THE REMEDIAL VALUE OF WTO TRADE SANCTIONS: A CRITICAL APPRAISAL

The most distinct characteristic of dispute settlement in the World Trade Organization (WTO) is the possibility of authorising a trade sanction against a non-complying member state. However, WTO observers are now questioning whether WTO trade sanctions are really advantageous to the success of the multilateral trading system. Against this background, the present paper first reviews the six disputes in which the WTO authorised trade sanctions, and then makes an appraisal of trade sanctions in terms of their consistency with the general international law of state responsibility and their contribution to the success of the multilateral trading system. The paper finds that trade sanctions are counterproductive and their remedial value is doubtful. Nevertheless, as there are not yet any alternatives that can replace trade sanctions, the conclusion is that the Dispute Settlement Understanding should be amended in order to dilute the stringency of trade sanctions and to conform with the law of state responsibility.

Abdul **GHAFUR** Hamid (alias Khin Maung Sein)*
LLB, LLM in International Law (Yangon), PhD (IIUM);
Associate Professor of Law and Member of the WTO and Globalisation Unit, International Islamic University Malaysia.

I. Introduction

1 How are the WTO rules enforced? They are enforced through the WTO dispute settlement mechanism, which is governed by the Dispute Settlement Understanding (DSU).[1] This dispute settlement mechanism consists of *ad hoc* panels and a standing Appellate Body. They issue reports with findings and recommendations, and in order to have binding force these reports are required to be adopted by the Dispute Settlement Body (DSB).[2] The DSB monitors the implementation of the

* This paper is a revised and updated version of a paper presented 28–29 September 2005 at the International Conference on Law and Commerce held at the Hilton Hotel, Petaling Jaya, Malaysia, which was jointly sponsored by Victoria University, Melbourne, and the International Islamic University Malaysia.

1 Understanding on Rules and Procedures Governing the Settlement of Disputes, available from the WTO website at <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (accessed 21 December 2006) (hereinafter "DSU").

2 The Dispute Settlement Body (DSB) is established by Art 2.1 of the DSU, *id*, and is in fact the General Council of the WTO in another guise.

rulings and recommendations, and has the power to authorise sanctions when a country does not comply with a ruling. Trade sanctions are, under the DSU, a remedy of last resort. However, the imposition of trade sanctions can now be found in some high profile cases, creating a serious impact on the economies of the disputing parties and affecting the objectives of the multilateral trading system. The present paper, therefore, considers the value of trade sanctions as a remedy under the law of the WTO and attempts to explore alternative ways and means of enforcement.

II. The WTO remedial system and the role of trade sanctions

2 According to Article 3.7 of the DSU, the three distinctive remedies under the WTO dispute settlement mechanism are:

(a) withdrawal of the inconsistent measure;

(b) compensation; and

(c) suspension of concessions or other obligations.

3 Under the general international law of state responsibility, "cessation and non-repetition" is considered a primary remedy for an internationally wrongful act.[3] We can also find this type of remedy in the WTO system, namely, the "withdrawal of inconsistent measure" remedy. If a panel or the Appellate Body concludes that the measure complained of is inconsistent with a covered agreement, it has to recommend that the member concerned "bring the measure into conformity with that agreement".[4] Prompt compliance with the ruling of the DSB is required.[5] If it is not possible to comply immediately, however, the violating member is given a "reasonable period of time" within which to comply.[6] Therefore, "to bring an inconsistent measure into conformity with the covered agreements" is the preferred remedy under the DSU.[7] We can even say that it is the ultimate aim of the entire WTO remedial system.

3 See the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, *infra* n 63, Art 30.
4 DSU, *supra* n 1, Art 19.1.
5 *Id*, Art 21.1.
6 *Id*, Art 21.3.
7 *Id*, Art 22.1.

4 If a measure has been found inconsistent with a covered agreement, and the member concerned has failed to bring the measure into conformity with the agreement within the determined reasonable period of time, the member must, if so requested, enter into negotiations with the complaining party with a view to developing mutually acceptable "compensation".[8] Compensation under the DSU has a very different meaning from that in general international law. It is actually the granting of a trade benefit to the complaining member in order to compensate prospectively for the nullification or impairment caused by the non-complying measure.[9] Rather than being pecuniary in character, compensation involves the lifting of trade barriers – such as tariff reductions or increases in import quotas – by the violating member. The remedy of compensation is voluntary[10] and the complaining member cannot impose it arbitrarily over the violating member without its consent.

5 If no agreement is reached on compensation, the complaining member may seek authorisation from the DSB to suspend trade concessions it would otherwise be obligated to grant the non-complying member.[11] DSB authorisation for the "suspension of concessions" is virtually automatic; it can be withheld only if there is a consensus against them.[12] Suspension of concessions need to be "equivalent to the level of the nullification or impairment" caused by the measure that was found to be in breach.[13]

6 Quite contrary to compensation, suspension of concession means the raising of trade barriers by the complaining member in connection with the violating member. Again, this remedy is purely prospective; it does not compensate for losses already suffered, but rather rebalances the playing field for the future.[14] The DSU provides that suspension of concessions is a temporary measure available only pending full compliance by the member concerned with the recommendation of the DSB.[15]

8 *Id*, Art 22.2.
9 See, for example, Christopher F Corr, "Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures" (1997) 18 NW J Int'l L & Bus 49 at 71.
10 DSU, *supra* n 1, Art 22.1
11 *Id*, Art 22.2.
12 *Id*, Arts 19.1 and 22.6.
13 *Id*, Art 21.4.
14 See Corr, *supra* n 9, at 71.
15 DSU, *supra* n 1, Art 22.1.

7 Out of the three remedies available under DSU, our main concern is the third, namely, "suspension of concessions or other obligations", commonly known as "trade sanctions".[16] The alternative terms used are "countermeasures" or "retaliation". With the advent of the WTO, the term "sanction" has been increasingly used to describe what Article 22 of the DSU authorises.[17] In *United States—Import Measures on Certain Products from the European Communities*,[18] the Panel referred to the United States action in the *EC—Bananas III* dispute[19] as "trade sanctions".[20]

III. Instances of WTO trade sanctions

8 Authorisations for WTO trade sanctions do not occur very often. Out of the 60-plus disputes in which a respondent government was judged to be in violation, the WTO authorised trade sanctions in six disputes, and only in five the winning parties invoked them.[21]

A. The EC—Hormones *dispute*

9 The *EC—Hormones* dispute involved two complaints against European Communities restrictions on the importation of meat

16 In fact, the term "sanction" cannot be found anywhere in the DSU. Nevertheless, the purpose of the WTO-authorised action is to induce compliance. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU—Decision by the Arbitrators* WTO Dec WT/DS27/ARB (9 April 1999), para 6.3 (hereinafter "*EC—Bananas III (EC Art 22.6 Arbitration)*"). (All WTO documents are available on-line from the WTO Documents Online website at <http://docsonline.wto.org>.) When a trade measure is used against a country to change its behaviour towards conformity with international obligations, that is properly called a "sanction". A "sanction" is a deliberate measure by one or more states to influence the conduct of the government in the target state: see Carl-August Fleischhauer, "Remarks, Compliance and Enforcement in the United Nations System" (1991) 85 Am Soc Int'l L Proc 428 at 432–433.

