Proportionality and Remedies in WTO Disputes

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Abstract

This article considers the role of proportionality in determining the level and type of remedies available to World Trade Organization Members for violations of legal obligations or for certain other undesirable or unfair conduct. As an aid to interpretation, proportionality confirms the purpose of suspension of concessions as inducing compliance and may clarify the meaning of 'nullification or impairment' and the appropriate response to actionable or prohibited subsidies. However, principles such as proportionality must yield to the relevant text of the WTO agreements, where that text is unambiguous, and WTO Tribunals must carefully investigate the meaning and scope of a principle before using it in the WTO. Contrary to certain past decisions, the principle of proportionality is not relevant to the imposition of safeguards in the WTO.

It goes without saying that a breach of a commercial treaty may not justify the taking of hostages in response.[1]

1 Introduction

The ordinary meaning of 'proportionality' is the 'quality, character, or fact of being proportional', which in turn is defined as 'corresponding in degree, size, amount, etc'.[2] In law, the notion of proportionality has several meanings, of varying breadth, depending on the context. At its broadest, proportionality in legal terms refers to the

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1 Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures', 12 *EJIL* (2001) 889, at 906.

2 W. Trumble and A. Stevenson (eds.), *Shorter Oxford English Dictionary on Historical Principles* (5th edn, 2002), ii, at 2371.

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requirement for a 'proper or balanced relationship between competing considerations',[3] a definition that is only marginally more specific than the meaning of the word in ordinary English and that seems to lack normative direction. More particularly, proportionality 'is said to involve the idea that there should be a reasonable relationship or balance between an end and the means used to achieve this end'.[4]

In this article, I try to narrow the meaning of proportionality by examining its existence and content as a general principle of law, a principle of customary international law, and a principle of WTO law. I do not propose to conduct an exhaustive investigation of the many different circumstances in which the notion of proportionality arises in law. Nor is my goal to establish definitively whether proportionality is a general principle of law[5] or a principle of customary international law.[6] Rather, in the following sections I examine some of the evidence that could support a suggestion that proportionality has achieved such a status (which would add legitimacy to any use of the principle in the WTO), while attempting to understand the meaning of and rationale for proportionality. I then consider how such a principle might be used in WTO disputes, either to interpret WTO provisions or as the basis of a claim.

At the outset, it is necessary to distinguish two main forms in which proportionality could be said to exist as a general principle of law, a principle of customary international law, and a principle of WTO law. The first, more general, form of the proportionality principle provides a guide to balancing competing rights, values or other objectives.[7] In this form, for example, proportionality may impose limits on the restriction of human rights and individual freedoms in domestic constitutions[8] or in international law.[9] Similarly, in the WTO, some commentators have used the notion of 'proportionality' to explain how to evaluate infringements of or exceptions to

[3] P. Nygh and P. Butt (eds), *Australian Legal Dictionary* (1997), at 941.

[4] Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality', 21 *Melbourne U. Law Rev.* (1997) 1, at 2.

[5] For different views on this question, see the sources cited in Gardam, 'Proportionality as a Restraint on the Use of Force', 20 *Australian Yearbook Int'l Law* (1999) 161, at 161. On one view, the principle 'has found almost universal acceptance in some way or another in domestic legal orders': Delbrück, 'Proportionality', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (2003), iii, 1140, at 1141.

[6] On this question, see Grieg, 'Reciprocity, Proportionality, and the Law of Treaties', 34 *Virginia J. Int'l Law* (1994) 295, at 322–324. Again, on one view, 'the widespread acceptance of the principle in various areas of international law and its fundamental importance for the international law-applying process suggests that proportionality can already be characterized as a general principle of international law': Delbrück, *supra* note 5, at 1144.

[7] See, e.g., de Búrca, 'Subsidiarity and Proportionality as General Principles of Law', in J. Nergelius and U. Bernitz (eds), *The General Principles of EC Law* (2000), at 97; Bermann, 'The Principle of Proportionality', 26 *American J. Comp. Law Supp.* (1977–1978) 415.

[8] See, e.g., Park, 'Korean Principle of Proportionality, American Multi-leveled Scrutiny, and Empiricist Elements in US–Korean Constitutional Jurisprudence', 1 *J. Korean Law* (2001) 105, at 109–110; Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality', 21 *Melbourne U. Law Rev.* (1997) 1, at 5–9.

[9] See, e.g., UN, *Universal Declaration of Human Rights*, GA Res 217A(III) (10 Dec. 1948), Art. 29(2); *International Covenant on Civil and Political Rights*, 999 UNTS 171 (adopted 16 Dec. 1966), Arts 21, 22(1).

stated WTO objectives, rules or disciplines.[10] Hilf can be seen as recognizing this form of proportionality as a principle of WTO law, in the following terms:

> [T]he principle of proportionality is one of the more basic principles underlying the multilateral trading system, although there is no explicit reference to it in WTO law. However, the basic idea of proportionality, i.e. the due balancing of competing rights, is reflected several times in WTO agreements.[11]

WTO provisions that may be seen as reflecting a principle of proportionality often include words such as 'necessary', 'proportionate', 'less trade restrictive',[12] and 'commensurate'.

The second form of proportionality is narrower. It addresses the requisite relationship between the penalty imposed for a given offence. Broadly speaking, proportionality may be required between punishment and crime (at the domestic level), countermeasure and internationally wrongful act (at the international level), and retaliation and violation or other undesirable conduct (in the WTO). These forms are related and not necessarily mutually exclusive. The second form could be described as a subset of the first, for instance, in the sense that it may involve balancing the rights of an individual who has committed a crime against the various goals of punishment and the rights of the community. However, for the sake of clarity, I concentrate on the second. The second form of proportionality presents a more manageable inquiry for this article, and it bears particular examination because it has been little considered in the context of the WTO. Below, I first explain how proportionality may be seen as a general principle of law and a principle of customary international law, before turning to how proportionality is reflected in the WTO rules concerning remedies. Against this background, I evaluate the use to date of proportionality in determining remedies in WTO disputes and how this principle might help guide future disputes.

2 Proportionality as a Principle in Assessing Remedies

A General Principle of Law: Crime and Punishment

I begin my assessment of proportionality by examining the relationship between crime and punishment as a general principle of law. A Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has recognized the requirement that a punishment be proportionate to the crime for which it is imposed as a 'general principle of criminal law'.[13] This principle forms part of the law of several common law countries. Below, I use the United States and Australia as examples.

[10] See, e.g., TBT Agreement, Arts 2.4, 5.4; SPS Agreement, Art. 2.4; GATT 1994, Art. XX; Sykes, 'The Least Restrictive Means', 70 *U. Chicago Law Rev.* (2003) 403; Neumann and Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law After Korea-Beef, EC-Asbestos and EC-Sardines', 37 *J. World Trade* (2003) 199.

[11] Hilf, 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?', 4 *J. Int'l Econ. Law* (2001) 111, at 120–121 (footnote omitted).

[12] Desmedt, 'Proportionality in WTO Law', 4 *J. Int'l Econ. Law* (2001) 441, at 442–443.

[13] *Prosecutor v. Blaskic* (IT-95-14) International Criminal Tribunal for the former Yugoslavia, Judgment of 3 Mar. 2000, at para. 796.

In the United States, proportionality is incorporated in the Eighth Amendment, which has been held to prohibit punishments that are disproportionate to the offence. This amendment states that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. The most important of these prohibitions has been the prohibition of cruel and unusual punishment.[14] Many rights (such as freedom of speech or freedom of interstate trade) are stated in absolute terms, even though they may need to be balanced against other rights or objectives. However, the right not to suffer excessive punishment itself incorporates the notion of proportionality.

The text of the Eighth Amendment clearly requires proportionality between the punishment and the offence when the punishment involves bail or fines. On its terms, proportionality is not strictly required for other forms of punishment. However, the Supreme Court has read the reference to 'cruel and unusual punishment' to encompass the principle of proportionality. In 1983, the Court stated in a majority opinion in *Solem v Helm*:

> The Eighth Amendment declares: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. . . . The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence . . . . When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality . . . . The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.[15]

The inclusion of a principle of proportionality within the words 'cruel and unusual punishment' is supported by the suggestion that 'it would be anomalous indeed' if proportionality were required in connection with bail and fines but not other forms of punishment.[16] Nevertheless, for some justices at least, the application of the principle depends on the type of punishment imposed. As regards capital punishment (the death penalty), it seems fairly well established that the principle of proportionality applies.[17] When it comes to non-capital punishment, the jurisprudence is less clear, with some judges maintaining that no test of proportionality is necessary[18] and others maintaining that strict proportionality is required.[19] However, the prevailing

[14] K. Hall (ed.), *Oxford Companion to the Supreme Court of the United States* (1992), at 247.

