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Are WTO Sanctions Unjust?

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1. Introduction

In the context of globalization, international economic relations raise many economic, legal and ethical issues, which are ultimately intertwined. This paper does not present a general theory of any kind, which would encompass the various aspects of this question². It is rather dedicated to one particular problem of justice stemming from the application of trade sanctions in international economic law. It is purposely not technical. The aim of what follows is neither to focus on the details of the law nor to discuss the various theories of international economics.

Section 2 briefly describes the World Trade Organization (WTO) sanction system. States usually violate WTO rules by establishing protectionist measures impeding foreign goods to enter their domestic market. When such a violation has been recognized by the Dispute Settlement Body, the prejudiced state may retaliate by raising its tariffs on some goods imported from the other country. Most often, the goods subject to the illegal protectionist measure are not of the same kind as those targeted by the retaliation.

Section 3 focuses on the question of direct effect of WTO rules. In the European Community, like in most countries, WTO law has no direct effect, which means that individuals or companies may not invoke WTO law before a national court to obtain its correct application, the annulment of a national measure inconsistent with its dispositions or damages against the government.³

As a result of these rules, the sanctions are not suffered by the violator (Section 4). Formally, protectionist measures are only imputed to states. In fact, they favour some producers (usually supported by a powerful lobby) to the detriment of foreign producers

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² This paper only addresses *one* justice problem of the WTO. A consequence of such a limited approach is obviously that many questions related to justice in international economic relations are not discussed here, including the most fundamental one of the justification of liberalization and free trade. Of course, I do not presuppose the justice of these aspects, which are taken as a background for the arguments. In other words, I am not concerned here with the general design of a perfectly just economic order, but only with one particular injustice of relatively minor importance in framework of the existing (albeit imperfect) international trade system.

³ The words "direct effect" are given more than one meaning in the literature. In this paper, the phrase "direct effect" refers to the capacity of international rules to be invoked by individuals before national courts, in any kind of action.

of similar goods. On the other hand, sanctions are formally targeted against states. In fact, they harm the producers of some (others) goods chosen by the retaliating state. Without direct effect, none of the prejudiced producers is entitled to compensation.

Section 5 explains why this mechanism is unjust. Section 6 is an attempt to generalize our findings and shows that this justice problem is a consequence of legal personality. It exists in many cases where a group of individuals is considered by law to be one single person.

2. Sanctions in WTO Law

The WTO was established by the Marrakesh Agreement of 1994 and succeeds to the GATT, a temporary agreement signed in 1947. The WTO aims at enhancing world trade by lowering tariffs and other barriers to trade. Inspired by ideals of free trade in a context of globalization, it opposes protectionism, with the declared goal of increasing welfare, employment and sustainable development.¹ Almost 150 states are parties to the Marrakesh Agreement, including most industrial countries.² By entering GATT, then WTO, these countries committed to reduce and bind most of their tariffs (i.e. set an upper limit to tariffs for each category of goods), to suppress many non-tariff impediments to international trade and to avoid discrimination against economic agents of others states (non-discrimination and most-favoured-nation clause).

A novelty of the Marrakesh agreement was the institution of a mandatory dispute settlement mechanism, designed to rule on the disputes between states relating to the application of the WTO agreements. The case is submitted to a group of independent experts (panel), who give an opinion on all aspects of the dispute. Any party may form an appeal against the panel's report. The appeal is heard by the Appellate Body (AB), composed of seven specialists in world trade appointed for a period of 4 years.³ The AB may only decide on questions of law and refers to the panel's findings as regards the facts. The reports of the Panel and of the AB are automatically adopted by the Dispute Settlement Body (DSB), unless member states decide by consensus not to adopt them. The opinion thus becomes binding, except if all states (including the prevailing party) reject it.

Any state found "guilty" of violating WTO rules must change its internal laws or practices to make them consistent with the DSB's findings, within a reasonable period of time. When necessary, the length of this reasonable period is determined by an arbitrator.⁴ In many cases, states comply with the DSB decision, or negotiate and reach an amicable settlement before the expiry of the reasonable period.

Sanctions arise when the decision of the DSB has not been implemented at the end of the reasonable period. In this case, the plaintiff may be authorized to retaliate by

¹ Preamble of the Marrakesh Agreement establishing the World Trade Organization (WTO Agreement).

² State as of Dec. 2005.

³ Art. 17 Dispute Settlement Understanding (DSU), which is an annex to the Marrakesh Agreement. Only three members of the AB rule in each particular case.

⁴ Art. 21 DSU.

suspending some of its own obligations resulting from the WTO agreements. In other words, this state is legally entitled to violate the WTO agreements towards the defendant state, for example by raising some tariffs above their bound rate. The level of this retaliation must not exceed the amount of the trade between the parties that is hindered by the violation. The retaliation is usually thought of as an incentive to comply with WTO law¹, but it is imperfect since retaliation is limited to an amount equivalent to the trade effect of the violation. It also has a compensatory effect, although an imperfect one too because, amongst other reasons, the damage incurred before the end of the reasonable period is not compensated.