17 See G Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 Duke LJ 829 at 901.

18 *United States—Import Measures on Certain Products from the European Communities—Report of the Panel* WTO Dec WT/DS165/R (17 July 2000) (hereinafter "*US—Import Measures on EC Products*").

19 *EC—Bananas III (EC Art 22.6 Arbitration)*, supra n 16.

20 *US—Import Measures on EC Products*, supra n 18, at paras 5.13 and 6.106.

21 Recently at the DSB meeting on 15 July 2005, Brazil requested authorisation to impose sanctions against the US in the dispute in *United States—Subsidies on Upland Cotton—Recourse to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU by Brazil* WTO WT/DS267/21 (5 July 2005), corresponding to a value of approximately US$3bn per year. The US objected to the appropriateness and level of the sanctions proposed by Brazil. The matter was referred to arbitration.

produced with the aid of growth hormones. One complaint came from the US and the other from Canada. In their decisions in *EC Measures Concerning Meat and Meat Products (Hormones)*,[22] the WTO Panel and the Appellate Body concluded that the EC's ban on meat violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("the SPS Agreement").[23] The DSB gave the EC a "reasonable period of time" of fifteen months to bring its food safety measures into compliance, and when the EC failed to do so, the US and Canada were authorised to suspend tariff concessions equal to US$116 million and C$11 million respectively.[24] Both governments implemented these trade restrictions by imposing 100% duties on selected products from various EC countries.[25]

10 At the DSB meeting on 7 November 2003, the EC stated that one of the reasons cited by the Appellate Body in its ruling against it was its failure to carry out a risk assessment within the meaning of the SPS Agreement, and that as the independent scientific committee commissioned by it to carry out a risk assessment had found that the hormones in question posed a risk for consumers, the EC had fulfilled its WTO obligations and was entitled to demand the immediate lifting of the sanctions imposed by Canada and the US.[26]

11 On 13 January 2005, the EC requested the establishment of a panel for continued suspension of concessions without recourse to the procedures established by the DSU after it had removed the measures found to be inconsistent with the WTO law in the *EC—Hormones* case. The EC made two complaints – one against the US and the other against

22 *EC Measures Concerning Meat and Meat Products (Hormones)—AB-1997-4—Report of the Appellate Body* WTO Dec WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998).

23 *Agreement on the Application of Sanitary and Phytosanitary Measures* WTO LT/UR/A-1A/12 (15 April 1994) <http://www.wto.org/english/docs_e/legal_e/15-sps.pdf> (accessed 19 December 2006).

24 See *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint by the United States—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU—Decision by the Arbitrators* WTO Dec WT/DS26/ARB (12 July 1999) (hereinafter "*EC—Hormones (US) (EC Art 22.6 Arbitration)*"); and *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Original Complaint by Canada—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU—Decision by the Arbitrators* WTO Dec WT/DS48/ARB (12 July 1999).

25 Paul Blustein, "Europe Hit by Tariffs in Battle over Beef; U.S. Acts After EU Ignores Trade Group", *Washington Post* (20 July 1999) at E1.

26 *European Communities—Measures Concerning Meat and Meat Products (Hormones)—Communication from the European Communities* WTO WT/DS26/22, WT/DS48/20 (28 October 2003).

Canada – giving rise to two new cases, namely, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*[27] and *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*,[28] which demonstrate the never-ending story of the *EC—Hormones* dispute. The Panel held its first hearing from 12 to 15 September 2005. On 20 January 2006, the Panel informed the DSB that due to the complexity of the dispute, it would not be able to complete its work in six months and expected to issue its final report only in October 2006.

12 This dispute clearly demonstrates the unending nature of trade sanctions. Although a violating party has alleged to have taken care of the non-complying measure, there can still be disputes between the two parties as to whether there has been genuine compliance.

B. The EC—Bananas III *dispute*

13 The *EC—Bananas III* dispute involved complaints against the EC's restrictions on the importation of bananas. In its decisions in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*,[29] the WTO Panel and the Appellate Body concluded that the discriminatory EC banana regime violated WTO rules in numerous ways. The DSB gave the EC a "reasonable period of time" of 15 months to bring its banana regime into compliance, and when the EC failed to do so, the US was authorised in April 1999 to suspend tariff concessions equivalent to US$191 million.[30] The US government took this action immediately by imposing 100% duties on selected products from various EC countries.[31] In November 1999, Ecuador was also given the authority to undertake suspension of tariff concessions equivalent to

27 *United States—Continued Suspension of Obligations in the EC—Hormones Dispute—Request for the Establishment of a Panel by the European Communities* WTO WT/DS320/6 (14 January 2005).

28 *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute—Request for the Establishment of a Panel by the European Communities* WTO WT/DS321/6 (14 January 2005).

29 *Appellate Body—European Communities—Regime for the Importation, Sale and Distribution of Bananas—AB-1997-3—Report of the Appellate Body* WTO Dec WT/DS27/AB/R (9 September 1997).

30 See *EC—Bananas III (EC Art 22.6 Arbitration)*, *supra* n 16.

31 "Trade War Escalates as EU Fights US Sanctions Move", *Financial Times* (5 March 1999) at 1. Actually, the US government took the sanctions prematurely by acting on 3 March 1999. The EC complained about this action at the WTO, and the panel and Appellate Body found that the US had retaliated without authority: *United States—Import Measures on Certain Products from the European Communities—AB-2000-9—Report of the Appellate Body* WTO WT/DS165/AB/R (11December 2000).

US$202 million.[32] In July 2001, EC communicated to the DSB that it had reached a mutually satisfactory solution with the US as well as Ecuador regarding the implementation of the recommendations adopted by the DSB.[33] On 21 January 2002, the EC announced that it had implemented Phase 2 of the Understanding with the USA and Ecuador.

C. The Brazil—Aircraft *dispute*

14 In July 1998, Canada lodged a complaint about Brazilian subsidies on the export of regional aircraft. In its decision in *Brazil—Export Financing Programme for Aircraft*,[34] the WTO Panel and the Appellate Body found that Brazil had been using prohibited export subsidies as defined in the WTO Agreement on Subsidies and Countervailing Measures ("the SCM Agreement").[35] The DSB gave Brazil a "reasonable period of time" of 90 days to bring its aircraft subsidies into compliance, and after a panel found that Brazil had failed to do so, Canada was authorised in December 2000 to suspend tariff concessions equal to C$344 million.[36] After Brazil announced that it had taken new steps to comply, Canada agreed to the appointment of a second WTO compliance panel in January 2001 to adjudge whether Brazil had complied. On 26 July 2001, the Panel decided that the new steps taken by Brazil were not inconsistent with the WTO rules.[37] Although the WTO authorised trade sanctions in this case, the winning party was not in a position to invoke them as the losing party complied with the WTO agreements after the authorisation. This dispute can be said as a rare example of how an authorisation of a trade sanction successfully works.