[15] *Solem v. Helm*, 454 US 277, at 284–286 (1983) (majority: Powell J, joined by Brennan, Marshall, Blackmun, and Stevens JJ) (footnote omitted).

[16] *Ewing v. California*, 538 US 11, at 33 (2003) (Stevens J, joined by Souter, Ginsburg, and Breyer JJ) (quoting *Solem v. Helm*, *supra* note 15).

[17] See, e.g., *Coker v. Georgia*, 433 US 584, at 592 (1977) (plurality: White J, joined by Stewart, Blackmun, and Stevens JJ); *Enmund v. Florida*, 458 US 782, at 797–798 (1982) (majority: White J, joined by Brennan, Marshall, Blackmun, and Stevens JJ).

[18] See, e.g., *Harmelin v. Michigan*, 501 US 957, at 994 (1991) (Scalia J, concurring in the judgment, joined by Rehnquist CJ); *Ewing v. California*, *supra* note 16 (Thomas J, concurring in the judgment).

[19] *Ibid.*, at 35 (Stevens J, joined by Souter, Ginsburg, and Breyer JJ) (stating that 'a broad and basic proportionality principle' applies, rather than a narrow proportionality principle as held by a plurality of the Court in that case).

majority view is that, '[t]hrough this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as "clearly established" . . . : A gross disproportionality principle is applicable to sentences for terms of years'.[20] This means that such a sentence must not be grossly disproportionate to the offence committed. Although the parameters for determining whether a sentence violates this standard are not clearly defined, a violation will occur only in rare or extraordinary circumstances.[21] In *Ewing v. California*, a plurality of the Court endorsed this 'gross disproportionality' principle, but using instead (rather confusingly) the label 'narrow proportionality principle'.[22] The principle can be described as narrow in the sense that it will not be violated by the imposition of a punishment that is disproportionate to the offence as long it is not grossly disproportionate.

The reason that several justices of the Supreme Court take the view that strict proportionality between an offence and punishment in the form of a sentence of some years is not required probably relates in part to their perception of the proper role of the judiciary: a reviewing court must accord legislatures and sentencing courts 'substantial deference . . . in determining the types and limits of punishments for crimes, as well as . . . in sentencing convicted criminals'.[23] The gross disproportionality test therefore relies, to the extent possible, on 'objective factors'.[24] Thus, the Court considers not only the 'gravity of the offense and the harshness of the penalty' (which might depend on the Court's own policy assessments) but also 'the sentences imposed on other criminals in the same jurisdiction' and 'the sentences imposed for commission of the same crime in other jurisdictions' (which can be determined as a matter of fact).[25]

In Australia, as in the United States, the High Court has emphasized the need to take account of 'objective circumstances' in determining whether a particular sentence is disproportionate to the offence. Thus, the High Court has described the principle of proportionality as follows:

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances . . .[26]

[20] *Lockyer v. Andrade*, 538 US 63, at 72 (2003) (majority: O'Connor J, joined by Rehnquist CJ, and Scalia, Kennedy, and Thomas JJ). See also *Harmelin v. Michigan*, *supra* note 18, at 1001 (Kennedy J, joined by O'Connor and Souter JJ); *Ewing v. California*, *supra* note 16, at 23–24 (plurality: O'Connor J, joined by Rehnquist CJ and Kennedy J); Pater, 'Struck out Looking: Continued Confusion in Eighth Amendment Proportionality Review after *Ewing v California*, 123 S. Ct. 1179 (2003)', 27 *Harvard J. Law & Public Policy* (2003–2004) 399.

[21] *Lockyer v. Andrade*, *supra* note 20, at 73 (majority: O'Connor J, joined by Rehnquist CJ, and Scalia, Kennedy, and Thomas JJ).

[22] *Ewing v. California*, *supra* note 16, at 20 (plurality: O'Connor J, joined by Rehnquist CJ and Kennedy J).

[23] *Solem v. Helm*, *supra* note 15, at 290 (majority: Powell J, joined by Brennan, Marshall, Blackmun, and Stevens JJ). See also *Harmelin v. Michigan*, *supra* note 18, at 1001 (Kennedy J, joined by O'Connor and Souter JJ) (referring to the 'primacy of the legislature').

[24] *Ibid.*, at 1001 (Kennedy J, joined by O'Connor and Souter JJ).

[25] *Solem v. Helm*, *supra* note 15, at 292 (majority: Powell J, joined by Brennan, Marshall, Blackmun, and Stevens JJ).

[26] *Hoare v. The Queen* (1989) 167 CLR 348, at para. [7] (see also para. [20]).

The High Court has used the principle of proportionality to determine the outer limits of sentencing discretion, only intervening where the exercise of that discretion 'reflects an error of principle or results in some manifest injustice'.[27] The notion of 'manifest injustice' may be comparable to the high threshold of 'gross disproportionality' applied by the Supreme Court of the United States.

The High Court has not yet provided clear guidance on how to apply this principle.[28] However, the Court's reasoning does point to certain considerations that may be relevant in sentence-setting, which may shed light on the reasons underlying the proportionality principle. Although these considerations may differ in nature or weight in setting a minimum as opposed to a maximum sentence,[29] they may include the sentences previously imposed for the offence in question,[30] the possibility of rehabilitation,[31] 'the propensity of the offender to commit violent crimes, the likelihood of his re-offending and the need to protect the community'.[32] These considerations are linked to the objectives of punishment, which Scalia J of the Supreme Court of the United States addressed briefly in *Ewing v. California*. In his Honour's view, proportionality derives from the notion of punishment as retribution (meaning 'punishment imposed as repayment or revenge for the offense committed'),[33] but it has no place to the extent that the objective of a punishment is deterrence, incapacitation, or rehabilitation.[34]

The various theories of retribution 'justify punishment on the ground that persons who culpably commit or attempt acts and omissions that are morally wrong deserve punishment'.[35] Under these theories, proportionality plays a dominant role.[36] Assuming that retribution provides one reason for punishment, the question arises whether the punishment that a culprit deserves should be determined absolutely (the non-comparative or cardinal approach) or according to the punishment received by other people committing the same or other offences (the comparative or ordinal approach).[37] The comparative approach attends to the concern expressed by several justices of the Supreme Court of the United States and the High Court of Australia that higher courts should assess punishments objectively and without intervening

[27] *Bugmy v. The Queen* (1990) 169 CLR 525, at para. [24] (Mason CJ and McHugh J, dissenting); see also [7] (majority: Dawson, Toohey, and Gaudron JJ).

[28] See generally Fox, 'The Meaning of Proportionality in Sentencing', 19 *Melbourne U. Law Rev.* (1994) 489.

[29] *Bugmy v. The Queen, supra* note 27, at para. [13] (majority: Dawson, Toohey, and Gaudron JJ); at para. [20] (Mason CJ and McHugh J, dissenting). See also *The Queen v. Shrestha* (1991) 173 CLR 48; 100 ALR 757, at 768 (Brennan and McHugh JJ, dissenting).

[30] *Bugmy v. The Queen, supra* note 27, at para. [12] (majority: Dawson, Toohey, and Gaudron JJ).

[31] *The Queen v. Shrestha, supra* note 29; at 772 (ALR) (Deane, Dawson, and Toohey JJ).

[32] *Bugmy v. The Queen, supra* note 27, at para. [23] (Mason CJ and McHugh J, dissenting); see also at para. [9] (majority: Dawson, Toohey, and Gaudron JJ).

[33] B. Garner (ed.), *Black's Law Dictionary* (7th edn., 1999), at 1318.

[34] *Ewing v. California*, *supra* note 16, at 31–32 (Scalia J, concurring in the judgment).

[35] Alexander, 'The Philosophy of Criminal Law', in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), at 815, 816.

[36] Von Hirsch, 'Proportionality in the Philosophy of Punishment', 16 *Crime & Justice* (1992) 55, at 56.

