

PRELIMINARY DRAFT (10/11/04)

Public vs. Private Enforcement of International Economic Law:
Of Standing and Remedy

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Like all bodies of law, the public international law of trade and investment requires an enforcement mechanism. The choices to be made in designing such a mechanism are many. Parties to trade and investment agreements must decide whether to create an adjudicative body to hear complaints about alleged breach of obligations, or to rely on informal diplomacy. They must decide whether to create formal sanctions for breach of obligations, or to rely on each party's concern for its reputation, and perhaps unilateral retaliatory actions, to discourage breach. If they choose to create an adjudicative body, they must decide who has standing to bring complaints before that body. And if they choose to create a formal sanction for breach of obligations, they must select the type of penalty that they will use as well as some mechanism for calibrating its magnitude.

A fair amount has been written about various aspects of these issues with specific reference to international economic law, but relatively little has been written from an analytical perspective about what the law and economics literature terms the choice between public and private enforcement of law. This choice becomes relevant once parties to an international agreement elect to allow an adjudicative body to hear complaints. They may then reserve to themselves the exclusive right to petition that body (public enforcement), or allow private actors with a stake in the dispute to petition it (private enforcement). Intertwined with that choice is the parties' choice of a sanction for breach of obligations -- regardless of who has standing before the adjudicative body,

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the parties to the pertinent agreement may provide no formal sanctions for a finding of breach, they may provide for sanctions that only a governmental party to the agreement has the capacity to administer (such as trade sanctions), or they may provide for money damages that can be paid to the parties injured by violations

A quick survey of international economic law reveals quite a mixed picture along these dimensions. Private rights of action for money damages are routine in international investment agreements. In the trade area, by contrast, money damages are much more circumscribed, and are absent from some important multilateral arrangements (although they are always an option for the settlement of disputes as a practical matter). Likewise, some trade agreements afford private actors standing to enforce the rules in a court, while others do not. The goal of this paper is to explain these features of current law from a political economy perspective.

Section I sets out relevant characteristics of international trade and investment law, and reviews existing commentary on private standing and remedies. Section II then offers a political economy explanation for why investment agreements have private rights of action for money damages but trade agreements often do not, emphasizing the importance to investment agreements of inducing private actors to incur new sunk costs. Section III considers the heterogeneity among trade agreements regarding the remedies available to private parties, and explains why governmental parties to trade agreements may prefer to act as political filters in the dispute process by reserving standing to themselves, particularly in the absence of a political body with the power to reverse problematic judicial decisions.

I. Legal and Economic Background

A. Current Law

1. Investment

The public international law of investment is largely a creation of bilateral

agreements, and to a lesser extent customary international law. The United States, for example, has relied on a network of bilateral Friendship, Commerce and Navigation (FCN) Treaties to secure limited rights for investors (as well as certain trade and shipping rights) in foreign countries throughout much of its history.¹ These treaties generally did not create any private rights of action. It was also long thought that customary international law provided foreign investors with protection against expropriation, requiring “prompt, adequate and effective compensation” in the event of any expropriation. Customary law would afford a private right of action to an investor if the host country would allow customary law to be enforced against it in its domestic courts, or would comply with an award by a foreign court.

During the middle of the 20th century, various developing countries began to question whether customary law obliged them to provide “prompt, adequate and effective compensation” for expropriation. This movement culminated with the 1974 U.N. Charter of Economic Rights and Duties of States, adopted by the general Assembly, which provided that compensation for expropriation was to be measured by the law of the expropriating state. These developments created considerable unease among investors in developing countries, and spawned an initiative that began in Europe to negotiate new “Bilateral Investment Treaties” (BITs). The United States began its own program to negotiate BITs in 1977.² BITs typically provide various nondiscrimination commitments, and expressly embrace the old customary law standard of “prompt, adequate and effective compensation” for expropriation. They provide investors with the right to take investment disputes to neutral international arbitration, and commit each

¹ For illustrative examples of an FCN treaty, one between the United States and Argentina (1853) and one between the United States and Liberia (1939), see <http://www.yale.edu/lawweb/avalon/diplomacy/argentina/argen02.htm> and http://170.110.214.18/tcc/data/commerce_html/TCC_2/LiberiaFriendship.html.

² For a thorough history, see Vandeveld (1993).

party to enforce arbitral awards (including an award of damages).³

Many of the principles found in BITs were incorporated into the investor rights provisions of NAFTA. Chapter Eleven of NAFTA contains non-discrimination obligations respecting investment and an obligation to provide prompt compensation for any “expropriation.”⁴ It also requires parties to accord investors of another party “treatment in accordance with international law, including fair and equitable treatment and full protection and security.”⁵ Any dispute under these provisions may be submitted by an investor to arbitration, and the arbitrators have the power to award money damages and restitution.⁶

NAFTA Chapter Eleven has sparked a number of interesting cases in recent years, which have led some public officials and academic commentators to question the wisdom of the investor rights provisions. I will say more about these controversies below.

Finally, the OECD’s proposed (and now abandoned) Multilateral Agreement on Investment also would have included private rights of action for investors. Its provisions in this regard closely resembled a typical BIT, with investors having the right to proceed to arbitration and to collect monetary compensation from violator states.⁷

2. International Trade Law

International trade law is a vast area, encompassing numerous bilateral, regional and multilateral agreements. It will suffice for my purposes to note four of these arrangements: the WTO (incorporating GATT); NAFTA; the Treaty Establishing the

³ The U.N. maintains a searchable database of BITs on the UNCTAD website – see http://www.unctadxi.org/templates/DocSearch_779.aspx. When last visited, the website listed 44 BITs to which the United States is a party.

⁴ NAFTA Art. 1110.

⁵ NAFTA Art. 1105(1). See generally NAFTA Arts. 1102 (national treatment), 1103 (most-favored nation treatment), 1110 (expropriation and compensation).

⁶See NAFTA Art. 1135.

⁷ The negotiating text of the MAI may be found at 1998 BDIEL AD LEXIS 33.

European Community (the EC Treaty); and the United States Constitution. I recognize, of course, that the EC Treaty and the U.S. Constitution are much more than simply “trade agreements,” but it is their trade-related provisions, as interpreted by their respective high courts, that are of interest here.

Although these trading arrangements differ in many particulars, they are strikingly similar as to their core substantive obligations. All four arrangements expressly limit or eliminate tariffs on trade among their members.⁸ All four arrangements place severe limitations on quotas and other quantitative restrictions.⁹ And all four systems prohibit discriminatory taxation and regulation that disadvantages commerce from other member states for the purpose of protecting domestic firms against foreign competition.¹⁰ Many other similarities might be noted.

The four systems differ importantly, however, regarding the *standing* of private parties to invoke the rules. Under the law of the WTO, only member governments may bring disputes into the dispute resolution process. Private parties may lobby their governments to do so, of course, but the ultimate decision to pursue a case is reserved to national governments.