In principle, retaliation should be aimed at imports of the same sector² as the exports affected by the violation. If this is impossible or inefficient, the suspension of obligations should concern the same agreement (GATT³, GATS⁴ or TRIPS⁵). In the last resort, the prejudiced party may suspend obligations relating to another agreement⁶. These last two possibilities are called cross-retaliation, because the application of one agreement is obtained through pressures exercised in the realm of another sector or agreement.

Despite this three-step mechanism, meant to ensure that sanctions be exercised on products as close as possible to those for which the sanction is authorized, in practice sanctions always affect other industry branches. As all goods are deemed to form only one sector, any violation of the GATT can be punished with retaliation on any good. The principle of comparative advantage – a major basis of international trade – implies that a country usually does not import the same products as it exports.⁷ Since violations occur on exports and retaliation is directed at imports, they rarely, in fact, relate to the same products. One could also mention the effects of sanctions on the producers of inputs or of business-related services.

WTO law is often violated in subtle ways. States do not simply raise their tariffs above their bound level. They rather pretend to apply an exceptional provision of WTO law allowing them to take protectionist measures (antidumping, safeguards, countervailing measures) or they disseminate in their legislation relatively minor protectionist rules (technical or sanitary rules, for instance), which are formally applicable to foreign and domestic producers alike, but in fact favour the latter. In some cases, these measures are declared illegal by the DSB on the basis of technical rules which often come down to the basic prohibition of discriminating foreigners in favour of the domestic industry.

¹ C. CARMODY, “Remedies and Conformity under the WTO Agreement”, *J. Int’l Econ. Law*, 2002, p. 307-329; S. CHARNOVITZ, “Rethinking WTO Trade Sanctions”, *Amer. J. Int’l Law*, 95(4), 2001, p. 792-832; P. GRANÉ, “Remedies under WTO Law”, *J. Int’l Econ. Law*, 2001, p. 755-772. *Contra*: D. PALMETER & S.A. ALEXANDROV, “‘Inducing compliance’ in WTO dispute settlement”, in D.L.M. KENNEDY & J.D. SOUTHWICK (eds), *The Political Economy of International Trade Law – Essays in Honor of Robert E. Hudec*, Cambridge, C.U.P., 2002, p. 646-666.

² Shortly stated, broad categories of services and intellectual property rights each form one sector.

³ General Agreement on Tariffs and Trade.

⁴ General Agreement on Trade in Services.

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁶ Art. 22.3 DSU. See also Sec. 301 of US Trade Act of 1974.

⁷ However, intra-branch trade also exists in international economics. See M. RAINELLI, *La nouvelle théorie du commerce international*, 3rd ed., Paris, La Découverte, 2003, p. 45-60.

The prohibited protectionist measures typically concern the production of special branches of the domestic industry. These branches are sensitive because of the number of workers they employ, their impact on the domestic economy (especially in developing countries), the power of their lobbies on politicians, their symbolic status, their vulnerability to international competition and the like. In western countries, steel and agricultural products are good examples.

3. Direct Effect of WTO Law: The Example of the EC

As a general rule, private persons (individuals and companies) are not legal subjects of the international legal order. They cannot be a party to an international treaty.¹ Only states conclude treaties which bind them towards other states, and implement them within their national legislation. Private persons may only invoke, and are only bound by, the internal legislation thus enacted by states as they implement their international (treaty-based) obligations.

However, some treaty provisions are directly applicable to the individuals, who are then allowed to invoke the treaty rules directly before national courts. Lawyers call “direct effect” this special property of some international norms. Direct effect is particularly developed in the European Community. At a very early stage of the EC development, the European Court of Justice (ECJ) determined that some provisions of the EC Treaty itself could be directly invoked by individuals.² This case-law was later extended to other legal instruments of the EC, notably some directives³ – although they are meant to require implementation measures by the member states – and international treaties entered into by the EC.⁴

The ECJ tried to objectify the criteria for recognizing direct effect although, according to some scholars⁵, they ultimately remain linked to the intention of the author of the international rule. The case law is now settled in the sense that direct effect in EC law is a property of rules which are sufficiently precise, clear and unconditional (i.e. their content leaves no discretion to the states for their implementation).

Direct effect allows individuals to benefit from the effects of the treaty, even if it has not been implemented (completely) by the state. Direct effect is therefore, in a sense, a method of private enforcement⁶, against the states, of their international obligations. For example, as the EC Treaty banned tariffs and taxes of equivalent effect, any individual required by a member state to pay tariffs by virtue of a national regulation contrary to the treaty could apply for a remedy before the national court and benefit from the

¹ J.H. JACKSON, *The World Trading System – Law and Policy of International Economic Relations*, 2nd ed., Cambridge (MA), Londres, MIT Press, 1997, p. 127.

² E.C.J., 5 February 1963, *Van Gend & Loos*, 26/62, *Rec.*, 1963, p. 3.

