strongly points in the favor of a property rule. Although some of the factors contributing to this difficulty also affect the efficiency of a property rule since even the victim

cannot accurately measure harm,[58] it is clear that the afflicted parties will have better information about the harm than either the breaching party or the adjudicator. The afflicted party is in the best position to understand their own economy, and the buy-in they provide under a property rule effectively eliminates the political harms caused by unilateral breaches.

With respect to transaction costs of renegotiation, the story is not so clear. On one hand, negotiation is obviously not free. On the other hand, recall that negotiation was one of the three key aspects of the international trade context discussed in section II.1: negotiation is valuable. As negotiation involves communication and fosters relations between nations, negotiation often has value in and of itself; in economic terms, negotiation produces a positive externality. This externality, while difficult to measure, offsets the transaction costs associated with negotiation. The value of negotiation must be great, as negotiation is always occurring. Indeed, even the formalized liability rule for tariff violations under Article XXVIII makes negotiation a requirement before unilateral breach can occur. Thus, any advantage that a liability could have in terms of transaction costs must come from the substantive nature of renegotiations under property rules, as opposed to the procedural aspects of negotiation.

The one potential problem with renegotiating obligations within the multilateral trade system is that obligations are owed to all parties to the WTO under the Most Favored Nation principle of Article 1 GATT. Professors Warren Schwartz and Alan Sykes argue that because WTO membership is large (159 at the time of this writing),[59] a potential breaching party would face an almost insurmountable holdout problem.[60] They argue that each party, regardless of their actual interest in the right stake, would holdout on giving approval until they capture a sizable portion of the breaching party's expected gain.

This view is incorrect; for a number of reasons the international trade context is significantly different from the standard holdout problems experienced in real estate purchases. First, all parties are constantly in communication, which enables potential breaching parties to produce a take-it-or-leave-it offer to all parties at once, conditioned on the offer being successful. Since the "purchase" of the right to breach occurs at the same time, the holdout problem disappears. Second, the approval of all parties is not necessary. Deviations from non-tariff obligations under the WTO and GATT would typically take the form of a waiver, under Article IX:3 of the WTO Agreement and Article XXV:5 of the GATT 1947 Agreement, which require 75% and 67% approval respectively. Thus, a single holdout or even a small group of holdouts will not prevent an efficient breach. These first two points suggest that a take-it-or-leave-it offer in the trade context is somewhat similar to corporate acquisitions via a tender offer, which is recognized by many as an effective solution to the holdout problem.[61] Third, and perhaps most

[58] For example, the forward looking nature of the harm (lost future profits).

[59] http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[60] Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization, 31 The Journal of Legal Studies No. S1, S179-S204, S187 (2002).

[61] See Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 Tex. Rev. L. & Pol. 49, 88 (1998) ("the tender offer is an innovation in corporate law designed to overcome the holdout problem associated with control transactions.") (citing J. Gregory Sidack & Susan E. Woodward, Takeover Premiums, Appraisal Rights and the Price Elasticity of a Firm's Publicly Traded Stock, 25 Ga. L. Rev. 783, 801-05 (1991)); Justin Lewis Bernstein, Tender Offer Taking: Using Game Theory to Ensure That Governments Efficiently and Fairly Exercise

notably, the international relations context of trade law makes the holdout problem even less relevant than in any other context. Sellers in both the real estate and corporate acquisitions contexts are unrelated and cannot bargain amongst themselves; in the trade context however, not only can honest holdouts receive their fair valuation via negotiations with other sellers, but also dishonest ones are likely to suffer reputational and diplomatic sanctions for preventing an efficient breach. Thus, it is unlikely that the holdout problem is as acute as Schwartz and Sykes argue it is, or even a problem at all.

The above discussion demonstrates the advantages of a property rule relative to a liability rule in terms of incentivizing efficient breach. Given that transaction costs are similar under both possible rules, and that non-breaching parties are in the best position to measure the harm caused by a breach, the analysis weighs heavily in favor of a property rule.