Putting aside the investor rights provisions noted above (as well as heretofore unused private rights of action under the largely meaningless NAFTA side agreements on labor and the environment), NAFTA also denies standing to private parties. Only the three member governments can initiate a case to enforce the core trade commitments

⁸ See GATT Art. II; NAFTA Art. 302; Treaty of Rome Art. 25; U.S. Const. Art. I, Sec. 10.

⁹ See GATT Arts. XI & XX; NAFTA Art. 309; Treaty of Rome Arts. 28 & 30. Under the U.S. Constitution, protectionist quantitative restrictions are prohibited by judicial interpretation, the so-called “Dormant Commerce Clause.”

¹⁰ See GATT Art. III; NAFTA Art. 301. Under the EC Treaty, such discriminatory measures will be found to have “equivalent effect” to quantitative restrictions, and thus be prohibited under Article 28 unless they can be justified by certain “mandatory requirements” such as public health. (see Article 30). The leading case remains *Rewe-Zentral AG v. Bundesmonopolverwaltung Fur Branntwein (Cassis de Dijon)* ECJ Case 120/78, [1979] ECR 649. Similar jurisprudence has evolved in the Dormant Commerce Clause cases in the United States. See David Currie, *The Constitution of the United States*, Chap. 3. (University of Chicago Press: 2000).

regarding tariffs, quotas, nondiscrimination commitments, and the like.

Within Europe, the situation is different. Private interests can resist the enforcement of laws that violate the EC Treaty in the courts of member states. Controversial issues may be referred to the European Court of Justice for a ruling, which the courts of member states treat as binding.¹¹ In an indirect way, therefore, private parties may be said to have standing to enforce the trade rules of the EC Treaty against member states that would otherwise violate them.

The United States presents a similar picture. Private actors can challenge state laws that they believe to violate the trade-related principles of U.S. Constitutional jurisprudence in state or federal court. A ruling to the effect that a state law is unconstitutional will ordinarily be accompanied by an order directing state enforcement authorities not to enforce it.

With regard to the *remedy* that is available when a party challenging the legality of a member state law obtains a favorable ruling, the four systems also exhibit some important differences. The WTO system requires member states adjudged to be in violation of WTO rules to conform their behavior within a “reasonable period of time.”¹² If the member state fails to do so (and the “reasonable period will be fixed by arbitration if necessary), the complaining member and the violator must negotiate over the possibility of trade compensation (usually, substitute trade concessions by the violator to “compensate” for the violation). If those negotiations fail, the complainant may withdraw trade concessions that it has made to the violator (i.e., retaliate) in an amount “equivalent” to the harm done by the violation.¹³ The magnitude of retaliatory suspension of concessions is also subject to binding arbitration. In cases where the

¹¹ See *Cassis de Dijon*, *supra*.

¹² WTO Dispute Settlement Understanding (DSU) Art. 21(3).

¹³ Some commentators argue that the equivalence requirement can be understood, in a rough way, to implement a rule of expectation damages. See Sykes (2000).

violator conforms its behavior within a “reasonable time,” however, the mainstream view is that the complainant has no rights to trade compensation or retaliation, or to compensation of any other sort.¹⁴ Some commentators have questioned this proposition, however, finding precedent in international law for retrospective remedies, and noting that a few dispute panels (mostly under the old GATT system) have recommended remedies that are retrospective (such as reimbursement of wrongfully collected antidumping duties). See Mavroidis (2000).

Further, nothing in the structure of the system prevents WTO members from “settling” for monetary compensation. Such a settlement has occurred once to my knowledge, in a case involving a challenge to the U.S. Copyright Act brought by Europe under the WTO TRIPs agreement. U.S. law did not require the collection of royalties for music played at certain smaller eating and drinking establishments, and was adjudged to violate TRIPs. In lieu of amending the Act, the United States ultimately agreed to pay approximately \$1 million per year in compensation to European artists. See Bhala and Attard (2003). The Copyright case is discussed at length in Grossman and Mavroidis (2003).

The NAFTA dispute resolution system is quite similar to that of the WTO. Under Chapter 20, disputes that cannot be settled through consultations are referred to an arbitral panel. If the panel rules in favor of the complaining member, the losing party must comply with the ruling, offer compensation to the prevailing party, or else suffer retaliation in the form of the suspension of “benefits of equivalent effect.” There is no monetary remedy.

¹⁴ One might argue that such a system encourages cheating because there is no penalty for it unless the cheater is caught and still refuses to stop within a “reasonable time.” No fully satisfactory explanation for this aspect of the system exists, although Schwartz and Sykes (2002) offer a speculation. They argue that the bulk of disputes involve good faith differences in interpretation of WTO law, and that litigating such disputes to conclusion may create an important positive externality in the form of useful precedent for the hundred-plus other states bound by the same ambiguous “contract.” The rule denying a right of compensation or retaliation for violations unless cured within a reasonable time encourages parties to litigate to a final judgment. It may also assist developing countries, whose legal capacities are limited and who may inadvertently fail to comply with WTO law quite regularly.

The situation is a bit muddled in Europe, but a damages remedy is available in some cases against a member state for a violation by that state of its EC treaty. A leading case on monetary compensation is *Francovich v. Italy*,¹⁵ in which the Court of Justice held that workers injured by the failure of the Italian government to implement a Commission Directive to protect workers in bankrupt firms might have an action for damages against the Italian government. Subsequently, in *Brasserie du Pêcheur v. Germany*,¹⁶ the Court of Justice ruled that Community Law afforded a right to damages under three conditions: “the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach...and the damage.”¹⁷ The second factor is often the key issue, and the question whether a breach is “sufficiently serious” turns in significant part on courts’ assessments of whether the national government in question has committed a flagrant breach of EC law or has instead acted in good faith (albeit illegally) in an area where it has considerable discretion.¹⁸

The situation in the United States has changed somewhat in recent years. Until fairly recently, cases challenging state laws under the Dormant Commerce Clause sought only declaratory or injunctive relief. Sitting in the background since the Reconstruction Era, however, was 42 U.S.C. §1983, which provides for private rights of action against any “person” who, under “color” of state law, deprives any individual of “any rights, privileges, or immunities secured by the Constitution and laws” of the United States. The remedy for a violation of §1983 includes money damages and attorney fees (pursuant to

¹⁵ (cases C 6 & 9/90) [1992] IRLR 84.

¹⁶ Joined with *The Queen v. Secretary of State for Transport, Ex Parte Factortame Ltd.*, Cases C-46, 48/93, [1996] ECR I-1029.

¹⁷ *Id.* ¶51.

¹⁸ See generally George A. Bermann, Roger Goebel, William J. Davey & Elanor M. Fox, *European Union Law*, 2d ed., chap. 10 (West: 2002).