³ E.C.J., 17 December 1970, *SACE*, 33/70, *Rec.*, 1970, p. 1213.

⁴ E.C.J., 30 September 1987, *Demirel*, 12/86, *Rec.*, 1987, p. 3719, 14; E.C.J., 16 June 1998, *Racke*, C-162/96, *Rec.*, p. I-3655, 31; E.C.J., 14 December 2000, *Dior e.a.*, C-300/98 & C-392/98, *Rec.*, 2000, p. I-11307, 42.

⁵ For instance J. VERHOEVEN, « La notion d’« applicabilité directe » du droit international », *Rev. belge dr. int.*, 1980, p. 253 sq., J. VERHOEVEN, « Applicabilité directe des traités et ‘intention des parties contractantes’ », *Liber amicorum E. Krings*, Brussels, Story Scientia, 1991, p. 899 sq.

⁶ E.C.J., 5 February 1963, *Van Gend & Loos*, 26/62, *Rec.*, 1963.

application of the treaty (rather than be subjected to the national regulation). The mechanism of reference to the ECJ for a preliminary ruling helped to ensure that national courts give effect to European law rather than to national provisions.

The WTO is the result of a treaty which, like most international treaties, was agreed upon by states (in this case also the EC) and formally only binds states (and the EC). The parties have to implement the WTO agreement by enacting appropriate national legislation, which will be applicable to national economic agents.

Although this view should be qualified in some respects¹, it is usually held in the EC (and in the US²) that WTO law does not have direct effect.³ The ECJ justifies this position by stating that WTO law is not sufficiently unconditional, because it “accords considerable importance to negotiation between the parties”⁴. Another important argument for the ECJ is that some of “the most important commercial partners of the Community”⁵ do not recognize direct effect to WTO law, which raises a problem of reciprocity.⁶ If WTO had direct effect only in the EC, it could be privately enforced in the EC, while the US could violate it without fearing legal action by individuals.

Consequently, individuals and companies may not invoke the WTO rules before the national courts or the ECJ to obtain the annulment or the non-application of an inconsistent national measure or even damages for breach by the state of its WTO commitments. If national rules are contrary to the WTO treaty, they are nonetheless applied to individuals, who have no other option than trying to convince the government of another member state to challenge the illegal regulation. As stated earlier, the decision of the DSB on this issue has no retroactive effect: the national regulation may remain in place until the end of the reasonable period of time before the state incurs any WTO sanctions. The whole WTO judicial process may take more than two years.

If direct effect of WTO rules applied, individuals could invoke them before the European Court to argue that the EC has violated its international obligations. If this

¹ See in particular the following cases: E.C.J., 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol)*, 70/87, *Rec.*, 1989, p. 1781; E.C.J., 7 May 1991, *Nakajima All Precision Co. Ltd*, C-69/89, *Rec.*, 1991, p. I-2069; E.C.J., 30 September 2003, *Biret International*, C-93/02, *Rec.*, 2003, p. 10497 and E.C.J., 30 September 2003, *Etablissements Biret et Cie*, C-94/02, *Rec.*, 2003, p. 10565.

² For a discussion of this issue in US law, see J.H. JACKSON, *The Jurisprudence of GATT & the WTO*, Cambridge, C.U.P., 2000, p. 297 sq. and M. MATSUSHITA, T.J. SCHOENBAUM & P.C. MAVROIDIS, *The World Trade Organization – Law, Practice, and Policy*, Oxford, O.U.P., 2003, p. 97 sq.

³ E.C.J., 23 November 1999, *Portugal v Council*, C-149/96, *Rec.*, 1999, p. I-8395, 36. Some authors criticize this case law (for instance S. GRILLER, « Judicial Enforceability of the WTO Law in the European Union – Annotation to Case 149-96, *Portugal v. Council* », *J. Int'l Econ. Law*, 2000, p. 441-472; N. VAN DEN BROEK, « Legal Persuasion, Political Realism and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order », *J. Int'l Econ. Law*, 2001, p. 411-440). Others are more indulgent (for instance P. EECKHOUT, « Judicial Enforcement of WTO Law in the European Union – Some Further Reflections », *J. Int'l Econ. Law*, 2002, p. 91-110).

⁴ E.C.J., 23 November 1999, *Portugal v Council*, C-149/96, *Rec.*, 1999, p. I-8395, 36.

⁵ E.C.J., 23 November 1999, *Portugal v Council*, C-149/96, *Rec.*, 1999, p. I-8395, 43.

⁶ On the question of reciprocity in this context, see S. GRILLER, « Judicial Enforceability of the WTO Law in the European Union – Annotation to Case 149-96, *Portugal v. Council* », *J. Int'l Econ. Law*, 2000, p. 455 sq.

violation caused an injury to the plaintiff, he would be entitled to compensation according to the rules of extra-contractual liability.

4. Who Is Really Sanctioned?

The combination of the WTO rules on sanctions and the case-law on direct effect leads to surprising results for the nationals of states engaged in commercial disputes.