32 *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities under Article 22.6 of the DSU—Decision by the Arbitrators* WTO Dec WT/DS27/ARB/ECU (24 March 2000).

33 *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Notification of Mutually Agreed Solution* WTO WT/DS27/58 (2 July 2001).

34 See *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU—AB-2000-3—Report of the Appellate Body* WTO Dec WT/DS46/AB/RW (21 July 2000), para 2.

35 *Agreement on Subsidies and Countervailing Measures* WTO LT/UR/A-1A/9 (15 April 1994) <http://www.wto.org/english/docs_e/legal_e/24-scm.pdf> (accessed 19 December 2006).

36 *Brazil—Export Financing Programme for Aircraft—Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement—Decision by the Arbitrators* WTO Dec WT/DS46/ARB (28 August 2000). See Jennifer L Rich, "WTO Allows Canada Record Sanctions Against Brazil", New York Times (23 August 2000) at C4; and Frances Williams, "Canada Is Given Go-Ahead for Brazil Sanctions", Financial Times (13 December 2000) at 12.

37 *Brazil—Export Financing Programme for Aircraft—Second Recourse by Canada to Article 21.5 of the DSU—Report of the Panel* WTO WT/DS46/RW/2 (26 July 2001).

D. *The* US—Foreign Sales Corporations *dispute*

15 In *United States—Tax Treatment for Foreign Sales Corporations*,[38] the DSB authorised the EC to suspend its tariff concessions and other obligations towards the US to the extent of *US$4 billion* for the latter's failure to comply with the Appellate Body's decision that the USA had violated the WTO rules, in particular the Agreement on Subsidies and Countervailing Measures,[39] by providing prohibited subsidies to foreign sales corporations (FSCs) in the form of tax breaks. The US challenged the tremendous size of the EC's trade sanctions against it, arguing that it was disproportionate to the EC's trade loss caused by its violation. The arbitrators rejected the US's argument on the grounds that the main objective of trade sanctions was to compel violators to comply with rules, that the US's prohibited export subsidies were a more severe form of violation, and that the WTO Subsidy Code was a *lex specialis* (special law) to the DSU[40] in terms of dispute settlement procedures.[41]

16 On 22 October 2004, the US enacted the American Jobs Creation Act of 2004.[42] The EC claimed that the Act contained provisions which would allow US exporters to continue benefiting from tax exemptions already found to be WTO-incompatible and thus failed to properly implement the DSB recommendations. Accordingly, the EC invoked for the second time Article 21.5 of the DSU.[43] On 30 September 2005, the Panel found that the US, by enacting the American Jobs Creation Act, had continued to fail to implement fully the operative DSB rulings to withdraw the prohibited subsidies. On 24 November 2005, the US

38 *United States—Tax Treatment for Foreign Sales Corporations—Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement—Decision of the Arbitrator* WTO Dec WT/DS108/ARB (30 August 2002).

39 *Supra* n 35.

40 Here the arbitrators were referring to Art 22.4 of the DSU, *supra* n 1, which requires the level of a sanction to be equivalent to the level of nullification or impairment.

41 See Sungjoon Cho, "The Nature of Remedies in International Trade Law" (2004) 65 U Pitt L Rev 763 at 778–779.

42 22 October 2004, Public Law No 108-357; 26 USC § 1 note; 118 Stat 1418, available from the website of the US Government Printing Office at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ357.108.pdf> (accessed 19 December 2006).

43 *United States—Tax Treatment for Foreign Sales Corporations—Second Recourse to Article 21.5 of the DSU by the European Communities—Request for the Establishment of a Panel* WTO WT/DS108/29 (14 January 2005).

notified its decision to appeal to the Appellate Body. On 26 January 2006, the Appellate Body upheld the second compliance panel report.[44]

17 In this case, the authorisation by the arbitrators to suspend trade concessions towards the United States was to the extent of US$4 billion, which was unprecedented. However, it was quite logical for the arbitrators to argue that the WTO Subsidy Code was *lex specialis* to the DSU, which applies the proportionality principle for trade sanctions.

E. The US—Offset Act *(Byrd Amendment) dispute*

18 A joint complaint was made by Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea and Thailand,[45] and also by Canada and Mexico,[46] against the US concerning the amendment to the Tariff Act of 1930[47] entitled the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"),[48] usually referred to as "the Byrd Amendment". According to the complainants, the CDSOA was inconsistent with the obligations of the US under several provisions of the General Agreement on Tariffs and Trade 1994 (GATT),[49] the Anti-Dumping Agreement,[50] the SCM Agreement, and the WTO Agreement.[51]

44 *United States—Tax Treatment for Foreign Sales Corporations—Second Recourse to Article 21.5 of the DSU by the European Communities—AB-2005-9—Report of the Appellate Body* WTO Dec WT/DS108/AB/RW2 (13 February 2006), para 98.

45 *United States—Continued Dumping and Subsidy Offset Act of 2000—Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand* WTO G/ADP/D31/1, G/L/430, G/SCM/D39/1, WT/DS217/1 (9 January 2001).

46 *United States—Continued Dumping and Subsidy Offset Act of 2000—Request for Consultations by Canada and Mexico* WTO G/ADP/D36/1, G/L/452, G/SCM/D43/1, WT/DS234/1 (1 June 2001).

47 19 USC § 1671 *et seq*.

48 Part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act (28 October 2000), Public Law No 106-387, Title X, § 1002, 114 Stat 1549, available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ387.106.pdf> (accessed 19 December 2006).

49 WTO LT/UR/A-1A/1/GATT/1 (15 April 1994) <http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf> (accessed 20 December 2006).

50 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* WTO LT/UR/A-1A/3 (15 April 1994) <http://www.wto.org/english/docs_e/legal_e/19-adp.pdf> (accessed 20 December 2006).

51 *Marrakesh Agreement establishing the World Trade Organization* WTO LT/UR/A/2 (15 April 1994) <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> (accessed 20 December 2006).

