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# The Legal Nature of WTO Obligations and the Consequences of their Violation

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## Abstract

*The obligations deriving from participation in the World Trade Organization are never inherently indivisible or erga omnes in the sense elaborated by the International Court of Justice in the field of human rights. As a rule, remedies for violations of WTO obligations remain available only to the Member(s) whose international trade interests have been affected, in actual or potential terms. Nonetheless, contracting parties have decided to extend to a limited number of WTO obligations the legal regime of indivisible obligation and to consider immaterial for the purpose of resorting to the dispute settlement system the effects of their violations. WTO obligations, therefore, are not a monolithic bloc. They may be divided into two categories which are governed by different rules as far as legal standing and counter-measures are concerned. Depending on whether the obligation allegedly breached belongs to one or the other category, the nullification or impairment of benefits is presumed – but can be challenged – under Article 3(8) of the DSU or is entirely irrelevant. Furthermore, countermeasures are normally proportionate or equivalent to the nullification or impairment of the benefits of the complainant. In the case of WTO obligations treated as indivisible obligations, however, the effects of the violation are immaterial and the trade interests of the complainant may well be unaffected. As a result, counter-measures are to be permitted to the extent that they will effectively ensure compliance. Special problems may finally arise in the case of multiple applicants, especially when the countermeasures are authorized at different times.*

## 1 Introduction

This article discusses the extent to which the notion of indivisible or *erga omnes* obligations – which has made its appearance in WTO case law and provoked the stiff reaction of the United States<sup>1</sup> – may apply to the obligations stemming from participation

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in the WTO. It first describes the main legal features of indivisible obligations as elaborated by the International Court of Justice (ICJ) in the field of human rights. It then examines whether WTO obligations – like human rights obligations – are inherently indivisible and, in the negative, explores whether contracting parties have nonetheless extended the legal regime of indivisible obligations to some or all WTO obligations. The consequences of the application of the notion of indivisible obligations are considered from the perspective of the settlement of disputes concerning violations of WTO obligations in general,<sup>2</sup> and the adoption of counter-measures in particular. The discussion also attempts to throw some light on the neglected question of whether a legal interest is necessary before one can resort to the WTO dispute settlement system.

## 2 The Notion of *erga omnes* Obligations as Elaborated by the International Court of Justice

In international law, the legal relationships deriving from a multilateral treaty can normally be divided into a bunch of bilateral relationships.<sup>3</sup> The effects of the multilateral treaty are identical to those of a network of bilateral treaties concluded by all contracting parties with each other.<sup>4</sup> It follows that a state, although bound to comply with the obligations deriving from the treaty *vis-à-vis* all the other contracting parties, can breach them only in relation to one or more, but not necessarily all, other contracting parties. Only the state(s) suffering from the consequences of the breach – or at least being exposed to potential harm<sup>5</sup> – can react and resort to the remedies permitted in international law. This is possible since the legal relationship between

<sup>1</sup> See *US – Tax Treatment for 'Foreign Sales Corporations'*, Art. 22(6) Arbitration, WT/DS108/ARB, 30 Aug. 2002. The legal nature of WTO obligations has recently been dealt with by Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 13 *EJIL* (2003) 907. For the purpose of this article, *erga omnes* obligations are to be intended as obligations stemming from multilateral treaties, although their denomination as *erga omnes contractantes* or *erga omnes partes* would be more accurate. The general considerations made in section II, however, can be extended *mutatis mutandis* to *erga omnes* obligations existing under customary international law.

<sup>2</sup> On non-violation complaints, see Cottier and Nadakavukaren Schefer, 'Non-violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future', in E.-U. Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), at 143 ff. Non-violation complaints tend to fall into desuetude, as observed by P. Picone and A. Ligustro, *Il diritto dell'Organizzazione Mondiale de Commercio* (2002), at 600.

<sup>3</sup> See Giraud, 'Modifications and terminaison des traités collectifs', 49 *Annuaire Institut de Droit International* (1961) 1 ff, esp. at 16; Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 *Recueil des cours* (1972-III) 419, at 724.

<sup>4</sup> The network would be composed of:  $n(n-1)/2$  bilateral agreements, where 'n' indicates the number of states.

<sup>5</sup> In *Wimbledon*, PCIJ, Ser. A, No. 1 (1923) 20, in particular, the Permanent Court of International Justice declared admissible the applications submitted by France, Japan, Italy, and the UK as 'each of the four Applicants Powers has a clear interest in the execution of the provisions relating to the Kiev Canal, since they all possess fleets and merchant vessels flying their respective flags, even though they may be unable to adduce a prejudice to any pecuniary interest'.

the state in breach and the victim state(s) can be isolated from the legal relationships between each of these states and the other remaining contracting parties, and between the other remaining contracting parties.<sup>6</sup>

In contrast, *erga omnes* obligations are legally indivisible<sup>7</sup> as they simultaneously satisfy an interest which is common to all states and cannot be specifically allocated to any of them.<sup>8</sup> As typically occurs in the field of human rights, compliance with *erga omnes* obligations cannot be selective: a state complies with an *erga omnes* obligation either towards all other addressees of the norm or towards none of them.

The fact that normally a violation by a state of *erga omnes* obligations does not affect the material interests of any other states or its nationals is not an obstacle to recognizing that all other states possess a subjective right in the respect of these obligations. In the *South West Africa cases*, the ICJ rejected the third preliminary exception submitted by South Africa, according to which the conflict or disagreement alleged by the applicants was not a dispute the Court could have adjudicated upon as no material interest of the applicants or their nationals was involved.<sup>9</sup> In a subsequent decision concerning the same cases, the ICJ confirmed that a legally protected interest 'need not necessarily relate to anything material or "tangible" and can be infringed even though no prejudice of a material kind has been suffered'.<sup>10</sup>

In the first decision, the ICJ introduced the notion of *erga omnes* obligations. It declared that the members of the League of Nations 'were understood to have a legal right or interest' in the observance by South Africa of its obligations deriving from the mandate over South West Africa, regardless of any prejudice of a material kind.<sup>11</sup> Importantly, in the second decision the Court did not in principle reject the notion of *erga omnes* obligations; it rather maintained that the subjective rights 'must be clearly vested in those who claim it by some text or instrument, or rule of law', a condition which was not satisfied in the cases under scrutiny.<sup>12</sup>

<sup>6</sup> In *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du Sud d'Afrique (Naulilaa case)*, 2 UNRIIA 1011, at 1025 it has been stated that a countermeasure 'a pour effet de suspendre momentanément, dans le rapport des deux Etats, l'observance de telle ou telle règle du droit de gens'.

<sup>7</sup> See G. Arangio-Ruiz, *4th Report on State Responsibility*, 44 *Yearbook Int'l L Commission (YBILC)* (1989-II) Part I, 33 ff. As observed by Morelli, 'A proposito di norme internazionali cogenti', 51 *Revue de Droit International* (1968) 108, at 115, there exists for each state a 'unique legal situation' towards all other states.