IV.2 Trade Risk and Efficient Investment

Trade and investment are intrinsically linked: without investment there could be no trade, and without trade, there would be no investment. Thus, trade rules can create incentives for investment, and so it's important that they do so efficiently. Investments are risky by nature, and that risk is central to the decision to invest. Because a property rule has a different effect on the trade risk borne by WTO members than a liability rule, the effect of the two rules on investment differs. Whether or not more risk is good or bad is not altogether clear. However, this subsection argues that lowered trade risk is preferable, and that because a property rule lowers trade risk under the current system, it is preferable to a liability rule.

In the first instance, it is important to understand how risk is affected by each rule. A property rule eliminates downside risk for the non-breaching party, since that party will never agree to "sell" their right for less than it is worth.[62] In other contexts, a liability rule typically also eliminates downside risk when damages are set to the expectation measure. However, in the international trade context, consequences for breaching parties do not take the form of a payment to the non-breaching party, but rather come in the form of suspended concessions. The reason for this is likely the strength of the national sovereignty norm, which would work against forcing nations to pay compensation. Thus, under a liability rule, non-breaching parties are not compensated for their losses, and bear the downside risk from breaches by other parties under a liability rule.[63]

With respect to incentives for investment, risk cuts both ways. On one hand, the actors responsible for investing are generally risk averse (e.g., small businesses or even multinational corporations), and because they are tiny relative to nations they feel downside trade risk acutely.

Eminent Domain, 17 Tex. J. C.L. & C.R. 95, 105 (2011)

[62] Two caveats must be stated. First, an honest holdout who cannot holdout due because other WTO members are satisfied by an offer still experiences loss, and not all downside risk is eliminated in reality. Second, upside risk still remains. This is bad because it can incentivize inefficient investment made for the purpose of capturing a piece of the breaching party's gain. This is similar to the holdout problem. However, this consideration is directly offset by the previous situation (inability to holdout).

[63] Note that under a well functioning property rule, even if it were enforced via punitive damages (i.e., a forced payment), the property rule would not be infringed upon and national sovereignty would not be diminished.

This creates excessive deterrence of investment activity, and can result in good investments being foregone. On the other hand, risk can also deter bad investment, which would otherwise be incentivized by lack of risk. For example, it would make little sense for Country A to invest in increasing its capacity to produce widgets for export to Country B, if Country B decides to ban widget imports after investment occurs. Regardless of whether Country B's decision is efficient or not (assume it is), Country A's investment is wasteful and inefficient. However, if Country A is fully compensated from losses resulting from Country B's decision, then it will invest in its widget production capacity as if it had the right to export to Country B (i.e., the possibility of a ban is irrelevant). If Country A is not compensated however, it will take into account the risk of a ban and invest accordingly (and efficiently).

Therefore, the increased trade risk of a liability rule will deter both good and bad investment. It is claimed that increased risk will deter more good investment than it deters bad investment. This is because most breaches of WTO o bligations result from creating barriers to trade: since economic theory (i.e., comparative advantage) tells us that barriers to trade generally have negative welfare consequences, the likelihood of (efficient) breach in a given industry occurring is relatively low. Because the costs of incentivized bad investment manifest themselves only when breach occurs (rarely), but the costs of deterred good investment manifest themselves always (because they occur *ex ante*), it is suggested that the costs of deterred bad investment cannot actually be that bad whereas the cost of good investment deterred may be significant.

To illustrate this claim, consider first that the reason bad investment under a compensatory regime is bad is opportunity cost. Two opportunities are forgone: the opportunity of the would-be buyers of gadgets had Country A's producers invested in producing gadgets instead of widgets (i.e., the consumer surplus), and the unrelated opportunity of Country B to breach when its breach would have been efficient had Country A invested in producing gadgets instead of widgets. The first opportunity cost manifests itself only when there is a breach. As stated above, this likelihood is low, and so the expected cost is low. The second opportunity cost mentioned (foregone efficient breaches) depends on the existence of efficient breach opportunities, which we stated above was likely very low. Thus, the cost of bad investment is small because the opportunities foregone are not very valuable.

Consider next the costs of deterring good investment. A significant amount of good investment may be foregone due to even a small amount of trade risk. Whereas the risk aversion of actors is not relevant to the opportunity cost of bad investment, it has a direct impact on good investment. Due to the risk aversion of actors, a small probability of loss due to breach can greatly increase the cost of good investment. Thus, a substantial amount of good investment might be forgone. While the cost of that foregone investment is impossible to know, this analysis suggests that the cost of risk, deterring good investment, outweighs the benefit of risk, deterring bad investment. Therefore, because a property rule results in less risk than a liability rule, it creates better incentives for investment.