[37] Alexander, *supra* note 35, at 818; Von Hirsch, *supra* note 36, at 76–77.

unduly in the decision-making of the legislature or lower courts. Yet a purely comparative approach would leave the courts no room to assess the gravity of the offence (in terms of the harm caused and the fault or culpability of the person committing the offence).[38] This may explain why sentencing in both jurisdictions appears to require more than a simple inspection of sentences previously imposed for the offence committed.

If retribution demands proportionality, what scope is there for utilitarian concerns such as the need to protect the community?[39] Put differently, is Scalia J correct that the principle of proportionality cannot apply to the extent that a punishment aims to prevent the offender from reoffending? The answer seems to lie in the type and stringency of proportionality applied. According to Cohen, 'everyone is to be punished alike in proportion to the gravity of his offense or to the extent to which he has made others suffer'.[40] Thus, simplifying for the sake of clarity, the current Australian and United States positions could be explained as follows: non-comparative proportionality, derived from notions of fairness and retribution, sets an absolute ceiling on the severity of the punishment for a given offence, based on the seriousness of the offence in terms of the culpability of the offender and the harm caused. Below this ceiling, sentences should be uniform in a comparative sense unless some justification exists (utilitarian or otherwise) for departing from the usual degree of punishment.

B Principle of Customary International Law: Countermeasures for Wrongful Acts

The previous section addressed proportionality as it relates to infringement of individuals' rights, namely infringement taking the form of punishment for a recognized offence by an individual. However, proportionality also operates in international law to limit infringement of the rights of states and, in particular, infringement taking the form of countermeasures for an internationally wrongful act committed by a state.

Article 51 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) provides that countermeasures 'must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[41] Arguably, this provision reflects the proportionality principle that applies with respect to countermeasures under customary international law.[42] In his commentaries on the ILC Articles, Crawford states that '[p]roportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence'.[43] This observation is

[38] Von Hirsch, *supra* note 36, at 81.

[39] See generally *ibid.*; Walker, 'Legislating the Transcendental: Von Hirsch's Proportionality', 51 *Cambridge Law J.* (1992) 530.

[40] M. Cohen, *Reason and Law* (1961), at 53.

[41] Official Records of the General Assembly, 56th session, Supplement No. 10, UN DOC. A/56/10, Ch. V.

[42] See, e.g., White and Abass, 'Countermeasures and Sanctions', in M. Evans, *International Law* (2003), at 505, 507 (referring to 'the codification of countermeasures by the International Law Commission').

[43] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 294.

borne out by several pronouncements of the International Court of Justice[44] and in international arbitrations.[45] Indeed, in terms very similar to Article 51 as finally drafted, the ICJ held in *Gabcíkovo-Nagymaros Project* that 'the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question' – this is 'the proportionality which is required by international law'.[46]

Just as the objectives of punishment are relevant in assessing the role of proportionality in domestic sentencing, the objective of imposing countermeasures is crucial to their validity and may reflect on whether they meet the requirement of proportionality in international law. Under Article 49(1) of the ILC Articles, '[a]n injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two', which includes obligations to cease the unlawful act[47] and to provide reparation for the injury.[48] According to Crawford, 'a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49'.[49]

Proportionality under Article 51 primarily involves an assessment of the relationship between the countermeasure and the injury suffered as a result of the initial wrongful act, while 'taking into account' the gravity of the wrongful act and the rights in question. The gravity of the act is thus separated from the injury it causes, even though one might normally expect the injury caused to be a component in assessing the gravity of the act. The consideration of the gravity of the act and the rights infringed, separately from the injury suffered, suggests that countermeasures may serve some fairness or retributive purposes, contrary to the purely utilitarian or consequentialist approach suggested by Crawford and the text of Article 49. Cannizzaro explains this 'contradiction'[50] as indicating 'that the ILC conceives proportionality as a factor mitigating the instrumental nature of countermeasures'.[51] Another explanation

[44] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America)* [1986] ICJ Rep 14, at para. 249 (referring to 'proportionate counter-measures').

[45] See, e.g., *'Naulilaa' (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa)* (1928) II Reports of International Arbitral Awards 1013; *Air Services Agreement of 27 March 1946 (United States v. France)* (1978) XVIII Reports of International Arbitral Awards 417 (cited in Crawford, *supra* note 43, at 294).

[46] *Gabcíkovo-Nagymaros Project (Hungary / Slovakia)* [1997] ICJ Rep 7, at para. 85.

[47] ILC Arts, UN, *Report of the International Law Commission,* A/56/10 SUPP (1 Oct. 2001), Art 30.

[48] Reparation may take the form of restitution, compensation, or satisfaction, which themselves incorporate a requirement of proportionality: *ibid.*, Arts 31, 34–37.

[49] Crawford, *supra* note 43, at 296. Here, Crawford seems to assume that a countermeasure that is disproportionate to the injury suffered, within the meaning of Art. 51, will also be disproportionate to the need to induce compliance, within the meaning of Art. 49. See also at 284 ('[c]ountermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part Two').

[50] White and Abass, *supra* note 42, at 513 ('there appears to be a contradiction in the approach of the ILC. The issue ought not to be one of proportionality to the injury caused, because this would suggest that countermeasures are taken to punish the responsible State').

[51] Cannizzaro, *supra* note 1, at 894.

could be that the drafters considered that determining the level of countermeasures necessary to induce compliance would be more subjective or difficult than determining (i) the injury suffered, and (ii) the gravity of the wrongful act and the rights in question. Accordingly, these two factors are used as a proxy in identifying countermeasures necessary to induce compliance.

The need for proportionality to take into account non-utilitarian purposes arises in the context of international law on countermeasures in much the same way as it does in the context of domestic laws regarding punishment. If the goal is solely utilitarian, the response to an internationally wrongful act (or an individual's offence) risks being far worse than the original breach, if that is what is required to prevent future breaches.[52] Thus, as in the domestic criminal law systems examined above, fairness and retribution require proportionality, which sets an absolute ceiling on the severity of countermeasures according to the 'the injury suffered'[53] (that is, the harm caused), 'taking into account the gravity of the internationally wrongful act and the rights in question'[54] (that is, the culpability of the actor).

Article 51 addresses countermeasures taking the form of 'non-performance for the time being of international obligations of the State taking the measures towards the responsible State'.[55] It does not allow countermeasures involving the use of force,[56] which appear to be prohibited by Article 2 of the United Nations Charter (except perhaps in the context of self-defence)[57] and which are less relevant in the context of the WTO. Nevertheless, it is worth noting that, even in the context of war, the principle of proportionality applies to the imposition of countermeasures (often called belligerent reprisals).[58]

3 Proportionality and Remedies in WTO Law

In the next two sections I assess the role of proportionality in limiting the extent of retaliatory actions that WTO Members may take against each other. Such measures take two broad forms, which I discuss in turn: first, the suspension of concessions (pursuant to the understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)) in response to a failure by a Member to bring its WTO-inconsistent measures into conformity with the WTO agreements as recommended in a Panel or Appellate Body report adopted by the Dispute Settlement Body (DSB);[59] second, unilateral use of trade remedies in response to certain kinds of

[52] See *ibid.*, at 892, 905; von Hirsch, *supra* note 36, at 63–64.

[53] ILC Arts, *supra* note 47, Art 51.

[54] *Ibid.*

[55] *Ibid.*, Art 49(2).

[56] *Ibid.*, Arts 22, 50(1)(a).

[57] Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law', 170 *Military Law Rev.* (2001) 155, at 158.

[58] *Ibid.*, at 160–161. On proportionality in the laws of war, see also Fenrick, 'The Rule of Proportionality and Protocol in Conventional Warfare', 98 *Military Law Rev.* (1982) 91; Gardam, *supra* note 5.

[59] See generally Jürgensen, 'Crime and Punishment: Retaliation under the World Trade Organization Dispute Settlement System', 39 *J. World Trade* (2005) 327.

unfair conduct or other situations, pursuant to the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), or the Agreement on Safeguards.