<sup>8</sup> In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep 15, at 23, the ICJ observed that 'contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely in the accomplishment of those high purposes which are the raison d'être of the convention'. See also Judge Morelli, sep op in *South West Africa Cases*, Second Phase, [1966] ICJ Rep 6, at 64–65. In *Prosecutor v. Blaskic*, Case No IT-95-14-PT, T. Ch. II, 18 July 1997, at para. 26, the Chamber of the International Tribunal for Former Yugoslavia (ITFY) concluded that Art. 29 of the Statute 'imposes an obligation on all Members towards all other Members' for the protection of a 'community interest'. In literature, see in particular M.L. Forlati Picchio, *La sanzione nel diritto internazionale* (1974), at 340 ff and 441 ff.

<sup>9</sup> *South West Africa Cases*, Preliminary Objections [1962] ICJ Rep 319, at 327.

<sup>10</sup> *South West Africa Cases*, Second Phase [1966] ICJ Rep 6, at 32.

<sup>11</sup> *Supra* note 9, at 336. As observed by Judge Morelli, the expression 'legal right or interest' is to be read as synonymous with subjective right: *supra* note 8, at 57 ff. 61.

<sup>12</sup> *Supra* note 10, at 32.

The notion of *erga omnes* obligation was further developed by the ICJ, which on several occasions did not hesitate to confirm that all states *taken individually* have a legal interest – intended as a subjective right – in the respect of such obligations, even if their material or moral interests are not involved.<sup>13</sup> Hence, there is no departure from the undisputed assumption that the ‘correlation between a legal right on the one hand and a subjective right on the other admits of no exception’,<sup>14</sup> nor any need to resort to the legal fiction of a relationship between the defaulting state and the international community as a whole or to the notion of *actio popularis*.<sup>15</sup>

As with any other violation of international law, the violation of *erga omnes* obligations entails the international responsibility of the state concerned. Such violation affects the subjective rights of all states,<sup>16</sup> and each of them is consequently to be considered as an injured party and entitled to react on the international plane.<sup>17</sup> The right conferred on each state to claim compliance with *erga omnes* obligations by any other state, regardless of any material or tangible interest, is an indispensable corollary of this category of obligations.<sup>18</sup>

In this perspective and in line with the well-established principle that ‘only the Party to whom an international obligation is due can bring a claim in respect of its breach’,<sup>19</sup> Article 40(2)(e)(iii) of the 1996 Draft Articles on State Responsibility much better reflected the notion of *erga omnes* obligations – as elaborated by the ICJ – than Article 48 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts.<sup>20</sup> It provided that all states bound by *erga omnes* obligation were to be considered

<sup>13</sup> See, in particular, *Barcelona Traction, Light and Power Company, Limited*, Judgment [1970] ICJ Rep 3, at 32; *Case Concerning East Timor*, Judgment [1995] ICJ Rep 90, at 102; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment [1996] ICJ Rep 595, at 616.

<sup>14</sup> R. Ago, *2nd Report on State Responsibility*, 22 YBILC (1970-II), Part 1, at 192–193. The ILC further observes that ‘to each and every obligation corresponds *per definitionem* a right of at least one other State’: ILC, *Report to the General Assembly*, 37 YBILC (1985-II), Part 2, at 25.

<sup>15</sup> The existence of *actio popularis* was rejected in both *South West Africa* decisions, *supra* notes 9 and 10, as observed by Judge Morelli, *supra* note 8, at 60.

<sup>16</sup> As noted by Arangio Ruiz, *supra* note 7, at 43: ‘[a] State can thus be injured by a breach of an *erga omnes* obligation even if it did not suffer any damage other than the infringement of its right’.

<sup>17</sup> In *Prosecutor v Furundzija*, 10 Dec. 1998 in 38 ILM (1999) 317, para. 151, the ITFY described *erga omnes* obligations as ‘obligations owed towards all the other members of the international community ... the violation of such obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member’. S. Schwebel, *Justice in International Law* (1994), at 164, observes that ‘when a State protests that another is violating the basic human rights of the latter’s own citizens, the former State is ... seeking to vindicate international obligations which run towards it as well as all other States’.

<sup>18</sup> Arangio-Ruiz, *supra* note 7, at 46, notes that denying states the right individually to react to violations would clearly be tantamount to excluding the very existence of such obligations as international legal obligations. See also D. Shelton, *Remedies in International Human Rights Law* (1999), at 55–56; Weisburd, ‘The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights’, 25 *Georgia J Int’l Comparative L* (1995/96) 99, at 108.

<sup>19</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, at 182.

<sup>20</sup> *Articles on Responsibility of States for Internationally Wrongful Acts*, ILC *Report to the General Assembly*, UN Doc. A/56/10, 318.

injured states if the violation concerned rights created or established for the protection of human rights and fundamental freedoms.<sup>21</sup> As a result, every state is entitled to invoke the responsibility of the state concerned, and in particular to obtain cessation of the unlawful conduct, reparation, and guarantees of non-repetition. However, since the violation of *erga omnes* obligations normally does not cause any material or moral damage to any state, compensation cannot be sought.<sup>22</sup> This is not a question of 'limited standing',<sup>23</sup> but simply the logical consequence of the fact that the unlawful conduct normally does not cause any quantifiable damage to the injured state. In this respect, it must be noted that compensation is not always admissible in international law. In the *Wimbledon case*, for instance, only France suffered financially assessable injury, and therefore that state alone was entitled to obtain compensation as a consequence of Germany's breach of international law.<sup>24</sup>

The indivisible character of *erga omnes* obligations also precludes the application of the *inadimplenti non est adimplendum* principle. A state is thus prevented from invoking the breach of an *erga omnes* obligation as a ground for not complying with the same obligation, precisely because in so doing it would unavoidably violate the subjective rights of all states. It follows that states are bound to comply with *erga omnes* obligations regardless of whether some other states are not complying with the same obligations. From the standpoint of the law of treaties, in particular, this is reflected in Article 60(5) of the Vienna Convention on the Law of Treaties which excludes the suspension or termination of the operation of a treaty on the ground of material breach of provisions relating to the protection of the human person contained in human rights or humanitarian treaties.<sup>25</sup>

### 3 The Divisible Character of WTO Obligations

WTO obligations – and international trade obligations in general – are always legally divisible.<sup>26</sup> They allow selective compliance and are capable of affecting or threatening to affect the rights of one or more – but not necessarily all – other Members. Since it is always possible to treat differently the products originating from or destined for certain Members or negatively to affect the trade interests of some – but not necessarily all – Members, these obligations can be split into a bunch of bilateral relationships. The following examples, albeit not covering the whole range of WTO obligations, may be illustrative of this conclusion.

The most-favoured-nation (MFN) treatment obligation imposed under Article I(1) of GATT is by definition divisible, being based on the extension of the most favourable

<sup>21</sup> *Draft Articles on State Responsibility, ILC Report to the General Assembly*, UN Doc. A/51/10, 159.

<sup>22</sup> G. Arangio-Ruiz, *Preliminary Report on State Responsibility*, 40 YBILC (1988-II) Part 1, 37; *id.*, *supra* note 7, at 47.

<sup>23</sup> As apparently maintained by Pauwelyn, *supra* note 1, at 940.

<sup>24</sup> *Supra* note 5, at 30 ff.

<sup>25</sup> 1155 UNTS 331.