IV.3 Risk-Bearing Cost

Quite apart from the fact that risk creates an indirect cost by affecting investment, risk also has a direct risk-bearing cost. Consider an investment that would be made under both rules. In this example, the investment is the same, and so there is no cost related to that investment. However, the same investment would be valued less under a liability rule because it is riskier. To see this, consider that investors would be willing to buy insurance against the risk.[64] The price they would be willing to pay to eliminate the risk entirely is the cost of risk. Therefore, the mere presence of risk creates a risk bearing cost. A property rule, which results in less risk than a liability rule, is again superior here.

V. Should the Property Rule be Formalized?

Part IV demonstrated that a property rule is preferable to a liability rule along all fronts and Part III concluded that the current WTO law is a partially formalized property rule. The question remains whether the punitive element of the property rule should be formalized or left to the current self-help regime.

Formal punitive damages would offer two significant benefits: an uncontroversial statement of the property rule and a softening of the current (arguably) might makes right regime. Given that some argue that the current regime is based on a liability rule,[65] and especially to the extent that they are correct in their judgment, formal punitive damages would result in the relative benefits of a property rule over a liability rule that were discussed in Part IV. That is, punitive damages might lead to more efficient breaches, more efficient investment, and less risk-bearing cost if it causes actors that currently view rights under the WTO Agreement as vulnerable to unilateral breach to shift their expectations and expect those rights to be protected by a property rule. To the extent that nations currently comply with rulings promptly, this benefit is non-existent; however, to the extent that nations can delay compliance and extend the remedy gap, this benefit might be quite significant.

The second significant benefit of formal punitive damages would be the opportunity to achieve a more efficient distribution of remedial power. To the extent that the current informal punitive element allows more powerful WTO Members to exert more remedial power, and to the extent that that imbalance is inefficient, formalized damages could even the playing field and achieve a more efficient contract.

Although the aforementioned benefits could potentially be quite large, the costs of implementing a formal regime are not trivial. First, are the substantive and administrative considerations involved in actually implementing a fully formalized system. With respect to the substance of the law, current WTO rules were meant to function in a regime founded upon self-help—it is far from clear that those same rules are ideal in a regime founded in formality.[66] A

[64] Although this type of risk is likely uninsurable, they could reduce the risk through derivative markets.

[65] Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization, 31 The Journal of Legal Studies No. S1, S179-S204, S183 (2002).

[66] See Richard A. Epstein, The Theory and Practice of Self-Help, 1 J.L. Econ. & Pol'y 1, 24-25 (2005) (observing that the set of substantive rules developed in a formal system will be different from those relied upon in a system based on self-help)

likely scenario will be that certain rights will remain best protected by a self-help remedy (e.g., antidumping and countervailing duties) or even by a liability rule (e.g., tariff obligations), whereas others will call for the protection of a property rule.[67] Thus, the process of formalization might well require far more than a simple change in the DSU; it may require a change in the GATT and other agreements. Administrative and procedural concerns are also significant. Punitive damages have often been considered draconic remedies. Thus, careful calibration of remedies and process would have to occur. This concern is only exacerbated by the next point.

Implementation of punitive damages might also strain international relations and place undue burden on the WTO. Consider that the cost of imposing punitive damages on a sovereign state given a punitive element would be enormous (never mind the cost of imposing them wrongly). Whereas in the current informal system the defendant would place blame primarily on the nation engaging in a self help remedy, this blame may be redirected at the WTO an the DSB if they were to have the power of ordering punitive remedies.

In light of the costs of formalization, it is not easy to see how such a step might be achieved in the near future. The amount of power nations would have to surrender in order to avail themselves to the virtues of formal punitive remedies is substantial. Given the current power imbalance within the WTO, it is not even clear that such a bargain could be struck, as the most powerful would have too little gain.

[67] For an example of how one might approach this problem, see Joel P. Trachtman, The WTO Cathedral, 43 Stan. J. Int'l L. 127, 134 (2007) (breaking down potential GATT violations into four categories and arguing that they should be protected via different rules).