



Countermeasures under the Agreement on Subsidies and Countervailing Measures: Between the Aircraft Manufacturing Industry and Society

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Abstract

Countermeasures under World Trade Organization (WTO) law are separated into two categories, remedies and a method to induce compliance after another defaulting state fails to adhere to WTO's panel recommendation. This article will focus on the second category. The term 'countermeasures' specifically refers to an act of suspension of concessions or other obligations. One case of granted countermeasures is DS316, a case between the United States of America (US) and the European Union (EU). The issue of this case is the subsidies granted by the EU for Airbus, an aircraft manufacturer based in Europe which consists of four European nations, which resulted in Boeing's market loss. The US then requested countermeasures authorisation by the WTO. Countermeasures are related to the principle of proportionality both under public international law and WTO law. Additionally, countermeasures can lead to a more complex situation since it affects the human rights of the private actors of international trade as a part of society. This article explains the implementation of both the countermeasures and the proportionality principle, and analyses the precedents of cases and the countermeasures granted by the WTO as well as the effects of the granted countermeasures to society as it creates barriers for all the international trade actors.

Keywords: *Agreement on Subsidies and Countervailing Measures (SCM Agreement) Countermeasures; International Trade Law; Society.*

1. INTRODUCTION

Subsidising national entities¹ to promote their domestic industry is a common practice to keep up with the competitiveness of international trade

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¹ Huala Adolf and An-An Chandrawulan, *Masalah-Masalah Hukum dalam Perdagangan Internasional*, (Bandung: Rajagrafindo Persada, 1995), 70.

and to develop the State's education, health, security, and other sectors.² The World Trade Organization (WTO) does not entirely prohibit States to subsidise their national entities insofar as the subsidies do not negatively affect other States' position in international trade or distort the stability of international trade. It is common for a State to subsidise an aircraft manufacturer since it is a high-risk industry with technological and market uncertainties and a high stake of financial risk.³ The dispute between the United States of America (US) and the European Union (EU) is no exception.

European Communities (EC, the predecessor of the EU) subsidised Airbus Industrie GIE (the predecessor of Airbus S.A.S, hereinafter "Airbus"), a consortium of aircraft manufacturers between the Deutsche Airbus unit of Germany's Daimler-Benz AG, the British Aerospace PLC of Britain, the Aerospatiale of France and the Construcciones Aeronáuticas SA of Spain.⁴ Airbus started to produce Large Civil Aircraft (LCA) in the early 1970s.⁵ This subsidy increased the rivalry between Airbus and Boeing,⁶ a US aircraft manufacturer that has previously dominated the world's aerospace manufacturing industry with Boeing 707 as their pioneer fleet for civil aircraft⁷ and Boeing 737 as the best-selling civil aircraft.⁸

The Agreement on Trade in Civil Aircraft (ATCA)⁹ governs the trade of civil aircraft with the purpose to eliminate adverse effects as the result of government funding for the development, production and marketing of civil aircraft.¹⁰ Both the US and the EC as parties of the ATCA found difficulties in implementing ATCA.¹¹ Thus, they renegotiated the implementation of the ATCA resulting in the establishment Agreement on Trade in Large Civil Aircraft¹² (ATLCA) which limits subsidies, *inter alia*, the prohibition of direct

² Mitsuo Matsushita, et al., *the World Trade Organization: Law, Practice, and Policy Third Edition*, (Oxford: Oxford University Press, 2015), 300.

³ U.S. Congress, Office of Technology Assessment, "Competing Economies: America, Europe, and the Pacific Rim", OTA-ITE-498, Washington, DC: U.S. Government Printing Office, 1991, 343.

⁴ Jennifer A. Manner, "How To Avoid Airbus II: A Primer For Domestic Industry", *California Western International Law Journal* 23, no. 1 (1992): 141.

⁵ Douglas A. Irwina and Nina Pavcnik, "Airbus versus Boeing Revisited: International Competition in the Aircraft Market", *Journal of International Economics* 64 (2004): 223-224.

⁶ Jeffrey D. Kienstra, "Cleared for Landing: Airbus, Boeing, and the WTO Dispute over Subsidies to Large Civil Aircraft", *Northwestern Journal of International Law and Business* 32, no.3, (2012): 571.

⁷ Marc C. Mathis, "Uncivil Aviation: How the Ongoing Trade Dispute Stalemate between Boeing and Airbus has Undermined GATT and May Continue to Usher in an Era of International Agreement Obsolescence under the World Trade Organization", *Tulsa Journal of Comparative and International Law* 13, no. 1, (2005): 181

⁸ Jeffrey D. Kienstra, *op.cit.*, 573.

⁹ A plurilateral agreement between Aircraft Manufacturer Countries which is a part of GATT Tokyo Round 1979.

¹⁰ *Ibid.*, see also, Preamble of Agreement on Trade in Civil Aircraft.

¹¹ Jennifer A. Manner, *op.cit.*, 144.

¹² Agreement between the European Economic Community and the Government of the United States of America Concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft.

government support.¹³ In 2003, the US failed to propose a renegotiation with the EC to modify the ATLCA.¹⁴

Eventually, on 6 October 2004, the US unilaterally terminated the ATLCA and initiated to settle the dispute in the WTO. The US requested consultations with the EC and proposed that the EC were contrary to Article 3, 5, and 6 of the Agreement on Subsidies and Countervailing Measures (hereinafter, “SCM Agreement”) and Article III: 4 and XVI: 1 of the GATT 1994. The case brought by the US was titled *DS316 - EC and certain member States — Large Civil Aircraft* (hereinafter, “DS316”).¹⁵ They started the negotiation on 4 November 2004. On 11 January 2005, they agreed to a framework for additional negotiations.¹⁶ The framework was aimed to secure a comprehensive agreement to end subsidies to LCA producers by agreeing that subsidies and litigation would be suspended and add three months more for negotiations.¹⁷ However, amid the period of the agreed framework, the EC continued to grant subsidies for the development of A350.¹⁸

After years of proceeding, on 30 June 2010, some of the EC’s measures constituted illegal subsidies¹⁹ and had adverse consequences, as they displaced imports of the US aircraft into the European market. The subsidies also terminated the export of similar products of the US in the markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico, and Singapore. Lastly, in the same market, the subsidies caused substantial revenue losses. The Panel recommended that the EU shall remove the adverse effects or withdraw the subsidy immediately.²⁰ However, both parties appealed the rulings of the Panel to the Appellate Body (AB). To sum up, the AB reversed the Panel’s recommendation regarding the German, Spanish and UK A380 Launching Aid.²¹ The AB affirmed the Panel’s conclusion as to the launch aid and R&TD subsidies granted as specific subsidies under any of the EC Framework Programmes. In addition, the AB demanded that the EU put its actions in line with its responsibilities under the SCM Agreement.²²

¹³ Agreement on Trade in Civil Aircraft (ATLCA), Art.3. *see also*, Özgür Çalışkan, “An Analysis of the Airbus-Boeing Dispute from the Perspective of the WTO Process”, *Ege Academic Review* 10, no: 4 (2010): 1132.

