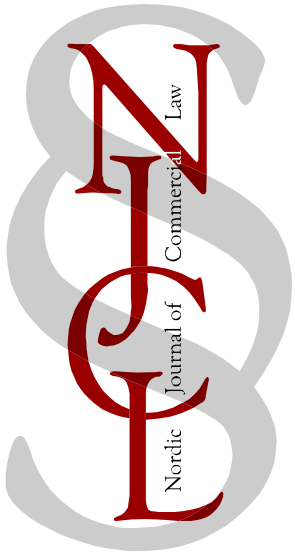


# COLLECTIVE COUNTERMEASURES AND THE WTO DISPUTE SETTLEMENT: 'SOLIDARITY MEASURES REVISITED'

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## 1. Introduction

In the ten years of the existence of the World Trade Organization (WTO) dispute settlement system, eighty cases have led to the adoption of the Panel Reports and sixty-one to the adoption of the Appellate Body (AB) Reports. Among these cases, the enforcement mechanism of last resort-countermeasure has been resorted to eight times. The eight cases include, *EC – Bananas* (US), *EC – Bananas* (Ecuador),[1] *EC – Hormones* (US, Canada),[2] *Brazil – Aircraft*,[3] *FSC*,[4] *Canada – Aircraft II*,[5] *US – 1916 Act*,[6] and the "*Byrd Amendment*".[7] This number is almost four times more than those under the forty-seven year life-span of the WTO's predecessor-the General Agreement on Tariffs and Trade (GATT) 1947. On the other hand, there are also cases where compliance with the dispute settlement reports has been contested.[8]

The relatively frequent recourse to countermeasures and the disagreement with the level of compliance presumably suggest that the present enforcement regime of the WTO Dispute Settlement Body (DSB) reports seems to be arduous.[9] We therefore contend in this writing that the weakness of countermeasures is not because countermeasures by nature cannot induce compliance, but because the WTO countermeasures are not coercive enough to induce compliance. The traditional international law counter-measures (which may be collective) were codified by the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Act in 2001 and are presumably applicable to all fields of international law where there arises a question of state responsibility, except there is a derogation provided for by a particular regime. Classical treaty law also considers a material breach of a multilateral treaty by one party as a sufficient ground for the suspension in part or in whole of the operation of the treaty by other parties to the treaty.[10] Neither the panel nor the Appellate Body (AB) has really considered addressing these issues in its rulings and recommendations since the establishment of the WTO; though a number of academic writings and dispute settlement reports suggest that the WTO regime should not be conceived as an isolated field of international law.

The following section of this paper examines from a more general perspective the use of collective remedies under international law. The third section of the paper presents the debate on collective countermeasures developed in the ILC's draft Articles. This, we will call solidarity measures.[11] By using past panels and AB jurisprudence, section four sets forth arguments in support of the view that acceding to the WTO engages the State so doing to a multilateral engagement, which may be invoked by any WTO Member at any time in case of a breach. Section five makes the case for solidarity measures in the WTO dispute settlement, while section six deals with the conclusions.

## 2. Collective Remedies under International Law

Remedies under international law have always been traditionally viewed as something more bilateral than collective.[12] Thus, according to this view, only states which have directly suffered injuries from an illegal act can claim damages.[13] But recent events and practices in the international legal system have proven this traditional view not necessarily correct. As early as in 1915, Eliahu Root argued that states engaging in the illegal use of force or taking other actions which constitute threats to law and order in the international community should be subject to remedies from other states which are not directly injured by the defendant's illegal act.[14]

The incorporation of collective countermeasures into the international legal system is based on the assumption that international agreements from a broad perspective have a multilateral effect in the events of their violation. The remedies at the disposal of a directly injured state may also be inadequate for such state to make a recalcitrant state to respect its obligations under international law. Seeking the participation of third states for the eventual application of collective remedies in such a situation may be seen as a desirable alternative. It could also be possible that a directly injured state may be capable of imposing sufficient sanctions on a recalcitrant state; but due to blatant and widespread violation of international law the application of a sufficient unilateral countermeasure is often not possible. For instance, during the war in the Persian Gulf between Iraq and Iran, the safety of neutral vessels was threatened. The United Nations intervened and did not oppose other neutral states that deployed forces in the Gulf to protect their flags and other flag vessels from illegal attacks from those engaged in battle.[15]

There is no world police to command or coerce obedience to international law rules. Instead, the international community has to rely on the combination of other mechanisms such as countermeasures to win respect and compliance for these duties. The jurisprudence of the WTO Dispute Settlement System (DSS) suggests alternatively that collective countermeasures against the impairment or nullification of WTO law are still alien in the practice of the system.[16] For the reason stated above, countermeasures must be effective in the sense that in their collective form; the rights of smaller states to a particular agreement would be respected as much as the rights of powerful member states. Countermeasures must also be effective in order to achieve its primary purpose of inducing compliance.

In the first place, when we try to establish a case law argument for third states remedies in international law, we would often rely upon the land-mark *Wimbledon case* in which the Permanent Court of International Justice (PCIJ) allowed third party members of a multilateral treaty to intervene.[17] The PCIJ in this case allowed Poland to intervene, though it had no interest in the case. The basis for Poland's intervention rested on the fact that it was a party to the Treaty of Versailles which had been violated by Germany. Though the *Wimbledon case* seems to have established only a good procedural support for third states intervention in third party adjudication under international law, it does provides some supportive arguments for collective action under international dispute resolutions. This is based on the theory that legal rights belong to all parties to a multilateral treaty.