19 The Panel concluded that the CDSOA was the WTO non-consistent.[52] The Appellate Body upheld the finding of the Panel.[53] The DSB adopted the reports on 27 January 2003. Brazil, Chile, the EC, India, Japan, Korea, Canada and Mexico requested authorisation of the DSB to suspend concessions on the ground that the US had failed to implement the DSB recommendations and rulings within the reasonable period of time. The DSB authorised the suspension of concessions as requested. Australia, Thailand and Indonesia (the remaining complainants), however, reached an understanding with the US with respect to this dispute.[54]

20 On 4 May 2005, the European Communities and Canada notified the DSB that they had suspended, as of 1 May 2005, the application of concessions and related obligations under GATT 1994 on imports of certain products originating in the US.[55] On 19 August 2005, Japan also notified the DSB that they were suspending, as of 1 September 2005, the application of concessions and related obligations under GATT 1994 on imports of certain products originating in the US.[56]

F. *The* Canada—Aircraft Credits and Guarantees *dispute*

21 On 22 January 2001, Brazil brought an action, *Canada—Export Credits and Loans Guarantees for Regional Aircraft*,[57] against Canada before the DSB, claiming that subsidies which had allegedly been granted by Canada to its regional aircraft industry were subsidies within the meaning of Article 1 of the SCM Agreement since they were financial

52 *United States—Continued Dumping and Subsidy Offset Act of 2004—Report of the Panel* WTO Dec WT/DS217/R, WT/DS234/R (16 September 2002).

53 *United States—Continued Dumping and Subsidy Offset Act of 2004—AB-2002-7—Report of the Appellate Body* WTO Dec WT/DS217/AB/R, WT/DS234/AB/R (16 January 2003).

54 See *United States—Continued Dumping and Subsidy Offset Act of 2000—Understanding between Australia and the United States* WTO WT/DS217/44 (6 January 2005); *United States—Continued Dumping and Subsidy Offset Act of 2000—Understanding between Thailand and the United States* WTO WT/DS217/45 (10 January 2005); and *United States—Continued Dumping and Subsidy Offset Act of 2000—Understanding between Indonesia and the United States* WTO WT/DS217/46 (12 January 2005).

55 See *United States—Continued Dumping and Subsidy Offset Act of 2000—Communication from the European Communities* WTO WT/DS217/47 (4 May 2005); and *United States—Continued Dumping and Subsidy Offset Act of 2000—Communication from Canada* WT/DS234/33 (4 May 2005).

56 *United States—Continued Dumping and Subsidy Offset Act of 2000—Communication from Japan* WTO WT/DS217/48 (19 August 2005)

57 *Canada—Export Credits and Loans Guarantees for Regional Aircraft—Report of the Panel* WTO Dec WT/DS222/R (28 January 2002).

contributions that conferred a benefit. A panel established by the DSB found that some of the subsidies were contrary to the SCM agreement and required Canada to withdraw the subsidies within 90 days. The DSB adopted the Panel report. On 24 June 2002, Brazil sought authorisation from DSB to suspend concessions for an amount of *US$3.36 billion* towards Canada as the latter had failed to withdraw its prohibited subsidies within the time frame specified by the Panel. The DSB referred the matter to arbitration, which determined that the suspension of concessions by Brazil covering a total amount of US$247,797,000 would constitute appropriate countermeasures.[58] The DSB authorised the suspension of concessions.

22 After a careful analysis of the above disputes in which trade sanctions were authorised, the following conclusions can be made: first, in over 60 cases in which the DSB decided that there were violations, trade sanctions or countermeasures were requested and authorised only in six cases; secondly, the complainant states were mostly the developed countries, namely, Australia, Brazil, Canada, the EC, Japan and the US, and very few developing countries were involved in trade sanctions (exceptionally we can find Indonesia and Thailand in *US—Offset Act* dispute); and thirdly, out of the six disputes, compliance occurred in two cases (*EC—Banana III*, and *Brazil—Aircraft*). Nevertheless, we cannot conclude that compliance does not or will not occur in the remaining four disputes. In these disputes, there are still ongoing differences between the parties as to whether there has been compliance or the extent of compliance.

IV. A critical evaluation of WTO trade sanctions

23 The WTO trade sanctions will now be evaluated in terms of their consistency with the law of state responsibility and their advantages and disadvantages.

A. Are trade sanctions consistent with the general international law of state responsibility?

24 Since the WTO is a rule-based international organisation composed primarily of sovereign States, the law of the WTO is nothing

58 *Canada—Export Credits and Loans Guarantees for Regional Aircraft—Recourse by Canada to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement—Decision by the Arbitrator* WTO Dec WT/DS222/ARB (17 February 2003).

but international law (albeit a special type of international law), and its sources are basically the sources of international law as enunciated in Article 38(1) of the Statute of the International Court of Justice.[59] The Agreement establishing the WTO[60] is a "particular" international convention within the meaning of Article 38(1)(a), as are the "covered agreements". Customary international law plays a specific role in WTO dispute settlement by virtue of Article 3.2 of the DSU, which provides that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements "in accordance with customary rules of interpretation of public international law."[61]

25 Therefore, one way of appraising WTO trade sanctions is to examine whether they are consistent with public international law in general and the law of state responsibility in particular.[62] The seminal work of the International Law Commission entitled *The Draft Articles on Responsibility of States for Internationally Wrongful Acts*[63] ("Draft Articles on State Responsibility") was adopted by the General Assembly on 28 January 2002.[64] It addresses the notion of countermeasures, based on relevant state practice, judicial decisions and doctrinal writings – the recognised sources of international law.

26 According to general international law, countermeasures are justified under certain circumstances.[65] Article 49(1) of the Draft Articles on State Responsibility provides that "an injured State may only take a

59 David Palmeter & Petros C Mavroidis, "The WTO Legal System: Sources of Law" (1998) 92 AJIL 398 at 398. The Statute of the International Court of Justice (ICJ) is available from the ICJ's website at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (accessed 20 December 2006).

60 *Supra* n 51.

61 Normally, panels and the Appellate Body refer in this respect to Arts 31 and 32 of the Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331 (entered into force 27 January 1980), available from the UN Treaty Collection website at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> (accessed 20 December 2006), which have been held to codify customary international law on treaty interpretation.

62 See Petros C Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11 Eur J Int'l L 763 at 766–774.

63 *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR 6th Comm, Annex, Agenda Item 162, UN Doc A/RES/56/83 (2002) available from the Official Documents System of the UN at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement>. The document is also available from the UN Treaty Collection website at <http://untreaty.un.org/ilc/texts/instruments/english/draft articles/9_6_2001.pdf> (both accessed 20 December 2006).

64 *Ibid*.

65 See generally, O Y Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (Clarendon Press, 1988) at pp 37–41.

countermeasure against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations". The permissible objective of countermeasures, therefore, is "to induce the wrongdoer state to comply with its obligations". The WTO trade sanctions can be said to be consistent with this rule because in *EC—Bananas III*[66] the arbitrators confirmed that the purpose of countermeasures (trade sanctions) was to induce compliance.[67] Nonetheless, according to the law of State responsibility, the wrongdoer State has two obligations to comply with: (a) to cease the wrongful conduct if it is continuing, and (b) to provide reparation to the injured State.[68] As a WTO trade sanction aims to make a non-complying measure compliant, the first obligation under the general international law can be said to be satisfied.

27 Even in respect of the obligation to cease the wrongful act, an obvious weakness of countermeasures under the DSU is that the possibility of achieving compliance may be greater if the complaining state is one of the developed members of the WTO. For a weaker member (for example, a developing State) faced with non-compliance by a disproportionately stronger member, the imposition of countermeasures may make compliance very hard to achieve.