42 U.S.C. §1988). Only in modern times did litigants begin to advance the theory that state laws, regulations and administrative actions in violation of the Dormant Commerce Clause amounted to a violation of §1983. The first decisions rejected this theory, holding that the Commerce Clause creates no “individual rights” and merely constrains the activities of states.¹⁹ But in *Dennis v. Higgins*,²⁰ the Supreme Court held that a violation of the Commerce Clause by a state does give rise to a cause of action under §1983 and to a claim for attorney fees under §1988. Later decisions by lower courts have awarded monetary damages for the injuries suffered by private plaintiffs due to Commerce Clause violations,²¹ although reported litigation in the area to date is fairly sparse.

Among the reasons for the paucity of litigation is the confusing body of precedent regarding what constitutes a “person” acting under color of law and what “immunities” such “persons” enjoy. Generally speaking, municipalities are considered “persons” and enjoy no immunity from suit, even when they act in good faith. However, municipal liability is limited to actions that represent the “policy or custom” of the municipality. State governments, by contrast, are completely immune from suits for damages unless they waive their immunity. Individual officials (state or municipal) may be sued in their “individual capacity” (as distinguished from suits against their government employers), but they enjoy various immunities as well, ranging from absolute immunity for some functions (like the actions of legislators) to qualified or good faith immunity for other types of actions. The result of this hodgepodge is that for a plaintiff to recover money damages from a state, either the state must have waived immunity, or the suit must be brought against a state official in their “individual capacity” and the plaintiff must

¹⁹ See, e.g., *Consolidated Freightways Corporation of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469 (10th Cir. 1985).

²⁰ 498 U.S. 439 (1991).

²¹ See *Poor Richard's v. Ramsey County*, 922 F. Supp. 1387 (D. MN 1996) (awarding approximately \$60,000 plus provable attorney fees for wrongful revocation of a waste disposal license).

overcome whatever “immunity” is afforded to the defendant. Then, damages may be sought from the individual defendant, and will be obtained from the state itself only if the state has a policy of indemnifying its employees against liability.²² Given all of these potential hurdles, it is no surprise that successful actions for damages appear to be quite rare.

In sum, trade agreements present a mixed landscape on both the issues of standing and remedy. The two entities considered here with the deepest degree of economic integration, Europe and the United States, afford private rights of action to prevent member states from enforcing laws and regulations that violate core trade commitments. Both systems also open the door to monetary remedies to a limited extent. The WTO and NAFTA do not provide private rights of action with respect to trade commitments, nor do they provide monetary remedies even for the member governments with standing to bring cases (although nothing precludes monetary settlements).

B. Prior Commentary on Standing and Remedy in International Economic Law

Recent writing on standing and remedy in the trade and investment areas has focused on three issues: the wisdom of recent developments in NAFTA investor rights litigation; the proper role of private parties as *amicus curiae* in the WTO; and the wisdom of trade sanctions for violations of WTO law.

Much of the commentary on NAFTA investor rights litigation has been highly critical of the decisions in cases brought by private parties. The greatest concern is that the concept of “expropriation” is being applied too elastically, and that “regulatory takings” are imprudently found to constitute compensable expropriation.²³ A case of

²² For an introduction to this confusing body of law, see Erwin Chemerinsky, *Federal Jurisdiction*, 4th ed., chapter 8 (Aspen: 2003).

²³ Another concern was that arbitral panels would read NAFTA Article 1105 broadly, and that its requirement of “fair and equitable” treatment would become a license to award damages for any government action that the arbitrators viewed as unfair. Much of the concern here flowed from the arbitrators reading of Article 1105 in *Metalclad Corp. v. United Mexican States*, 40 I.L.M. 36 (2001), see esp. ¶100-01. That issue was perhaps laid to rest by a recent “clarification” adopted by the NAFTA Free Trade Commission, which stipulates that Art. 1105 requires no more than observance of the customary

particular concern in this context is *Metalclad Corp. v. United Mexican State*,²⁴ which involved the denial of an environmental permit to a waste disposal site, and resulted in a \$16 million award to the American complainant. Another notable case was *S.D. Myers, Inc. v. Canada*, which involved a claim by an American company producing a fuel additive in Canada that a Canadian ban on inter-provincial trade in the additive was enacted for protectionist reasons rather than the stated health reasons. Canada settled the case for \$19 million rather than litigate to conclusion.²⁵

Commentators make the point that such decisions imply a far broader “takings” doctrine under NAFTA than under U.S. domestic law, and generally argue against compensation for these regulatory takings. Among other things, they contend that the conventional cost internalization argument for compensation is flawed, and that any benefits from compensation as “insurance” are available in the private insurance market. See Been and Beauvais (2003). The same issues feature prominently in earlier literature on domestic takings. See Epstein (1980); Blume and Rubinfeld (1984). Notwithstanding the critique of individual decisions, however, there has been little or no criticism of private rights of action in the investment area *per se*. All of the commentators seem to accept their wisdom, as long as they are governed by the proper substantive rules.

In the trade area, the absence of private rights of action in the WTO and NAFTA also seems to be accepted by most of the commentators.²⁶ But the United States and many non-governmental organizations favor a more limited opportunity for private actors to participate in the WTO dispute process as *amicus curiae*. In two controversial

international law standard regarding minimum treatment of aliens. See the discussion of the *Metalclad* case in John H. Jackson, William J. Davey & Alan O. Sykes, *International Economic Relations*, 4th ed. (West 2002), 1153-66. [hereafter Jackson, Davey & Sykes].

²⁴40 I.L.M. 36 (2001).

²⁵ Information on both cases may be found at <http://www.naftaclaims.com>. Much of the critical commentary is collected in Brower (2003).

²⁶ But see Shell (1995).

decisions, the WTO Appellate Body ruled that dispute panels and the Appellate Body itself could accept such submissions at their discretion.²⁷ These decisions received a chilly reception from the membership at large, however, and reportedly only the United States spoke in defense of them before the Dispute Settlement Body. Developing countries argued that their result was to shift the balance of power toward the well-funded non-governmental organizations of the developed world, whose agendas were often at odds with the interests of developing countries.²⁸ One infers from these events that any proposal for creating private standing would be roundly rejected by the WTO membership as a whole.

If there has been little advocacy of private standing, there has been much discussion of changing the remedy for violations of WTO rules. Numerous commentators have observed that trade sanctions cause substantial welfare losses. See Guzman (2002). It is considered a puzzle as to why international trade agreements do not use money damages as a sanction, which are said to constitute “transfers” without the deadweight costs of trade retaliation. See Guzman (2004). Such observations lead various commentators to advocate changes in WTO sanctions. Charnovitz (2000 & 2002); Davey (2001). Prominent practitioners have recently joined the chorus, arguing for monetary penalties calibrated to the damages suffered by injured exporters (though stopping short of advocating a private right of action).²⁹

Another line of commentary pushes in the same direction. It has long been claimed that developing countries are at a disadvantage in the WTO dispute resolution process. The explanation usually includes the notion that developing countries have

²⁷ See Jackson, Davey & Sykes, *supra*, 315-17.