## 3. International Law Codification and Collective Remedies

Recent codifications of international law reflect the desire of the international community to clearly bring to the fore the idea of collective countermeasures in case of a continuous violation of international law.[18] The draft articles prepared by the International Law Commission (ILC)[19]are important in the evaluation of the application of collective countermeasures in the WTO Dispute Settlement Mechanism (DSM). The adoption in August 2001 by the ILC of its articles on Responsibility of States for Internationally wrongful acts clearly marked a defining moment in the more than half a century journey of the work of the ILC on the definition of the nature of the obligations of States and other actors in international law. The ILC has undergone a long journey

in accomplishing its duties on the codification of customary international law in the field of state responsibility.

The issue of solidarity measures occupied an important part of the debates in the ILC's work as it is demonstrated in Article 54 of the Draft. In the last years of the ILC work, the role of third states as regards the enforcement of the decisions of an international tribunal formed one of the three most important substantive problems to resolve. The other two main issues were the fate of States' crimes and the delimitation of the notion of 'injured State,'[20] However, the ILC work in its draft stage has already attracted attention from international adjudicating body, as seen from the comments of J. Charpentier and G. Apollis in the *Rainbow Warrior* Case.[21] Though, without detailed guidelines on invoking solidarity measures, perhaps the best support for collective countermeasures against a state for a continuous violation of a multilateral treaty is found in the ILC's Articles. Even if not promptly adopted by the General Assembly of the United Nations as the case may be, the ILC's Articles now represents an authoritative restatement of customary international law,[22]which maybe useful in a sense for international dispute resolution. Consequently from this viewpoint, the ILC's Articles seemingly appear as a relevant starting point for solidarity measures in the enforcement of member states obligations under the multilateral trading system.

*3.1. The importance of the ILCs Draft on approaching Collective Remedies*

Prior to the adoption of the last draft of the Commission's report in 2001, some members made candid statements indicating that the outcome of the Commission's final reports would be a significant move towards the 'construction of international public law.'[23] Such statements were far from being wrong. As pointed out above, the final Articles of the Commission's work adopted in 2001 might seemingly not be open for signatures by Members of the United Nations. It might take the form of a resolution of the General Assembly of the United Nations. However, it appears that if there is no diplomatic conference to sanction the application of the Articles, the ILC's work will best serve the needs of the international community only if it is weighed, interpreted, and applied with much care.[24] This is no surprise. The Vienna Convention on the Law of Treaties (VCLT), which is widely applied now by international courts "as customary international law and not by its reason of being treaty", witnessed the same care.[25] In a way, the proposal on collective countermeasures in the ILC's Articles may be seen as 'the beginning of international public enforcement.'[26]

However, the question whether a non-injured state should be allowed to go with the directly injured state or entirely on her own, seemed to have presented some difficulties in the final stages of the work of the Commission.[27] The sensitive nature of the issue explained why some of the Commission's members were quite cautious about it. On the other hand, the importance of collective countermeasures in the Commission's work was further developed by the proposal of James Crawford in 2000. In the proposal, Crawford identified two scenarios where collective countermeasures could be imposed in order to enforce the rulings of an international tribunal.

First, the injured state could request assistance from a third state, where it finds itself incapable of inducing the recalcitrant state to respect the rulings of the tribunal. Secondly, third states may collectively impose countermeasures when they perceive that the responsibility breached is of a

general interest.[28] Hence, the rationale for the latter is based on what Martti Koskenniemi describes as "solidarity measures."[29] And, as mentioned earlier, we will be using it interchangeably with collective countermeasures in this writing. Though some governments preferred rather to shift the issue of collective countermeasures to the discretionary power and general mandate of the Security Council, Crawford's proposal received a wide degree of support from within and outside the ILC.

The grudging wariness with which the Commission viewed the importance of countermeasures permeated the entire project.[30] However, the importance of the work of the Commission has not only sparked a stream of intellectual writings by academics,[31] but also attention from an international adjudicating body.[32] The International Court of Justice (ICJ) and the ILC have so far had a protracted relationship. It is not only that the ICJ makes citations from the work of the ILC, but also the ILC members have always been elected members of the Court.[33] Not withstanding the difficulties that surrounded the task of the Commission members, the ILC draft is an important step toward the codification of customary international law.

*3.2. The ILC's Articles and Legal Regimes without specification on particular remedy*

One open-ended question as regards different legal regimes is when such regimes do not provide for specific remedies. But a regime with specific rules on how to clinch differences stemming from such a regime may provide a definitive leeway for disputes resolution. The usefulness of such a regime also stems from the fact that it may provide better access to the will of the parties intended to be bound by such treaty as the case may be. But when the *lex specialis* nature of such a regime fails for instance, in the domain of remedies, the whole issue of specific remedies appropriate for the illegality at hand may fall back to what might be ascertained by the judge as the common intention or the will of the parties at the time of concluding the treaty in question. Thus, either the 'common intention' of the parties or general international law would be the guiding force for the judiciary in such a case.[34] This issue appeared to have been handled in a more general manner by the PCIJ in the *Chorzow Factories* case.[35] Though it may be difficult to say with certainty when a *lex specialis* has failed, if the limitation of *lex specialis* can only be cured by general or customary practice, the conclusion of the ILC's work demonstrated a significant move towards the codification of the rule of customs in the international sphere.[36] Furthermore, a special regime may also be complemented not on the basis of a particular failure, but to fill lacunae. If such cases concern closing a gap without which certain objectives might not be achieved; for instance, inducing compliance by countermeasures in the case of WTO jurisprudence, a resort to classical treaty law maybe unavoidable. Thus, Article 60.2 of the VCLT which is presumably by its nature applicable to all domains of public international law (including the WTO law), considers a material breach of a multilateral treaty, as a sufficient ground by other parties to the treaty to suspend in part or in whole or to terminate altogether the operation of such treaty against the defaulting party.[37]

In Part Four article 55 of the ILC's draft Articles, dealing with *lex specialis,* the draft applies only where there is no provision under a particular convention governing the wrongful act committed.[38] There is a presumption that the draft will be very useful for an adjudicating body where there is a lacuna as regards a particular treaty provisions. To this extent, (assuming it represents an authoritative text or an authoritative restatement of customary international law) the ILC draft may be applicable if not directly, indirectly to the dispute settlement regime of the WTO.