¹⁴ Robert J. Carbaugh & John Olienyk, “Boeing-Airbus Subsidy Dispute: A Sequel”, *Global Economy Journal* 2, no. 6, (2004): 3.

¹⁵ European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/1, WTO, Request for Consultations by the US, 1.

¹⁶ Jeffrey D. Kienstra, *op.cit.*, 589.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, WTO, Panel Report, (hereinafter, “DS316: Panel Report”) 2010, para. 8.1(a)(i).

²⁰ DS316: Panel Report, *op.cit.*, para. 8.6, 8.7

²¹ *Ibid.*, para. 8.1(j).

²² *Ibid.*

The EU informed the WTO on 19 December 2011 that it has adopted necessary measures to comply with the recommendations of the DSB and its obligations as a member of the WTO as regulated under Article 7.8 of the SCM Agreement and Article 19.1 of the Dispute Settlement Understanding ("DSU"). Previously, on 9 December 2011, the US already requested for the authorisation of countermeasures to the WTO and initiated consultations with Article 21.5 of DSU as the basis.²³ The US submitted this request since the EU had not fully complied with the WTO obligations and DSB's rulings. The EU objected to the countermeasures requested by the US and insisted to arbitrate the matters pursuant to Article 22.6 of the DSU.²⁴

After years, both parties continued the arbitration on 13 January 2018 following the circulation of the compliance panel report.²⁵ The Arbitrator distributed the Decision to Parties on 2 October 2019. On 14 October 2019, the DSB authorised the US to take countermeasures in the amount of USD 7,496.623 million annually.²⁶ The countermeasures level is the highest amount ever authorised by the DSB and in the form of Annual Suspension which gives rise to the importance of determining whether this amount is necessary for the balance of international trade or merely putting a burden for the EU to enter the US' market. Even though the disputing objects of the case were aircraft, this study is focused on the international trade aspect and does not analyse the topic through the international aviation law aspect.

The main objective of this research is to analyse the issues that arise from the conditions that occurred in the DS316 case where the DSB granted the highest level of countermeasures in history. First, this article assesses the definition and implementation of countermeasures from the WTO law and case precedents that force the defaulting State to immediately comply with the WTO obligations. Second, to assess the principle of proportionality in the WTO dispute under the SCM Agreement. Lastly, this article addresses the impacts of countermeasures in society.

This article applies the normative juridical approach with a conceptual approach, statute, case study, and comparative method that is conducted through library research. The article focuses on international trade law, especially how the regulations (international agreements and proceeding rules of the WTO) are implemented in practice. The results of the research are elaborated through the qualitative method.

²³ DS316: European Communities, available online on 10.02.21 at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm, *op.cit.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/ARB, WTO, Recourse to Article 22.6 of the Dispute Settlement Understanding (DSU) by the European Union Decision by the Arbitrator, 2 October 2019, (hereinafter, “DS316, Article 22.6 Decisions”) para. 9.

2. RESULT AND DISCUSSION

2.1. Authorised Countermeasures Under the WTO Law and Cases Precedents

Before discussing the main issue, it is necessary to explain 'countermeasures' under the public international law and the WTO rules.²⁷ The WTO rules acting as the *lex specialis* of the international trade-related issues.²⁸

2.1.1. Countermeasures under International Law

Countermeasures in international law refer to acts of retaliation which are known as 'reprisals' with no involvement in the use of force.²⁹ In practising countermeasures, States hold the obligation to withhold from threats or use of force as pursuant to the Charter of the United Nations.³⁰ The notion of 'use of force' is limited to the armed force as indirectly elaborated under United Nations General Assembly Resolution 2625 (XXV).³¹ In short, reprisals without the use of force can be defined as a retaliation where the State shall refrain itself from using armed or military force when the State implements it. In implementing it, States have to respect human rights, obligations of a humanitarian character prohibiting reprisals and other *jus cogens* obligations.³² International law recognises countermeasures as circumstances that preclude wrongfulness.³³

Gabčíkovo-Nagymaros Project case³⁴ sets the requirements for permissible countermeasures. The conditions are: (a) parties must attempt to resolve the dispute in good faith by calling upon the injuring state to discontinue its wrongful conduct or to make the reparation caused by the wrongful act;³⁵ (b) the countermeasures are only taken against the injuring

²⁷ See Joost Pauwelyn. "The Role of Public International Law in the WTO: How Far Can We Go?", *American Journal of International Law* 95 (2001): 538.

²⁸ *Ibid.*, 539.

²⁹ Peter Malanczuk. *Akehurst's Modern Introduction to International Law*, 7th ed., (New York: Routledge, 1997), 271, *see also*, Malcolm Shaw. *International Law*, 6th ed., (Cambridge: Cambridge University Press, 2008), 794.

³⁰ Art. 2(4) of the Charter of the United Nations.

³¹ UNGA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/2625 (XXV), 24 October 1970, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/25A1C8E35B23161C852570C4006E50A> B, *see also*, Dörr, Oliver, and Albrecht Randelzhofer. "Purposes and Principles, Article 2 (4)," in *The Charter of the United Nations: A Commentary, Volume I (3rd Edition)*, ed. Bruno Simma, Daniel-Erasmus Khan and et.al (Oxford: Oxford University Press, 2012), para. 16-28.

³² Malcolm Shaw, *op.cit.*, 795, *see also*, ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Art. 50.

³³ ARSIWA, Art. 49 and Chapter V

³⁴ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgement, 1997, 7.