28 Under general international law, the responsible State is again under an obligation to make full reparation for the injury caused by the wrongful act. As laid down in the *Chorzów Factory* case,[69] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution should be in kind, or if this is not possible, there must be payment of a sum corresponding to the value which a restitution in kind would bear. According to the Draft Articles on State Responsibility, full reparation can take the form of restitution, compensation and satisfaction, either singly or in combination.[70] However, there is nothing in the DSU to satisfy the most important obligation of the wrongdoer State under general international law, namely, to provide reparation to the injured State. With few

66 *Supra* n 29.
67 *EC—Bananas III (EC Art 22.6 Arbitration)*, *supra* n 16.
68 See the Draft Articles on State Responsibility, *supra* n 63, Arts 31 and 32.
69 *Chorzów Factory (Germany v Poland)* [1928] PCIJ (Ser A) No 17, available from the ICJ website at <http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf> (accessed 20 December 2006).
70 Draft Articles on State Responsibility, *supra* n 63, Art 34.

exceptions, WTO rulings have not required the member in breach of WTO rules to make reparation for the damage caused in the past. Until now, WTO remedies have offered only prospective relief, that is, the withdrawal of the inconsistent measure.[71]

29 It is common knowledge that principle of "proportionality" applies to countermeasures. Article 51 of the Draft Articles on State Responsibility summarises the requirement of proportionality in these words: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". Proportionality is a well-established requirement for taking countermeasures and is widely recognised in State practice, doctrine and jurisprudence.[72] In the *Naulilaa* case,[73] it was held that "one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them".[74] In the *Air Services* arbitration[75] between the US and France, the Tribunal ruled that:

> It is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of countermeasures is not an easy task and can at best be accomplished by approximation…[76]

30 In the above case, the countermeasures taken by the US (to suspend Air France flights to Los Angeles) were in the same field as the initial measures (France's refusal to allow a change of gauge in London on flights from the US) and concerned the same routes, although they were rather more severe as far as their economic effect on the French carriers than the initial French action.[77]

31 The International Court of Justice has had an opportunity to rule on the requirement of "proportionality" in the *Gabcíkovo-Nagymaros*

71 See Joost Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach" (2000) 94 Am J Int'l L 335 at 337.
72 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) at p 294.
73 *Naulilaa (Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa)* (1928) 2 RIAA 1013.
74 *Id*, at 1028.
75 *Case Concerning the Air Services Agreement of March 27, 1946 (United States v France)* (1978) 18 RIAA 417.
76 *Id*, at 433.
77 See Crawford, *supra* n 72, at p 295, para 3.

Project case.[78] In that case, the Court held that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".[79] The Court therefore took into consideration the quality or character of the rights in question as a matter of principle and (similar to the tribunal in the *Air Services* case) did not assess the question of proportionality only in quantitative terms. It is therefore the established rule of general international law that proportionality must be assessed taking into consideration not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach.

32 Do WTO trade sanctions comply with the proportionality requirement of general international law? The DSU requires that "the level of the suspension of concessions or other obligations shall be equivalent to the level of the nullification or impairment".[80] Although the WTO trade sanctions will not generally be out of proportion,[81] the lack of a retrospective remedy may prevent WTO countermeasures from being commensurate with the injury suffered.[82] Then what is the rationale behind the WTO legal system not to allow full reparation as required under general international law? Why does it only focus on trade sanctions being commensurate with the level of nullification or impairment?

33 The WTO regime has to be understood and interpreted in light of the original GATT framework, that is, as a balance of negotiated concessions, not primarily as a set of legal rules. A state does not become a WTO member simply by virtue of having ratified WTO agreements. In

78 *Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ 7, available from the ICJ website at <http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm> (accessed 21 December 2006).

79 *Id*, at para 85.

80 DSU, *supra* n 1, Art 22.4. In *EC—Bananas III (EC Art 22.6 Arbitration)*, *supra* n 16, at para 4.1, the arbitrators noted that the ordinary meaning of the word "equivalence" is "equal in value, significance or meaning", or "something equal in value or worth". In *EC—Hormones (US) (EC Art 22.6 Arbitration)*, *supra* n 24, at para 20, the arbitrators indicated that the determination of whether the overall proposed level of suspension is equivalent to the level of nullification and impairment involves a quantitative – not qualitative – assessment of the proposed suspension.

81 However, see the ruling of the arbitrator in the *US—Foreign Sales Corporations* dispute, *supra* n 38, confirming a US$4-billion sanction against the US.

82 For example, the measure of the sanction in *EC—Hormones* is the projected ongoing loss of trade on an annual basis. The US was not permitted to make up for trade lost in previous years.

addition to the multilateral obligations set out in the WTO agreements, the new member has to agree to a series of trade concessions, tariff reductions, market access commitments and so on. A member–member relationship is founded on a delicately negotiated balance not only of rights and obligations explicitly enshrined in WTO agreements, but also of trade concessions. The outcome is that instead of tackling breaches of international law obligations, the WTO's dispute settlement system focuses on the "nullification or impairment" of benefits. That is the main reason why the WTO's remedy of last resort is to "suspend concessions or other obligations up to the level of the nullification or impairment". A WTO member state may have action taken against it when and because it upsets the balance negotiated with another member, not because it violates multilaterally-agreed rules in place for the benefit of all WTO members. That is why some writers are critical of this influence of GATT over WTO as a package of bilateral equilibria, and arguing for the acknowledgment of WTO rules as international legal obligations and for an enforcement mechanism of a more collective nature in the WTO rather than unilateral trade sanctions.[83]

34 Article 50(1) of the Draft Articles on State Responsibility provides, *inter alia*, that countermeasures shall not effect obligations for the protection of fundamental human rights and obligations under peremptory norms of general international law. The WTO trade sanctions could be in tension with this rule if we considered economic rights of the private actors in member states as fundamental human rights.[84] In its General Comment 8 (1997), the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civil populations and especially on children and stressed that

> … it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral

83 See Pauwelyn, *supra* n 71, at 340–343.

84 For the recognition of economic rights as fundamental human rights, see the International Covenant on Economic, Social, and Cultural Rights (16 December 1966), GA Res 2200A (XXI) 21, UN GAOR Supp No 16 at 49, 993 UNTS 3, 1977 UKTS No 6 (Cmnd 6702), (1967) 6 ILM 360 (entered into force 3 January 1976), available from the website of the Office of the UN High Commissioner for Human Rights at <http://www.ohchr.org/english/law/pdf/cescr.pdf>, to which 155 states were parties as at 6 December 2006: see <http://www.ohchr.org/english/countries/ratification/3.htm> (both accessed 21 December 2006).

> infliction of suffering upon the most vulnerable groups within the targeted country.[85]

35 Under Article 53, countermeasures shall be terminated as soon as the responsible state has complied with its obligations. The DSU has no provision designed to achieve a rapid termination should the winning party resist lifting its sanctions. This defect may necessitate an amendment to the DSU.