Formally, the WTO is only concerned with the behaviour of states and only imposes sanctions onto states failing to comply with DSB rulings. The arbitrator determines the level of trade impeded by the violation of WTO obligations and the DSB allows trade sanctions up to an equivalent amount. If a state has blocked the exports of another state, the latter will be authorised to impede the same amount of exports from the former. Leaving aside the particular problem of retroactive effect, this appears to be, at first sight, quite an equitable solution.

Imposing sanctions, however, may be costly¹, especially for (economically) small countries. By preventing foreign goods from entering its territory², the small country and its nationals are bound to do without these goods or to buy them at a higher price from another producer. Besides, sanctions stemming from a small country are usually not efficient to induce a large country to comply. The former's imports account for a tiny part of the latter's exports. The ban imposed by the small country has therefore little comminatory effect, if any.

Moreover, small countries' economies usually survive by exporting to larger ones a limited number of goods. Large economies can import these goods at world price from many sources. Thus, they are in a strong position to impose sanctions onto small economies.³

This explains why, practically, big players alone are able to apply WTO sanctions effectively. This was best verified in the Bananas case, when both the US and Ecuador were authorized to impose sanctions against the EC. Only the US effectively retaliated. Ecuador, which had even invoked the cross-retaliation provision, feared to suffer from the implementation of its own sanctions, refrained from sanctioning the EC and eventually resolved to settle the case.

¹ S. CHARNOVITZ, "Rethinking WTO Trade Sanctions", *Amer. J. Int'l Law*, 95(4), 2001, p. 814 sq.; P.C. MAVROIDIS, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *Europ. J. Int'l Law*, 2000, p. 807. See also T.C. MORGAN & N.A. BAPAT, "Imposing Sanctions: States, Firms, and Economic Coercion", *Int'l Studies R.* 5(4), 2003, p. 66, stressing that costs are born mainly by individuals and companies, not by the government.

² Although this is by no means compulsory, sanctions effectively imposed have often taken the form of additional *ad valorem* tariffs up to 100 %.

³ On the question of import/export dependency and its effect on sanctions, see S. CHARNOVITZ, "Rethinking WTO Trade Sanctions", *Amer. Journ. Int. Law*, 95(4), 2001, p. 816 sq.; P.C. MAVROIDIS, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *Europ. J. Int'l Law*, 2000, p. 807 sq.

The unavailability of sanctions to the weak while the rich may retaliate as they wish is an important injustice of the WTO.¹ It probably results more from the economic inequalities of today's world than from the WTO system as such, even if the WTO could take action to ensure compliance with its rules despite economic inequalities. However, I leave this problem aside in this paper, to concentrate on another injustice, more closely linked to the shape of WTO and internal laws.

Who are the real beneficiaries of the violation and the real victims of the sanctions? As a WTO panel once noted², states, although they appear in the front line from a legal point of view, are economically in the second line. International trade is primarily conducted by private entities, especially companies, which are submitted (or not) to taxes in the form of tariffs. This in turn influences the prices of goods and services and the welfare of consumers. States do not trade (much). They collect taxes and tariffs and otherwise benefit from international trade through the profits made by their residents.

When they violate WTO law, states usually intend to protect a particular branch of industry, for various reasons. Sometimes, this branch is well organized, backed by lobbies or simply close to the ruling class of the country. A violation may also occur in consideration of a broader interest, if the branch of industry is vital to the country's economy, if it employs many workers who risk unemployment and could not easily be redirected to other activities. Protectionism can thus be decided with very noble political intentions, linked to the stability of a country. WTO obligations can also be violated, as in the *Hormones* case³ or (maybe) in GMO cases, with relatively little protectionist intentions compared to the pressure from the public opinion to ban potentially dangerous products, independently of the effect on trade and prices.

Whatever the intent of the violation, it favours one branch of industry and all its stakeholders, to the detriment of foreign producers and – at least in a short-term and purely economical view – of the population in general, which usually pays higher prices for the products involved.

These “real beneficiaries” of violations should be compared to the “real victims” of the sanctions.

By and large, the retaliating country may choose the products on which it imposes sanctions. As a country does not usually import the same goods as it exports, sanctions are rarely directed against foreign counterparts of the prejudiced (domestic) producers. States are concerned about the efficiency of their sanctions and want to induce a swift compliance. Therefore they may choose to target products which account for a large part of the other nation's exports towards them, to maximise the effect of deterrence.

¹ D. PALMETER & S.A. ALEXANDROV, “‘Inducing compliance’ in WTO dispute settlement”, in D.L.M. KENNEDY & J.D. SOUTHWICK (eds), *The Political Economy of International Trade Law – Essays in Honor of Robert E. Hudec*, Cambridge, C.U.P., 2002, p. 661 sq.; C. FUDALI, “A Critical Analysis of the WTO Dispute Settlement Mechanism: Its Contemporary Functionality and Prospects”, *Netherlands Int'l L. R.*, 2002, p. 73 sq.