³⁵ ARSIWA, Art. 52(1). *see also*, *ibid.*, para. 84, *see also*, Eliza Fitzgerald, "Helping States Help Themselves: Rethinking the Doctrine of Countermeasures: Are

state;³⁶ (c) the action is proportional;³⁷ (d) the countermeasures are meant to persuade the wrong-doing State to comply with international obligations³⁸ and (e) the conduct is reversible.³⁹ In this case, Slovakia failed to satisfy the proportionality requirements. Its action of diverting the Danube River was disproportionate since the action of unilaterally diverting international watercourse or shared resources resulted in the deprivation of Hungary's right to an equal and fair share of the river's natural resources.⁴⁰

Countermeasures also took place in the Air Services Agreement cases. As an example, a case regarding the change of gauge in third countries, specifically in the Pan American World Airways (Pan Am) flight from San Francisco to Paris with a fleet change stop in London. Pan Am flew the Boeing 747 from San Francisco and landed the aircraft in London to change the fleet to Boeing 727 and later continued the flight to France in order to make the trajectory more efficient.⁴¹ According to France's view, the 'change of gauge' in third countries was not stated in the US-France Air Transport Services Agreement and only applied to the 'change of gauge' in the territories of the parties.⁴²

Later, France disallowed passengers to disembark and to embark into the fleet which caused Pan Am to stop the service. At the same time, Air France was operating direct air service from Paris to Los Angeles. For this reason, the US Civil Aeronautics Board found that France was inconsistent with the bilateral agreement and later announced that it would enact the retaliatory suspension for all of the French flights with Paris to Los Angeles route. The arbitrators recalled that countermeasures and the alleged breach must have some degree of equivalence,⁴³ and determining the 'proportionality' of the countermeasures can only be at an approximation.⁴⁴ The arbitrator ruled that the countermeasures taken by the US were proportionate when compared to France's measure.⁴⁵ In sum, the principle of proportionality has to be proportional in qualitative and quantitative terms.⁴⁶ Further, the injured State likely satisfies the cumulative requirements of necessity and proportionality of countermeasures if the actions taken are

Countermeasures an Effective Means of Resolving Disputes between States?", *Macquarie Law Journal* 16, (2016): 69-70.

³⁶ *Gabčíkovo-Nagymaros Project*, *op.cit.*, para. 83.

³⁷ *Ibid.*, para. 85, 87.

³⁸ ARSIWA, Art. 49 (1). *see also*, *Ibid.*

³⁹ Art. 49 (3) of ARSIWA, Art. 49 (3) *see also*, *Gabčíkovo-Nagymaros Project*, *op.cit.*

⁴⁰ *Ibid.*, para. 87.

⁴¹ Lori Fisler Damrosch. 'The 1978 US-France Aviation Dispute', *American Journal of International Law* 74, no. 4, (1980): 785.

⁴² *Ibid.*

⁴³ *Air Services Agreement of 27 March 1946, (US v. France)*, 1978, 83.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ James Crawford. *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, (Cambridge: Cambridge University Press, 2002), 296.

the same or related, but it does not limit a state to take countermeasures in a different or unrelated obligation.⁴⁷

2.1.2. Countermeasures in the WTO Law

Countermeasures under the WTO law are the means available to WTO members in order to deal with exceptional circumstances and alleged breaches of the rules.⁴⁸ Countermeasures in the WTO regime come in two categories. The first category consists of trade remedies or trade defence mechanisms and contingent protection. The forms of these countermeasures are anti-dumping, countervailing duties and safeguards.⁴⁹ In terms of remedies, the WTO sets the hierarchy of remedies, which includes (a) bilateral agreement; (b) withdrawal by the defendant of the WTO inconsistent measures; (c) compensation and; (d) retaliation.⁵⁰ The reason countermeasures or retaliation fall into the last option of the hierarchy is that many have criticised the imposition of countermeasures since it negates the purpose of the WTO and it may benefit the Member States which imposed it can compound their economic importance.⁵¹

The second group of countermeasures is the one that requires DSB's authorisation.⁵² There are several terms used to describe this group, which include 'retaliation', 'sanctions' 'enforcement' 'rebalancing', and 'countermeasures'. However, the commonly used term in the WTO rules is 'suspension of concessions or other obligations'.⁵³ This type of countermeasures acts as the last resort to encourage the defaulting state to bring the unlawful measures back to conformity with their obligations under the WTO rules or DSB's recommendations promptly.⁵⁴ Hence, it is regulated under the objective and rational procedure and process.⁵⁵ This article will assess the second group of countermeasures as the research object.

⁴⁷ *Ibid.*, 283.

⁴⁸ Walter Goode. *Dictionary of Trade Policy Terms*, 6th ed., (Cambridge: Cambridge University Press, 2020), 132.

⁴⁹ *Ibid.*

⁵⁰ R. Rajesh Babu. *Remedies under the WTO Legal System*, (Leiden: Koninklijke Brill NV, 2012), 131.

⁵¹ Junianto J. Losari and Michael Ewing-Chow, "A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law", *Journal of World Investment and Trade* 16 (2015): 304, *see also*, Marco Dani. "Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders", *European Journal of International Law* 21, no. 2, (2010): 320.

⁵² Walter Goode, *op.cit.*

⁵³ *Ibid.*, 224, *see also*, Michelle Limenta. *WTO Retaliation: Effectiveness and Purposes*, (Portland: Hart Publishing, 2017) 90.

⁵⁴ DSU, Art. 19.1.

⁵⁵ Ida Bagus Wyasa Putra and Ni Ketut Supasti Dharmawan, *Hukum Perdagangan Internasional*, (Bandung: Refika Aditama, 2017), 150.

Countermeasures in the WTO law are expected to induce compliance and to justify a countermeasure that is punitive in nature.⁵⁶ As regulated under the DSU, countermeasures or the suspension of concessions or other obligations is not permanent and can only be executed in the time where the non-compliant Members fail to implement the recommendations and rulings.⁵⁷ There is no limit on the types of objects of the countermeasures.⁵⁸ Countermeasures frequently take the form of the suspension of concessions or other obligations.⁵⁹

The complaining State shall follow the principles and procedures in considering the concessions or other obligations to be suspended. The first principle states that the suspension of concessions or other commitments in the same sector(s) should be given priority.⁶⁰ Second, if the first principle is impracticable or ineffective, the complaining state may seek to suspend concessions or obligations of different sectors under the same agreement.⁶¹ Third, if the second principle is impracticable or ineffective and the circumstances in particular cases are severe enough, the complaining State may attempt to suspend concessions or obligations of another covered agreement.⁶²

A suspension may take place as long as the covered agreement allows it and the application is authorised by the DSB to the degree that it corresponds to the level of nullification or impairment.⁶³ The DSB shall authorise within 30 days of the expiry of the reasonable period of time unless the DSB decides to reject the request. If there is an objection to the level of the suspension requested or if the request is contrary to the second and third principles or procedure, the party shall refer the disputed matter to the arbitration.⁶⁴

The arbitration has a purpose to determine the equivalency of the suspension requested with the level of the nullification or impairment, the legality of the requested suspension under covered agreement and not the nature of the concessions or obligations unless the matter of the arbitration

⁵⁶ European Communities — Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB, 9 April 1999, para 6.3, *see also*, US – Gambling and Betting, Recourse to Arbitration by the US under Article 22.6 of the DSU, WT/DS285/ARB, 21 December 2007, para 3.71, *see also*, Arie Reich, “The Effectiveness of The WTO Dispute Settlement System: A Statistical Analysis”, *EUI Working Paper LAW 2017/11*, (2017): 15.