A Multilateral Remedies for WTO Violations

The aim of the WTO dispute settlement system is 'to secure a positive solution to a dispute'.[60] Ideally, this is to be achieved through a mutually agreed solution between the parties, or withdrawal of any measures of Members that are inconsistent with the WTO agreements (as determined by Panels or the Appellate Body in reports that are adopted by the DSB). However, as a 'last resort', if the Member fails to bring the inconsistent measure into conformity within a reasonable period of time, the complainant has the possibility of 'suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB'.[61] Essentially, the DSB is required to grant such authorization 'within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request'.[62] Members must follow the relevant dispute settlement procedures before suspending concessions in response to a failure to bring an inconsistent measure into conformity within the required period.[63]

Proportionality in retaliatory actions under the WTO dispute settlement system has qualitative and quantitative requirements. The qualitative requirement relates to the form of the retaliatory action. Significantly, the ultimate sanction by a complainant against a respondent's WTO violation is to cease performing some of its WTO obligations towards that Member. This 'suspension of concessions' is analogous to the form of countermeasures envisaged by Article 49(2) of the ILC Articles ('non-performance for the time being of international obligations') and the response provided for in Article 60(2)(b) of the Vienna Convention on the Law of Treaties for a material breach of a treaty ('suspending the operation of the treaty in whole or in part'). In addition, Article 22.3 of the DSU provides that the suspension of concessions should preferably be in the same sector and, if this is not practicable or effective, the suspension should be with respect to other sectors but under the same agreement. Only if this is not practicable or effective, and only if the circumstances are serious enough, may concessions be suspended under another WTO agreement. This qualitative requirement of proportionality may spring from the same rationale as *lex talionis* (infliction on the wrongdoer of the injury the wrongdoer has caused – simply put, an eye for an eye).[64]

[60] DSU, Art. 3.7.

[61] *Ibid.* See also Art. 22.1. Suspension of concessions was also provided as a last resort under GATT 1947 (Art. XXIII:2).

[62] DSU, Art. 22.6.

[63] *Ibid.*, Art. 22.3(c). See also Panel Report, *US – Certain EC Products*, WT/DS165/R + Add (adopted 10 Jan. 2001), DSR 2001:I, 313, at para. 6.87 (issue not appealed – Appellate Body Report, *US – Certain EC Products*, WT/DS165/AB/R, adopted 10 Jan. 2001, DSR 2001:II, 413, at para. 117).

[64] Fox, 'The Meaning of Proportionality in Sentencing', 19 *Melbourne U. Law Rev.* (1994) 489, at 490; Garner (ed), *supra* note 33, at 924.

As to the level of suspension of concessions that the DSB authorizes (the quantitative requirement of proportionality), Article 22.4 of the DSU provides that this must be 'equivalent to the level of nullification or impairment'. The reference to 'nullification or impairment' derives from Article XXIII of the General Agreement on Tariffs and Trade (GATT) 1994, which refers to the settlement of disputes where a Member considers 'that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired' due to, for example, another Member's inconsistent measure. Thus, the level of nullification or impairment is, broadly speaking, the amount of injury that the Member has suffered due to the inconsistent measure. In that sense, the aim is to ensure that the penalty (suspension of concessions) is not disproportionate to the injury suffered (nullification or impairment).[65] Thus, as in the international law of countermeasures, the focus of the proportionality inquiry is on the harm caused rather than the culpability of the actor or the need to induce compliance (which could weigh in favour of a lower or higher penalty).

If the Member objects to the level of suspension proposed by the complainant, or claims that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, the matter is referred to arbitration under Article 22.6 of the DSU. It is up to the arbitrators (generally comprising the original panel) to determine whether the level of suspension proposed is equivalent to the level of nullification or impairment and/or to confirm whether the principles of Article 22.3 have been followed.

Under the SCM Agreement, special dispute settlement procedures apply and take precedence over the usual DSU rules.[66] For actionable subsidies that are not brought into compliance within six months of adoption, in the absence of agreement on compensation, the DSB grants authorization to the complaining Member, by reverse consensus, to 'take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist', which may be determined by arbitrators under Article 22.6 of the DSU.[67] For prohibited subsidies that are not brought into compliance within the timeframe specified by the Panel, the DSB grants authorization to the complaining Member, by reverse consensus, to 'take appropriate countermeasures'.[68] Footnotes 9 and 10 to the SCM Agreement make clear that the reference to 'appropriate' countermeasures 'is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited'. This is one of the few explicit references to proportionality in the WTO agreements. Again, Article 22.6 arbitrators may determine whether proposed countermeasures fulfil

[65] Two unusual features of the WTO dispute settlement system are that the injury is measured only from the expiry of the reasonable period of time and not retrospectively from the time when the inconsistency began, and that the penalty imposed on the Member acting inconsistently may also harm the complaining Member. For further discussion of these and related problems with the compliance mechanism, see generally Horlick, 'Problems with the Compliance Structure of the WTO Dispute Resolution Process', in D. Kennedy and J. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002), at 636; Charnovitz, 'Should the Teeth be Pulled? An Analysis of WTO Sanctions', in *ibid.*, at 602, 619–627; Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement', 1 *World Trade Rev.* (2002) 123.

[66] DSU, Art. 1.2 and App. 2.

[67] SCM Agreement, Arts 7.9–7.10.

[68] *Ibid.*, Art. 4.10.

this requirement.[69] Later in this article, I consider the significance for the principle of proportionality of the differences between these provisions under the SCM Agreement and the corresponding provisions of the DSU.

B Unilateral Remedies for Certain Other Conduct

An unusual form of retaliatory action available in the WTO is the trade remedy or unilateral remedy. These remedies, which generally take the form of increased tariffs (or, sometimes, import quotas), come in three guises: anti-dumping measures, safeguards, and countervailing measures. Each is imposed for a different reason.

Anti-dumping and countervailing measures are closest to penalties in domestic law or countermeasures in international law, because Members may impose them in response to conduct that is accepted as 'unfair' (dumping or certain forms of subsidy). Thus, the Members recognize that 'dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member'.[70] They also agree that '[n]o Member should cause, through the use of any [specific subsidy], adverse effects to the interests of other Members', including 'injury to the domestic industry of another Member'.[71] In response to one Member's dumping or subsidization causing injury, another Member may therefore (subject to certain stringent conditions) impose anti-dumping[72] or countervailing measures[73] respectively.

Under Article 9.3 of the Anti-Dumping Agreement, a Member may not impose an anti-dumping duty in excess of the margin of dumping.[74] Similarly, under Article 19.4 of the SCM Agreement, Members must not impose countervailing duties in excess of the amount of the subsidy.[75] The ceiling on the amount of penalty (in the form of duties) is therefore set by the undesirable act (dumping or the imposition of certain kinds of subsidies), even if the injury caused by that act is higher. A Member could, of course, choose to impose no anti-dumping or countervailing duties, even if it had the right to do so. Moreover, '[i]t is desirable' that the amount of duties imposed be less than the margin of dumping or the amount of the subsidy 'if such lesser duty would be adequate to remove the injury to the domestic industry'.[76]

In the context of anti-dumping and countervailing measures, the difference between the undesirable act and the injury caused is clear, and even potentially quantifiable, although the WTO agreements do not currently require Members to calculate a margin

[69] *Ibid.*, Art. 4.11.

[70] GATT 1994, Art. VI. The normal value of a dumped product is 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country': Anti-Dumping Agreement, Art. 2.1.

[71] SCM Agreement, Art. 5.

[72] Anti-Dumping Agreement, Art. 9.

[73] SCM Agreement, Art. 19.

[74] See also GATT 1994, Art. VI:2. The margin of dumping is the difference between the normal value and the export price of the product.

[75] See also *ibid.*, Art. VI:3.

[76] Anti-Dumping Agreement, Art. 9.1; SCM Agreement, Art. 19.2.

of injury. This contrasts with the situation in domestic law or customary international law, where it may be extremely difficult in practice to distinguish between the seriousness of the act and the degree of harm caused. In addition, the degree of proportionality required for anti-dumping and countervailing measures is exact. The parties may have different views as to the margin of dumping or the amount of the subsidy, but once the Member's relevant authorities have determined that level in an investigation in accordance with the WTO requirements, the Member cannot impose a duty that exceeds it.[77]

Safeguards are a little different. Most importantly, safeguards are imposed in response to increased imports causing serious injury.[78] No unfairness is involved,[79] and all Members are subject to the safeguards.[80] Therefore, safeguards are less analogous to penalties imposed for unlawful actions. Safeguards do involve some sort of proportionality requirement, in the sense that a Member may apply safeguards 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment'.[81] However, as safeguards are not imposed in response to an unlawful or undesirable act by any other Member, and as a Member may continue to impose safeguards to the extent necessary 'to facilitate adjustment' (which may bear no relationship to the conduct of other Members), these cannot be seen as retributive measures or measures imposed to induce compliance. Accordingly, I do not view the current WTO provisions on the imposition of safeguards as incorporating the principle of proportionality in the sense described earlier in this article in relation to criminal penalties and international countermeasures.[82] I return to this issue below in addressing certain Appellate Body pronouncements regarding the principle of proportionality.