## 4. Contextual Issues

In the perspective of the WTO Dispute Settlement Understanding (DSU), article 19.1 sentence two is to the effect that in addition to the recommendations of the panel or Appellate Body (AB), they may suggest ways of implementation of their decisions to the non-compliant Member. To this extent, article 19.1 does not prejudge the limit of the panel in making such suggestions. In line with this reasoning, the DSU does not preclude the suggestion of a specific remedy. The WTO Agreement is an international treaty, and acts committed in breach of an international treaty amount to international wrongful acts. Parties to an international treaty would not just sit and watch another contracting party walk away from their international obligations under such treaty. From this perspective, the ILC's draft is consequently relevant for the evaluation of the necessity of solidarity measures under the WTO Agreements.

Many negotiators in Geneva may be quite sceptical as regards this view. The scepticism stems from the fact that they consider the WTO regime to be quite special in itself (*lex specialis*), as opposed to other branches of general international law. Eventually, they are 'insulated from general public international law.'[39]

Much has been said about the special nature of the WTO law.[40] The question one would ask at this juncture is; how special WTO law really is? It is worth noting that being a Member of the WTO creates international obligations, which Members must respect in good faith. The principle of *Pacta Sunt Servanda* which applies to all international law obligations including those of the WTO requires States to respect their treaty obligations in good faith.[41] This principle, at once a principle of law and a general principle of international law, controls the exercise of rights by WTO Members.[42] Joost Pauwelyn rightly argues that,

> "[S]tates in their treaty relations, can contract out of one, more or in theory, all rules of general international law (other than those of *jus cogens*), but they cannot contract out of the system of international law. As soon as states contract with one another, they do so automatically and necessarily within the system of international law."[43]

By implication, the moment the accession process to the WTO of a particular State is completed; such Member will be subjected within the system of international law to conform its trade practices to the treaty text obligations of the WTO and annexed agreements.

However, the debate on whether to conceive international economic law such as GATT/WTO in isolation from the general corpus of international law has long been contentious within the academic circles. In his report on the *Societé Francaise Pour le Droit International*, Prosper Weil argued that international economic law has the same place as the law of treaties and the law of neutrality in international law.[44] The understanding of the meaning of 'self contained' regime in itself seems to be very uncertain. Nonetheless, in its first report, the AB acknowledged that the WTO Agreement and its annexes are not to be read in clinical isolation from public international law.[45] This judgment seems to have been confirmed and followed in subsequent dispute settlement rulings.[46]

In this particular respect, the ILC's Articles have dealt with the issue of countermeasures taken by third States and where the responsibility is owed to the international community at large (*erga omnes*).[47] Collective countermeasures may also be invoked in a situation where the responsibility is owed to a group of States of which the State taking the countermeasure is a member and the obligation is established for the protection of the collective interests of that group of States. Taking into account the fact that WTO rules are rapidly expanding in the sense of the parties that they affect, there is a strong reason to consider WTO obligations as multilateral and not merely bilateral.[48] Any breach of WTO obligations affects not only members as governments, but also individual companies, consumers and other economic operators in the domestic and global market places. Furthermore, pursuant to DSU Article 3.8, a breach of a particular WTO obligation affects not only a particular WTO Member, but all the Members to the agreement in question. Thus, a particular breach has a multilateral effect.[49]

The panel in the *United States Section 301-310* case stressed the importance of the "creation of market conditions conducive to individual economic activity in national and global market places".[50] Indeed, the panel recognised the importance of the individual consumers and undertakings in various member states when applying a measure within the WTO disciplines. The arbitration has also pointed out that the DSU has very significant objectives,

> "[t]he most relevant in our view are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system."[51]

The Arbitration reiterated on the fact that the DSU is the WTO cornerstone for providing predictability and security to the entire WTO disciplines and through it that of the market place and its different operators.[52]

With this in mind, there is an incentive to believe that a nullification or impairment of benefits accruing to any member state to the WTO treaty entails a breach of responsibility under a multilateral treaty.[53] Thus, such wrongdoers shall be compelled or induced to bring their measures into conformity with their responsibility under the WTO law and also be liable for the provision of compensation.[54] Furthermore, on appeal in the *EC – Bananas III* case, the AB upheld the panel rulings that the increased interdependence of the global economy is a glaring indication that any WTO Member has an interest in any particular violation. Thus, all WTO "Members have a stake in enforcing the WTO rules" now more than ever.[55] To this extent, the ILC's draft Articles deal with collective countermeasures by permitting states not 'directly injured' by the illegal measures to invoke the responsibility of other States and take countermeasures where there is continuous violation of a treaty obligation.[56]

The issue of collective implementation of the rulings of the Dispute Settlement Body (DSB) seem to have been taken note of, though has rarely been literally raised. According to the second sentence of DSU Article 21.6,

> "[T]he issue of implementation of recommendations or rulings may be raised at the DSB by any Member at any time following their adoption."[57]

Alternatively, since the purpose of countermeasures in the DSU (suspension of concessions as in WTO parlance) is to induce compliance,[58] the ILC's draft seem to be more clear on this issue[59] in the sense that the ILC's Articles provide a good basis for the arguments for collective countermeasures in the context of the DSU.