² *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WT/DS152/R, 7.73 sq.

³ *European Communities – Measures concerning meat and meat products (hormones)*, WT/DS26 and WT/DS48.

They may also wish to retaliate on products which can easily be imported from another nation, to avoid the “backlash” effect of their own sanctions.

Beside these economic considerations, states also use the political effects of sanctions to quicken compliance. For example, similarly to their violations of WTO law, they target branches of industry with powerful lobbies, which will convince their government to comply with the ruling and have sanctions waived. Regional products are also subject to sanctions, if this region is of particular importance for the foreign ruler (grapefruits of Florida have been a favourite target of the EC).¹ States avoid targeting too many foreign producers, to minimize collective action problems and thus allow political mobilization of the affected producers.²

In order to enhance the effects of sanctions, some governments have imagined changing frequently the targeted products (so-called “carousel sanctions”). The efficiency of such ever-changing sanctions relies on their destabilizing effect on the other country’s economy, the quasi impossibility of many industry branches to forecast the level and the price of their future exports, and the difficulty to compensate the (ever changing) affected companies.³

Again, whatever their particular pattern, sanctions hit industries and their stakeholders which, in most cases, have nothing but nationality in common with the beneficiary of the violations.⁴

Sanctions also affect consumers.⁵ In the “violating country”, prices are supposed to rise on the products unlawfully protected, and to fall on products which can no more be exported due to the retaliation. The situation is opposite in the retaliating country.⁶ In

¹ About these strategic considerations in the application of sanctions, already before the WTO, see L. BOISSON DE CHAZOURNES, *Les contre-mesures dans les relations internationales économiques*, Paris, Pedone, 1992, p. 128 sq.

² J. GOLDSTEIN & L.L. MARTIN, “Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note”, *International Organization*, 2000, p. 616 sq.

³ See Sec. 306 of US Trade Act of 1974, 19USC2416, and *United States – Section 306 of the Trade Act of 1974 and Amendments Thereto – Request for Consultations by the European Communities*, 13 June 2000, WT/DS200/1, contending that carousel sanctions violate WTO Agreements.

⁴ B. O’CONNOR, “Remedies in the World Trade Organization Dispute Settlement System – *The Bananas and Hormones Cases*”, *J. World Trade*, 2004, p. 260; S. CHARNOVITZ, “Rethinking WTO Trade Sanctions”, *Amer. J. Int’l Law*, 95(4), 2001, p. 810 sq.; M.-A. FRISON-ROCHE, “Le système des sanctions”, *Les Notes bleues de Bercy*, n° 186, 1^{er}-15 juillet 2000, http://www.minefi.gouv.fr/notes_bleues/nbb/nbb186/sanct.htm (visited in Oct. 2004); K.W. DAM, *The GATT – Law and International Economic Organization*, Chicago, Londres, Chicago University Press, 1970, p. 357 (under GATT of 1947).

⁵ T.C. MORGAN & N.A. BAPAT, “Imposing Sanctions: States, Firms, and Economic Coercion”, *Int’l Studies R.* 5(4), 2003, p. 65.

⁶ One could think that a retaliating country, especially if it is a price-maker, would set its retaliating tariff to the optimal tariff rate, to benefit from the terms-of-trade effect. However, 100 % *ad valorem* tariffs used as trade sanctions have little chance of being anything close to the optimal tariff. Prohibitive tariffs always entail negative welfare effects on the country (see P.H. LINDERT & T.A. PUGEL, *Economie internationale*, 10^{ème} éd., Paris, Economica, 1997, p. 175 sq and P.R. KRUGMAN & M. OBSTFELD, *International Economics – Theory and Policy*, Int’l ed., 6th ed., Boston, Addison Wesley, 2003, p. 223-224). In the *FSC* case, the EC set a relatively low tariff rate, which, if not efficient, would at least reduce the negative effect of the tariff on the European markets (see Council Regulation (EC) No 2193/2003 of 8 December 2003 establishing additional customs duties on

the worst case, consumers support the rise in price of one good while the fall in the price of the other is taken away by the producer or some intermediary. Even in the best case, the welfare effects of price variations do not offset fully, since a higher tariff creates an inefficiency resulting in less consumer welfare.

The effect of sanctions is most problematic in the case of a suspension of obligations from the TRIPS agreement, whereby previously protected intellectual property rights are suspended or suppressed. Individuals or companies are therefore denied the benefits of a subjective right which used to be theirs. This simply amounts to an uncompensated expropriation. They only recover such benefits when their state of origin complies with the DSB's ruling.

The situation is worsened by the fact that most often few people benefit greatly from the violation, while the whole population suffers from the sanctions. As the damage of each individual citizen is usually small and almost invisible, collective political action to stop the violation or to compensate the injury is practically prevented.

This discrepancy between the "real beneficiaries" of the violation and the "real victims" of the sanction could be compensated internally by the state. This would require taxing the beneficiary of the violation and distributing the same amount to the victims of the sanctions. The retaliating state would have to set up a similar compensatory scheme. This is however impossible to realize, mainly for political and economical reasons.