[77] The precision of this exercise may be diminished in certain circumstances, for example where the investigation authorities limit their examination because the number of exporters, producers, importers, or types of products is so large as to render impractical a determination of individual dumping margins: Anti-Dumping Agreement, Arts 6.10, 9.4.

[78] Agreement on Safeguards, Art. 2.1.

[79] The Appellate Body has recognized this distinction between safeguards, on the one hand, and anti-dumping or countervailing measures, on the other hand. See, e.g., Appellate Body Report, *Argentina—Footwear (EC)*, WT/DS121/AB/R, adopted 12 Jan. 2000, DSR 2000:I, 515, at para. 94.

[80] Agreement on Safeguards, Art. 2.2. Some uncertainty surrounds the application of safeguards to products from partners from a regional trade agreement falling within Art. XXIV of GATT 1994, *supra* note 10. See generally Pauwelyn, 'The Puzzle of WTO Safeguards and Regional Trade Agreements', 7 *J. Int'l Econ. Law* (2004) 109; Lockhart and Mitchell, 'Regional Trade Agreements Under GATT 1994: An Exception and Its Limits', in A. Mitchell (ed.), *Challenges and Prospects for the WTO* (2005), at 217.

[81] Agreement on Safeguards, Art. 5.1. See also Art. 7.1. In addition, Art. 8.1 of the Agreement on Safeguards requires a Member proposing to apply a safeguard to 'endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure'.

[82] The Agreement on Safeguards, provides for an additional unilateral remedy when the Member applying a safeguard is unable to agree with other Members on how to achieve a 'substantially equivalent level of concessions and other obligations' as specified in Art. 8.1. Specifically, upon satisfaction of certain conditions, 'the affected exporting Members shall be free . . . to suspend . . . the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure': *ibid.*, Art. 8.2. Again, the requirement of equivalence introduces the notion of proportionality, but this kind of unilateral remedy does not involve a response to unlawful or undesirable conduct, assuming that the safeguard was imposed in a manner consistent with the Agreement on Safeguards. Accordingly, I do not regard *ibid.*, Art. 8 as incorporating the principle of proportionality in the sense described in this article.

4 Using Proportionality in WTO Disputes

I now examine how WTO Tribunals might use proportionality in WTO disputes. I first consider the relevance of proportionality to the imposition of multilateral remedies – that is, the suspension of concessions authorized by the DSB in response to either a general WTO violation or an actionable or prohibited subsidy that has not been remedied in accordance with the recommendations and rulings of the DSB in a given dispute. I then turn to proportionality in connection with unilateral remedies, namely the imposition of safeguard measures.

A General WTO Violations

As mentioned earlier, Article 22.4 of the DSU requires that the level of suspension of concessions for a particular WTO violation be equivalent to the level of nullification or impairment caused by that violation. In understanding the role of proportionality, it is useful to consider the purpose of this requirement. Most of the interpretation of the Article 22.4 requirement of equivalence has come from arbitrators pursuant to Article 22.6 of the DSU. Several arbitrators have suggested that the purpose of suspending concessions is to induce compliance but that:

> this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature.[83]

The Appellate Body has endorsed this view.[84]

Palmeter and Alexandrov argue that the purpose of retaliatory measures 'is not to induce compliance, but to maintain the balance of reciprocal trade concessions negotiated in the WTO agreements'.[85] In contrast, Charnovitz considers that suspension of concessions in the WTO 'is conceived primarily as a sanction, while the rebalancing idea retains vestigial influence'.[86] In my view, the suspension of concessions is intended to induce compliance. This is consistent with Article 22.8 of the DSU, which states that the suspension of concessions is a temporary measure available only until the inconsistent measure has been removed. It is also consistent with

[83] Decision by the Arbitrators, *EC – Bananas III (US) (Art. 22.6 – EC)*, at para. 6.3. See also Decision by the Arbitrators, *Brazil – Aircraft (Art. 22.6 – Brazil)*, at para. 3.55; Decision by the Arbitrators, *EC – Hormones (US) (Art. 22.6 – EC)*, at para. 40; Decision by the Arbitrators, *US – 1916 Act (Art. 22.6 – US)*, at paras 5.5–5.8; Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Art. 22.6 – EC)*, at para. 76. However, in Decision by the Arbitrators, *US – Offset Act (Byrd Amendment) (Brazil) (Art. 22.6 – US)*, at paras 3.73–3.74, 6.2–6.4, the arbitrators suggested that inducing compliance is simply one of several possible purposes.

[84] Appellate Body Report, *US – Cotton Yarn*, WT/DS192/AB/R, adopted 5 Nov 2001, DSR 2001:XII, 6027, at para. 120 and n. 92; Appellate Body Report, *US – Line Pipe*, WT?DS202/AB/R, adopted 8 Mar. 2002, DSR 2002:IV, 1403, at n. 252. See also Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *AJIL* (2000) 335, at 343.

[85] Palmeter and Alexandrov, '"Inducing Compliance" in WTO Dispute Settlement', in Kennedy and Southwick, *supra* note 65, at 646, 647.

[86] Charnovitz, *supra* note 65, at 611.

Article 3.2 of the DSU, which indicates that, '[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the [inconsistent] measures'.[87] It is true that this purpose is somewhat at odds with the fact that, pursuant to Article 22.4 of the DSU, the DSB cannot authorize suspension of concessions beyond the level of nullification or impairment.[88] However, this reflects a strikingly similar approach to the ILC Articles. In both cases, the purpose of the penalty is said to be to induce compliance, but the penalty itself must not be disproportionate to the harm caused, even if a greater penalty would be required to induce compliance. This contradiction seems no worse under WTO law than under international law, and it seems to flow from the WTO provisions themselves rather than any faulty interpretation in dispute settlement.

In the first Article 22.6 arbitration, the arbitrators explicitly recognized the 'general international law principle of proportionality'.[89] They relied on this principle in determining how to calculate the level of nullification or impairment where a given WTO violation nullifies or impairs benefits accruing to several Members at once.[90] Specifically, the arbitrators held that the need for proportionality precluded 'double-counting' of a given amount of nullification or impairment.[91] On this basis, the arbitrators refused to include, in the calculation of nullification or impairment suffered by the United States as a result of certain measures of the European Communities in relation to bananas, lost United States exports in the form of inputs (such as fertilizer) in the cultivation of Latin American bananas.[92] In the arbitrators' view, only the relevant Latin American countries could seek authorization to suspend concessions for nullification or impairment suffered with respect to Latin American bananas.[93]

Reading the relevant WTO provisions in light of the principle of proportionality, it is clear that the maximum level of suspension of concessions by all WTO Members for a given violation cannot exceed the total level of nullification or impairment suffered by those Members. However, this does not mean that the amount of nullification or impairment suffered by one Member must be reduced according to the amount of nullification or impairment suffered by other Members. The arbitrators suggested that 'the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*'.[94] Yet this is far from self-evident. A WTO violation may nullify or impair benefits accruing to one Member, while at the same time nullifying or impairing benefits accruing to another Member. In that instance, the nullification or impairment suffered by one Member is quite different from the nullification or impairment suffered by another Member, even though it results from the

[87] Palmeter and Alexandrov disagree: see *supra* note 85, at 650.
[88] Charnovitz, *supra* note 64, at 614; Pauwelyn, *supra* note 83, at 343–344.
[89] *EC – Bananas III (US) (Art. 22.6 – EC)*, *supra* note 83, at para. 6.16.
[90] *Ibid.*, at para. 6.15.
[91] *Ibid.*, at paras 6.15–6.16 (emphasis omitted).
[92] *Ibid.*, at para. 6.12.
[93] *Ibid.*, at para. 6.14.
[94] *Ibid.*, at para. 6.16.

same act. Therefore, perhaps the arbitrators could have better explained their decision regarding exports of United States inputs into Latin American bananas by elaborating on why exports of this kind did not constitute a benefit accruing to the United States directly or indirectly under the WTO agreements, instead of by reference to the proportionality principle.