<sup>26</sup> Pauwelyn, *supra* note 1, at 934, notes that 'while breach of human rights necessarily violates the rights of all parties, breach of WTO treaty can be limited to one single party'.

treatment accorded by Member A to Member B to the bilateral relationships between A and all other remaining Members. As pointed out by the Appellate Body in *Canada – Automobiles*, a violation of MFN treatment arises when the advantage of import duty exemption is accorded – *de jure* or *de facto*<sup>27</sup> – to some product originating in *certain countries* without being accorded to like products from *all* other Members.<sup>28</sup>

The privileged treatment Members of regional economic agreements may offer each other,<sup>29</sup> as well as the special and preferential treatment that may be accorded to developing and least-developed countries in derogation from Article I,<sup>30</sup> confirms the divisible character of the obligations under consideration. Furthermore, the treatment accorded to developing countries does not need to be extended to all Members belonging to this category, but can be limited to some of them, provided that the non-discrimination principle – as recently clarified by the Appellate Body<sup>31</sup> – is respected.

The obligations relating to tariff, quota, and other barriers to market access are equally divisible, as Members can violate them only with regard to certain – but not necessarily all – other Members by adopting measures applicable only to these Members, or introducing discriminatory treatment for their products. This is clearly illustrated by regulatory regimes such as the EC Banana Import Regime,<sup>32</sup> and in particular by the possibility of breaching<sup>33</sup> as well as waiving<sup>34</sup> obligations under Article XIII of GATT only with regard to certain Members. Leaving aside the peculiar circumstances of the dispute, *US – Certain EC Products* further demonstrates that a Member may intentionally target exclusively the products imported from designated Members and potentially violate Article II of GATT.<sup>35</sup>

The divisible character of the national treatment obligation imposed by Article III of GATT is less immediate, but nonetheless still clear. The provision, which is expressly directed at preventing Member States from affording protection to their domestic production, prohibits discrimination against imported products once they have entered their domestic markets. As a matter of fact, a state could reserve to like products or directly competing or substitutable products imported from certain countries

<sup>27</sup> *Canada – Certain Measures Affecting the Automotive Industry*, Report of the Appellate Body, 31 May 2000, WT/DS139/AB/R, at para. 78.

<sup>28</sup> *Ibid.*, para. 85. See also *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS55/R, Panel Report, 2 July 1998, at para. 14.145.

<sup>29</sup> See in particular Art. XXIV GATT.

<sup>30</sup> See, for instance: Decision of 28 Nov. 1979 (L/4903), known as Enabling clause; Decision on waiver adopted on 15 June 1999 (WT/L/304); and Decision on waiver adopted on 14 Nov. 2001 (WT/MIN(01)15).

<sup>31</sup> In *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 Apr. 2004, at para. 173, the Appellate Body noted that ‘preference-granting countries are required ... to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond’.

<sup>32</sup> See Reg. EEC 404/93 of 13 Feb. 1993, OJ 1993 L 47/1.

<sup>33</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body, WT/DS27/AB/R, at paras 161 and 163.

<sup>34</sup> See, for instance, Decision on waiver, 14 Nov. 2001 (WT/MIN(01)16).

<sup>35</sup> *US – Import Measures on Certain Products from the EC*, WT/DS165/R, 17 July 2000, para. 6.54.

treatment identical to that of domestic like products, while imposing less favourable treatment on those produced in other countries. This kind of discrimination is likely to take the form of *de facto* discrimination.<sup>36</sup> At any rate, the measures are inconsistent with Article III, albeit that the products of certain Members may be treated as that of the wrongdoing Member and may even benefit from the discriminatory measures.

The obligations relating to unfair trade are divisible too. The relevant treaties impose upon Members a number of substantive obligations relating to the adoption of anti-dumping measures or countervailing duties, both of which typically target one or more identified Members. These obligations can be disregarded in respect of some, but not necessarily all, of the Members allegedly involved in dumping or subsidy. As far as subsidies inconsistent with the WTO are concerned, it is feasible to limit them to the products directed to or imported from one or more identified or identifiable Members. Not even in the case of 'neutral' grants of subsidies will all other Members necessarily suffer from resulting negative consequences on their production.

With regard to the obligations concerning safeguards measures, a Member may adopt these measures in a discriminatory manner, thus breaching its obligations with regard to one or more – but not necessarily all – Members from the territory of which the product concerned is imported. Such a possibility is evident in several disputes, including, for instance, *Argentina – Safeguard Measures on Imports of Footwear*.<sup>37</sup>

Finally, the divisible character of WTO obligations is corroborated by the numerous provisions expressly establishing special or differential treatment for developing or less-developed Members,<sup>38</sup> or by those requiring Members to single out certain developing countries for the purpose of the application of certain measures.<sup>39</sup>

## 4 Extending to WTO Obligations the Legal Regime of Indivisible Obligations

WTO obligations are never inherently indivisible. The legal consequences of their breach, therefore, are limited to the wrongful Member and the Member suffering from or exposed to the adverse effects of the violation, unless the contracting parties have decided to opt out. As observed by the International Law Commission:

<sup>36</sup> See, for instance, *US – Measures Affecting Alcoholic and Malt Beverage*, 19 June 1993, GATT BIDS (39th Suppl).

<sup>37</sup> *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Appellate Body Report, 25 Nov. 1997, especially para. 112.

<sup>38</sup> For a summary of these provisions, see Annex II to the Uruguay Round Agreements in favour of developing countries, available at [www.wto.org/english/tratop\\_e/devel\\_e/anexii\\_e.doc](http://www.wto.org/english/tratop_e/devel_e/anexii_e.doc). See also *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77, 25 Oct. 2004.

<sup>39</sup> Art. 9(1) of the Agreement on Safeguards provides an useful example. See, for instance, *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, 8 Mar. 2002, WT/DS202/AB/R.

States when creating ‘primary’ rights and obligations between them may well, at the same time, determine which State or States are to be considered the ‘injured’ State or States in case of a breach of obligation imposed by that ‘primary’ rule, and thereby determine which State or States are entitled to invoke new legal relationships and even which new legal relationships are entailed by such a breach.<sup>40</sup>

Hence, nothing prevents Members from extending to WTO obligations the legal regime of indivisible obligations. Indeed, when negotiating a treaty on international trade, contracting parties may agree that each of them possesses a legal right in the compliance by any other contracting parties with the obligations imposed by the treaty, and in case of violation is to be considered as an injured state, regardless of any actual or potential adverse impact on its economic interests. As a result, the effects of the violation become immaterial for the purpose of bringing a claim before the adjudication bodies and of reacting to breaches.

In WTO law, such a choice has been the exception rather than the rule. It has been made, in particular, with regard to prohibited subsidies – in so far as the so-called multilateral track is concerned – under the Agreement on Subsidies and Countervailing Measures (SCM) and to obligations deriving from the General Agreement on Trade in Services (GATS).<sup>41</sup>

The SCM is currently based upon the distinction between prohibited and actionable. As regards the first category, under Article 4 of the SCM, any Member that ‘has reason to believe that a prohibited subsidy is being granted or maintained by another Member’ can request the establishment of a panel. In this perspective, all Members are entitled to resort to the dispute settlement system regardless of the effects of the alleged violation.<sup>42</sup>

In *US – FSC*, the arbitrator emphasized that ‘trade effects’, ‘adverse effects’, or ‘trade impact’ are immaterial. He further noted:

Other Members are not obliged to make a case regarding the adverse effects to successfully challenge such measures. They are required simply to establish the existence of a measure that is, as a matter of principle, expressly prohibited. As an empirical matter they undoubtedly do have adverse effects. But that is not the legal basis upon which action may be taken to challenge them under the SCM Agreement.<sup>43</sup>

The different treatment reserved for prohibited subsidies and actionable subsidies<sup>44</sup> may be considered as a compromise definitively to overcome the traditional reluctance of

<sup>40</sup> 37 YBILC (1985-II), Part 2, 26.