⁵⁷ DSU, Art. 22.1 *see also*, Dyan F. D. Sitanggang, “Posisi, Tantangan, Dan Prospek Bagi Indonesia dalam Sistem Penyelesaian Sengketa WTO”, *Veritas et Justitia* 3, no. 1: 96.

⁵⁸ Canada — Export Credits and Loan Guarantees for Regional Aircraft — Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Decision by the Arbitrator, 17 February 2003, WT/DS222/ARB, footnote 82.

⁵⁹ Michelle Limenta, *op.cit.*, 90.

⁶⁰ DSU, Art. 22.3 (a).

⁶¹ DSU, Art. 22.3 (b).

⁶² DSU, Art. 22.3 (c).

⁶³ DSU, Arts. 22.4 and 22.5.

⁶⁴ DSU, Art. 22.6.

invokes the principles and procedures as set under Article 22.3 of the DSU.⁶⁵ As countermeasure is temporary, it shall be terminated at the moment that the inconsistent Member has removed the inconsistent measure, or a solution is given by the Member for the secession or impairment of benefits, or if the Member States find mutually agreed solutions.⁶⁶ To conclude, countermeasures under the WTO law require the authorisation from the DSB and the countermeasures are taken under the surveillance of the DSB.

2.1.3. Countermeasures under the SCM Agreement

The SCM Agreement uses the expression 'countermeasures' rather than 'suspension of concessions or other responsibilities' as opposed to the DSU. Not to be confused with the 'countervailing measure', countermeasure induces compliance with the recommendations and rulings of the panel of non-complying States. While countervailing duty is an act of a State where they levy a special duty to offset any subsidy bestowed of any merchandise. Nevertheless, the SCM Agreement follows the provisions under the DSU when a party of a dispute requested for an arbitration proceeding as established under Article 22.6 of the DSU.⁶⁷ Forms of countermeasures under the SCM Agreement vary and follow the types of subsidies under the SCM Agreement, which are the prohibited subsidies and actionable subsidies. However, the provisions of non-actionable subsidies under the SCM Agreement have expired as stipulated under Article 31 of the SCM Agreement, including the provisions regarding countermeasures.⁶⁸

Article 4.10 of the SCM Agreement regulates countermeasures for prohibited subsidies, where the DSB shall authorise to the prevailing members to take appropriate countermeasures if the recommendation of the DSB is not followed by the non-compliance member state within the time period specified by the panel unless the DSB decides by consensus to reject such request from requesting member.⁶⁹ Furthermore, Article 4.10 and 4.11 of the SCM Agreement complement each other,⁷⁰ wherein Article 4.11 of the SCM Agreement, the arbitrator shall decide if the countermeasures are appropriate pursuant to Article 4.10 before the DSB authorises the countermeasures requests. Article 4.11 of the SCM Agreement also refers to Article 22.6 of the DSU in terms of the request for arbitration.⁷¹

⁶⁵ DSU, Art. 22.7.

⁶⁶ DSU, Art. 22.8. *see also*, US – Continued Suspension, Appellate Body Report, WT/DS320/AB/R, 16 October 2008, section IV.E.

⁶⁷ SCM Agreement, Arts. 4.11 and 7.10

⁶⁸ Article 31 of the SCM Agreement, *see also*, Mark Wu, *Re-examining 'Green Light' Subsidies in the Wake of New Green Industrial Policies*, (Geneva: International Centre for Trade and Sustainable Development, 2015), 3.

⁶⁹ SCM Agreement, Art. 4.10.

⁷⁰ Wolfgang Müller. *WTO Agreement on Subsidies and Countervailing Measures: A Commentary*, (Cambridge: Cambridge University Press, 2017), 243.

⁷¹ SCM Agreement, Art. 4.11.

The countermeasures for actionable subsidies are regulated under Article 7.9 of the SCM Agreement. If a Member State has not taken sufficient steps to eliminate the adverse effects of the subsidy or to revoke the subsidy within six months of the date on which the panel report or the AB report is adopted by the DSB and no agreement on compensation has been reached, the DSB shall grant the complaining Member the authorisation to take countermeasures.⁷² Under the SCM Agreement, Article 7.10 fulfils a similar function with Article 4.11 since it complements Article 7.9 and gives a mandate for the arbitrator to determine the commensurateness of the countermeasures requested with the adverse effects caused by subsidies.⁷³

2.1.4. Precedents of Authorised Countermeasures

The *US - Upland Cotton (DS267)* is a landmark decision before WTO DSB. The background of this case was the US granted subsidies in the form of the US domestic agricultural support measures or known as 'domestic support', export credit guarantees and measures believed to be export subsidies and domestic content subsidies.⁷⁴ After sets of proceedings, the DSB decided that some supports by the US' government were prohibited and actionable subsidies.⁷⁵ After the decision was circulated, Brazil requested to establish the Compliance Panel. On 18 December 2007, the panel ruled that the US had not removed the inconsistent measures. However, the US appealed the compliance panel decision. The AB report was delivered to the Member States on 2 June 2008 and ruled that the US was still inconsistent and had to urgently put their measures into conformity.

As the US had refused to adhere, well after the conclusion of the compliance proceedings, Brazil demanded the resumption of the arbitration proceedings.⁷⁶ Previously, Brazil requested the authorisation of 'cross-retaliation'. On 31 August 2009, the reports of the arbitration were circulated, the arbitrator authorised Brazil's request to impose the countermeasures towards the US at a level of USD 147.4 million for the prohibited subsidies and USD 147.3 million annually for the actionable subsidies. Brazil was also granted to take 'cross-retaliation' for sectors regulated in the TRIPS Agreement and/or the GATS. On 30 April 2010, Brazil told the DSB that it was postponing the imposition of countermeasures and because Brazil and the US had engaged in a negotiation to find agreed solutions to the conflict.

⁷² SCM Agreement, Art. 7.9.

⁷³ Wolfgang Müller, *op.cit.*, 360.