In *US – Offset Act (Byrd Amendment)*, the arbitrators stated that a WTO violation is distinct from the nullification or impairment that may arise from that violation.[95] In support of this conclusion, the arbitrators referred to Article 3.8 of the DSU, which provides that a WTO violation is presumed to nullify or impair benefits of other Members. According to the arbitrators, the fact that the defending Member may rebut this presumption suggests that the violation does not of itself constitute nullification or impairment. Rather, 'the benefit nullified or impaired must necessarily be something else'.[96] As a result, the arbitrators refused Brazil's suggestion that the minimum level of nullification or impairment caused by the Continued Dumping and Offset Act (which the Panel and Appellate Body had found inconsistent as such with the United States' WTO obligations)[97] corresponded to the amount of payments made under that act.[98]

Under the DSU, the concept of nullification or impairment is indeed separate from that of a WTO inconsistency or violation, and Article 22.4 of the DSU does prevent a Member from imposing a penalty (in the form of suspension of concessions) that exceeds the harm caused (in the form of nullification or impairment).[99] However, this does not necessarily preclude the possibility that the violation itself may constitute nullification or impairment in at least some circumstances.[100] This would show how culpability may be relevant to proportionality as a principle of WTO law, just as it is to proportionality as a general principle of law and as a principle of customary international law.

Where the degree of culpability is high but the trade effects are low, accepting that a WTO violation itself may be a form of nullification or impairment would promote the effectiveness of suspension of concessions in inducing compliance and would recognize the retributive element of such action. Conversely, where the degree of culpability is low but the trade effects are high, it could place a further limit on retaliatory action. Granted, Members may impose anti-dumping and countervailing measures beyond the level of harm caused, which seems to depart somewhat from the prevailing general and international law principle of proportionality. However, this follows

[95] See, e.g., *US – Offset Act (Byrd Amendment) (Brazil) (Art. 22.6 – US)*, *supra* note 83, at paras 3.20–3.23, 3.30, 3.32, 3.54.

[96] See, e.g., *ibid.*, at paras. 3.21–3.23, 3.34, 3.55.

[97] Panel Report, *US – Offset Act (Byrd Amendment)*, WT/DS217/R, WT/DS234/R, adopted 27 Jan. 2003, at para. 8.1; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, WT/DS217/AB/R, WT/DS234/AB/R. adopted 27 Jan. 2003, at para. 318(a), (b).

[98] See, e.g., *US – Offset Act (Byrd Amendment) (Brazil) (Art. 22.6 – US)*, *supra* note 83, at paras 3.10, 3.16, 3.56.

[99] See Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2000) 763, at 773, 800–801, 807.

[100] See Pauwelyn, *supra* note 84, at n. 46.

from a clear decision, expressed in the text itself, about the relevance of harm to the penalty imposed.[101] The same cannot be said in relation to whether nullification or impairment is restricted to trade or economic effects independent of the violation. It is therefore preferable to read the requirement of equivalence between suspension of concessions and nullification or impairment in a manner consistent with proportionality as a general principle of law and a principle of customary international law, such that culpability (the violation itself) should be considered in assessing the level of nullification or impairment.

B Actionable and Prohibited Subsidies

I now turn to how proportionality may be used in connection with retaliatory action for failure to bring actionable or prohibited subsidies into conformity with the WTO agreements as recommended in a Panel or Appellate Body report adopted by the DSB.

Beginning with actionable subsidies, the rule seems fairly similar to that for usual WTO violations. In both cases, the acceptable level of retaliation focuses on the harm caused – in the case of an actionable subsidy, the harm caused is 'the degree and nature of the adverse effects determined to exist'.[102] These are 'adverse effects to the interests of other Members', in the form of injury to the domestic industry of another Member, nullification or impairment of benefits accruing directly or indirectly to other Members, or serious prejudice to the interests of another Member.[103] However, the wording of the proportionality requirement ('countermeasures' are to be 'commensurate with the degree and nature of the adverse effects determined to exist')[104] seems to grant greater discretion to the arbitrator than in the usual case under the DSU (where the 'level of suspension of concessions . . . shall be equivalent to the level of nullification or impairment').[105]

No arbitrators have yet been called upon to determine whether proposed countermeasures are commensurate with the adverse effects.[106] However, as with general WTO violations, reading this requirement in light of the principle of proportionality suggests that culpability (and not just harm caused) should play some role. This is consistent with the fact that the unlawful conduct giving rise to culpability (that is, granting an actionable subsidy) is itself defined by reference to the harm caused (that is, adverse effects to the interests of other Members). Specifically, under Article 5 of the SCM Agreement, '[n]o Member should cause, through the use of any [specific subsidy], adverse effects to the interests of other Members'. Thus, in identifying countermeasures commensurate with the degree and nature of such adverse effects, the arbitrator or retaliating Member takes into account not only the harm caused but also the culpability of the subsidizing Member. It could be said that the principle of proportionality not only informs the interpretation of Article 7.9 of the SCM Agreement,

[101] Anti-Dumping Agreement, Art. 9.1; SCM Agreement, Art. 19.2.
[102] *Ibid.*, Art. 7.9.
[103] *Ibid.*, Art. 5.
[104] *Ibid.*, Art. 7.9.
[105] DSU, Art. 22.4.
[106] SCM Agreement, Art. 7.10.

but is incorporated in the use of the term 'countermeasures' (which is a term of art in customary international law) and is therefore part of the applicable law.

As for prohibited subsidies, under Article 4.10 of the SCM Agreement, countermeasures must be 'appropriate', which 'expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited' (footnote 9). Proportionality, as a general principle of law or a principle of customary international law, could influence the ordinary meaning of the words 'countermeasures' and 'disproportionate'.

Three Article 22.6 arbitrations have examined the proscription of disproportionality in footnote 9 of the SCM Agreement. As the arbitrators in the first of these arbitrations (*Brazil – Aircraft*) pointed out:

> it seems difficult to clearly identify how the second part of the sentence ('in light of the fact that the subsidies dealt with under these provisions are prohibited') relates to the first part of the sentence ('This expression is not meant to allow countermeasures that are disproportionate'). This is probably due to the use of the words 'in light of the fact that'.[107]

Indeed, one might have expected the drafters to state that countermeasures must not be disproportionate 'to' the gravity of the offence or the harm caused. Instead, the use of the words 'in light of the fact that' the subsidies are prohibited leaves open the question of what it is that countermeasures must not be disproportionate to. The ordinary meaning of a 'countermeasure' does not resolve this question (as it may be directed towards the illegal subsidy or the harm caused by that subsidy).[108] However, reading footnote 9 of the SCM Agreement consistently with the principle of proportionality in general and international law suggests that both culpability and harm should be considered in assessing whether countermeasures are disproportionate. The reference to the fact that the subsidies are prohibited indicates that the degree of culpability is fairly high for this kind of WTO violation. In other words, the prohibited nature of the subsidies in question is an 'aggravating' rather than a 'mitigating' factor.[109] But that does not mean that culpability alone is determinative in assessing proportionality. Indeed, although a complaining Member need not demonstrate that a prohibited subsidy is causing harm in order to establish a violation, this may be because such subsidies are regarded as inherently or necessarily harmful rather than because harm is irrelevant. This conclusion is consistent with Renouf's reference to the 'irrebuttable presumption of trade effect attached to prohibited subsidies'.[110]

Article 22.6 arbitrators have interpreted footnote 9 rather differently. As adverse effects need not be demonstrated to establish the existence of a prohibited subsidy in violation of Article 3 of the SCM Agreement,[111] the arbitrators in *US – FSC* suggested

[107] *Brazil – Aircraft (Art. 22.6 – Brazil)*, *supra* note 83, at para. 3.51.

[108] Decision by the Arbitrators, *US – FSC (Art. 22.6 – US)*, at para. 5.6.

[109] *Brazil – Aircraft (Art. 22.6 – Brazil)*, *supra* note 83, at para. 3.51; *US – FSC (Art. 22.6 – US)*, *supra* note 107, at para. 5.23.

[110] Renouf, 'A Brief Introduction to Countermeasures in the WTO Dispute Settlement System', in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (forthcoming 2005), at 75, 80.