36 The general idea is that the mechanism of trade sanctions under the DSU has to be fairly in conformity with the international law of state responsibility. It is, however, to be noted that in so far as there are explicit provisions in the DSU which clearly depart from general international law, they are to be regarded as special law (*lex specialis*) and by virtue of Article 55 of the Draft Articles general international law does not apply to these situations.[86]

B. Advantages of trade sanctions

37 The first argument for having trade sanctions is that they provide the WTO with teeth. The most striking defect of international organisations of universal character is their lack of effective enforcement machinery. Take the United Nations as an example. Despite being the most important organisation of the present day, its enforcement machinery depends entirely on the unanimity of the Big Five,[87] which has paralysed the organisation in a number of major crises. Therefore, the advocates of trade sanctions argue that the WTO can be seen as the only international organisation (apart from some regional organisations) with teeth, namely, trade sanctions against members which violate its rules.

85 Committee on Economic, Social and Cultural Rights, *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights: CESCR General Comment No 8*, UN ESCOR, 17th Sess, at para 4, UN Doc E/C.12/1997/8 (1997), available from the Treaty Body Database of the UN High Commissioner for Human Rights at <http://www.unhchr.ch/tbs/doc.nsf> (accessed 21 December 2006).

86 Crawford, *supra* n 72, at p 307, para 3.

87 That is, the five permanent members of the UN Security Council – China, France, the Russian Federation, the UK and the US: Art 23(1) of the Charter of the United Nations, available from the UN website at <http://www.un.org/aboutun/charter/> (accessed 21 December 2006). Art 27(3) of the Charter provides that, in general, decisions of the Security Council shall be made by an affirmative vote of nine members, including the concurring votes of the permanent members.

38 The second argument is that the WTO is a rule-based system and trade sanctions may induce compliance with rules. A good example is *Brazil—Aircraft* case[88] where Brazil complied with the WTO agreements after the authorisation of trade sanctions. The deterrent effect of trade sanctions can also be taken into consideration, that is, where the threat of sanctions contributes to compliance such that it is not necessary to impose sanctions. In a few WTO cases, the threat of sanctions seems to have had an effect on non-complying governments. For instance, in *Australia—Measures Affecting Importation of Salmon*,[89] the WTO compliance panel held that Australia had not corrected the violation found earlier.[90] Australia complied only when Canada sought authorisation to impose C$45 million in trade sanctions.[91]

39 Nevertheless, reservations must be made to the above argument that trade sanctions induce compliance. An analysis of some of the high-profile disputes (for example, the banana and beef hormones cases) demonstrates the WTO's apparent inability to achieve compliance, especially from superpower nations.[92] The banana dispute, in particular, indicates the difficulties caused by disagreements among parties as to what constitutes full compliance. The implementation process itself provides opportunities for the losing party to delay compliance through the use of political strategies within the WTO. The disputes over bananas and beef hormones show that the EU, and possibly others, may prefer to see the imposition of sanctions rather than comply with the WTO ruling. This disturbing trend will seriously undermine the effectiveness of the WTO dispute settlement process.[93] Although the EU has stopped short of outright rejection of the negative decisions, it has interpreted decisions in a way than falls short of full compliance and has caused lengthy delays. Indeed, without the ability to block an adverse ruling, long delays and non-compliance may actually become more viable alternatives. The

88 *Supra* n 34.

89 *Australia—Measures Affecting Importation of Salmon—Recourse to Article 21.5 of DSU by Canada—Report of the Panel* WTO Dec WT/DS18/RW (18 February 2000).

90 The panel found that Australia had excluded imports of chilled and frozen salmon without basing this action on a risk assessment and without using the least trade-restrictive approach. This was a dispute under the SPS Agreement, *supra* n 23.

91 *Australia—Measures Affecting Importation of Salmon—Recourse by Canada to Article 22.2 of the DSU* WTO WT/DS18/12 (15 July 1999); see also "Canada Drops Proposal to Retaliate in WTO Salmon Dispute with Australia" 17 *Int'l Trade Reporter* (10 August 2000).

92 Benjamin L Bremeyer, "Banana, Beef and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance on Super Power Nations" (2001) Minn J Global Trade 133 at 134.

93 *Id*, at 163.

banana and beef hormones disputes reveal that the WTO is ineffective at preventing both delay and non-compliance.

C. Disadvantages of trade sanctions

40 Trade sanctions are self-punishing – they may damage the economy of the country imposing them. It is common knowledge that while sanctions may contribute to inducing compliance by the violating country, at the same time they hurt citizens of the imposing country and its own economy. The violator may get bitten, but the country imposing the sanctions also ends up biting itself. In *EC—Bananas III*[94] and *EC—Hormones*,[95] for example, the US government imposed high tariffs on imports from the EC. This action backfired and adversely affected domestic consumers in the US, who suffered a loss of choice and probably had to pay higher prices for substitute products. In the *Bananas* dispute, the WTO arbitrators admitted that a suspension of concessions "may also entail, at least to some extent, adverse effects for the complaining party seeking suspension".[96]

41 Trade sanctions may contradict the *raison d'être* of the WTO. The ultimate aim of the WTO is "free trade" through gradual liberalisation of trade, and the main purpose of its dispute settlement mechanism is to maintain the balance of trade concessions. Trade sanctions, which are in effect an authorisation to exercise trade restrictions, contravene the very spirit of the WTO.[97] As Charnovitz has rightly put:

> International organizations do not generally contradict their own *raison d'être* in the name of sanctions. The World Health Organization does not authorize one party to spread viruses to another. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO 's use of trade restrictions to promote free trade is bizarre.[98]

94 *Supra* n 29.
95 *Supra* n 22.
96 *Supra* n 32, at para 86.
97 International Financial Institution Advisory Committee (the Meltzer Committee), *Report* (March 2000), available from the website of the Joint Economic Committee of the US House of Representatives at <http://www.house.gov/jec/imf/meltzer.htm> (accessed 21 December 2006).
98 Steve Charnovitz, "Should the Teeth be Pulled? An Analysis of WTO Sanctions", in *The Political Economy of International Trade Law: Essays in Honour of Robert E Hudec* (Daniel L M Kennedy & James D Southwick eds) (Cambridge University Press, 2002), ch 20, p 602 at p 622.