<sup>41</sup> E.-U. Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (1997), at 170, however, notes that since the presumption foreseen in Art. 3(8) DSU has never been refuted, it would be logical to extend the procedure of Art. 4 SCM and Art. XXIII GATS by omitting references to the concepts of nullification or impairment or treaty benefits in future reforms of WTO law and WTO procedures for violations complaints.

<sup>42</sup> On the contrary, countervailing measures can be resorted to with regard to prohibited subsidies only if the subsidization is causing or threatens to cause injury to the Member concerned.

<sup>43</sup> *US – FSC*, *supra* note 1, at para. 5.39. See also *Canada – Export Credit and Loans for Regional Aircraft*, WT/DS222/ARB, at para 3.29.

<sup>44</sup> On actionable subsidies, see *infra* Section V.

the United States to accept a determination of injury as a legal requirement for resorting to countervailing duties.<sup>45</sup>

Moving to GATS, Article XXIII(1) reads as follows:

If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

Considering the special nature of trade in services, at the Uruguay Round the Contracting Parties deliberately omitted from Article XXIII of GATS any reference to the concept of nullification or impairment of benefits. Such choice does not derive from GATT case law;<sup>46</sup> it is rather an intentional deviation from the general rule – developed in GATT case law and subsequently codified in Article 8(3) of the DSU – that introduced the *presumption* that a violation of the rules contained in a covered agreement has an adverse impact on the complainant.<sup>47</sup> It follows that in the case of a dispute concerning GATS obligations the consequences of the breach are immaterial and the respondent cannot on this ground challenge the admissibility of the claim.<sup>48</sup>

In the cases of obligations concerning both prohibited subsidies and trade in services, contracting parties intended to attach to violations of divisible obligations some of the typical consequences of *erga omnes* obligations. In the case of a violation, all Members would be considered *ipso facto* injured states and each of them would be entitled to refer the dispute to the DSB, even if the measure concerned had no actual or potential adverse impact upon it.<sup>49</sup>

## 5 Linking the Consequences of Violations of WTO Obligations to the Adverse Impact on the Legally Protected Interest of the Member Concerned

As a rule, resort to the adjudicating bodies has been associated with the notion of nullification or impairment of treaty benefits, in the sense that the conduct allegedly

<sup>45</sup> The question of injury as a requirement for the imposition of countervailing duties was crucial in the Tokyo Round. Until then, the US had invoked the so-called 'grandfather clause' in order to continue to apply the 1930 Tariff Act – under which no finding of injury was necessary – in spite of Art. VI(6) GATT. Other members, led by the European Community, insisted on the need to determine the existence of an injury before resorting to countervailing duties. An agreement was eventually reached in a plurilateral agreement, known as the Subsidies and Countervailing Duties Code (the Agreement on the Interpretation and Application of Arts VI, XVI, and XXIII of the GATT, available at [www.worldtradelaw.net/tokyoround/subsidiescode.pdf](http://www.worldtradelaw.net/tokyoround/subsidiescode.pdf) (last visited 21 July 2006), which required a demonstration that the subsidized imports are causing injury.

<sup>46</sup> Zdouc, 'WTO Dispute Settlement Practice Relating to the GATS', 2 *J Int'l Economic L* (1999) 295, at 298, maintains that this choice 'reflects the fact that the presumption of nullification or impairment of benefits under the agreement in case of a violation of GATT rules was never refuted in GATT dispute settlement practice, and has for all practical purposes operated like an irrefutable presumption'.

<sup>47</sup> See *infra*, text to note 54.

<sup>48</sup> See *infra*, text to note 83.

<sup>49</sup> In *Brazil – Export Financing Programme for Aircraft*, Art. 22(6), WT/DS46/ARB, 28 Aug. 2000, at para 3.48(a), the arbitrators observed that a violation of Art. 3 SCM 'entails an irrefutable presumption of nullification or impairment. It is therefore not necessary to refer to it'.

incompatible with WTO law must have an actual or potential adverse impact on the international trade of the Member concerned.

Already in the GATT system, a violation of the treaty obligations was presumed to cause the nullification or impairment of the treaty benefits of the claimant. In a leading case decided in 1962, the panel maintained that ‘there is normally a presumption that a breach of the rules has an adverse impact on other Members ... and in such cases, it shall be up to the Member against whom the complaints has been brought to rebut the charge’.<sup>50</sup> In 1987, however, another panel noted that there was in the history of GATT not a single case in which a Member had successfully rebutted such a presumption. From this, it deduced that ‘while the Contracting Parties had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption’.<sup>51</sup>

It has been observed that behind the clumsy expression ‘irrefutable presumption’ lies the attempt to turn the treaty language *on its head* since:

by stating that a *prima facie* case cannot be rebutted, it makes the presumption of nullification or impairment derive *ipso facto* from a violation, thus almost discarding the nullification or impairment concept in favor of a focus on whether or not a violation or breach of obligation exists.<sup>52</sup>

In this deformed perspective the impact of the violation would become immaterial, as in the case of indivisible obligations. Article 3(8) of the DSU definitively put the presumption on the right track. It reads as follows:

In cases where there is an infringement of the obligations assumed under a covered treaty, the action is considered as *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

The rebuttable character of the presumption is intended to confine litigation to disputes in which the trade interests of the complaining party are affected, and ultimately to protect the respondent against claims from Members with no economic interests at stake. Yet, the notion of nullification or impairment of treaty benefits has been linked to that of ‘adverse impact’ or ‘harm’.<sup>53</sup> It has been accurately pointed out that Article 3(8) of the DSU:

<sup>50</sup> *Uruguay v. 15 Developed Countries. Recourse to Art. XXIII*, 15 Nov. 1962, BISD (11th Suppl.) 95, at 99–100.

<sup>51</sup> *US – Taxes on Petroleum and Certain Imported Substances*, 17 June 1987, BISD (34th Suppl.) 136, at para. 5.1.9.

<sup>52</sup> J.H. Jackson, *The Jurisprudence of GATT and the WTO* (2000), at 176.