²⁸ See Statement by Uruguay at the General Council Regarding the Decision by the Appellate Body Concerning Amicus Curiae Briefs, WT/GC/38 (December 12, 2000), excerpted in Jackson, Davey & Sykes, *supra*, 303-05.

²⁹ See Marco Bronckers and Naboth van den Broek, Trade Retaliation is a Poor Way to Get Even, *Financial Times*, June 24, 2004, p. 15.

small markets and are thus unable to affect the prices received by exporters to their markets (in effect, they lack any “monopsony power” that can be exploited through tariffs). Consistent with this thesis, Bagwell, Mavroidis and Staiger (2004) indicate that in not one instance has a developing country actually exercised its retaliation rights in a WTO dispute.³⁰ This perceived imbalance of power has led a group of African nations to propose that monetary penalties be introduced into the system, and has led Mexico to propose that retaliation rights be subject to auction. Bagwell, Mavroidis and Staiger (2003) develop an auction model based on the Mexican proposal, in which they argue that retaliation rights will typically be bought up by violator states if they are allowed to bid. If their analysis is correct, an auction system would become a device for transferring monetary compensation from violator states to states holding retaliation rights.

II. Investment vs. Trade: A First Cut

This section offers a rationale for the existence of private rights of action for money damages in investment agreements, a rationale that does not apply to trade agreements. As noted earlier, the impetus for modern BITs (which provide the model for NAFTA Chapter Eleven) was a growing concern about the expropriation of foreign investments in developing countries during the mid-20th century. The concern reached its zenith when developing countries as a group took the position that customary law did not require compensation for expropriation.

From the developing countries’ perspective, BITs were a double-edged sword. They plainly limited the capacity of governments to expropriate existing foreign investments without compensation, a limitation that worked to their disadvantage, other things being equal. But they also yielded an important benefit. Investors in developing

³⁰ But see cite to Reinhardt and Busch suggesting that developing countries do reasonably well in many phases of dispute settlement.

countries (as elsewhere) will require a risk premium on their investments to ensure themselves an expected competitive rate of return. A risk of uncompensated expropriation thus increases the price of imported capital to developing countries. A reduction in this risk likewise lowers the cost of foreign capital, which creates rents for domestic factors of production that work with foreign capital. Those factors will in turn offer political support for any policy that reduces expropriation risk.³¹ This account of why many developing countries agreed to BITs is a conventional one in the literature. See Guzman (1998).³²

Thus, a central *goal* of the investment agreements was to induce foreign investors to make new investments in developing countries at a lower interest rate. The utility of a private right of action for money damages is obvious in relation to this key objective. To see why, consider a world of BITs without the private action. In the event of an uncompensated expropriation, an investor would have to lobby its own government to take some sort of action against the violator state. Its government might have any number of geopolitical reasons for declining to take any action, or for declining to retaliate against the violator in any effective way. And even if some retaliation were forthcoming, it might do nothing to compensate the investor for its losses. Considerable

³¹ For a simple diagrammatic exposition of the benefits of capital inflow to the country that hosts new foreign investment, see Peter Lindert, *International Economics* 9th ed. 547-49 (Irwin: 1991).

³² Guzman argues that developing countries accepted BITs because they lowered the cost of foreign capital in this fashion, and made direct foreign investment in the territory of the signatory more attractive than in the territories of other nations that had not executed BITs. Guzman further argues that the net effect on BITs on developing countries as a group may have been adverse – if they collectively possessed monopsony power in the capital market, a policy that permitted uncompensated expropriation might have allowed them to exploit it. He argues that proposed BITs induced the abandonment of this collectively valuable policy by forcing each developing nation into a sort of Prisoner's Dilemma. Each was tempted to defect from the collectively preferred regime by the prospect of obtaining a competitive advantage over others, and once they all defected they were collectively worse off than before. Whether or not Guzman is correct in this account, it seems that on all accounts the developing countries accepted BITs because of their desire to lower the cost of foreign capital.

risk for investors would remain, and the risk premium on new investments would reflect it. A credible promise of monetary compensation to investors, by contrast, in an amount set by neutral arbitrators, goes much farther to reduce investment risk and to achieve the developing countries' goal of lowering the cost of foreign capital.

Moreover, for any developing country that does not plan to engage in significant expropriation, a credible promise of monetary compensation to investors imposes few if any offsetting costs. If expropriation never occurs, compensation and the attendant litigation costs need never be paid. The possibility of socially excessive litigation because of a divergence between the private and social costs of suit – a concern explored in Section III below -- is likewise minimal. A promise of monetary compensation to investors is thus a cheap “signal” for the states with benign intentions toward investors. Thus, if we imagine that developing nations consist of two “types,” good types (not inclined to expropriate) and bad types, BITs can be interpreted as a device for inducing a separating equilibrium between them.

Trade Agreements Contrasted. The political rationale for trade agreements differs importantly from the rationale for investment agreements. Trade agreements arise because exporters seek greater access to foreign markets. In the absence of trade agreements, trade policy reflects the political equilibrium between the interest groups opposed to imports (domestic import-competing industries) and interest groups that favor imports (domestic import-consuming industries and consumers). Domestic exporters have little direct stake in the policy except to the degree that a more restrictive import policy may result in some retaliation against exports by foreign governments. When trade agreements become possible, by contrast, exporters will lobby their home

governments to lower their import barriers in exchange for negotiated concessions on market access from foreign governments. Exporter interests thus play a far larger role in determining the political equilibrium, and the result is a more open trading system.

In contrast to the situation with investment agreements, none of the parties to trade agreements has any great interest in lowering the risk of new investments by foreign firms. To be sure, trade agreements will induce some new investment in export sectors, and a private right of action for money damages on behalf of those new investors would reduce the risk that they face. But neither the export-sector investors nor the political officials in the nations that import from them will benefit significantly (or at all) from such reductions in risk. Consider first the investors. Any risk associated with violations of trade agreements can be priced into the risk-adjusted rate of return to ensure a competitive profit (in expectation). As long as new investments in export sectors can earn no better than competitive returns, policies that reduce their risk create no new rents, and thus export sector investors will invest little political capital to secure such policies. Now consider the importing nations. Policies to reduce the risk of new investments by exporters abroad will reduce their cost of capital, and lead them to lower their prices. But cheaper imports from abroad are not desired by the parties to trade agreements. To the contrary, the reduced import prices that result from trade agreements are viewed by importing nations as politically costly “concessions,” attractive only because of the market access concessions abroad that are given in exchange for them. The situation here is thus fundamentally different from the investment context, where lowering the cost of foreign capital by reducing investment risk is the central benefit for the developing countries that accede to BITs and related agreements.