42 Trade sanctions favour larger economies over smaller ones.[99] Sanctions are much less effective for developing countries than for developed ones because the former lack the economic or political might to employ them in responding to the non-compliance by the latter. The appraisal of the six disputes in which trade sanctions were authorised in the previous section of this paper clearly indicated that the states which have taken advantage of trade sanctions are developed countries like Australia, Canada, the EU, Japan and the US. That is why there are proposals to tackle this problem by allowing sanctions to be imposed collectively.[100] These should be considered seriously in the negotiations to improve the dispute settlement mechanism. Besides the size of the economy, other determinants for a successful trade sanction are the import dependency of the state imposing the sanction and the export dependency of the target state.[101] A highly import-dependent country may find it hard to use sanctions. A highly export-dependent country (like Australia) may find itself vulnerable to the threat of sanctions.[102]

43 In cases of non-compliance, it is often found that the political cost of compliance is too high. Although it is true that each government is obliged to comply with WTO rules, it is not sure whether lawmakers will agree to get rid of a non-complying measure.[103] In some cases, the legislative body adamantly opposes amending legislation which is WTO non-consistent. In many cases, local people and companies are against any government measure which would take away subsidies or special favours for them.

44 Due to the self-defeating nature of trade sanctions, we may fairly conclude that their disadvantages outweigh the advantages. As rightly pointed out by some analysts, trade sanctions are bad policy and they

99 Joost Pauwelyn, *supra* n 71, at 338. Palmeter has pointed out how major and smaller economies are not similarly situated when it comes to imposing WTO "sanctions": David Palmeter, "The WTO as a Legal System" (2000) 24 Fordham Int'l LJ 444 at 472–473.

100 Pauwelyn, *id*, at 345.

101 Mavroidis, *supra* n 62, at 807.

102 Steve Charnovitz, "Rethinking WTO Trade Sanctions" (2001) 97 Am J Int'l L 792 at 816.

103 See the controversial dispute *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather—Recourse to Article 21.5 of the DSU by the United States—Report of the Panel* WTO Dec WT/DS126/RW, para 6.48 (21 January 2000). Australia's complaint was that the DSB was asking it to confiscate the company's assets when the company had done nothing wrong. See Steve Charnovitz, "The WTO and the Rights of the Individual" (2001) 36 *Intereconomics* 98 at 106–107.

undermine the entire WTO system, which is based on mutually-agreed trade liberalisation.[104]

V. Are there any alternatives to trade sanctions?

45 From the above discussions, it is clear that apart from the possible advantage of inducing compliance, the remedial value of WTO trade sanctions is rather doubtful. An important question that can be raised here is whether there are alternatives to trade sanctions. The following are usually proposed as some of the possible alternatives.

A. Compensation

46 "Compensation" in the WTO context does not refer to financial compensation.[105] It means the reduction of trade barriers by the violator government. The DSU prefers "compensation" to "suspension of concessions" but provides that compensation is "voluntary".[106] Furthermore, compensation has to be given in accordance with the most-favoured-nation ("MFN") principle.[107] Therefore, a difficult problem with compensation is that in lowering tariffs for the benefit of the complaining country, the violating country will also provide greater market access to other countries (in line with the MFN principle), and the quantum of liberalisation will probably be higher than the "nullification or impairment".

47 There have been suggestions that compensation should not be subject to the MFN principle, and that member states have by practice made country-specific and bilateral compensation arrangements. In the *EC—Poultry* case,[108] for example, Brazil argued that the Oilseeds Agreement had been negotiated under Article XXVIII of the GATT to compensate Brazil from the impairment of benefits from the oilseeds concession. According to Brazil, there was an element of specificity about

104 Mitsuo Matsushita, Thomas Schoenbaum & Petros C Mavroidis, *The World Trade Organization: Law, Practice and Policy* (Oxford University Press, 2003) at pp 93–94.

105 Compensation is not defined in the DSU, *supra* n 1, Art 22.1. Monetary compensation has never been employed, although the idea was debated in the GATT in the early 1960s.

106 DSU, *id*, Arts 3.8, 22.1 and 22.2.

107 Andreas F Lowenfeld, "Remedies Along with Rights: Institutional Reform in the New GATT" (1994) 88 Am J Int'l L 477 at 486 n 14.

108 *European Communities—Measures Affecting Importation of Certain Poultry Products—AB-1998-3—Report of the Appellate Body* WTO WT/DS69/AB/R (13 July 1998).

compensation, which explained and justified possible departure from the MFN (non-discrimination) principle. Brazil maintained that in practice there were examples of country-specific tariff rate quotas offered and implemented by the EC as compensation under Article XXIV.6 of the GATT and that there was no reason why the same principle should apply to compensation under Article XXVIII of the GATT. The Appellate Body rejected Brazil's argument and held:

> We do not accept this argument. We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempted from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994.[109]

48 Compensation as a remedy is favoured by many WTO analysts. Pauwelyn has suggested that the DSU be amended to make compensation compulsory.[110] According to Allan Rosas, it is possible to use arbitration to determine the appropriate compensation.[111] So far, however, no one has devised a way to make the violating country consummate the compensation by lowering its tariffs. As noted above, one of the virtues of WTO sanctions is that they can be implemented unilaterally. Thus, although compensation can be said to be a much better remedy than a trade sanction, it cannot replace a trade sanction from the perspective of a complaining country.

B. Monetary fines or damages

49 A fine is a penalty for violating a law. Although the use of monetary fines has been rare on the international plane, a prominent example can be found in the Treaty Establishing the European Communities,[112] which provides that a penalty payment can be imposed against a member state that fails to comply with a judgment of the European Court of Justice (ECJ).[113] In *Commission v Hellenic Republic*,[114] the ECJ for the first time made use of the monetary fines provision of the treaty. In this case, the Greek government failed to implement certain

109 *Id*, at para 100.
110 Joost Pauwelyn, *supra* n 71, at 345–346.
111 Allan Rosas, "Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective" (2001) 4 J Int'l Econ L 131 at 144.
112 Consolidated Version of the Treaty Establishing the European Communities [2002] OJ C 325/33 <http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf> (accessed 21 December 2006).
113 *Id*, Art 171.
114 Case 387/97, [2000] ECR I-05047, <http://eur-lex.europa.eu/en/index.htm> (accessed 21 December 2006).

water disposal directives. The Court decided that Greece had to pay a penalty of €20,000 per day.[115]

50 A further example of the use of monetary fines is the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA).[116] According to this treaty, the Authority (composed of heads of state or government) can, by consensus, decide to impose a financial penalty on a member state for failure to comply with obligations or conduct prejudicial to the common market.[117]

51 A new trend found in some recent free trade agreements is the requirement for the payment of an "annual monetary assessment". This is not exactly a monetary fine but is very similar to it, For example, under the Australia–United States Free Trade Agreement (AUSFTA),[118] the complaining party may not suspend concessions or benefits if the party complained against provides written notice that it will pay an annual monetary assessment. By consultation, the two parties have to agree upon the amount of monetary assessment. If they are unable to reach an agreement, the amount of the assessment has to be set at a level equal to 50% of the level of concessions to be suspended.[119] This monetary assessment has to be paid to the complaining party or, as the case may be, into a fund to facilitate trade between the parties, including further reduction of trade barriers.[120]

52 According to the report of the Meltzer Commission, "instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel or provide equivalent trade liberalization".[121] Marco Bronckers believes that monetary damages may induce compliance more effectively than trade sanctions, because governments would have to pay the costs rather than

115 "Greece Hit for Waste Dumping as ECJ Sets First Fine for Law Compliance Failure" (2000) 23 Int'l Env't Reporter 558.