First, it would be politically impossible to tax the beneficiaries of the violation, who are often industries of a sensitive branch of the economy. Besides, there would be no sense in protecting them by violating WTO law and then taking away the benefits of this protection. As explained above, those who succeed in getting discriminatory protection from international trade are probably influential enough on the country's political life to avoid also compensatory taxes.

As already stated, an increase in tariff rates also generates an economic inefficiency, such that the collected duties would not suffice to compensate adequately the victims of the retaliation. And this is supposing that the state has gained money from the violation of WTO law, which is not always the case, for instance when the illegal measure concerns a non-tariff impediment to trade.

Independently of a compensatory scheme organized by the state, why could the victims (of the violation or of the retaliation) not sue the state for damages? The general conditions for such an action are met: the state violated an obligation and this violation caused an injury to the claimant.

In most cases, this question is not even raised, because the damage incurred by the victims is too small to justify taking the case to court. But companies have tried to sue the EC for violation of its WTO obligations. These claims have all been rejected because, in the absence of direct effect, private persons are not allowed to invoke the

imports of certain products originating in the United States of America, *O.J.*, L 328, 17 Dec. 2003, p. 3-12).

rules of the WTO or the decisions of its DSB before national courts.¹ This is why the absence of direct effect is linked to the consequences of WTO violations and sanctions.

It appears, therefore, that the beneficiaries of WTO law violations do not bear the cost of sanctions, neither directly nor as a consequence of an internal redistribution system. Furthermore, those who suffer from sanctions cannot apply for a remedy which would have the effect of shifting this burden onto the whole population.

5. (Why) Is This Unjust?

Most people would admit that something can be wrong with this sanction system. But does that make it unjust in every case?

Liberalization resulting from the WTO agreements shifts the distribution of wealth inside member states (some win, others loose²) and arguably produces a surplus. Sanctions cause the opposite move: they suppress the surplus and modify the distribution of wealth. As far as the distribution is concerned, therefore, sanctions are *per se* no more just or unjust than liberalization.

The justice problem of the WTO involves the distribution, among different stakeholders, of the cooperative surplus generated by the agreement. If a state chooses to violate WTO and to suffer trade sanctions³, it intends to confer a benefit to some nationals. The consequence is a suspension of the cooperation, which cancels the cooperative surplus previously benefiting some other nationals. The overall operation can be described as a shift of the distribution pattern among the stakeholders. But such a shift does not necessarily imply that violations and sanctions are unjust: those who believe that state intervention in economic matters can be justified would see nothing intrinsically wrong there, even if it leads to an inferior equilibrium.

This is to show that, *in theory*, trade sanctions are not intrinsically unjust. However, *in practice*, WTO sanctions have all chances to be so.

When the state intervenes to modify the distribution of wealth or decides on the sharing of a cooperative surplus, the effects of the system are deliberate. The government consciously decides how wealth should be distributed or shared, i.e. who should gain and, possibly, who should loose. In doing so, they may take account of the various interests involved and strike an appropriate balance. Depending on the criteria guiding

¹ For example E.C.J., 30 September 2003, *Biret International*, C-93/02, *Rec.*, 2003, p. 10497; C.F.I., 20 March 2001, *Cordis v. Commission*, T-18/99, *Rec.*, 2001, p. II-913; C.F.I., 20 March 2001, *Bocchi Food Trade International v. Commission*, T-30/99, *Rec.*, 2001, p. II-943; C.F.I., 20 March 2001, *T. Port v. Commission*, T-52/99, *Rec.*, 2001, p. II-981; C.F.I., 12 July 2001, *T. Port v. Council*, T-2/99, *Rec.*, 2001, p. II-2093; C.F.I., 12 July 2001, *Banatrading v. Council*, T-3/99, *Rec.*, 2001, p. II-2123.

² « To a large extent, a decision by a WTO adjudicating body calling for an end to an illegal trade practice is a decision to redistribute wealth within a particular society » (P.C. MAVROIDIS, “Remedies in the WTO Legal System: Between a Rock and a Hard Place”, *Europ. J. Int’l Law*, 2000, p. 807).

³ This choice is of course a factual and not a legal one.

this decision and the various theories of justice one can adhere to, government intervention can be justified.

This is not what happens when WTO rules are violated and retaliation occurs.

First, in many cases, the violation of WTO law is not grounded on an ideal of justice, but on a particular interest. The power of lobbies on decision-makers is felt very strongly in the field of international trade. In these matters, one party has usually more incentive to lobby than the others. Domestic producers are few and have good information about the relevant market. They have a lot to gain from a protectionist measure. Consumers are often numerous, less informed and face huge coordination problems. Foreign producers, of course, do not have much power over the domestic government. The fact that a decision is influenced by lobbies does not, as such, make it unjust, but it sheds doubts on the justice of the outcome. It is at least possible, indeed likely, that a powerful lobby could convince a government to violate WTO law in case where this does not foster overall justice. Also is it likely that those able to put such pressure on governments are precisely the winners in the globalized economic system.