⁷⁴ Summary of the US – Upland Cotton, DS267, available online on 10.02.21 at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds267sum_e.pdf.

⁷⁵ United States - Subsidies on Upland Cotton, WT/DS267/R, Report of the Panel, and United States - Subsidies on Upland Cotton - WT/DS267/AB/R. Report of the Appellate Body.

⁷⁶ Brazil already requested to take countermeasures in 2005. However, both Brazil and the US requested to suspend the arbitration proceeding.

The second case that is related to subsidies, countermeasures, and specifically aircraft subsidies is *Canada – Export Credits and Loan Guarantees for Regional Aircraft (DS222)*. It was regarding the disagreement between Canada and Brazil between 1996 and 2001 which involved regional aircraft export financing schemes resulting in three WTO cases,⁷⁷ including DS222. The matters of the case were the measures of Canada for the export credits, including financing, loan guarantees, or interest rate to facilitate the export of civil aircraft, and export credits and guarantees.⁷⁸ The arbitrator ruled that the EDC Canada Account financing to several Airlines constituted illegal subsidies.⁷⁹ Thus, Canada had to withdraw the illegal subsidies.

However, Canada failed to conform its measures to the Panel's rulings and recommendations. Hence, Brazil requested USD 3.36 billion countermeasures authorisation in accordance with Article 4.10 of the SCM Agreement, Brazil submitted this value of countermeasures by measuring the competitive damage caused by the subsidy from Canada.⁸⁰ Firstly, the arbitrator determined what countermeasures constituted as 'appropriate'. Briefly, the amount proposed by Brazil was disproportionate under two main reasons; firstly, the amount calculated by Brazil was based on assumption and not sustainable, and secondly, the amount resulted from the calculation methodology proposed by Brazil was clearly disproportionate.⁸¹ The arbitrator then calculated the appropriate level of the countermeasures through the methodology to calculate the subsidy per-undelivered-aircraft as Canada submitted, not the competitive harm per-aircraft caused by Canada's subsidies.⁸²

The reason why the arbitrator ruled that the amount proposed was disproportionate was that the level of the countermeasures exceeded the value in the case of *Brazil – Aircraft (DS46)*,⁸³ a case involving the same parties and identical breaches of the SCM Agreement.⁸⁴ The countermeasures submitted in the DS222 by Brazil case had a 43 times greater level than the level granted in DS46, bearing in mind that the amount of subsidies per aircraft had not so different.⁸⁵ The arbitrator also calculated the appropriateness of the proposed countermeasures by comparing the level of countermeasures with the overall amount of goods

⁷⁷ Stefan Gössling, Frank Fichert and Peter Forsyth, "Subsidies in Aviation", *Sustainability* 9 (2017): 5.

⁷⁸ *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, WTO, Report of the Panel, para. 2.2.

⁷⁹ *Ibid.*, para 8.1(a)-(j).

⁸⁰ *Canada – Export Credits And Loan Guarantees For Regional*, WT/DS222/ARB, WTO, Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, (hereinafter, "DS222: Article 22.6 Decisions") para. 3.1.

⁸¹ *Ibid.*, para. 3.50.

⁸² *Ibid.*, para. 3.26, 3.89.

⁸³ Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000.

⁸⁴ DS222: Art. 22.6 Decisions, *op.cit.*, para. 3.39.

⁸⁵ *Ibid.*

imported from Canada.⁸⁶ The arbitrator found that the level proposed exceeded the overall imported goods from Canada. In 2001, Canada submitted that the goods imported were around USD 591 million, while Brazil submitted that the sum including the transhipped goods from the US was USD 927 million, the countermeasures proposed certainly exceeded the overall imported goods from Canada to Brazil.⁸⁷ The arbitrator also established that Article 4.10 of the SCM Agreement allows the requesting party to determine the level of the countermeasures based on either the level of the subsidy or the effect of the subsidy.⁸⁸ Later, the arbitrator set the level of the countermeasures to USD 247,797,000.⁸⁹

The third case to analyse is DS316. The US requested the authorisation for countermeasures since the EU failed to remove the adverse effects caused by the subsidies granted or to withdraw the subsidies within six months pursuant to Articles 7.8 and 7.9 of the SCM Agreement.⁹⁰ The US requested the DSB's authorisation to take countermeasures in the amount of USD 7-10 billion per year.⁹¹ Burdened by the level of the requested countermeasures, the EU referred to arbitration under Article 22.6 of the DSU. The proceeding has been suspended for six years and then it was resumed after the US requested to continue the arbitration on 13 July 2018, specifically six weeks after the compliance panel report and the AB report were adopted.

In the arbitration proceedings, the EU requested preliminary rulings with three arguments. First, the EU argued that under Article 22.8 of the DSU, countermeasures could only be authorised after the outcome of the multilateral review of substantive compliance claim and the EU asserted that in this case, the compliance panel's report had not been issued, prohibiting the DSB to authorise such claim proposed by the US. The Arbitrator rejected the EU's arguments since the implementation of Article 22.8 of the DSU related to the 'post-authorisation',⁹² the Arbitrator referred to the *US – Tuna II (Mexico)* where Mexico requested for the authorisation to retaliate against the US. However, at around the same time, both parties requested for the establishment of the compliance panel in a separate request, the US' revised measure entered into force and the US claimed it was already consistent. Finally, the arbitration finished the proceedings and the DSB granted the request of Mexico to retaliate against the US before the compliance panel issued their report.

This is similar to this case where the US requested the authorisation before the second compliance panel finished their work. Citing from the *US – Tuna II*, Article 22.6 of the DSU requires the arbitrator to determine the level of nullification or impairment on the basis of the original measure

⁸⁶ *Ibid.*, para 3.42.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, para. 3.57-3.60.

⁸⁹ *Ibid.*, para 4.1.

⁹⁰ DS316: Art. 22.6 Decisions, *op.cit.*

⁹¹ *Ibid.*, para. 1.5.

⁹² *Ibid.*, para. 2.22

inconsistency with the WTO or a subsequent WTO-inconsistent compliance measure. The arbitrator further set that the basis to determine the level of nullification or impairment may or may not be the most recent measures.⁹³ In the DS316, the Arbitrator did not determine the level of nullification or impairment based on the most recent version measures since the Arbitrator did not wait for the unfinished second compliance panel.