116 Treaty Establishing the Common Market for Eastern and Southern Africa (5 November 1993), 33 ILM 1067 (entered into force 4 December 1994), available from the COMESA website at <http://www.comesa.int/comesa treaty/comesa treaty/Multi-language_content.2005-07-01.3414/en> (accessed 21 December 2006).

117 *Id*, Arts 8 and 171.

118 Australia–United States Free Trade Agreement (18 May 2004), [2005] ATS 1 (entered into force 1 January 2005) <http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html> (accessed 21 December 2006) ("AUSFTA").

119 AUSFTA, *id*, Art 21.11, para 5.

120 *Id*, para 6.

121 *Supra* n 97.

shift them.[122] Unlike sanctions, monetary fines (damages) would not harm other unrelated sectors, and unlike compensation, the harmed industry can be the beneficiary of the remedy. Bhagwati has suggested that damages could be awarded directly to the member state, who would then pass it on to the aggrieved industry.[123] The difficulty with a monetary fine, however, is that it cannot be the remedy of last resort. The main problem with monetary fines is the question of what to do if the violating country fails to pay the fines.

C. Suspension of a member's rights

53 In a number of international organisations, suspension of a member's rights is a normal action against a violating member.[124] However, as a general rule it is not effective because it seems that a member would not take it as a matter of life or death to be suspended from membership, especially when the national interest is at stake. The scenario would, however, be different in the case of the WTO. WTO membership appears to be too important for the economic development of a member state for it to lose it. No state may be prepared to surrender huge concessions and economic benefits that it enjoys as a member of the WTO. Therefore, denying a non-complying member the right to participate in the WTO system could be an effective means of enforcement.[125] Nevertheless, we have to admit that suspension of membership is also a bad policy, and an international organisation cannot be successful by suspending its members.

54 All of these possible solutions have their own problems. At present, therefore, the elimination of WTO trade sanctions is inconceivable. To quote what the Director-General of the WTO Pascal Lamy once said:

> It would be good to think that we could find a way of ensuring WTO conformity without getting into the business of distorting trade flows

122 Marco C E J Bronckers, "More Power to the WTO?" (2001) 4 J Int'l Econ L 41 at 62.

123 Jagdish Bhagwati, "After Seattle: Free Trade and the WTO" (2001) 77 Int'l Affairs 15 at 28. Given the lack of direct effect of WTO rules, member states normally prevent private parties from invoking DSB rulings before domestic courts. See, however, Alberto Alemanno, "Judicial Enforcement of the WTO *Hormones* Ruling within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions?" (2004) 45 Harv Int'l LJ 547 at 548.

124 See, for example, Art 19 of the UN Charter, *supra* n 87, which provides that the voting rights of a member which is in arrears in the payment of its financial contributions to the organisation shall be suspended.

125 See Matsushita, Schoenbaum & Mavroidis, *supra* n 104, at 94.

> which stems from sanctions. That said, the current system is all we have to enforce compliance, and I certainly cannot and will not tell you today that we renounce the instrument in the absence of better ideas.[126]

VI. Conclusion

55 The WTO is unique in combining a set of binding rules with a powerful mechanism for dispute settlement and the possibility of imposing trade sanctions to enforce compliance. It is the only international organisation of a universal character in which there is an effective machinery of enforcement to compel a non-complying state. Yet, trade law analysts are questioning whether the availability of such enforcement machinery in the form of trade sanctions is sensible. The present paper finds that the practice of trade sanctions undermines the WTO system itself, the main purpose of which is to promote free trade and remove trade barriers. The paper also argues that the availability of trade sanctions offers some advantages, but also incurs many disadvantages which outweigh the advantages.

56 WTO members are in the process of conducting "negotiations on improvements and clarifications of the DSU" in the Special Sessions of the DSB.[127] This was mandated by the Doha Ministerial Declaration. During the recent Hong Kong Ministerial Meeting, the Chairperson of the DSU Special Sessions submitted briefing notes on DSU negotiations. It appears that the main issues on the agenda of the DSU negotiations included enhancing third-party rights, improving the sequence of procedures, enhancing compensation, strengthening special and differential treatment (SDT) for developing countries, and transparency. The issues that did not attract a high level of support, unfortunately, included a modified procedure for trade sanctions and collective trade sanctions.[128] The Hong Kong Ministerial Declaration, adopted on

126 Pascal Lamy, Director-General of the WTO, "US–EU: The Biggest Trading Elephants in the Jungle – But Will They Behave?", speech to the Economic Strategy Institute, Washington, DC (7 June 2001), <http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119421.pdf> (accessed 21 December 2006).

127 The WTO Members, at the Doha Ministerial Conference in November 2001, agreed to conduct "negotiations on improvements and clarifications of the Dispute Settlement Understanding". See the Doha Ministerial Declaration adopted on 14 November 2001, *Ministerial Conference—Fourth Session—Doha, 9–14 November 2001—Draft Ministerial Declaration* WTO WT/MIN(01)/DEC/W/1 (14 November 2001), para 30. These negotiations take place in Special Sessions of the DSB.

128 "Dispute Settlement: Force of Argument, Not Argument of Force: Hong Kong WTO Ministerial 2005: Briefing Notes" <http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief10_e.htm> (accessed 21 December 2006).

18 December 2005, directed the DSU Special Sessions to continue to work toward the rapid completion of the negotiations.[129] According to Doha mandate, the DSU negotiations will not be part of the single undertaking, *ie,* they will not be tied to the success or failure of the other negotiations mandated by the declaration.[130] Nevertheless, the process of DSU negotiations appears to be very slow and no concrete achievements are foreseeable in the near future.

57 In any case, it is a fact that some amendments to the DSU need to be made to dilute the stringency of trade sanctions and to promote a more viable and just dispute settlement system. As the law of the WTO is part and parcel of public international law, trade sanctions – the enforcement of last resort in the WTO – need to be in fair conformity with the law of state responsibility. The DSU should be amended, making "compensation" compulsory and automatic, like trade sanctions. This means that at the time when trade sanctions are imposed, the legal obligation to compensate should continue to exist.[131] The imposition of monetary fines or damages is a traditional and very straightforward remedy which could very well strengthen the present remedial system of the WTO. A careful combination of trade sanctions, compensation and monetary damages would provide genuine leverage to induce compliance.

---

129 *Ministerial Conference—Sixth Session—Hong Kong, 13–18 December 2005—Doha Work Programme—Ministerial Declaration—Adopted on 18 December 2005* WTO WT/MIN(05)/DEC (22 December 2005), para 34.

130 See the Doha Ministerial Declaration, *supra* n 127, at para 47.

131 See Pauwelyn, *supra* n 71, at 344.