Even assuming, *arguendo*, that some WTO rule is violated for the sake of justice, the system could only be just if the retaliation also takes the justice dimension into account. But WTO violations and sanctions do not form an organized system. Violations are decided by one government. Sanctions are imposed by another. If one could pretend that protectionist measures have a redistributive (and maybe legitimate) intent, sanctions are motivated by efficiency, deterrence and compliance, which has no chance to coincide with justice, whichever justice theory one chooses. Moreover, although violations and sanctions are each decided by a different government, they both have effects on the individuals and companies of both countries – and possibly third countries too. In other words, if WTO sanctions are just, this would be a mere effect of luck, with an infinitely small probability. What impedes violations and sanctions to be just, therefore, is the lack of coordination between the two.

Two methods could be used for reconciling the decisions about violations and sanctions.

If a state does not want or is not able to comply immediately with the DSB's ruling, it can offer compensations to the state threatening retaliation and thus avoid trade sanctions. These compensations have to be agreed upon by the states involved.¹ Compensations are often preferred to sanctions because they imply larger (rather than narrower) market access. But they also help avoid the justice problem described above. When compensation is granted, the states jointly decide who will bear the cost of the continuing violation. Compliance or deterrence effects are no longer relevant arguments. The states' agreement is not necessarily just, but at least it has a chance to be, since the states can take into account all the diverging interests and reach whatever balance justice commands.

The other method would involve concentrating all the impact of the violation within one state. Instead of the existing retaliation system, a state violating WTO rules would be

¹ Art. 22.1 and 22.2 DSU.

obliged to compensate whoever suffers damage abroad.¹ This could be achieved by granting a partial direct effect to WTO rules. The costs and benefits of the WTO violation would be borne by the citizens of one (and only one) country. Assuming that this country is able to set up a just system of wealth allocation, it could decide internally on the distribution of benefits and sharing of costs. One single and coherent authority would decide and could take account of all interests at stake. Chances are that, under these conditions, the state would not violate WTO rules in the first place. But this is not the point of the argument, which is only aimed at permitting a coherent allocation of the benefits and burdens of violations and sanctions – coherence being the first step toward justice.

Both methods imply the recognition that the Marrakech agreement is not only an agreement between states. Its implications on the internal distribution of wealth of individuals are such that they should be taken into account (beyond the search for economic efficiency on the international level) when acting in the field of international trade.

6. Attempt of generalization

The justice problem described in this paper is not specific to the WTO. It results from a discrepancy between the legal system and the economic and philosophical liberal ways of thinking, which both imply methodological individualism.

For technical and practical reasons remotely, if at all, linked to social justice, the legal system treats some groups of human beings as one single (legal) entity. Well-known instances of legal persons are companies, states or international organizations. Liberal lawyers view this as a *fiction* which they accept for its usefulness, not because it is justified. Others consider the legal entity as a “reality” and emphasize in particular the existence of an underlying community, by which legal persons (like natural persons) exist even before they are *recognized* by law. For positivists, legal persons are *constituted* by a mere legal technique, with no regard to the (non legal) substratum.

With such a technique, a field of law can consider the corporate entity as the only relevant person, regulate the relations between legal entities and disregard the way individuals are treated *within* the legal entity. For example, the law of commercial contracts regulates how companies trade with each other, without consideration to the effects of this trade on the shareholders. More clearly even, international law applies to relations between states and, at least in its traditional form, is not concerned about the treatment of nationals within states. Thus, by a purely formal operation of law, a separation is created between an “inside” and an “outside”, with two (supposedly) independent legal systems applying simultaneously, one for the relations within the legal person, and the other for the relations between different legal persons.

¹ In the present state of international relations, enforcement against the states raises serious difficulties. However the rule of law in most democratic states implies that states pay damages when their own courts condemn them to do so.

In this context, it is tempting to apply the same reasoning to moral matters. All the more so that, just like each domain is governed by different legal rules, so too can it possibly be ruled by diverging principles of justice. One could intuitively agree that principles of justice applying between citizens within a state do not necessarily apply between states in the international realm.¹ What is wrong, however, is to deduce from there that the various domains are independent from one another. The main point of this paper is to show a real-life example of such a link and to describe the justice problems it raises. And so is it wrong to consider without further argument that philosophers too can consider legal entities as individuals for purposes reaching beyond strictly legal reasoning, as their creation does not only rely on ethically relevant concerns.² This would run contrary to individualism, a basic assumption of liberal theories, which implies that all questions of justice are ultimately to be decided at an individual level.

This being said, groups of people recognized by law (eg: states) are also a useful tool for the realization of justice inside the institution, albeit excluding in the same moment all outsiders from the application of the internal principles of justice. This is so because they create a *demos* in which principles of justice can be debated.³ This argument acknowledges that legal entities are justified in part because they help to realize justice between individuals. But it does not justify anything on justice questions outside the entity, let alone between entities. On the contrary, it points to the fact that relations between corporate bodies cannot be evaluated independently from their effects on individuals.