## 5. The Case for Solidarity Measures in Enforcing DSB Rulings and Recommendations

The underlining rationale for a call for solidarity measures in the context of the DSB rulings and recommendations enforcement process would depend on whether a violation of a particular WTO covered agreement would be seen as a breach of a Member's obligation under international law and also largely on the implications of a non-compliance with the WTO law. In this context, having made these determinations in the foregoing sections, it is still not self-evident why alternative enforcement possibilities under customary rules of State Responsibility cannot be resorted to if the remedy (suspension of concessions by the 'directly injured' state alone) under the DSU appears illusory to result in compliance.[60] It is true, that the DSU in itself does not explicitly provide any real guidance or reference to the general rules of State Responsibility in the context of the WTO, let alone a possibility to resort to an alternative enforcement regime provided for by the customary rules of State Responsibility in a situation where the DSU becomes insufficient to respond to continues violation of a relevant WTO treaty commitment.[61] It is also true that even if the panels or the AB on its own, make use of the customary rules of State Responsibility, their recommendations cannot add to or diminish the rights and obligations of Members under a covered agreement.[62] But, it is clear that the concept of violation and or nullifications or impairment of benefits presupposes both the determination that a Member has failed to carry out its conventional obligations and the establishment of the legal consequences stemming from such conduct.[63]

The fact that the DSU is silent about the invocation of other rules of international law such as those provided for under the law of State Responsibility to counter breaches of the WTO Agreements presumably implies that the WTO Members have not contracted out of those rules.[64] Consequently, the DSU only sets forth a number of rules dealing with the consequences of a particular breach of the WTO Agreements. This means that these rules in themselves can still be less exhaustive and may require other international rules or customary rules to complement them.[65] It is also clear from the ILC's Articles that to the extent that there is no special regime (*lex specialis*) taking care of a continuous violation of a treaty, the ILC's Articles will be valid in the enforcement of such a treaty.[66] Thus, by inference, assuming that the ILC work also represents the 'common intention' of the multilateral community; Article 54 'solidarity measures' of the ILC's codified customary law would be relevant in the context of the WTO treaty system.[67]

In the context of DSU Article 3.2, there is already an understanding that the DSU was not meant to be an exhaustive set of rules. Any relevant rules of international law can be used by the panel and or the AB when interpreting the provisions of the WTO covered agreements, so long as the interested parties are also parties to those set of rules in question.[68] With this in mind, presumably, the extent to which non-WTO rules would be relevant in a particular dispute would still largely depend on the will of the parties and probably the reasoning of the panels or the AB. For instance, in the *EC – Computer Equipment*,[69] the AB, in rejecting one of the decisions of the

panel, expressed regrets as to why the panel did not consider the *Harmonized System* and its *Explanatory Notes* to which both the EC and the US were parties to, during the conclusion of the Uruguay Round trade negotiations.[70]

Article 48 of the ILC's Articles establishes grounds on which other Members, other than a directly injured state for a breach of a convention can invoke the responsibility of the wrongdoing state while Article 54 states;

> The Chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interests of the beneficiaries of the obligations breached."

Conversely, DSU Article 3.2 clearly states the objective of WTO dispute settlement. It states;

> "...[T]he Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

If by virtue of the provisions of DSU Article 3.2, Article 54 of the ILC's work is used by the panels or AB, as a codified version of customary practice, it would be doing so only because it would serve to preserve the WTO Member's rights and obligations under the relevant covered agreements.[71] But, by virtue of Article 3.2 and 19.2 of the DSU, it has been argued that the WTO Members did not intend to incorporate customary international law rules into the WTO *acquis,* other than those dealing with treaty interpretations, as provided for under Articles 31 and 32 of the VCLT.[72] With this in mind, other aspects of general international law can only be incorporated into the WTO *acquis* when there is a *renvoi* to such rules under a particular covered agreement.[73] But, this view may somehow be misleading, if we conceive inter-state relations as an evolving process. Even if the WTO law is considered self-contained from different angles, its operation may be conditioned 'by its legal-systemic environment'.[74] The fact that DSU Article 3.2 seem to be referring only to the question of interpretation as under customary international law does not mean that Article 3.2 of the DSU shut its door to all other aspects of customary international law when dealing with a particular dispute under the WTO Agreements.[75] The panels and the AB have applied other general international law rules and even some concepts embedded in Member states practices, when dealing with aspects unrelated to interpretation. For example, In *US – Wool Shirts and Blouses*, the AB in order to determine the party to which the burden of proof rested, held that: "...[v]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether a claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions that the burden of proof rests upon the party whether complaining or defending, who asserts the affirmative of a particular claim or defence."[76]

Furthermore, the panels and the AB have in a number of cases referred to other international law practices unrelated to treaty interpretation such as, *locus standi*,[77] and manifest error in the formation of a treaty etc.[78]

*5.1. ILC Article 55 lex specialis in the context of WTO dispute settlement countermeasures*

From the foregoing section, it may be understood that the WTO Members did not intend to prioritise the use of countermeasures. The countermeasures are meant to be resorted to only when there is a continuous violation of agreed negotiated tariff commitments. A countermeasure is thus a fall-back in the event of non-compliance with a particular dispute settlement report.[79] This also seems to be true under other international practices. For instance, the ICJ in the *Gabcikovo-Nagimaros* Project stated that countermeasure must only be taken when the injured State has called upon the Wrongdoing State to discontinue its wrongful act and to make reparation, to no avail. The purpose of the countermeasures must be to induce compliance with an international obligation.[80]

Alternatively, with the current situation in the WTO, this function can only be attained if there are sufficient trade relations between the directly affected Member and the implementing Member. But in certain cases, particularly those concerning a developing country against a developed country, such trade relations might be absent. By implication, unilateral countermeasures by such a developing country would not be sufficient to induce compliance. Thus, unless such compliance is induced, the enforcement mechanism of the WTO dispute settlement system cannot function properly.[81] Eventually, article 3.2 of the DSU and Article 55 of the ILC's draft Article presumably, set forth grounds for the invocation of ILC article 54 solidarity measures.