<sup>53</sup> In *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, 28 Sept. 2001, the panel noted that the presumption that benefits are nullified or impaired means that there is a presumption of ‘harm’: at para. 6.105. In *US – Anti-Dumping Act of 1916*, 28 Aug. 2000, WT/DS136/AB/R, at para 73, the Appellate Body recognized the right of Members under Art. 17(4) of the Anti-Dumping Agreement ‘to seek redress when illegal action affects *its* economic operators’ (emphasis added). In the case of provisional anti-dumping measures, such a right is limited to cases in which these measures have ‘a significant impact’.

restates the long-agreed rule that the showing of adverse trade effects ('nullification or impairment of benefits') required under GATT Article XXIII for one government to complain another's conduct will be presumed in cases where the defending government has infringed its obligations under the relevant Uruguay Round Agreement. The defending government may rebut this presumption, however, and prove that the measure has not had an adverse effect on other members.<sup>54</sup>

In order to raise this presumption, the applicant must provide positive evidence<sup>55</sup> and not merely a general assertion<sup>56</sup> that it is suffering from an adverse impact. Then the burden of proof shifts to the respondent, which has to prove the contrary.<sup>57</sup>

The fact that the presumption established by Article 3(8) of the DSU has never been rebutted demonstrates that Members have judiciously resorted to the DSB, as required by Article 3(7).<sup>58</sup> It is hardly conclusive proof that resort to adjudicating bodies is independent of the nullification or impairment of the claimant's treaty benefits. In the era of globalization, certain violations may have an impact on the legally protected interests of most or even all WTO Members. Each of them, therefore, is entitled to resort to the DSB. Such a course of events, nonetheless, is incidental and does not deprive Article 3(8) of its meaning and function.

WTO case law confirms the rebuttable nature of this presumption. In *Guatemala – Cement*, for instance, the panel examined and rejected the argument advanced by Guatemala that the alleged violation did not nullify and impair benefits accruing to Mexico.<sup>59</sup> In *Turkey – Textiles*, the panel observed that Turkey did not provide it with 'sufficient information to set aside the presumption that the introduction of these import restrictions ... has nullified and impaired the benefits accruing to India under

<sup>54</sup> United States, *Statement of Administrative Action, Understanding on Rules and Procedures Governing the Settlement of Disputes*, HR Doc. No. 316, 103rd Cong., 2nd Sess., Vol. 1, 1008–1022 (27 Sept. 1994), reproduced in R. Bhala, *International Trade Law: Theory and Practice* (2nd edn., 2001), at 218, 220.

<sup>55</sup> In *Indonesia – Autos*, *supra* note 28, at para. 14.154, the Panel had to examine 'whether the EC and the US have demonstrated by positive evidence that the measures in question have caused serious prejudice or, in the case of the EC, have threatened to cause serious prejudice, to their interests within the meaning of Part III of the SMC Agreement'. Similarly, in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the US*, WT/DS132/R, 28 Jan. 2000, at para. 7.26, the Panel stated that 'it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired'.

<sup>56</sup> See *Indonesia – Autos*, *supra* note 28, at para. 14.234.

<sup>57</sup> In *Brazil – Aircraft*, *supra* note 49, at para. 3.46, the arbitrators noted that 'if a measure violates a provision of a covered agreement, the measures is considered *prima facie* to cause nullification or impairment. However, if the defendant succeeds in rebutting the charge, no nullification or impairment will be found in spite of the violation.' In *Argentina – Ceramic Tiles*, *supra* note 53, at para. 6.105, the panel observed that it was up to the respondent 'to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement'.

<sup>58</sup> The first sentence of this provision reads: '[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful'. See Martha, 'The Duty to Exercise Judgment on the Fruitfulness of Actions in World Trade Law', 35 *JWT* (2001) 1035.

<sup>59</sup> *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, Panel Report, 17 Nov. 2000, WT/DS156/R, at paras 8.105 ff.

GATT/WTO'.<sup>60</sup> The adverse trade impact does not necessarily imply a decline in the volume of international trade of the state concerned. It is indeed possible that the adverse impact means more limited growth than that which would have been attained in the absence of any conduct inconsistent with WTO obligations. In *Turkey – Textiles*, the panel further pointed out that, 'even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, it would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions'.<sup>61</sup>

Furthermore, it may be sufficient for the violation to have a potential adverse impact, regardless of its negative effects on actual trade.<sup>62</sup> The obligations concerning national treatment are a remarkable example. It has been observed that Article III of GATT 'obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products'.<sup>63</sup> In other words, this provision is directed at 'avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships'.<sup>64</sup>

Exposing imported products to a *risk* of discrimination itself constitutes a form of discrimination within the meaning of Article III.<sup>65</sup> In particular, it is irrelevant that the 'trade effects' on the tax differential between imported and domestic like products, as reflected in the volume of imports, are insignificant or even non-existent. Article III protects expectations not of any particular trade volume, but rather of 'the equal competitive relationships between imported and domestic products'.<sup>66</sup>

<sup>60</sup> *Turkey – Restrictions on Import of Textiles and Clothing Products*, WT/DS34/R, Panel Report, 31 May 1999, at para 9.204.

<sup>61</sup> *Ibid.*

<sup>62</sup> According to the 1949 *Working Party Report on Brazilian Internal Taxes*, GATT/CP.3/42, 30 June 1949, II/181, 185, at para 16, 'the absence of imports from contracting parties ... would not necessarily be an indication that they had no interest in the exports of the product affected by the tax, since their potentialities as exporters, given national treatment, should be taken into account'. The potential character of the harm also means that a Member could resort to the dispute settlement system in respect of measures that could in perspective have a negative impact on the competitive relationship, even if not yet enforced: *US – Section 337 of the Tariff Act of 1930*, 7 Nov. 1989, BISD (36th Suppl.), at para. 5.13. See also *US – Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, BISD (39th Suppl.) 206. The notion of potential harm is well known in the case law of both the ICJ (see *Wimbledon Case*, *supra* note 5) and the ECJ (Case 8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837, at 852). Being related to conditions of competition, this notion must be kept separate from that of legitimate expectations. The latter expression belongs to the non-violation procedure: see *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 19 Dec. 1997, WT/DS50/AB/R, at para. 42; *EC – Customs Classification of Certain Computer Equipment*, 5 June 1998, WT/DS62/AB/R, Appellate Body Report, at paras 88 ff.

<sup>63</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, 4 Oct. 1996, 16.

<sup>64</sup> *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, 18 Jan. 1999, at para. 120.

<sup>65</sup> *EEC – Measures on Animal Feed Proteins*, BISD (25th Suppl.), 14 Mar. 1978, at paras 5.57, 5.60, and 5.76.

<sup>66</sup> *Japan – Alcoholic Beverages*, *supra* note 63. Similarly, quantitative restrictions are illegal under Art. XI GATT even if there is no actual effect on trade: see *EEC – Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, BISD (37th Suppl.), 25 Jan. 1990, 86 (M 126).

## 6 Legal Standing in the WTO Dispute Settlement System

It is somehow surprising that the WTO dispute settlement system has not developed a complete doctrine of legal standing.<sup>67</sup> In *EC – Bananas*, the EC contested the right of the US to advance a claim with regard to the trade in bananas, as its production was minimal and its exports non-existent. It was argued that the US had no legal interest in the dispute, as it had suffered no nullification or impairment of its benefit in the sense of Article 3(3) and (7) of the DSU. Relying on Permanent Court of International Justice (PCIJ) and ICJ case law,<sup>68</sup> the EC requested the panel to decline to rule on the issue with respect to the US's complaint for lack of legal interest.