[111] *US – FSC (Art. 22.6 – US)*, *supra* note 107, at para. 5.39.

that countermeasures may exceed what is necessary to counter any such effects.[112] Instead, in all three arbitrations on this point, the arbitrators have started or ended their proportionality analysis with the amount of the prohibited subsidy,[113] which can be seen as representing the extent of the 'wrongful act'[114] or culpability of the subsidizing Member. Harm caused by the prohibited subsidy (including its effects on the complainant's trade) has been relegated to the role of a potentially relevant factor rather than a necessary consideration.[115]

This interpretation of footnote 9 is not merely at odds with the principle of proportionality, which is informed by notions of justice and fairness; it also raises serious problems given that the WTO is a multilateral agreement in which numerous WTO Members may challenge a prohibited subsidy. If harm does not play a limiting role in assessing the proportionality of countermeasures, this means that the first complainant may retaliate beyond the level it has suffered and up to the full amount of the subsidizing Member's culpability. Later complainants will either have to rely on the first complainant's decision about whether to impose countermeasures as authorized by the DSB, or they will be granted an additional right to impose countermeasures, meaning that the subsidizing Member must pay several times over for its violation. Article 22.6 arbitrators have suggested that this problem can be avoided and the countermeasures authorized will depend on the number of complainants.[116] However, this assumes that all challenges to a particular prohibited subsidy will be brought at the same time. It also seems strange that the question whether a given countermeasure proposed by a WTO Member complies with the proportionality requirement will depend on other Members' complaints about the same measure.

In *Canada – Aircraft*, the arbitrators determined that countermeasures amounting to 120 per cent of the amount of the prohibited subsidy were not disproportionate.[117] The arbitrators might have chosen to base this decision on a finding that Canada's culpability in granting the prohibited subsidy, and the harm caused by that subsidy, went beyond the amount of the subsidy. This would have been consistent with the principle of proportionality. However, this was not their rationale. Rather, the arbitrators added the additional 20 per cent 'to take into account the fact that Canada, until now, has stated that it does not intend to withdraw the subsidy at issue and the need to reach a level of countermeasures which can reasonably contribute to induce compliance'.[118] All Article 22.6 arbitrators have suggested that the purpose of

[112] *Ibid.*, at paras 5.41, 5.49, 5.61.

[113] *Brazil – Aircraft (Art. 22.6 – Brazil)*, *supra* note 83, at para. 3.60; *US – FSC (Art. 22.6 – US)*, *supra* note 107, at paras 6.10–6.11; Decision by the Arbitrators, *Canada – Aircraft (Art. 22.6 – Canada)*, at para. 3.51. See also Renouf, *supra* note 110, at 80.

[114] *US – FSC (Art. 22.6 – US)*, *supra* note 108, at para. 6.11.

[115] *Ibid.*, at paras 5.23, 6.10, 6.33–6.35.

[116] *Brazil – Aircraft (Art. 22.6 – Brazil)*, *supra* note 83, at para. 3.59; *US – FSC (Art. 22.6 – US)*, *supra* note 108, at paras 6.27–6.28, 6.62.

[117] *Canada – Aircraft (Art. 22.6 – Canada)*, *supra* note 113, at para. 3.121.

[118] *Ibid.*, at para. 3.119.

countermeasures under Article 4.10 of the SCM Agreement is to induce compliance through the withdrawal of the prohibited subsidy.[119]

In this context, I agree with Palmeter and Alexandrov that the arbitrators went too far.[120] Even assuming that the purpose of countermeasures for prohibited subsidies is to induce compliance, to use this as a justification for increasing countermeasures beyond the degree of culpability or harm is plainly contrary to the principle of proportionality. As I suggested earlier in relation to proportionality as a general principle of law, non-comparative proportionality sets an absolute ceiling on the amount of the penalty imposed for a given offence, based on the seriousness of the offence and the injury it causes. The arbitrators in *Canada – Aircraft* had discretion to identify this ceiling and, below this ceiling, to adjust the amount of the countermeasures according to comparative proportionality (that is, countermeasures allowed in similar cases, which the arbitrators did consider)[121] and other factors such as utilitarian objectives, including deterrence and inducing compliance.

C Safeguards

In two trade remedy disputes, the Appellate Body has recognized the principle of proportionality as a principle of customary international law.[122] First, it did so implicitly in *US – Cotton Yarn* in 2001, based on Article 51 of the ILC Articles (then in draft form).[123] Next, it did so explicitly in *US – Line Pipe* in 2002, based not only on Article 51 but also on two ICJ decisions.[124] In that case, the Appellate Body also 'observed' that the United States itself had recognized the existence of such a principle in customary international law in its comments on the draft ILC Articles and in an international arbitral tribunal.[125] Of itself, the Appellate Body's recognition of the proportionality principle may not be particularly remarkable. However, in both cases the Appellate Body used the principle of proportionality in an unusual way.

In *US – Cotton Yarn*, the Appellate Body was examining the 'specific transitional safeguard mechanism'[126] provided under Article 6 of the now defunct Agreement on Textiles and Clothing (ATC).[127] This mechanism enabled a Member to impose a safeguard if a product was being imported into its territory in such increased quantities as to cause serious damage to the domestic industry producing like or directly competitive

[119] *Ibid.*, at para. 3.59; *US – FSC (Art. 22.6 – US)*, *supra* note 108, at para. 5.57; *Brazil – Aircraft (Art. 22.6 – Brazil)*, *supra* note 83, at para. 3.44.

[120] Palmeter and Alexandrov, *supra* note 85, at 653–654.

[121] Appellate Body Report, *Canada – Aircraft*, WT/DS70/AB/RW, adopted 4 Aug. 2000, DSR 2000:IX, 4299, at paras 3.40–3.41.

[122] Appellate Body Report, *US – Cotton Yarn*, *supra* note 84, at paras 120–122; Appellate Body Report, *US – Line Pipe*, *supra* note 84, at para. 259.

[123] *US – Cotton Yarn*, *supra* note 122, at n. 90.

[124] *US – Line Pipe*, *supra* note 84, at para. 259 and n. 256 (citing *Nicaragua v. United States of America*, *supra* note 44, at para. 249 and *Gabcíkovo-Nagymaros Project*, *supra* note 46, at 220).

[125] *US – Line Pipe*, *supra* note 84, at para. 259 and n 257 (referring to the Arbitral Tribunal established by the Compromise of 11 July 1978 in the *Air Services Agreement of 27 March 1946 (United States v. France)*, *supra* note 45).

[126] ATC, art 6.1.

[127] This agreement was terminated, in accordance with its Art. 9, on 1 Jan. 2005.

products.[128] Article 6.4 of the ATC stated that Members had to apply safeguard measures 'on a Member-by-Member basis', such that 'Members to whom serious damage is attributed . . . shall be determined on the basis of a sharp and substantial increase in imports . . . from such . . . Members individually'. This contrasts with the MFN rule in Article 2.2 of the Agreement on Safeguards, which states that safeguards imposed under that agreement 'shall be applied to a product being imported irrespective of its source'. Based primarily on Article 6.4, the Appellate Body concluded that 'the part of the total serious damage attributed to an exporting Member' (and, hence, the level of the safeguard applied to that Member) 'must be proportionate to the damage caused by the imports from that Member'.[129] This seems to follow from the text of the provision, particularly when read in context.

The Appellate Body could well have ended its analysis here. However, it went on to support its interpretation of Article 6.4 of the ATC by reference to the proportionality principle. The Appellate Body suggested that Article 22.4 of the DSU incorporates this principle by requiring suspension of concessions to be equivalent to the level of nullification or impairment.[130] I came to a similar conclusion above. But what does that have to do with the transitional safeguard under the ATC? Noting that safeguards are not imposed in response to unfair trade, the Appellate Body stated:

> It would be absurd if the breach of an international obligation were sanctioned by proportionate countermeasures, while, in the absence of such breach, a WTO Member would be subject to a disproportionate and, hence, 'punitive', attribution of serious damage not wholly caused by its exports. In our view, such an exorbitant derogation from the principle of proportionality in respect of the attribution of serious damage could be justified only if the drafters of the *ATC* had expressly provided for it, which is not the case.[131]

Although the Appellate Body did not refer to the principle of proportionality in the context of anti-dumping or countervailing measures, the principle it applied was similar to that existing under the Anti-Dumping Agreement and Part V of the SCM Agreement. Put simply, it concluded that textile safeguards could not be applied to a Member from whom imports had not increased (just as anti-dumping duties cannot generally be imposed against a company whose exports have not been dumped, and countervailing duties cannot generally be imposed against a company whose exports have not been subsidized). Intuitively, this seems like a fair and sensible result, and it may well flow from a proper reading of Article 6.4 of the ATC, as mentioned earlier. However, it seems to me that the Appellate Body's invocation of the proportionality principle in this context was not only unnecessary but also inappropriate.