The DSU only set forth the purpose of countermeasure and does not say much about the situation where inducement cannot be achieved.[82] Thus, article 55 *lex specialis* of the ILC's draft states;

> "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[83]

From this point of view, we could assume that the ILC's Articles are meant to be applicable to all fields of international law provided that there arises the problem of State Responsibility,[84] especially where there is no alternative regime to effectively deal with such breaches. Contextually, panels or the AB could only refrain from taking inspiration from the ILC's draft article 54, to recommend other WTO Members to jointly enforce the DSB recommendations, if there is a justification that the DSU or other covered agreements have provisions dealing with illusory countermeasures. To this extent, there seems to be no such justification.[85]

It is however, true that the panel and the AB do not in any case represent judicial law-making institutions of the WTO. Only a Ministerial Conference, as provided for in Article IX of the WTO Agreement can lawfully perform such a task.[86] Nonetheless, by arguing that the panel and the AB could resort to the use of collective countermeasure as provided for under article 54 of the ILC's draft, to fill the lacunae in the DSU is not a plea to tend the panel and the AB to a judicial law-making body of the WTO. The competence of the panel and the AB is to interpret and apply the law and not to add or diminish the rights and obligations of the WTO Members. Obviously, extending the application of customary international law beyond treaty interpretation to deal with

enforcement in the dispute settlement system will not be an over-stretch of the normal judicial bounds of the panel and AB. It would be an issue of sources of law[87] and whether the WTO treaty system is part of the general corpus of international law.[88] As has been mentioned earlier, a review of the WTO jurisprudence already demonstrates that the panel and the AB would not be exceeding their mandates by using the ILC's articles in adjudication. By referring to an earlier version of the ILC's draft (article 49 of the 1997 version), the Arbitration in the *EC – Bananas* case held that "...[c]*umulative* compensation or *cumulative* suspension of concessions by different WTO Members for the *same* amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures".[89] Most importantly, in the *Cotton Yarn* case, the AB again in justifying its position on the proportionality of countermeasures, referred to Article 51 of the 2001 ILC's Articles.[90] Consequently, it is not self-evident as to why the 2001 ILC's draft article 54 may not be resorted to by the WTO dispute settlement organs.

## 6. Tentative Conclusions

The enquiry in this writing demonstrates that the non-effective nature of countermeasures, as a last resort remedy in the WTO dispute settlement seems to present a threat to the credibility of the WTO. It is true that if compared with other third parties adjudicating bodies and most importantly the GATT, the WTO dispute settlement up to this point seems to have worked quite well. But, it appears that the rules of international trade are generally silent as to what will happen, if violation of the WTO obligations cannot be cured by a countermeasure taken by a relatively small WTO Member. In this respect, and considering the fact that the WTO dispute settlement organ already started using the ILC's draft Articles (both the 1997 draft version and the 2001 version, adopted by the Drafting Committee on its second reading) to fill the lacunae in DSU article 22, it would be useful for the purpose of preserving the security and predictability of the WTO to find a way of inducing compliance through a resort to ILC's article 54 solidarity measures. There seems to be no provision in the DSU or any other covered agreements, preventing the panel or the AB in doing so. Moreover, when the panels and the AB deal with other aspects not covered by the DSU, it seems they do not generally depart from the solutions provided for under general international law. Only in some rare cases there appear to be derogations from the rules of general international law. As there is now a growing common understanding that the WTO would routinely needs other public international law rules to complement or to better understand certain of its provisions, it will be increasingly difficult to justify why traditional international law remedy such as solidarity measures provided for under article 54 of the ILC's draft Articles and VCLT article 60, might not be considered so as to induce compliance, if countermeasures taken by an LDC or developing country for instance, proves unworkable.

Although with very limited elaboration, the primary rules that might govern collective countermeasures as provided for under the ILC's draft Articles, and VCLT article 60, seem to be sufficiently precise if framed in the WTO dispute settlement context. But the danger of their abuse might also be great. A resort to a collective countermeasure by the WTO may entail supportive institutional procedures, transparency and political will. Though a legally clear and circumscribed solidarity measure will be an important step towards the enhancement of the confidence in the multilateral trading system, it would be wrong to take this important step

precipitously without extensive discussion since doing so might present more problems than it would resolve. A definitive solidarity measure would be important for the multilateral spirit that binds the WTO Members though. But, a proper recourse to solidarity measure might also entails a definition in the WTO Agreements of which categories of countries or which breaches would lead to a call for solidarity measures in which the 'directly injured' state should not be left alone, else, the system would soon become a forum for Great Power policy. However, the purpose of legal research is rather to lay a foundation for changes in approaches within the academics and practitioners circles.

**(Endnotes)**

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[1] *European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU, (May 18 2000).*

[2] *European Communities – Measures Concerning Meat and Meat Products (Hormones*) (US and Canada), WT/DS26/ARB, WT/DS48/ARB, (July 26 1999).

[3] *Brazil – Export Financing Programme for Aircraft*, WT/DS46/ARB, (December 12 2000)

[4] *United States – Tax Treatment for "Foreign Sales Corporations*", WT/DS108/ARB, (May 7 2003).

[5] *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB, (March 18, 2003).

[6] *United States – Anti-Dumping Act of 1916*, WT/DS136/ARB, (February 24, 2004).