The panel rejected the argument, since in its view 'neither Article 3:3 nor Article 3:7 of the DSU nor any other provisions of the DSU contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel'.<sup>69</sup> Nonetheless, the panel noted that the US was a producer of bananas and that its internal market for bananas could be affected by the EC regime. It concluded that 'a Member's potential interest in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreement are *each* sufficient to establish a right to pursue a WTO dispute settlement proceedings'.<sup>70</sup>

The Appellate Body upheld the panel's conclusion. It did not read the PCIJ and ICJ case law in the sense of requiring a 'legal interest' in order to bring a case. It further indicated several factors – namely that the US produced bananas, it might have a potential export interest, and its internal market could be affected by the EC regime – which, taken together, were sufficient justification for the US to bring a case.<sup>71</sup> It finally took good care to declare that the decision 'does not mean ... that one or more factors we have noted in this case would necessarily be dispositive in another case'.<sup>72</sup> This conclusion is far from convincing and has been described as 'uncertain'<sup>73</sup> or 'unclear'.<sup>74</sup>

<sup>67</sup> See Bustamante, 'The Need for a GATT Doctrine of *Locus Standi*: Why the United States cannot *Stand* the European Community's Banana Import Regime', 6 *Minnesota J. Global Trade* (1997) 533.

<sup>68</sup> The argument advanced by the EC can be appreciated only through the references to it made by the Panel and the Appellate Body. Unlike with the ICJ, the written documents submitted by the parties in the context of WTO litigation are confidential. Regrettably, neither the panel nor the Appellate Body discussed in detail the PCIJ and ICJ decisions referred to by the EC, and in particular: *SS Wimbledon*, *supra* note 5, *Mavrommatis Palestine Concessions*, PCIJ, Ser. A, No. 2 (1924); *South West Africa Cases*; *supra* note 10; *Northern Cameroons*, Preliminary Objections [1983] ICJ Rep 15; *Barcelona Traction*, *supra* note 13.

<sup>69</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas (Bananas III)*, Panel Report, WT/DS27/R, at para. 7.49.

<sup>70</sup> *Ibid.*, at para. 7.50 (emphasis added).

<sup>71</sup> Report of the Appellate Body, WT/DS27/AB/R, 9 Sept. 1997, at paras 136 and 137.

<sup>72</sup> *Ibid.*, at para. 138. It must be noted that in the arbitration under Art. 22(6), circulated on 9 Apr. 1999, at para. 6.12, the arbitrators took the view that 'the benchmark for the calculation of nullification or impairment of US trade flow should be losses in US export of goods to the EC and losses by US service suppliers in or to the EC'.

<sup>73</sup> Davey, 'Has the WTO Dispute Settlement System Exceeded its Authority?' A Consideration of Deference shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques', 4 *J Int'l Economics & L* (2001) 79, at 98.

<sup>74</sup> F. Breuss, S. Griller, and E. Vrane (eds), *The Banana Dispute. An Economic and Legal Analysis* (2003), at 43.

Legal standing has been defined as ‘the right to bring an action in a dispute’.<sup>75</sup> In other words, the claimant must have a ‘legal right that a court will protect’.<sup>76</sup> According to Article 3(7) of the DSU, the aim of the dispute settlement mechanism is to secure a positive solution to disputes, normally through the withdrawal of the measures found to be inconsistent with the provisions of any covered Agreement. The notion of dispute is to be found in public international law.<sup>77</sup> A dispute arises when state A unsuccessfully requires state B to take or abandon certain conduct allegedly proscribed or prohibited by an obligation incumbent upon state B in order to permit state A to satisfy what it perceives as its legally protected interest. The conflict of attitudes caused by the claim put forward by state A and the refusal of state B to concede,<sup>78</sup> ‘is a matter for objective determination’.<sup>79</sup> If there is no dispute, there can be no exercise of jurisdiction.

The reference to PCIJ and ICJ case law made by the panel and the Appellate Body in *Banana III* was rather unfortunate. Nothing in ICJ case law, in particular, suggests that there can be an adjudication regardless of the existence of a legal right or interest. Quite the contrary, the Court systematically verifies whether the subjective rights of the claimant are involved,<sup>80</sup> albeit that this does not necessarily imply that its material, economic or moral interests have to be affected by the violation.<sup>81</sup> Hence, there is no need to depart from these principles in the WTO dispute settlement system. The crux of the matter remains whether the claimant is seeking protection of its legal rights or interests or, to use the wording of Article 3(2) of the DSU, preservation of its rights and obligations under the covered Agreements. WTO adjudicating bodies, therefore, may be called upon to inquire whether the relevant treaty provisions legally protect the Members against certain conduct in so far as it has a negative impact – in actual or potential terms – upon their interests (as, for instance, in the case of the provisions concerning tariffs or actionable subsidies), or regardless of its effects (as in the case of GATS or prohibited subsidies).

Instead of inquiring which category the complaints advanced by the US belonged to, in *Banana III* the panel and the Appellate Body merely denied that the claimant had to possess a legal interest. They nonetheless introduced a set of criteria relating to its national and international economic interests which are apparently necessary to justify resort to the dispute settlement system. In so doing, they blurred the distinction between, on the one hand, legally protected rights respect for which constitutes the

<sup>75</sup> *EC – Regime for the Importation, Sale and Distribution of Bananas*, *supra* note 33, at para. 132, n. 65.

<sup>76</sup> Davey, *supra* note 75, at 97.

<sup>77</sup> With regard to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the following definition of dispute has been elaborated by the Executive Directors: ‘[t]he dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation’: 1 ICSID Rep 28.

<sup>78</sup> *South West Africa Cases*, Preliminary Objections, *supra* note 10, at 328.

<sup>79</sup> *Interpretation of Peace Treaties*, Advisory Opinion [1950] ICJ Rep 65, at 74.

<sup>80</sup> In *Barcelona Traction*, *supra* note 13, at 33, in particular, the Court observed that ‘it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium’s capacity’.

<sup>81</sup> See *supra* Section II.

objective of the WTO dispute settlement system; and, on the other hand, economic interests which may be absent in WTO disputes.

Following the pronouncement in *Banana III*, there is a tendency to treat all complaints brought within the WTO dispute settlement system as a unique genre.<sup>82</sup> Yet, not all WTO obligations are identical from the standpoint of the settlement of disputes. If a dispute concerns obligations to which Members have attached the consequences typical of indivisible obligations – namely prohibited subsidies or obligations stemming from GATS – adjudicating bodies do not need to assess the actual or potential adverse effects of the respondent's conduct upon the claimant's economic interests. It is extremely significant that in *Banana III* the EC challenged the US's legal standing with regard to the claims made under GATT, but not with regard to those made under GATS,<sup>83</sup> whose Article XXIII allows Members to resort to the adjudicating bodies regardless of the adverse effect of the respondent's conduct.

In all other cases, such scrutiny may be required when the respondent challenges the presumption established by Article 3(8) of the DSU that its conduct allegedly incompatible with WTO law has nullified or impaired the applicant's treaty benefits. As a result, WTO adjudicating bodies may have to assess, on the basis of the evidence provided by the parties, the actual or potential adverse effects of the respondent's conduct upon the claimant's economic interests.