The second argument of the EU was that the WTO's remedies were non-retroactive and prospective in nature and by authorising the US request, the Arbitrator would give the US a retroactive remedy, since the request sought remedies for past breaches of the SCM Agreement, rather than the recent inconsistency with the SCM Agreement.⁹⁴ Against the EU's argument, the Arbitrator established that under Article 22.8 of the SCM Agreement, the DSB will prospectively approve countermeasures from the date of the authorisation before a new multilateral decision is reached by the DSB that there is no longer a violation.⁹⁵ The unilateral declaration made by the EU which declared itself as having already achieved full compliance was not considered as multilateral determination until it is proven by the compliance panel.⁹⁶

Lastly, the Arbitrator rejected the EU's argument on the invoking decisions from certain cases, namely, the *EC – Bananas III (US)*, the *US – Upland Cotton*, *Brazil – Aircraft*, and the *US – Tuna II (Mexico)*, since the circumstances in those cases were different. For instance, the arbitrator in *Brazil – Aircraft* decided to wait for the compliance panel's result before starting the proceedings, since the result of this panel is influential to determine if Brazil's complying measure can be considered as conformity to the WTO obligations and the panel at that point had not determined the non-compliance measure from the compliance proceedings.⁹⁷ This is different from this case since the first compliance panel already circulated its report and there was no need to delay the proceeding further for the second compliance panel. After determining the preliminary issues, the Arbitrator assessed the countermeasures level requested by the US.

As submitted by the US, the measure will be taken in a form of Annual Suspension, in which, Annual Suspension refers to a single, maximum level of countermeasures that will be imposed by the US after the authorisation by the DSB.⁹⁸ The US submitted the 2011-2013 Reference Period as the basis to calculate the element of 'adverse effects determined to exist'. That Reference showed the five sales losses and impedance in six separate geographical markets within that period which were caused by the EU subsidies.⁹⁹

⁹³ *Ibid.*, para. 2.32

⁹⁴ *Ibid.*, para. 2.25

⁹⁵ *Ibid.*, para. 2.27

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, para. 2.31

⁹⁸ *Ibid.*, para. 6.3.

⁹⁹ *Ibid.*, para. 1.4.

The EU submitted that the 2011-2013 Reference Period cannot be used to grant Annual Suspension since it can only be granted if the measure in a past reference period is 'recurring'. The EU also added that the reference period did not provide the adverse effects of today or future estimations.¹⁰⁰ In response to the arguments submitted by both Parties, the Arbitrator addressed the level of the countermeasures which may be granted and recalled that it was their task to determine the level of the countermeasures which was mandated by Article 7.10 of the SCM Agreement. Concerning this issue, the Arbitrator found that the 2011-2013 Reference Period was appropriate to determine the countermeasures' maximum level since it represented the adverse effects caused by the EU's subsidies specifically the LA/MSF of A380 and A350XWB, in which the effects were the sales losses and impedance in six separate geographical markets. The Reference also satisfied points (a) and (b) of Article 6.3 of the SCM Agreement. This period took place shortly after the conclusion of the period of implementation in the present dispute.¹⁰¹

Regarding the 'recurring' measures condition proposed by the EU, the Arbitrator emphasised that 'recurrence' is not a prerequisite for an Annual Suspension, adding that countermeasures serve to induce conformity, whether the measure is 'recurring' or 'non-recurring', with regard to all manners considered to be WTO-inconsistent.¹⁰² Lastly, as argued by the EU, the 2011-2013 Reference Period did not provide the adverse effects of today or future estimations which resulted in the inappropriateness of the reference period to be used to calculate the maximum level of the countermeasures. The Arbitrator disagreed with this argument and stated that the lack of actual data entails that any such assumptions about the future or potential occurrence of adverse effects will be hypothetical. An additional concern as reported by the AB was that the predictability of the business environment in the LCA industry is by definition impossible.¹⁰³

2.2. The Proportionality of Countermeasures in the SCM Agreement

The SCM Agreement requires the taking of countermeasures in a proportionate way. The DSB shall approve the request of the complaining party for an 'appropriate countermeasure' as enshrined under Article 4.10 of the SCM Agreement. This Article does not define the precise formula or standard or the total amount of countermeasures that could be specifically approved in every instance.¹⁰⁴ However, if it effectively induces compliance or induces the withdrawal of a prohibited subsidy, then a countermeasure is

¹⁰⁰ *Ibid.*, para. 6.34.

¹⁰¹ *Ibid.*, para. 6.57

¹⁰² *Ibid.*, para. 6.52

¹⁰³ *Ibid.*, para. 6.64, and EC and certain member States – Large Civil Aircraft (Article 21.5 – US), WT/DS316, WTO, Appellate Body Report, 18 May 2011, at fn 1625.

¹⁰⁴ US – FSC, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS108/ARB, (hereinafter, "DS108: Article 22.6 Decisions"), 30 August 2002, para. 5.11.

deemed as appropriate.¹⁰⁵ Even though the expression of ‘appropriate countermeasures’ provides the flexibility to determine which measure is ‘appropriate’,¹⁰⁶ the level or amount of the authorised countermeasures has some boundaries where countermeasure cannot be disproportionate or excessive considering that these provisions dealt prohibited subsidies.¹⁰⁷

In contrast, Article 7.9 of the SCM Agreement states that the countermeasures taken shall be ‘commensurate with the degree and nature of the adverse effects determined to exist’.¹⁰⁸ This expression implies that the arbitrator has more discretion than in the DSU, where the DSU stated that suspension of concessions level shall be equivalent to the level of impairments and nullifications.¹⁰⁹ The word ‘commensurate’ connotes to the correspondence between the countermeasures and the ‘degree and nature of the adverse’. While in defining the ‘degree and nature’, the term ‘degree’ related to the quantitative elements of the adverse effects and ‘nature’ corresponds with the qualitative elements of the adverse effects. Lastly, the element of ‘the adverse effects determined to exist’ refers to the injury to the domestic industry of a Member, nullification or impairment, or serious prejudice to the interests of another Member.¹¹⁰

2.2.1. Analysing the Proportionality Principle in the DS316

Accordingly, although the expression "commensurate with" may not entail accurate numerical correspondence, this does not suggest that countermeasures commensurate with the actual adverse effects could or should involve any punitive aspect.¹¹¹ The Arbitrator noted that Article 7.10 of the SCM Agreement is silent on the method when determining the commensurateness of the countermeasures, which means that Article 7.10 leaves the arbitrator a degree of discretion in choosing the appropriate methodology.¹¹² After assessing the parties’ submissions, the Arbitrator held that the US has the right to impose countermeasures towards the EU in the amount of USD 7,496.623 million by suspending the tariff concessions and related obligations to the EU under the GATT 1994 and/or horizontal or sectoral commitments included in the Services Sectoral Classification List, with financial services as the exception of the suspension and determined

¹⁰⁵ Brazil – Aircraft, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement WT/DS46/ARB, paras. 3.42-3.6

¹⁰⁶ DS108: Article 22.6 Decisions, *op.cit.*, para. 5.19.