[7] *United States – Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment),* WT/DS217/ARB, WT/DS234/ARB, (August 31, 2004).

[8] Twelve cases have led to the adoption of Article 21.5 compliance panel reports and eight cases to the adoption of Article 21.5 Appellate Body (AB) reports. Source, Legal Affairs Division, WTO Secretariat.

[9] It is true that taking this number as a fraction of the eighty cases that have gone through the system, would show a very positive picture of the WTO dispute settlement system. But, it is important to note that most of these cases that have resulted to countermeasures have concerned very sensitive disputes that could effectively test the enforcement regime of the system.

[10] See the 1969 Vienna Convention on the Law of Treaties (VCLT) Article 60. United Nations Treaty Series (UNTS), vol. 1155, at 331.

[11] 'Solidarity measures' is a borrowed phrase from the comments of Martti Koskenniemi on the 2001 International Law Commission's Articles. See Martti Koskenniemi, " Solidarity Measures: State Responsibility as a New International Order?" British Year Book of International Law (BRIT Y.B. INT. L.) 2001 340 (hereinafter, Koskenniemi, 2001).

[12] In its Judgment on the merits in the case concerning Military and Paramilitary in and Against Nicaragua, the International Court of Justice (ICJ) considered whether the United States had the unilateral rights to use force in response to Nicaragua's action against other Central American States. Military and Paramilitary in and Against Nicaragua, (Nicaragua v. United States) 1986, ICJ reports 14 at para. 106-11. Though the Court ruled that Third states could contribute in countermeasures, it finally rejected the claim by the United States to have a Unilateral rights against Nicaragua. See para. 146-49 of the ICJ reports.

[13] See the case of South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (1960-1966), where in the applications of South Africa as regards the merits of the case, it argued that the Court should rule that both Ethiopia and Liberia had no *locus standi* in the case. For a concise analysis of this case, see Ian Brownlie on 'Principle of International Law' 5th edition, 1998. Hereinafter Brownlie 1998, 469-476. Also, Willem Riphagen writing about the Fourth Report of the International Law Commission Draft on the Responsibility of States for Internationally Wrongful Acts supported the idea of collective countermeasures in the case of multilateral commitments such as international crimes committed by a state. Riphagen, Fourth Report on the Content, Forms and Degrees of International Responsibility, in Koskenniemi, 340, (2001).

[14] See Root Elihu, The Outlook for International Law, American Society of International Law (ASIL) 2, 5-10, (Dec 1915), in Charney Jonathan I., Third States Remedies in International Law, hereinafter, Charney, 10 MIJIL 57, 60-64, (1989).

[15] At a news conference on October 22nd 1987, the then President of the United States-Ronald Reagan, stated that 'We're there to protect neutral nation shipping in international waters that under international law are supposed to be opened to all traffic.' Reagan's news conference on domestic and Foreign Matters, New York Times October 23rd 1987 at A8. Collective countermeasures are thus a necessary part of any legal system, like the international legal system that lacks strong 'vertical' enforcement. See for instance, Daniel Badansky, John R. Crook and David J. Bederman, hereinafter known as Bodansky, Crook and Bederman in 'Counterintuiting Countermeasures,' 96 AMJIL 817, 1 2002.

[16] Though a broad interpretation of Article 19.1 of the DSU may give one the impression that a panel or Appellate Body has a mandate in some circumstances to permit collective countermeasures, since they have a mandate to make suggestions on implementation in addition to their recommendations.

[17] S.S Wimbledon, UK, France, Italy, Japan v. Germany, PCIJ 1923 (Ser. A) No. 1, 21. In this case, Germany was held liable for the abrogation of one of the clauses of the Treaty of Versailles on the right of navigation in the Kiel Canal. France was awarded reparation, but the other parties who intervened did not claim any pecuniary interest in the dispute. See Brownlie, 471, (1998), see also Jan Klabbers, Clinching the Concept of Sovereignty: Wimbledon Redux, Austrian Review of International and European Law (ARIEL), vol. 3, no. 3, 345-367, (1999). Hereinafter, Klabbers (1999).

[18] See for instance, Article 54 of the International Law Commission Draft (ILC Draft) on state responsibility which allow States other than the injured State take countermeasures for the benefit of the injured State or the other States for the obligation breached.

[19] Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session (2001). Official Records of the UN General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1) November 2001, also obtainable at http://www.un.org/law/ilc.

[20] Martti Koskenniemi, BRIT Y.B. INT. L. (2001).

[21] See J. Charpentier, 'L'affaire du Rainbow Warrior', Annuaire Français de Droit International, 31 (1985) 210-220 and G. Apollis, 'Le règlement de l'affaire du Rainbow Warrior', Review Gènèrale de Droit International Public 91 (1987) 9-43, see also the comments of James Crawford on the last version of the ILC Articles, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" 96 American Journal of International Law (AJIL) 874, (2002).

[22] Koskenniemi, 341, (2001).

[23] See Koskenniemi, 340 footnote 16, (2001).

[24] Coron, David D., The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority, 96 AJIL, 857, 873 (2002).

[25] See Crawford 96 AJIL, 889, (2002).

[26] See Koskenniemi, supra. footnote 12.

[27] See James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect," 96 AMJIL, 2002, 874-875, (hereinafter J. Crawford, 2002).

[28] J. Crawford, 884-885, (2002).

[29] Koskenniemi, 339, (2001).

[30] See for instance, for a careful extrapolation of the importance of countermeasure as regards the Commission's work, Bodansky, Crook and Bederman, 96 AMJIL 817, at 830-832, (2002). See also James Crawford's comments on the earlier version of the draft in 'Revising the Draft Articles on State Responsibility,' European Journal of International Law (EJIL) Vol. 10. No 2, 435-460, (1999), (hereinafter Crawford 1999).