The reader may well observe at this point, however, that even if there is little

demand in the trade context for reducing the risk of new investments in export sectors, there is still the question of the returns to existing investments – the enhanced stream of returns to exporters’ existing capital and scarce factors that motivates them to lobby for trade agreements in the first instance. A private right of action for money damages on behalf of the exporters would reduce the risk in this stream of returns and increase its expected value. Thus, trade agreements with private rights of action would be more valuable to exporters than agreements without them, and exporters would “pay” more for them in political terms. Although I have identified one difference between investment and trade agreements that tends to make private rights of action more attractive in the investment area, therefore, that factor does not suffice to explain why private rights of action are (often) absent in the trade arena. A more complete explanation for this difference follows in the next section.

Implications: The NAFTA Chapter Eleven Controversy. The explanation developed here for private rights of action under investment agreements offers some additional support to the argument of Been and Beauvais (2003) that a “regulatory takings” doctrine under NAFTA Chapter Eleven is undesirable. The commitment by a developing country to a private right of action for investors is a low-cost signal that it will respect investors’ property rights only to the extent that “expropriation” is defined to include acts that the national government is unlikely to want to undertake. An expansive regulatory takings doctrine, by contrast, can sweep in many acts of “expropriation” that arguably result from the resolution of regulatory uncertainty (like the denial of the environmental operating permit in *Metalclad*) or the emergence of new information about the subject of regulation (such as the health issues associated with the gasoline additive

in *S.D. Myers*).³³

Been and Beauvais note that such regulatory policy changes typically do not confer private rights of action for damages under U.S. law, and it seems unlikely that developing countries would wish to provide broader “insurance” against regulatory policy changes. The extensive literature on legal transitions suggests that compensation for policy changes (or insurance against them) can encourage over-reliance on policies that may change, and may chill desirable change as well. See, e.g., Kaplow (1986b); Shaviro (2000). Further, the capacity of international dispute panels to sort out well-intentioned or desirable regulatory policies from those driven by protectionism or other forms of capture is limited. See Trebilcock and Soloway (2002). The tendency in international law is to restrict the scrutiny of domestic regulation by international dispute panels to fairly narrow issues (such as the presence of clear discrimination or the violation of various procedural requirements) and to foreclose open-ended inquiry into the wisdom or legitimacy of regulation. See Sykes (1999). An open-ended “expropriation” doctrine that permits challenges to regulatory outcomes under investment agreements would thus stand in contrast to the treatment of national regulation in other areas of international economic law, a fact that casts additional doubt on the wisdom of compensation for regulatory takings under NAFTA.

III. International Trade

As noted, the fact that parties to trade agreements likely care little about reducing the risk of new investments by exporters cannot alone explain an absence of private rights of action for money damages – other reasons to provide such actions can be

³³ I stipulate that some commentators have a less benign view of the actions of the respective governments in those cases, and take no position on the ultimate merits of either case.

imagined. This section looks to some further considerations that bear on standing and remedy in the trade area.

A. Standing

The Value of Political Filters. A central tenet of public choice theory is that some interest groups are better organized than others, and thus better able to influence the political process. Indeed, this observation affords the standard explanation for protectionist trade policies, which (perhaps with rare exception) lower the national economic welfare of nations that employ them – the harm from protectionist policy is often borne by a diffuse group of poorly-organized consumers, while the benefits inure to well-organized import-competing industries.

Not all industries are equally well organized either. Industries comprised of a large number of small producers, for example, may have difficulty overcoming the transaction costs and free rider problems associated with efforts to influence the political process. Industries with a few larger firms may be better able to overcome free rider problems and transaction costs, by contrast, and individual firms in such industries may have high enough stakes in the outcome of policy decisions that they are willing to incur the costs of acting alone to influence political representatives.

Thus, consider some generally applicable legal rule under a trade agreement, such as a requirement that forbids regulatory measures that discriminate against foreign commerce (the “national treatment” obligation in WTO parlance), and imagine that a party to a trade agreement has violated that obligation. In the absence of any private standing to enforce the rule, political officials in the nation whose exporters are aggrieved by the violation must decide whether to bring a compliance action themselves. If the

violation affects a well-organized export industry, they may expect significant political rewards from such an action. If the violation affects a poorly-organized industry, by contrast, they may expect few political rewards from bringing the enforcement action.

The violation of the national treatment rule will also have political consequences for officials in the violating state. An inadvertent violation that confers rents on a poorly-organized import-competing industry, for example, will generate little political support for those officials. But if the violation confers substantial rents on a well-organized import-competing industry, it may be a source of considerable political benefits to the officials who can claim credit for it.

These observations suggest that the political officials who become parties to trade agreements can enhance their mutual welfare by retaining the right to act as a “political filter” for any enforcement actions. The basic idea can be formalized very simply as follows: Consider two states, A and B (although the analysis readily generalizes to the multilateral case). Assume for simplicity that states are unitary actors, each with a “political utility” function – let $U()$ denote the utility function for A and $V()$ denote the utility function for B. Each function is additive and its arguments will become clear in a moment.

Industries in each state may be divided into two categories, exporting industries and import-competing industries. State A has comparative advantage in the set of industries that export to B, call them industries in the set AB, with its members denoted α_{\square} , $\square = 1$ to n . State B has comparative advantage in the industries that export to A, call them industries in the set BA, with its members denoted β_j , $j = 1$ to m .

States A and B have entered a trade agreement, which contains some generally applicable legal rule (say, national treatment). Import-competing industries in each state

do not like the national treatment rule (which forecloses a range of protectionist policies that could benefit them), while exporting industries in each state benefit from the national treatment rule. Political officials in state A can thus gain political utility from a national treatment rule that is enforced for industries in AB, and but will suffer a loss of political utility from a national treatment rule that is enforced for industries in BA. Let $u(\alpha_i)$ denote the political benefit derived by officials in state A from the enforcement of the national treatment rule in (its exporting) industry α_i , and let $u(\beta_j)$ be the political detriment suffered by officials in state A from the enforcement of the national treatment rule in (its import-competing) industry β_j . Choose the utility scale so that $u(\alpha_i) \geq 0$, all α_i , and $u(\beta_j) \leq 0$, all β_j .

The situation in state B is exactly the opposite. Let $v(\alpha_i)$ denote the political detriment suffered by officials in state B from the enforcement of a national treatment rule in (its import-competing) industry α_i , and let $v(\beta_j)$ be the political benefit derived by officials in state B from the enforcement of the national treatment rule in (its export) industry β_j . Choose the utility scale so that $v(\alpha_i) \leq 0$, all i , and $v(\beta_j) \geq 0$, all j .

If the national treatment rule is enforced in all industries, officials in each state enjoy total utility equal to the sum of their respective utilities from enforcement in each industry:

$$U = \sum_{i=1 \dots n} u(\alpha_i) + \sum_{j=1 \dots m} u(\beta_j) \quad \text{and} \quad V = \sum_{i=1 \dots n} v(\alpha_i) + \sum_{j=1 \dots m} v(\beta_j).$$

But the parties can almost certainly do better. Imagine that some exporters in state A are very poorly organized, say, those in industry α_2 . Suppose for simplicity that $u(\alpha_2)=0$. But imagine that the import-competing firms in state B are better-organized, so that $v(\alpha_2) < 0$. The parties to the trade agreement would then experience a (political)

Pareto improvement if they agreed not to enforce the national treatment rule in industry α_2 – officials in state A would be no worse off, while officials in state B would enjoy utility gains.