It would have been one thing for the Appellate Body to reason that anti-dumping duties cannot exceed the dumping margin, and countervailing duties cannot exceed the amount of the subsidy, (reflecting the principle of proportionality), and therefore it would not make sense for safeguards to exceed the increase in imports justifying

[128] *Ibid.*, Art. 6.2.
[129] *US – Cotton Yarn*, *supra* note 84, at para. 119.
[130] *Ibid.*, at para. 120.
[131] *Ibid.*, at para. 120.

their application. It was quite another for the Appellate Body to apply the proportionality principle in interpreting Article 6.4 of the ATC, which is what it did, stating that this provision 'is to be seen in the light of the principle of proportionality as the means of determining the scope or assessing the part of the total serious damage that can be attributed to an exporting Member'.[132] Culpability plays an essential role in the principle of proportionality, where every instance involves culpability through an unlawful or undesirable act. In the absence of culpability, sanctions can have no retributive purpose or effect. The Appellate Body expressly recognized that safeguards are not responses to unfair or culpable conduct, but it applied the principle of proportionality anyway. It is not clear what meaning that principle can have when divorced from one of its core elements and rationales.

The second case in which the Appellate Body recognized the principle of proportionality in connection with safeguards was *US – Line Pipe*. In that case, the Appellate Body was examining Article 5.1 of the Agreement on Safeguards, which requires Members to impose safeguards 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment'.[133] The Appellate Body characterized the question before it as 'whether the permissible extent of a safeguard measure is limited to the injury that can be attributed to increased imports, or whether a safeguard measure may also address the injurious effects caused by other factors'.[134] In answering this question, the Appellate Body first noted that Article 4.2(b) of the Agreement on Safeguards states that, '[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports'. It suggested that this provision 'informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1'.[135]

The Appellate Body quoted certain passages relating to proportionality in *US – Cotton Yarn* and stating that 'the same reasoning applies here'.[136] In addition to comparing the imposition of safeguards to the suspension of concessions, as it had done in *US – Cotton Yarn*, the Appellate Body compared the imposition of safeguards to the imposition of anti-dumping or countervailing measures:

> If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties. On what basis should the *WTO Agreement* be interpreted to limit a countermeasure to the extent of the injury caused by unfair practices or a violation of the treaty but not so limit a countermeasure when there has not even been an allegation of a violation or an unfair practice?[137]

The Appellate Body therefore read Article 5.1 as requiring safeguards to be limited to the extent necessary to prevent or remedy serious injury attributed to increased

[132] *Ibid.*, at para. 122.
[133] *US – Line Pipe*, *supra* note 84, at para. 237.
[134] *Ibid.*, at para. 241 (emphasis omitted).
[135] *Ibid.*, at para. 252.
[136] *Ibid.*, at paras 254–257.
[137] *Ibid.*, at para. 257.

imports.[138] It is interesting to note that the Appellate Body here referred to countermeasures, even though the Agreement on Safeguards does not refer to safeguards as countermeasures. Indeed, the only reference to countermeasures in the WTO agreements is, as described above, in connection with subsidies that have been found inconsistent with Part II or III of the SCM Agreement (regarding prohibited and actionable subsidies respectively).[139]

The Appellate Body's use of proportionality in the context of the Agreement on Safeguards suffers from the same deficiency as its use of proportionality in the context of the ATC: the absence of culpability renders the principle almost meaningless. However, the deficiency is even greater under the Agreement on Safeguards. As already explained, if a Member decides to apply safeguards under this agreement because a 'product is being imported into its territory in such increased quantities . . . and under such conditions as to cause . . . serious injury to the domestic industry',[140] the Member must apply safeguards to each import of that product 'irrespective of its source'.[141] In *US – Line Pipe*, the Appellate Body was therefore not addressing the attribution to different Members of increased imports. Rather, it was addressing the attribution to 'increased imports' (as opposed to other factors) of injury suffered by the domestic industry. [142] A safeguard imposed under the Agreement on Safeguards is therefore even less like a penalty than the transitional safeguard under the ATC that the Appellate Body addressed in *US – Cotton Yarn*.

It seems clear from the terms of Article 5.1 itself that safeguards can go beyond what is needed to prevent or remedy serious injury – they can be used also to the extent necessary 'to facilitate adjustment'.[143] Putting this to one side, the Appellate Body is probably correct that the 'serious injury' described in Article 5.1 is serious injury caused by increased imports. Yet, as in *US – Cotton Yarn*, it did not need to rely on the proportionality principle to reach this conclusion. As the Appellate Body correctly pointed out,[144] Article 4.2(b) of the Agreement on Safeguards confirms that the serious injury that is relevant is that caused by increased imports. Furthermore, Article XIX:1(a) of GATT 1994, from which the Agreement on Safeguards derives, provides:

> If . . . any product is being imported into the territory of [a Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free [to impose a safeguard] in respect of such product . . . to the extent and for such time as may be necessary to prevent or remedy such injury.

[138] *Ibid.*, at para. 260.

[139] Art. 9.4 of the SCM Agreement also refers to countermeasures in connection with 'non-actionable subsidies'. Art. 9.4 (and the category of non-actionable subsidies in Part IV of the SCM Agreement) expired at the end of 1999 in accordance with Art. 31 of the SCM Agreement.

[140] Agreement on Safeguards, Art. 2.1.

[141] *Ibid.*, Art. 2.2.

[142] *US – Line Pipe*, *supra* note 84, at para. 241 (emphasis omitted).

[143] The Appellate Body does not appear to account for the words 'to facilitate adjustment' in its reading of Art. 5.1 in *ibid.*, at para. 260.

[144] *Ibid.*, at para. 252.

Evidently, the term 'such injury' in this provision refers to the serious injury described earlier in the passage, confirming that the injury relevant to the inquiry is serious injury caused by increased imports.

The United States' particularly vehement reaction to *US – Line Pipe*[145] may have stemmed from the Appellate Body's recognition of the principle of proportionality or, more specifically, its use of that principle in interpreting the WTO agreements. In this section, I have highlighted several difficulties with the Appellate Body's use of the proportionality principle in *US – Line Pipe*, as well as *US – Cotton Yarn*. This provides an example of the dangers of using principles with insufficient precision.

5 Conclusion

This article has provided certain evidence to suggest that proportionality could be characterized as a general principle of law and a principle of customary international law. More importantly, it has demonstrated how the principle of proportionality could be used in relation to WTO disputes, particularly in evaluating the level and type of multilateral and unilateral remedies that WTO Members may have in response to a WTO violation or other conduct that is classified as unfair in the WTO agreements.

Proportionality could be used in a non-interpretative manner as part of the applicable law, to the extent that it is incorporated in certain WTO provisions such as footnote 9 of the SCM Agreement. But the most obvious way in which the principle of proportionality could be used is in interpreting the WTO agreements. In this regard, it confirms the purpose of suspension of concessions as inducing compliance, as well as the limit on retaliation established by the harm caused by and culpability associated with the WTO violation in question.

This article has also revealed that principles such as proportionality should be used with caution in WTO disputes. Where the text of a WTO provision is clearly contrary to a general principle of law or a principle of customary international law, the principle cannot be used to interpret this distinction away. Thus, proportionality cannot be used in an interpretative manner to change the clear intention of the drafters of the Anti-Dumping Agreement and the SCM Agreement that Members should be entitled to impose anti-dumping or countervailing measures beyond the level of harm caused by the challenged dumping or subsidization (provided that the measures comply with the other conditions of the agreements). Finally, if WTO Tribunals are to use principles to inform their interpretation of particular provisions, they must ensure that they have secure grounds for doing so. As explained in this article, I regard proportionality as having no relevance to the imposition of safeguards, because safeguards are not imposed in response to any illegal or unfair act, and proportionality in general and international law centres on both harm and culpability. Accordingly, WTO Tribunals have erred in their use of the principle of proportionality in this context.

[145] See WT/DSB/M/121, Minutes of the DSB meeting held on 8 Mar. 2002, at para. 35.