[31] See in this case Crawford, Ibid, Charney, 10 MIJIL 57 (1989), Ian Brownlie, (1998), Petros C. Mavroidis 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' EJIL (2000). (Hereinafter Mavroidis 2000), Joost Pawelyn, 'The Role of Public International Law in the WTO: How far can we go?' 95 AMJIL 535, (2001), (hereinafter Pauwelyn 2001).

[32] See most importantly the comment of J. Charpentier and G. Apollis in the Rainbow Warrior Case as mentioned above.

[33] See Bodansky, Crook and Bederman, 818-819, (2002).

[34] See for instance, the recent report by the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, Fifty-sixth session of the International Law Commission, Geneva, 3 May-4 June and 5 July-6 August 2004, A/CN.4/L.663/Rev.1 paras. 8-18.

[35] "...it is a principle of public international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is an indispensable complement of a failure to apply a convention and there is no necessity for it to be stated in the convention itself." PCIJ, 1929, Series A, No. 8, 4 at 21. See also Article 1 of the ILC draft which states that "Every international wrongful act of a State entails the international responsibility of that State."

[36] See Crawford's retrospective comments on the report of the ILC, 96 AJIL 874, (2002), see also Koskenniemi, (2001).

[37] Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. Entry into force on 27 January 1980. See Text, United Nations Treaty Series (UNTS), vol. 1155, at 331.

[38] Article 55 states "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or the implementation of the international responsibility of a State are governed by special rules of international law."

[39] See Petros C. Mavroidis in "Remedies in the WTO Legal System: Between a Rock and a Hard Place," European Journal of International Law (EJIL), Vol. 11 No. 4, 763-813 (2000), (hereinafter Mavroidis 2000). Mavroidis also disagree with the view that the WTO regime should be isolated from the general corpus of international public law.

[40] See for instance Pieter Jan Kuijper, 'The Law of GATT as a Special Field of International Law,' 1994, Netherlands Year Book of International Law (NETH. Y.B.INT.L), 227, (1994),(hereinafter Kuijper, 1994). The expression 'self contained' regime as used in some of the arguments as regards the nature of the WTO law was employed by the ICJ to refers to the rules of the diplomatic law in the case of *United States of America v Iran*, see Judgment of the ICJ of 24 May 1980, ICJ Reports 1980, at 40, para. 86. See a study on self contained regimes in Simma Bruno, 'Self Contained Regimes', 6 NETH. Y.B.INT.L, 111-136, (1985).

[41] For the argument on the relationship between the principle of Pacta Sunt Servanda and WTO obligations, see Ngangjoh H. Yenkong, Pacta Sunt Servanda and Complaints in the WTO dispute settlement, forth-coming Manchester Journal of International Economic Law (MJIEL), (September 2004).

[42] AB Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, para. 158, (12 October 1998).

[43] Joost Pauwelyn, Role of Public International Law in the WTO Law, 95 American Journal of International Law (AJIL), 539 (2001).

[44] See Weil Prosper, *Le Droit International Economique, Mythe ou Realité?, Societé Francaise Pour le Droit International, Aspects du Droit International Economique, Colloque d'Orleans*, Paris, eds. Pedone, 1-34, at 31, (May 1971).

[45] United States – Standard for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 17, (March 20 1996).

[46] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, (12 October 1998). In order to judge the legality of the panel interpretation in the light of GATT article XX, the AB used a number of international agreements including the Rio Declaration on Environment and Development (Rio Declaration on Environment and Development, 3-14 August 1992, UN General Assembly Doc. A/CONF.151/26 Vol. I). para. 154.

[47] Articles 48.1(b) and 54 of the ILC articles, which indicates that third States can take countermeasures for the benefit of other States to the obligations breached.

[48] See Christian Walter, "Constitutionalizing (Inter)national Governance-Possibilities for and Limits to the Development of an International Constitutional Law," German Yearbook of International Law (GYBIL), Vol. 44, 172-73, (2001). (Hereinafter Walter 2001).

[49] See the AB report in the EC – Bananas III case where in rejecting EC argument that the US could not have been affected by the EC bananas regime, the AB held that though the US did not export Bananas to the EC, "[T]he internal market of the United States could be affected by the EC banana regime, in particular, by the effect of the regime on world supplies and world prices of bananas". See WT/DS27/AB/R, 61, para. 36, (9 September 1997).

[50] *United States Sections 301-310 of the Trade Act of 1974*, panel report, WTO document WT/DS152/R, para. 7.73, (December 22, 1999).

[51] See para. 7.71 of the panel report. Also, in the *EC – Bananas* case (WT/DS27/ARB) the arbitrators held that, "While it may be necessary to develop more sophisticated rules in this regard in the future, we believe that the line we have drawn is appropriate in this particular case, which involves the suspension of concessions. We imply no limitations on the extent of WTO obligations for this or other cases by this decision". Para. 6.18.

[52] See para. 7.75 ibid.

[53] In the *US – Shrimp* case, the AB concurred that "An abusive exercise by a Member of its own treaty rights thus results in a breach of a treaty rights of the other Members and, as well, a violation of the treaty obligations of the Member so acting". WT/DS58/AB/R, 92, para. 158.

[54] *Chorzow Factories* analytical definition of the concept of reparation.

[55] Para. 136.

[56] Articles 48 and 54 of the ILC draft articles.

[57] See also DSU Article 3.8.

[58] "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that recommendations and rulings are not implemented within a reasonable period of time." Article 22.1 DSU.

[59] See for instance Articles 48, 49.1 and 54 of the Draft dealing with countermeasures.