The point is much more general, and does not depend on the presence of export industries for which the political utility of enforcement is zero (indeed the utility scale is completely arbitrary). State A can agree to forego enforcement of the national treatment rule on behalf of its industries where the political gains to its officials are “small” and the political costs to officials abroad are “large,” while state B can make a reciprocal promise. The political costs in each state from foregone enforcement on behalf of export industries under such an arrangement can be far outweighed by the political gains from foregone enforcement in politically powerful import-competing industries.

One can take the analysis a step further and imagine that the parties write an elaborate contingent contract, specifying industry-by-industry where the national treatment rule applies and where it does not. Sykes (1991) solves a mathematically analogous continuous problem (here one might imagine a continuum of industries). For present purposes, it is enough to note that the solution has the following properties: For any point on the parties’ Pareto frontier (and thus associated with an optimal treaty), a shadow price exists that allows units of each party’s utility to be converted into units of the other’s utility. An optimal treaty will provide that the parties forego enforcement of the national treatment rule (or any other rule, for that matter) in any industry for which the political utility gain to officials in the violator state “outweighs” the political utility loss to officials in the state harmed by the violation, using the treaty’s shadow price to convert utilities into the same units.

A detailed contingent contract of that sort would be extremely costly to write,

however, especially given the wide array of rules found in modern trade agreements. The parties may thus prefer cruder and cheaper rules. A simple rule with considerable potential appeal is that parties will not bring enforcement actions on behalf of politically weak industries. As long as the poorly-organized export industries in state A are not as poorly organized on average in state B, and vice-versa, an exchange of reciprocal promises to forego enforcement on behalf of poorly-organized industries can leave both sides at a considerably higher level of utility.

How might the parties implement such a rule? The obvious way is to omit private rights of action from their agreement. Because it is costly for the parties to bring enforcement actions themselves, they will only bring actions on behalf of exporters who offer sufficient political rewards in exchange. It is precisely the group of politically weakest exporters whose cases will be ignored under this arrangement.

Two further considerations support this general line of analysis. First, in *newer* trade agreements such as NAFTA and much of the WTO, each member state confronts a number of transition issues. The task of ferreting out all national and sub-national regulation that might run afoul of the WTO Technical Barriers Agreement, the Sanitary and Phytosanitary Measures Agreement, and so on, is not a trivial one. Thousands of regulatory measures are potentially in play (especially after the WTO agreement made clear that its obligations apply to state and local regulation as well as national regulation), and many nations may be constrained in their capacity to make conforming changes quickly (especially developing countries). In the face of many potential “transition” violations, therefore, the parties may well desire to limit enforcement actions to those of the greatest political importance to aggrieved exporters. Private rights of action, by contrast, might tax the resources of nations seeking to comply with their obligations, and

distort the timing of the compliance agenda (from the standpoint of maximizing joint political gains).

Second, legal interpretations developed in one case inevitably have consequences for others. Officials concerned with their political welfare must worry that precedents established in an enforcement action brought on behalf of their exporters will come back to haunt them in an action brought against them by foreign exporters. Only by reserving standing to themselves, and thereby retaining control over the arguments put forward in litigation, can officials ensure that their export interests do not advance legal theories that are lacking in “net” political value.

Objections. One possible objection to this line of reasoning is that it ignores the resources that political officials must expend to bring compliance actions. Perhaps the direct costs of briefing and arguing cases, and the related expenses of deciding which claims to bring, more than offset the benefits from the “political filter” mechanism outlined above.

Although this objection surely raises a logical possibility, it should not be exaggerated. As a practical matter, governments can (if they wish) push much of the cost of compliance actions back onto the private sector. Indeed, it is routine in WTO practice for the private interests who seek compliance actions on their behalf to supply legal assistance for the purpose of developing the legal analysis, writing briefs, and the like. Nations could also agree to allow privately funded counsel to argue the cases (although neither NAFTA or WTO practice allows private parties to appear at present). It is simply not the case, therefore, that governments must bear high litigation costs when they choose to act as a political filter.

A second possible objection is that the analysis proves too much. If governments

can gain by interposing themselves as political filters between private interests and the dispute resolution process, why do private rights of action emerge in some contexts nevertheless? Section II suggests an answer to this question with particular reference to investment agreements, but both the European Union and the U.S. constitutional system afford private rights of action to parties aggrieved by violations of trade rules.

A partial explanation for the disparity across systems is that private rights of action may not have been contemplated by the framers of either the U.S. Constitution or the EC Treaty. In the United States, the contours of judicial review for constitutionality, and the important “free trade” principles associated with the Dormant Commerce Clause, were developed by the Supreme Court years after the Constitution was written. Likewise, the modern powers of the European Court of Justice in the trade area may not have been anticipated during the founding period, and decisions such as *Cassis de Dijon*, analogizing regulatory trade barriers to measures having an “equivalent effect” to quantitative restrictions, may have come as a surprise. Private rights of action in each system may thus be an unanticipated creation of the courts rather than a mechanism desired by the political founders.

Even if this suggestion is correct, however, it is at best an incomplete answer to the puzzle. Had private rights of action been viewed as seriously problematic in either system, political actors could have changed the law to extinguish them. This observation suggests a second important consideration bearing on the wisdom of private rights of action.

The Role of Political Oversight. Both Europe and the United States have political bodies (the Congress and the EC Commission) with the capacity to address sensitive trade matters directly. NAFTA and the WTO do not have such bodies – only a costly

process of amending the pertinent treaty text, which requires unanimous acceptance, can override judicial decisions that political actors find unpalatable.

The presence of a body like the Congress or the Commission reduces the value of interposing a political filter in the dispute resolution process. As long as the body has not lost too much flexibility to constitutional rules that it cannot change, it can handle the most politically charged matters directly, and can correct judicial decisions that become politically unacceptable over time (decisions under the Dormant Commerce Clause in the United States, for example, can always be overridden by an affirmative exercise of the Commerce power). In such a system, the danger of politically objectionable judicial decisions surviving for any length of time is much less, and the opportunity to shift the costs of bringing cases onto the private sector is more attractive. Put differently, bodies like the Congress and the Commission can serve as *ex post* political filters, undoing the undesirable decisions while avoiding the costs of sorting the larger number of cases that arise *ex ante*.

A possible objection to this line of reasoning, however, is that constitutional restrictions may preclude Congress and the Commission from discriminating among industries in a politically desirable fashion. The Equal Protection clause of the U.S. Constitution, for example, likely precludes policies that treat industries differently solely in accordance with their political efficacy (some other “rational basis” is almost certainly required to justify disparate treatment). An *ex ante* political filter may have the advantage of circumventing such “bothersome” legal constraints. Still, the *ex post* mechanism has a potentially sizeable cost advantage that may on balance favor private standing.