Conversely, legal entities raise problems of governance.⁴ For practical reasons (again), power over the corporate entity is entrusted to individuals supposed to exercise it for the benefit of all members. The danger lies in the possibility that this power be to some degree misused, i.e. used for other purposes or in some particular interest. This simply means that, rather than possibly serving justice as explained before, institutions may also foster injustice.

¹ One could also imagine that the same principles apply, but we need not enter into this discussion for the sake of our argument.

² See L. MICHOU, *La théorie de la personnalité morale et son application au droit français*, 3^{ème} éd., Paris, L.G.D.J., 1932, p. 70, 97; J. DABIN, *Le droit subjectif*, Paris, Dalloz, 1952, p. 109. The difficulty is sometimes overlooked even in philosophical arguments. When presenting the libertarian case in favour of free trade, Frank J. GARCIA (“Building a Just Trade Order for a New Millennium”, *George Washington Int’l L. R.* 33(3/4), 2001, p. 1015) uses such concepts as “free exercise of economic rights by private parties” or “people’s entitlements to their bodies and the fruits of their labor” (p. 1047). To prove that free trade can also be defended from a Rawlsian point of view, this scholar argues that free trade would accomplish the principle of equal liberty (i.e. of *individuals*) (p. 1047 sq.) while special and differential treatment (of *states*) is essential for the implementation of the difference principle: “The principle of special and differential treatment accomplishes this [the difference principle] by putting the wealthy markets of well-endowed states in the service of the economic development of the less fortunate states” (p. 1053). Beyond taking the state as morally granted, the difficulty here is doubled by the author shifting without much explanation from a reasoning based on individuals on one taking the states as the relevant units.

³ As we are talking of legal entities in a very broad sense, the word “*demos*” should be taken in a similarly broad meaning. Of course, the argument does not contend that the *demos* is of the same kind in a state, a company or an international organization, nor that the same principles of justice apply. It only means that legal entities create a forum where the principles of wealth distribution can be discussed and agreed upon.

⁴ On the link between the state system and the “democratic deficit” of international society, see A. BEVIGLIA ZAMPETTI, “Democratic legitimacy in the World Trade Organization: The justice dimension”, *J. World Trade* 37(1), 2003, p. 109 sq.

Thus, as long as one believes in justice (or indeed economic relations) between individuals, it is not coherent to conceive of legal entities as black boxes, simply ignoring what happens inside.¹ Unless one contends that justice or economics apply in an ultimate manner to legal entities, thereby denying the individualistic principle, one cannot design a theory of international justice or economics while keeping a blind eye on intra-state relations.

Although the division between “inside” and “outside” associated with the notion of legal personality is a founding distinction of their discipline, lawyers in the liberal modern world felt compelled to mitigate the effects of their own theory in order to protect individuals within legal entities. This amounts to “jumping over” the fence of legal personality. Such rules exist in corporate law, where the interests of shareholders, for instance, are to some extent guaranteed even with regard to deals made by the company and some third party.² International humanitarian or human rights law is another domain where the existence of legal persons (states) is sometimes disregarded to safeguard the interests of individuals. For example, the Vienna Convention on the law of treaties authorizes the states to suspend a treaty as retaliation for the violation of this treaty by another state. But the Convention adds that this is not possible for treaties protecting the human person or having a humanitarian character.³ Interestingly, these are not rules internal to the entity, but external to it: in these instances, criminal (not corporate) law protects shareholders, the same as international (not national) law safeguards human rights.

This discrepancy could principally be solved in two ways. On the philosophical side, one could try to think justice in terms of groups, rather than individuals. If one could consider only states, and not their citizens, one main justice problem of WTO sanctions would be solved. This might be advocated by some strong forms of communitarianism, but I doubt that this would realize any form of justice, at least if it is not supplemented by internal principles of justice (with which the problem re-enters by the back door). Non-individualistic versions of economics could exist too, but they would probably put into question the WTO project altogether. The specific question addressed by this paper, therefore, seems bound to be thought and solved within an individualistic framework.

The other way around the difficulty is to find ways of taking into account the interests of individuals within a formally non individualistic legal system, without losing the technical advantages of legal personality of states. This is what lawyers have sometimes done, though not in the case of WTO sanctions. Direct effect, much developed in the European legal systems (EU and EHRC) could be envisaged as a solution.

¹ To be sure, methodological purposes can justify that one does not embrace all issues at the same time. A questioning of the “inside” justice remains nevertheless indispensable at some point.

² See for instance article 492*bis* of the Belgian Penal Code (fraudulent use of corporate property).

³ Art. 60.5 of the Vienna Convention. See also S. CHARNOVITZ, “The WTO’s Problematic “Last Resort” Against Noncompliance”, *Aussenwirtschaft*, 2002, p. 419-420.