¹⁰⁷ Footnote 9 of the SCM Agreement, *see also*, Wolfgang Müller, *op.cit.*, 360.

¹⁰⁸ *Ibid.*

¹⁰⁹ Andrew D. Mitchell, “Proportionality and Remedies in WTO Disputes”, *European Journal of International Law* 17, no. 5 (2006): 1001.

¹¹⁰ WTO, WTO Analytical Index: SCM Agreement – Article 7 (Jurisprudence), available online on 10.02.21 at: https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art7_jur.pdf, 18.

¹¹¹ DS316: Art.22.6 Decisions, para. 5.4.

¹¹² *Ibid.*, para. 6.371.

that the value was ‘commensurate with’, lower than what the US proposed with USD 10,560 million.¹¹³

In determining the level of the countermeasures the Arbitrator excluded the present day inflation to the ‘adverse effect determined to exist’ as the US requested since in all referred arbitration proceedings ruled that the Annual Suspension maximum level or amount excluded the adjustment of inflation up until the day of the countermeasures authorisation from the past period level of nullification or impairment or the value of adverse effects sustained.¹¹⁴

Lastly, the US requested for the authorisation to adjust the maximum level of Annual Suspension with yearly inflation with reference to the inflation data from the previous year (for instance, the data from 2019 will be the basis for the US to adjust the 2020 maximum level of suspension).¹¹⁵ The Arbitrator declined the US’ request since there were no cases found that adjusting the level of Annual Suspension based on inflation as an appropriate method. Additionally, once the maximum level of Annual Suspension set, the level will be arranged in the future at a fixed monetary level.¹¹⁶ The Arbitrator also noted that the arbitrator in *US – Washing Machines* case¹¹⁷ held that the Annual Suspension could be adjusted each year since both parties agreed to the notion.¹¹⁸ The Arbitrator underlined that the arbitrator in the *US – Washing Machines* did not explain the reasons why they warranted such a different approach in comparison with other decisions, hence the Arbitrator decided differently with this case.¹¹⁹ The reason to set a fixed value for an annual suspension is to maintain the real value from being eroded by future inflation.

To determine the effectiveness of the countermeasures taken here, we can refer to the purpose of countermeasures itself which is to induce compliance and not a justification for countermeasures of a punitive nature.¹²⁰ By February 2020, the US imposed the tariff by raising the aircraft charges from 10% to 15%, leaving the 25% duty on other items unchanged and holds off on a threatened tariff increase on USD 7.5 billion of European exports.¹²¹ The EU complied their inconsistent measure with the WTO

¹¹³ *Ibid.*, para. 6.506.

¹¹⁴ *Ibid.*, para. 6.512.

¹¹⁵ *Ibid.*, para. 6.515.

¹¹⁶ *Ibid.*, para. 6.518.

¹¹⁷ *US – Washing Machines*, Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS464/ARB, Decision by the Arbitrator, 8 February 2019

¹¹⁸ DS316: Art. 22.6 Decisions, para. 6.518.

¹¹⁹ *Ibid.*, para. 6.520.

¹²⁰ European Communities — Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB, 9 April 1999, para 6.3, *see also*, United States – Gambling and Betting, Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS285/ARB, 21 December 2007, para. 3.71.

¹²¹ US holds off on threatened tariff hike in EU Airbus fight, available online on 10.02.21 at: <https://www.bbc.com/news/business-53756201>

obligations as announced in the press release dated 24 July 2020 where the governments of France and Spain along with Airbus SE agreed to modify the Repayable Launch Investment for the development of the A350 aircraft as granted by France and Spain.¹²²

2.3. The Effects of ‘Countermeasures’ to the Society

Despite accelerating the process to induce compliance for nonconforming States, countermeasures come with ‘side-effects’. Although it might seem that this authorised countermeasures only affect the Member States in the position as sovereignty since it harms both importing and exporting States by limiting economic freedom.¹²³ Not only affecting the situation of the State’s economy but countermeasures can also be more complex since they can affect the society either directly or indirectly. Private economic actors (such as persons, companies, even foreign investors) that act as either producers, consumers, exporters or importers are actually the ones that have to suffer from the countermeasures.¹²⁴ The situation worsens as the WTO law remains silent on providing direct mechanisms and only implicitly grants rights or obligations to them resulted in a high-risk situation for these actors.¹²⁵

States can impose countermeasures on other sectors if the same sector cannot satisfy the adverse effects caused by the breach. This principle can endanger private actors in other sectors, these injured actors are called as ‘innocent bystanders’.¹²⁶ One example of this issue was in the *EC – Banana III (US)* where the US imposed countermeasures towards the EC.¹²⁷ Briefly, the US submitted this case since the EC imposed a tariff quota of 2 million tonnes for the imported bananas from Latin American countries and non-traditional African, Caribbean and Pacific countries.¹²⁸ The EC also gave preferential treatment for the ‘former colonies’ under the same scheme known as the Common Market Organization.¹²⁹ This scheme was inconsistent with the WTO rules. Since the US won the case and the EC failed to remove this scheme, the US filed for the suspension authorisation from the DSB. The DSB granted this request and gave the right for suspension for the US in the amount of USD 191.4 million in a form of

¹²² European Commission, Press Release, EU and Airbus Member States take action to ensure full compliance in the WTO aircraft dispute, available online on 10.02.21 at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1405.

¹²³ Junianto James Losari and Michael Ewing-Chow, *op.cit.*, 304.

¹²⁴ Intan Innayatun Soeparna, ‘The Impact of the WTO Retaliation from the Perspective of Human Rights Law’, *Mimbar Hukum* 20, no. 3, (2008): 579, *see also*, Junianto James Losari and Michael Ewing-Chow, *op.cit.*, 278.

¹²⁵ Intan, *Ibid.*

¹²⁶ Marco Bronckers and Sophie Goelen, ‘Financial Liability of the EU for Violations of WTO Law: A Legislative Proposal Benefiting ‘Innocent Bystanders’’, *Legal Issues of Economic Integration* 39, no. 4 (2012): 399.

¹²⁷ European Communities — Regime for the Importation, Sale and Distribution of Bananas, WT/DS27.