[60] Since the purpose of countermeasures 'should be to perform an instrumental function of ensuring compliance' Article 54 of the ILC 's Articles, thus establishes a baseline for effecting such countermeasures by other states in a situation where unilateral countermeasure by the 'directly injured' state prove ineffective to induce compliance. See for instance James Crawford's Comments on the Third report on State Responsibility, A/CN.4/507/Add.3, 3, paras. 287 and 289 referring to the purpose of countermeasure established by the ICJ in the *Gabcikovo-Nagimaros* Project, 56-57, para. 87. See also VCLT Article 60.2.

[61] Article 23.1 of the DSU states "When Members seek the redress of a violation of obligations or other nullifications or impairment of benefits under the covered agreements or an impediment to the attainment of the objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding." It is not very clear whether this provision indicates that WTO Members in their commitments clearly waived their rights to resort to alternative tribunals for instance the ICJ even if they find that the remedies provided by the DSU is insufficient. In the *US – Sections 301-310* for example, the Panel pointed out that "Article 23.1…imposes on all Members to have recourse to…the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU." WT/DS152/R, para. 43.

[62] DSU Article 3.2.

[63] See for instance Villalpando Santiago M., Attribution of Conduct to the State: How the Rules of State Responsibility may be applied within the WTO Dispute Settlement System, JIEL 393-420, (2002).

[64] It is important in this respect to note the clear reference to customary rules of interpretation provided for under Article 3.2 of the DSU.

[65] See Pauwelyn, 573-575, (2001), see also Villalpando, 398-399, (2002).

[66] Article 55 of the ILC's Article.

[67] In pointing out the importance of the 'common intention' of members when interpreting a relevant WTO covered agreement, the AB in the *EC – Computer Equipment* held that "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the common intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty." WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84.

[68] The rules of interpretation as required by the VCLT states "…There shall be taken into account, together with the context…any relevant rules of international law applicable in the relations between the parties". See VCLT Article 31.3 (c).

[69] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, (adopted, June 22, 1998).

[70] "We are puzzled by the fact that the panel, in its efforts to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonised System*…Neither the European Communities nor the United States argued before the panel (footnote omitted) that the *Harmonized System* and its *Explanatory Notes* were relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*. AB Reports, *EC – Computer Equipment,* 33-34, para. 89.

[71] DSU Article 3.2. See also Matsushita Mitsuo, Thomas J. Shoenbaum & Petros C. Mavroidis, The World Trade Organization. Law, Practice and Policy, Oxford, 25, (2003). (Hereinafter, Matsushita).

[72] See Trachtman Joel P. The Domain of WTO Dispute Resolution, Harvard International Law Journal (HILJ), Vol. 40 no. 2, 333-337, at 343 (Spring 1999). See also Palmeter David and Petros C. Mavroidis, The WTO Legal System: Sources of Law, 92 AJIL, no. 3, 116, (1998).

[73] See for instance Article 2 of the Agreement on Trade Related Intellectual Property Rights (TRIPS).

[74] See Report of the Study Group of Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, (2004), A/CN.4/L.663/Rev.1, para. 9, at 5.

[75] For this view, see Pauwelyn 95 AJIL, 562-565, (2001), Garcia-Rubio, Graduate Institute of International Studies (GIIS), Geneva, 67-73, (2001).

[76] See AB Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* WT/DS33/AB/R, 14. See also AB Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, at 33, para. 87, (adopted 20 April, 2004).

[77] See *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (*EC – Bananas*), WT/DS27/R, para. 133, (September 27 1997). It is also important to note in this context that the panel and the AB in the Bananas case went as far as employing the *Lomé Convention* which was not part of general international law.

[78] In dealing with the issue of error in treaty formation, under the concept of non-violation complaint, the panel in the *Korea – Measures Affecting Government Procurement*, WT/DS163/R, (May 2000), resorted to customary international law practice (from Permanent Court of International Justice-PCIJ to the ICJ), as codified in VCLT Article 48. See panel report, paras. 7.120-7.123.

[79] Jackson John H., The World Trade Organization, Constitution and Jurisprudence, London, 85, (1998).

[80] ICJ Reports, *Gabcikovo-Nagimaros Project (Hungary/Slovakia)*, General List No. 92, paras. 82-87 (25 September 1997). See also www.icj-cij.org/icjwww/idocket/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm last visited 22-06-04.

[81] See *EC – Bananas* arbitration, where in reiterating the object and purpose of countermeasure under DSU article 22, the arbitrators insisted that "...[I]f a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly". WT/DS27/ARB/ECU, at 19, para. 76 (24 March 2000).

[82] DSU Article 22.1.

[83] Part four, Article 55, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1) (November 2001).

[84] See Villalpando, 399 (2002).

[85] For example, the Agreement on Subsidies and Countervailing Measures (SCM), in Annex I (k), provides for a situation where a non-WTO rule can be a justification for derogating from one's obligations under the SCM Agreement.

[86] The Ministerial Conference is the only Decision Making Body with the competent to amend the provisions of the Marrakesh Agreement Establishing the WTO or the provisions of any of the Multilateral Trade Agreements in Annex 1 of the WTO Agreements.

[87] See for instance Garcia-Rubio, (2001) and Villalpando, (2002).

[88] An elaborate analytical response to whether the WTO is an isolated regime of law has been provided in the eminent writings of John H. Jackson ( 2004 "International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?", AJIL, Vol. 98, 109-125, (2004)) and Joost Pauwelyn (The Role of Public International Law in the WTO: How Far Can We Go? 95 AJIL, 535-578, (2001))

[89] WT/DS27/ARB, at 38, para. 6.16 (April 19 1999).

[90] Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, 37, para. 120, footnote 90, (adopted, November 5, 2001).