B. Remedy: Trade Sanctions and Money Damages

Regardless of the rules governing the standing of private parties, some remedy must be made available to parties who have standing. We thus return to the puzzle of why trade agreements such as NAFTA and the WTO select the seemingly inefficient remedy of trade sanctions with their attendant deadweight costs, in preference to a remedy like money damages that is a mere “transfer.”

As noted, nothing in the current law of NAFTA or the WTO precludes the use of monetary payments to resolve disputes. “Compensation” is allowable (and indeed preferred) to trade retaliation, and nothing restricts the form that compensation might take. Yet, with very rare exception, WTO and NAFTA cases are not settled in this fashion (putting aside NAFTA investor rights cases). Thus, by “revealed preference” of sorts, we must infer that trade retaliation is preferred in general by violator states to the alternative option of money compensation, at least given the implicit reservation prices of complainants. I cannot offer a definitive explanation for why that is so, but will suggest a few considerations that surely have some bearing.

Are Monetary Remedies a Mere “Transfer?” The claim that money damages are a simple transfer is misleading for one well-known reason and one perhaps not so well-known. First, governments face budget constraints, and must finance money damages through taxation. Putting aside “lump sum” taxes, oft invoked by economists but hardly ever used in practice, taxes create their own distortions. The choice between trade sanctions and money damages then is not a simple choice between a mechanism that creates welfare costs and one that does not. And although it may well be true that methods to raise the money for a damages award can be found that cause less distortion than the trade sanctions for which the award substitutes, the magnitude of the difference need not be dramatic. This may be especially true in developing countries, some of

which still rely heavily on trade taxes to raise funds for their national treasuries – trade sanctions against them raise inefficient barriers to their exports, but monetary awards against them might well force an increase in inefficient tariffs on their imports (which might even hurt the exporters from the complaining nation).

Second, the claim that money damages are a simple transfer neglects the lessons of the economic literature on the private versus social value of litigation. Landes and Posner (1975) note that the Becker/Stigler prescription in the criminal law area for higher penalties and lower probabilities of sanction (to save on administrative costs) becomes problematic if private enforcers could collect the higher penalties – increases in the penalty may induce more expenditure on enforcement rather than less. See also Polinsky (1980). In the same spirit, Shavell (1982) explores the difference between the private incentive to file civil claims for damages, and their social value, in a tort setting. The social return to a prospective lawsuit is the value of the *ex ante* change in risky behavior, which can be measured by the reduction in the expected costs of accidents induced by prospective liability. The social cost of a lawsuit is its litigation cost – the damages payment from a defendant to a plaintiff is simply a transfer. Because there is no necessary relationship between the damages payment (and the attendant incentive to file suit) on the one hand, and the social gains from prospective liability on the other, litigation may occur too often or too infrequently from an economic standpoint. The analysis is refined somewhat in Menell (1983) and Kaplow (1986a), but the essential point remains the same. See also Shavell (2004).

These insights have potentially important implications for the wisdom of private damages actions in international economic law. The social gains from such actions and the private gains may be quite different. Consider a simple illustration. Figure I depicts a

market for imported goods in some importing state. The curve I_s is the import supply curve, reflecting the quantity of imports available to the state in question at each price. The curve I_d is an import demand curve, constructed from the excess of domestic demand over domestic supply for the good in question at every price. Assume that a pertinent trade agreement requires “free” trade, which would produce an equilibrium price P_f and quantity of imports Q_f where I_s and I_d intersect. But the importing nation violates the agreement, and imposes a tax of t on imported goods, yielding an equilibrium price to domestic consumers of P_v and net price to foreign sellers of P_v-t ; import quantity drops to Q_v . The deadweight cost of the violation in this simple framework is equal to the area abd . The rectangle $P_vdb(P_v-t)$ is tax revenue.

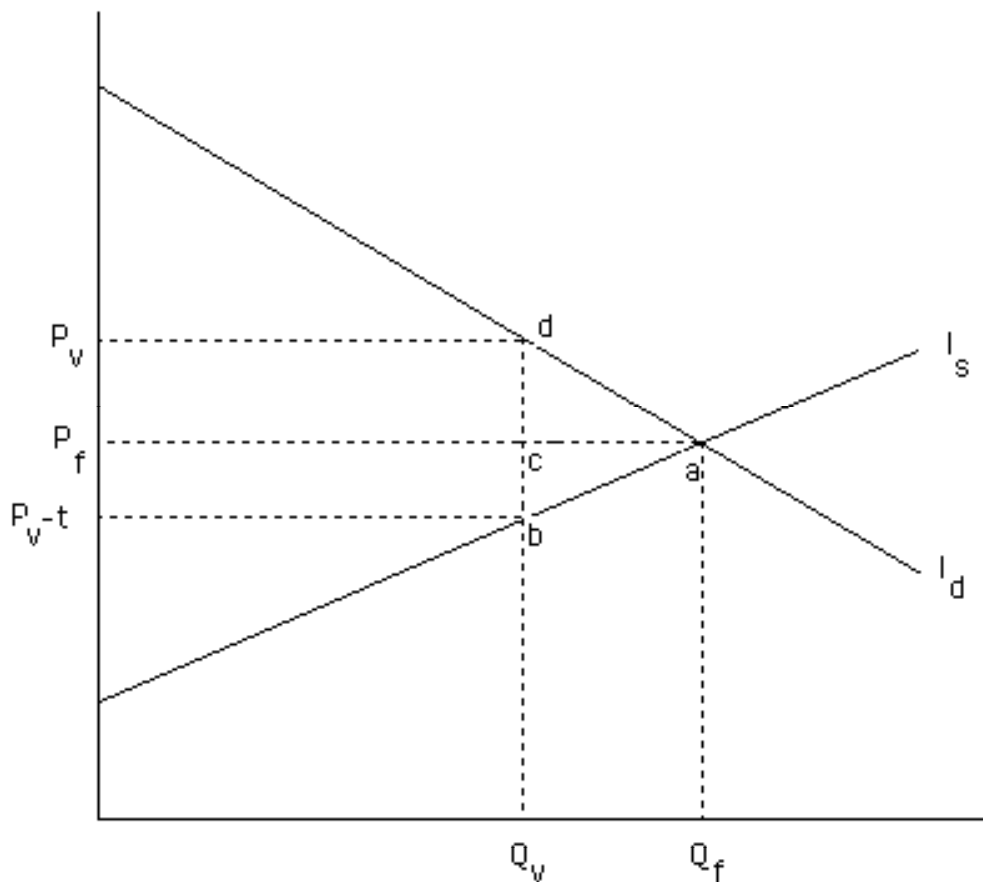


Figure I

Consider the incentives to file a case under these assumptions. Foreign sellers lose surplus in the amount $P_f ab(P_v - t)$. If the case will succeed with certainty, they will bring it as long as their litigation costs do not exceed this value. Because their gains from suit exceed the deadweight cost [triangle *acd* appears to be considerably smaller than rectangle $P_f cb(P_v - t)$], the distinct possibility arises that foreign sellers will file a case even if their litigation costs would exceed the social gains from correcting the violation. And if foreign sellers do not bear the litigation costs of the violator state and the tribunal (as in NAFTA or the WTO), there is an even greater danger that a case will be filed even though the social costs of litigation exceed the gains from correcting the violation.³⁴

The analysis is not quite so simple, however, because the mere *threat* of litigation may deter the violation in the first place. If violations never occur, and thus litigation never ensues, the danger of socially excessive litigation evaporates. This point is akin to the observation in Shavell (2004) that the danger of socially excessive tort litigation is diminished when injurers are subject to a negligence rule rather than a strict liability rule, and can avoid suit by exercising due care.