¹²⁸ Kawal Gill and Panya Baldia, ‘Going Bananas: A Glimpse into WTO’s Dispute Settlement Mechanism’, *Journal of International Business* 5, no.1 (2018): 111.

¹²⁹ *Ibid.*

annual suspension, the tariff was imposed on the imported goods from the EC, ranging from French cheese to Scottish cashmere.¹³⁰

This suspension also affected companies that were just innocent bystanders, for instance, FIAMM, a batteries producer, and Fedon, a spectacle cases company. Both companies were not related to the banana regulation; however, they were still unconvinced by the US' suspension. These two companies, along with four others¹³¹ sought compensation to the Court of First Instance of the European Communities after the EC did not follow the WTO recommendations. Unfortunately, the EC First Instance Court rejected the request for compensation made by these companies.¹³² In 2008, FIAMM and Fedon appealed to the European Court of Justice, but they failed to get the compensation caused by the EC's failure to conform its measures to WTO obligations.¹³³ This case indicates that individuals, or more specifically - private actors, in the society that actively participated in international trade can be the victims of countermeasures.¹³⁴

Countermeasures seem to infringe universal human rights as protected under the International Bill of Human Rights.¹³⁵ The international trade and consequence of countermeasures are closely related to Article 1 (2) of the International Covenant on Economic, Social and Cultural Rights since this Article ensures the right of all people to dispose of their natural and wealth resources for their ends.¹³⁶ By limiting the access to free trade of the people by imposing tariffs, it creates a barrier that limits the private actors from disposing of their wealth resources and reduce the opportunity of the people. Pierre Lemieux and Jim Powell oppose the idea of retaliation since it does not make any economic sense and not morally defensible as it prohibits people to freely trade.¹³⁷

The aircraft manufacturing industry promotes economy productivity in society. The industry itself ranges from research and development, manufacturing and its final product is used to transport people and cargo. These broad sectors can be threatened by countermeasures, especially when the countermeasures include different sectors, as in the DS316 case. The US will also impose countermeasures on non-aircraft goods ranging from

¹³⁰ Patrick Barkham, The Guardian, "The Banana Wars Explained", available online on 10.02.21 at: <https://www.theguardian.com/world/1999/mar/05/eu.wto3>.

¹³¹ Alberto Alemanno, "European Court Rejects Damages Claim from Innocent Bystanders in 'Banana War'", *American Society of International Law* 12, no. 21 (2008).

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Steve Charnovitz. "Rethinking Trade Sanctions", *American Journal of International Law* 1 (2001): 813.

¹³⁵ Oliver Diggelmann and Maria Nicole Cleis, "How the Right to Privacy Became a Human Right", *Human Rights Law Review* 14 (2014): 443.

¹³⁶ Intan, *op.cit.*, 582, *see also*, International Covenant on Economic, Social and Cultural Rights, Art. 1 (2).

¹³⁷ Pierre Lemieux, "Ottawa Wins a Jet Battle, But Canadians Lose", *Wall Street Journal* A17, (2000), *see also*, Jim Powell, "Why Trade Retaliation Closes Markets and Impoverishes People", *Policy Analysis* 43, (1990): 2.

food to garments and other goods and services included in the Services Sectoral Classification List.¹³⁸ This means that the actors in these sectors will be innocent bystanders. Reflecting on the *EC - Banana III (US)* case, the tariffs imposed by the US threatened the Scottish cashmere industry, and it was predicted that it would put thousands of workers at risk of losing their jobs.¹³⁹ Besides, US airlines that import Airbus aircraft will increase ticket prices due to the import tariffs, this will affect passengers because it forces them to pay more and indirectly to compensate for the import tariffs burdened to the airlines.¹⁴⁰ To reduce the loss caused by the tariffs, airlines might increase their fares which will cause the airlines' passengers to pay more.¹⁴¹ Countermeasures certainly cause disadvantages for all the trade actors.

3. CONCLUSION

Countermeasures under the WTO rules are different from the ones regulated under public international law. The WTO rules require prior DSB's authorisation to ensure effectiveness and restrain the disadvantages of countermeasures. Countermeasures act as the last resort that can effectively induce compliance. In the *DS267* both Parties successfully negotiated to postpone and later end the countermeasures in less than a year after the authorisation. In the *DS222*, the arbitrator established that the Party that requested the authorisation may base the level of countermeasures on the level of the subsidy or the effect of the subsidy. Lastly, in *DS316*, the Arbitrator authorised the countermeasures based on the calculation of the 2011-2013 Reference Period since it represented the adverse effects caused by the subsidies and did not assume about the future or potential occurrence.

Regarding the proportionality, Article 4.10 and 7.9 of the SCM Agreement give a different level of countermeasures. Article 4.10 of the SCM Agreement provides that countermeasures shall be appropriate, while Article 7.9 of the SCM Agreement governs that countermeasures shall be commensurate with the degree and nature of the adverse effects determined to exist. In sum, countermeasures are appropriate if it is effectively inducing compliance without any punitive intention. In the *DS316* case, the US requested for the Annual Suspension based on the past period of the adverse effects determined to exist. The Annual Suspension precludes the changes in the value caused by inflation. Lastly, since countermeasures are appropriate if it is effectively inducing compliance without any punitive intention, then the immediate responses of the EU mean that the

¹³⁸ Office of the United States Trade Representative, Federal Register/Vol. 85, No. 124, Annex I.

¹³⁹ Patrick Barkham, *op.cit.*

¹⁴⁰ Ruta Burbaite, "Airbus Slapped with 10% Tariffs, Industry to Lose More, It Says", available online on 10.02.21 at: <https://www.aerotime.aero/24027-airbus-slapped-with-10-tariffs-industry-to-lose-more-it-says>.

¹⁴¹ *Ibid.*

countermeasures hold an important role that could effectively induce inconsistent member state to be consistent with the WTO obligations. However, countermeasures only lapse after the WTO's confirmation or if the parties reached a mutually satisfactory solution.

Countermeasures also affect society since it harms both importing and exporting States by limiting economic freedom of the private economic actors that act as producers, consumers, exporters or importers. These actors are suffering from countermeasures due to increased tariffs on imported goods and/or services. These effects viably will happen in the DS316 since the US imposed import tariffs on goods and services from the EU that range from food to aircraft. Further, the tariff will threaten the US airlines industry, especially those that import Airbus' aircraft to the US. To reduce the loss caused by the importation tariffs, airlines might increase their fares. This consequence results from the lack of other methods to effectively induce compliance and how States rely on countermeasures as the last resort to protect the interests of the retaliating States and all Member States.

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