## 7 Countermeasures

In a case of non-compliance with the recommendations and rulings of the DSB, the Member that has won the case may request authorization to suspend the application to the Member found in breach of its obligations of concessions or other obligations under the covered agreements.<sup>84</sup> These temporary measures are adopted in order to induce compliance by the defaulting Member.<sup>85</sup> In line with the notion of countermeasures existing in international law,<sup>86</sup> WTO counter-measures affect the bilateral relationship between the applicant and the defaulting Member(s).<sup>87</sup> Yet, the reaction

<sup>82</sup> It is interesting to note, however, the different positions on the relevance of material injury in WTO litigation. For Picone and Ligustro, *supra* note 2, at 587–589, in particular, material injury is at once necessary and sufficient to bring a claim within the WTO dispute settlement system; whereas for M. Matsushita, T.J. Schoenbaum, and P.C. Mavroidis, *The World Trade Organization, The World Trade Organization. Law, Practice, and Policy* (2004), at 26, all WTO members seem to have an interest in any material breach of the covered agreements (*actio popularis*).

<sup>83</sup> As admitted by the Appellate Body, *supra* note 71, at para. 137.

<sup>84</sup> On WTO remedies, see in particular: Charnovitz, 'Rethinking WTO Trade Sanctions', 95 *AJIL* (2001) 792; Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2001) 763; Garcia-Rubio, 'Unilateral Remedies as a Means of Forcible Execution of WTO Recommendations and Decisions', in M.L. Forlati Picchio and A.L. Sicilianos (eds), *Economic Sanctions in International Law* (2004), at 445 ff.

<sup>85</sup> See, for instance, *Bananas III* Art. 22(6) Arbitration, WT/DS/27ARB, 9 Apr. 1999, at para. 6.3. In *Brazil – Aircraft*, *supra* note 49, at paras 3.44–3.45, the arbitrators noted that appropriate countermeasures would *effectively* induce compliance.

<sup>86</sup> See *Articles on Responsibility of States*, *supra* note 20, at 196, Arts 49 ff.

<sup>87</sup> See *Responsabilité de l'Allemagne*, *supra* note 6.

of Member A is triggered by the violation by Member B of obligations owed to Member A and is intended to damage the economic interests of Member B in order to ensure respect for the legally protected interests of Member A.<sup>88</sup> Normally, the magnitude of the reaction is strictly related to the adverse effects on the applicant caused by the violation. Under Article 22(4) of the DSU, ‘the level of suspension of concessions or other obligations authorized by the DSU shall be equivalent to the level of the nullification or impairment’.<sup>89</sup> The relationship is equally evident in the context of actionable subsidies, as Article 7(9) of the SCM establishes that counter-measures shall be commensurate with the degree and nature of the adverse effects determined to exist. As maintained by the arbitrators in *Brazil – Aircraft*, these countermeasures aim ‘at eliminating the adverse effects of measures on the trade of a given Member’.<sup>90</sup>

It is then necessary to quantify the adverse impact of the unlawful measures on the trade of the state concerned. The task is performed by the arbitrators as provided for by Article 22(6) of the DSU. As explained in *EC – Hormones*, once the panel has found a WTO inconsistency, it can *presume* that such inconsistency has caused nullification or impairment. The arbitrators appointed under Article 22(6), in contrast, must go one step further: they focus on trade flow and estimate trade foregone due to the unlawful measures as from the expiry of the reasonable period.<sup>91</sup>

In order to assess the level of nullification or impairment for the purpose of assessing whether counter-measures are appropriate, arbitrators may adopt a counterfactual approach.<sup>92</sup> They estimate the volume of trade that the complaining Member would have attained had the respondent complied with the recommendations and ruling promptly or within the reasonable period,<sup>93</sup> and then compare it with the actual volume of trade achieved.

Bearing in mind the above considerations,<sup>94</sup> however, certain WTO obligations are to be treated as indivisible, in the sense that if they are violated all Members are injured and therefore entitled to resort to the dispute settlement system – including the provisions concerning counter-measures – regardless of the actual or potential effects of such violation. This is notably the case with prohibited subsidies. As accurately

<sup>88</sup> Needless to say, the bilateral character of the countermeasures could undermine their effectiveness. See the proposals put forward by Mexico (TN/DS/W/23, 4 Nov. 2002) and the Least-developed Countries (TN/DS/W/17, 9 Oct. 2002) to improve the effectiveness through the introduction into the dispute settlement system, respectively, of tradable remedies and collective countermeasures. See also Bagwell, Mavroidis, and Staiger, ‘The Case for Tradable Remedies in WTO Dispute Settlement’, available at [www.ycsg.yale.edu/focus/gta/tradable\\_remedies.pdf](http://www.ycsg.yale.edu/focus/gta/tradable_remedies.pdf) (last visited 21 July 2006).

<sup>89</sup> On the distinction between proportionality and equivalence, see Kolb, ‘La proportionnalité dans le cadre des contre-mesures et des sanctions – essai de clarification conceptuelle’, in Forlati Picchio and Sicilianos (eds), *supra* note 84, at 379 ff. 387–388, and 435–436.

<sup>90</sup> *Brazil – Aircraft*, *supra* note 49, at para. 3.57(b).

<sup>91</sup> *EC – Measures concerning Meat and Meat Products (Hormones)*, Art. 22(6), WT/DS26/ARB, 12 July 1999, at para 42, emphasis in the original.

<sup>92</sup> *Canada – Aircraft*, *supra* note 43, at para. 3.40.

<sup>93</sup> For instance, in *EC – Hormones*, *supra* note 91, at para. 38, the arbitrators asked themselves ‘[w]hat would annual perspective US export of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999?’.

<sup>94</sup> See *supra*, Section IV.

noted in *Brazil – Aircraft*, counter-measures adopted in response to violations of Article 4 of the SCM aim ‘at removing a measure which is presumed under WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent’.<sup>95</sup>

The trade effects of the violation upon the complaining state being immaterial, the question whether the counter-measures are appropriate cannot be answered by means of the comparison described above. Rather, ‘countermeasures should be adapted to the particular case at hand’.<sup>96</sup> In the case of prohibited subsidies, in particular, the respondent has just one way of complying with the recommendations and ruling, namely by withdrawing the subsidies. Counter-measures therefore have been considered appropriate if they corresponded to the amount of subsidies that had to be withdrawn,<sup>97</sup> normally adjusted by the arbitrators to ensure that the respondent was effectively induced to withdraw them.<sup>98</sup>

It is not surprising that the notion of *erga omnes* or indivisible obligations made its appearance in WTO litigation precisely in arbitration under Article 22(6) of the DSU concerning prohibited subsidies. In *US – FSC*, the arbitrators found that the obligation concerning prohibited subsidies:

is an *erga omnes* obligation owed in its entirety to each and every Member. It cannot be considered to be ‘allocatable’ across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every Member, which is manifestly inconsistent with an *erga omnes per se* obligation. Thus, the US has breached its obligation to the EC in respect of all the money that it has expended, because such expenditure in breach – the expense incurred – is the very essence of the wrongful act.<sup>99</sup>

The obligation under examination is not inherently indivisible so as to create a unique legal situation *vis-à-vis* all Members, as is the case, for instance, with human rights obligations. Nonetheless, the Contracting Parties decided to extend the consequences typical of indivisible obligations to obligations relating to prohibited subsidies. Whereas the relationship between Members remains bilateral in character, all Members are entitled to require the respect for the obligations, to resort to the dispute settlement system, and to adopt counter-measures. In so doing they vindicate their own legal rights, regardless of the fact that they have suffered from the effects of the violation. Again in *US – FSC*, it was noted that:

the conclusion we have reached is not in any sense, a matter of ‘entitling’ the EC to act ‘on behalf’ of Members other than itself. [The EC] is proposing countermeasures relating to the redress of rights and obligations as between those two Members.<sup>100</sup>

<sup>95</sup> Decision by the Arbitrators, *supra* note 49, at para. 3.57(c).