It follows that the efficiency of private damages actions for violations of trade agreements turns, *inter alia*, on two empirical questions. First, when violations occur, how will the likely costs of litigation compare to the social gains of correcting the violation (assuming litigation will lead to its correction)? Second, to what extent will the prospect of private damages actions deter violations altogether?

Regarding the first question, Figure I hints at a potentially important general concern. Many violations of trade agreements result in large transfers – tax revenue for the government at the expense of foreign producers and domestic consumers, quota rents

³⁴ A dynamic perspective does not change the basic conclusion. Think of the amounts in Figure I as “per

to domestic importers who hold importation rights at the expense of foreign producers and domestic consumers, producer surplus for favored trading partners at the expense of other trading partners who are discriminated against, and so on. Deadweight losses arise in all of these scenarios to be sure, but they may be much smaller than the transfers away from injured foreign exporters. Such situations present a clear danger of socially excessive litigation costs. The problem is all the more acute, of course, to the degree that nations would prefer to pay damages in perpetuity than to conform their behavior, a possibility that cannot be completely discounted.

Regarding the second question, it is questionable whether trading nations can avoid litigation costs by simply “complying” with the rules. Flagrant cheating occurs in the system to be sure, but many disputes involve good faith disputes over the interpretation of legal obligations or the application of legal principles to the facts. Many violations may simply be “accidental,” especially by developing countries with limited compliance capacity. In other cases, the law is unclear or its application under the circumstances is fairly debatable -- trading nations can then “comply” with the rules only by abandoning potentially legitimate policies, and they may be unlikely to do so in many cases.

Money Damages and Developing Countries. Developing countries might feel quite threatened by a system of monetary damages, at least if they were calibrated to compensate foreign exporters for the damages they suffer due to illegal acts. Many developing countries regularly suffer severe shortages of hard currency, and will be hard-pressed to pay significant damages in any currency that they cannot print. And because their legal infrastructure is often weak, their ability to avoid damages judgments by

period” amounts, sum them over time and discount to present value -- the same issues arise.

simply “complying” with the law is limited as noted above – indeed, within the WTO, developing countries often complain that they do not fully understand how to implement their obligations, and seek assistance for “capacity-building” in this regard. Monetary damages might thus produce a significant chill on their domestic regulatory initiatives, and expose them to considerable liability for inadvertent violations.

Although some developing countries have nevertheless suggested that a monetary remedy be introduced into WTO law as noted earlier, Davey (2001) explains the nature of the remedy that they have in mind. They do not advocate a system of “compensatory damages,” but a sliding scale system of fines set on the basis of factors such as GDP and per capita income. Mexico’s proposal for auctioned retaliation rights provides similar protection to the treasuries of developing countries, in that no nation would be compelled to participate in any auction. Existing proposals for monetary remedies, therefore, are aimed at imposing substantial monetary costs on violations by wealthier states while imposing small costs on violations by developing countries. It is thus possible that no system of monetary damages lies in the “core” of the bargaining game between North and South, at least not as the game has been structured so far. The problem might be overcome in future bargaining by some sort of issue linkage, but the opportunity for such an arrangement perhaps has not yet arisen.

Is it Possible To Substitute Money Damages for Trade Sanctions? Finally, one must reflect on the practical challenges of designing a credible system of monetary penalties to replace trade sanctions. Imagine that monetary penalties were assessed against a violator state, which then declined to pay the judgment. What consequence would follow? Unless nations are confident that reputation or repeat play concerns will alone ensure respect for monetary awards – and they plainly lack confidence in these

forces to police the rest of their obligations – it seems that any system of monetary liability would have to be backed up with the threat of trade sanctions. At the end of a dispute, violator states would then have the opportunity to choose between paying the assessed damages or suffering the trade retaliation that follows from non-payment. In many ways, such a system is the mirror image of the *status quo* – violator states today choose between retaliation under agreed standards for calibrating it, and negotiated compensation, which can be monetary or anything else. It is not clear what advantage an alternative system of monetary penalties would really offer.

The Mexican auction proposal, of course, does embody a blend of monetary payments and trade retaliation. The proposal is apparently making little headway in the WTO at large, however, perhaps because of the concern noted above – it would amount to a sizable transfer from North to South, and may not yet lie in the core of any near-term global bargain.

I close this section by again noting an important difference between NAFTA and the WTO on the one hand, and Europe and the United States on the other. Damages awards in the U.S. and European systems are collectable by successful plaintiffs without the need for a trade sanctions regime in the background – we regularly see member states honoring judgments against them obtained by out-of-state plaintiffs.³⁵ The reason is likely multifaceted, relating to the existence of a political body that sits above the member states with various coercive options, the power of judges to order individual public officials to act and to punish those who do not, and perhaps a stronger pull of reputation in these more deeply-integrated systems. Whatever the precise explanation, it is clear that monetary penalties gain appeal when member states can count on other states

³⁵ Cross-ref to cases since *Dennis v. Higgins*, *Francovich* line in Europe.

to pay them without fuss.

Conclusion

The role of private actors in the enforcement of international economic law varies greatly between investment and trade agreements, and considerably within the trade area as well. A private right of action for money damages is especially valuable in the investment arena, where a key objective of the parties is to lower the cost of capital for new, irreversible investments. Nations can cheaply achieve that objective by credibly promising to compensate for “expropriation,” so long as “expropriation” is appropriately defined. This objective is absent in the trade area, where trading nations will often prefer to act as “political filters” by denying standing to private parties and thereby retaining the ability to block private enforcement actions that can reduce joint political welfare. The existence of a political body with the capacity to reverse politically unfortunate judicial decisions (an *ex post* political filter) is at least an imperfect substitute for the denial of private standing, and will make private rights of action more attractive, other things being equal. Finally, it is by no means clear that private rights of action for damages would be superior to trade sanctions, or that they could be substituted for trade sanctions as practical matter in a system such as the WTO or NAFTA. These observations can begin to explain, in broad brush, the patchwork of rules regarding private standing and remedies under existing investment and trade agreements.

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