<sup>96</sup> *US – FSC*, *supra* note 1, at para. 5.12; *Canada – Aircraft*, *supra* note 43, at para. 3.56.

<sup>97</sup> See *Brazi – Aircraft*, *supra* note 49, at paras 3.33–3.40, 6.1–6.5.

<sup>98</sup> In *Canada – Aircraft*, *supra* note 43, at paras 3.138–3.140, the arbitrators decided ‘to adjust the level of countermeasures calculated on the basis of the total amount of the subsidies by an amount which we deem reasonably to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations’.

<sup>99</sup> *US – FSC*, *supra* note 1, at para. 6.10.

<sup>100</sup> *Ibid.*, at para. 6.63.

In order to induce the US to comply with its obligations, the arbitrators considered as appropriate the counter-measures requested by the EC in the amount of US\$4 billion, roughly equivalent to the total value of the subsidy unlawfully granted by the US. They rejected the argument advanced by the US that counter-measures should have been allowed in proportion to the EC's share of the global trade effects of the subsidy, quantified at about 26.8 per cent of the estimated value of the subsidy. The US observed that the decision:

incorrectly and inappropriately purports to import into WTO jurisprudence the concept *erga omnes*. This concept is drawn from public international criminal law, and describes an obligation that is owed to all states. The concept *erga omnes* is squarely at odds with the fundamentally bilateral nature of WTO and GATT dispute settlement and with the notion that WTO disputes concern nullification and impairment of negotiated benefits to a particular Member. WTO adjudicators are tasked with resolving disputes between specific complaining and defending parties. Adjudicators may not, through improper importation of the concept *erga omnes*, enforce WTO obligations on behalf of non-parties to a dispute.<sup>101</sup>

The critique is not convincing. Apart from the awkward reference to public international criminal law, it neglects the fact that, in accordance with Article 4 of the SCM, a Member may complain about the concession of a prohibited subsidy even if such measure has no adverse impact on its trade. This does not mean that, as with the obligations in the field of human rights or humanitarian law, some WTO obligations are necessarily *erga omnes* or indivisible. Nevertheless, there is nothing intrinsically wrong with extending some features of indivisible obligations to international economic law. Thus, all Members have a legal interest in respect for it and litigation is not confined to cases in which the complainant has suffered or may suffer materially as a result of the violation. As a result, the proportionality test does not apply as between the counter-measures and the effects of the violation upon the complainant (which may be non-existent). Rather, it concerns the effectiveness of the counter-measures, as it applies between the counter-measures and the objective they are aimed at.<sup>102</sup>

With regard to the obligations described in part IV, it is fully possible that more than one Member – and theoretically even all Members – will complain about the same violation and request the authorization to adopt counter-measures. In *Brazil – Aircraft*, the arbitrators maintained that in this case ‘the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned’.<sup>103</sup> This view overlooks the fact that in disputes concerning these obligations some or even all complainants may have no trade in the product concerned. In the case of multiple simultaneous – presumably joint – complaints, the arbitrators deciding under Article 22(6) of the DSU may take into account

<sup>101</sup> Statement at the DSB meeting of 7 May 2003, Item 2. *US – Tax Treatment for ‘Foreign Sales Corporations’*, available at [www.us-mission.ch/press2003/0507DSB.html](http://www.us-mission.ch/press2003/0507DSB.html).

<sup>102</sup> The view expressed in the document referred to in *supra* note 101 that ‘the proportionality (or disproportionality) of countermeasures must be assessed in terms of the trade effects of the prohibited subsidies on the complaining Member’, therefore, cannot be shared.

<sup>103</sup> *Brazil – Aircraft*, *supra* note 49, at paras 3.57–3.60.

the trade interests of the complainant(s) – if any. However, they are not prevented from allocating counter-measures even in the absence of trade interests. The crux of the matter is the total of the authorized counter-measures the sum of which must be appropriate in the sense that they are expected effectively to induce compliance.

The question is more complicated when complainants are authorized to adopt counter-measures at different times. Such a possibility was clearly admitted in *US – FSC*, when the arbitrators observed that the finding did not affect ‘the ability of other complainants to subsequently request and, if warranted, obtain an authorization to take appropriate counter-measures in accordance with Article 4:10 of the SCM Agreement.’<sup>104</sup> Should this occur, the arbitrators need to adjust the evaluation made in the previous decision(s) in order to decrease the level of counter-measures already authorized and at that time deemed appropriate. This is necessary to ensure that the sum of the counter-measures so revised and those authorized in the present proceedings are adequate and will effectively induce the respondent to comply with the recommendations and rulings of the DSB.

## 8 Conclusions

The obligations deriving from participation in the WTO are never inherently indivisible or *erga omnes*. They are bilateral in character and compliance with them may be selective. Their violation may affect or threaten to affect the legally protected interests of one or more – but not necessarily all – other Members.

However, contracting parties have decided to extend to certain WTO obligations the legal regime of *erga omnes* obligations. This occurred with regard to the obligations relating to prohibited subsidies and those stemming from GATS. As with *erga omnes* obligations, all Members are considered injured parties and are allowed to bring a claim before the adjudicating bodies regardless of the actual or potential adverse effects of the violation upon their trade. This clearly remains the exception.

As a rule, resort to the WTO dispute settlement system is open to Members whose trade has suffered, in actual or potential terms, from the violation of WTO obligations. Hence, Article 3(8) of the DSU introduces the presumption that violations of WTO obligations cause nullification or impairment of the benefits of the Members. The respondent can challenge such a presumption and, if the challenge is successful, then adjudication is precluded.

The findings of *Banana III* notwithstanding, it is submitted that, in line with international litigation before the ICJ and other international tribunals, a Member complaining to the adjudicating bodies about a violation of WTO obligations is always seeking vindication of its legally protected interests. Whether the adverse impact of the violation upon the trade of the claimant is immaterial (as in the case of prohibited subsidies) or the object of the presumption established by Article 3(8) of the DSU depends on the relevant treaties provisions.

<sup>104</sup> *US – FSC*, *supra* note 1, at para. 6.63.

The extension of the legal regime of *erga omnes* obligations to certain WTO obligations must be appreciated also from the standpoint of counter-measures. As a rule, counter-measures must be proportionate or equivalent to the nullification or impairment of the benefits of the complainant. In the case of WTO obligations treated as indivisible, however, the effects of the violation are immaterial and the complainant may have suffered no adverse effects at all. As a result, counter-measures are to be permitted to the extent that they will effectively ensure compliance. In the case of multiple applicants, however, the share of the global market in the product concerned held by the different applicants may be taken into account. Furthermore, when counter-measures are not authorized simultaneously, their allocation must be adjusted each time an additional Member is allowed to resort to such measures.