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**A CALL FOR INTERIM RELIEF AT THE  
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INTERNATIONAL TRADE DIPLOMACY**

BY  
GEORGES A. CAVALIER

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All correspondence should be addressed to:  
World Competition  
c/o Hammond Suddards, Box 65, Avenue Louise 250, B-1050, Brussels, Belgium.  
Tel. +32-(0)2 627 7676  
Fax +32-(0)2 627 7686  
E-mail: World.Competition@HammondSuddards.co.uk

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## A Call for Interim Relief at the WTO Level *Dispute Settlement and International Trade Diplomacy*

Georges A. CAVALIER\*

### I. INTRODUCTION

Since World War II, international law has increasingly recognized that parties have legal standing in the event of a dispute.<sup>1</sup> It began first with the recognition of the standing of private parties in the field of human rights.<sup>2</sup> This was exemplified by the creation of regional courts of human rights and in public declarations by governments and international organizations.<sup>3</sup> In international economic law,<sup>4</sup> the 1948 International Trade Organization (ITO) provided for the first dispositions to settle General Agreement on

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\* Magistère-D.J.C.E., D.E.S.S. in business and tax law, University of Lyons III, 1996; LL.M. Georgetown University, 1997. Georges A. Cavalier practises international tax and financial law at Skadden, Arps, Slate, Meagher & Flom LLP in Paris, France. He teaches public international law and corporate tax law at the University Jean Moulin, Lyons. The author would like to thank Professor John H. Jackson, Professor Frieder Roessler and Isaac Shapiro, for their time, encouragement and advice.

<sup>1</sup> For the advantages of the legalistic approach, see Glen T. Schleyer (1997): *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 Fordham L. Rev. 2275, 2291. Professor John H. Jackson pointed out that "it is not the resolution of the specific dispute under consideration which is most important. Rather, it is the efficient and just future functioning of the overall system which is the primary goal of a dispute-settlement procedure." John H. Jackson (MIT Press, Cambridge, Mass., 1989): *World Trading System: Law and Policy of International Economic Relations* 112. See also John H. Jackson (MIT Press, Cambridge, Mass., 1997): *World Trading System: Law and Policy of International Economic Relations* 107 (2nd edn).

<sup>2</sup> Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, 3 September 1953, 213 U.N.T.S. 221, 225, in Art. 25, allows individuals to file applications with the Commission when the Member States have granted such right. See Jonathan L. Black-Branch (1996): *Observing And Enforcing Human Rights Under The Council Of Europe: Creation Of A Permanent European Court Of Human Rights*, 3 Buff. J. Int'l L. 1, 15; and Louis B. Sohn (1982): *The New International Law: Protection Of The Rights Of Individuals Rather Than States*, 32 Am. U.L. Rev. 1, 32. See, e.g., Art. 1:2 of the American Convention on Human Right, which entered into force on 18 July 1978, see O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (<http://www.umn.edu/humanrts/oasinstr/zoas3con.htm>), which states that "For the purposes of this Convention, 'person' means every human being."

<sup>3</sup> One of the first acts of the United Nations was the adoption of the Universal Declaration of Human Rights on 19 December 1948. The European Court of Human Rights was created by the Convention for the Protection of Human Rights and Fundamental Freedoms of 3 September 1953. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were created within the Framework of the Organization for American States. See generally Jonathan L. Black-Branch (1996): *Observing and Enforcing Human Rights Under the Council of Europe: Creation of a Permanent European Court of Human Rights*, 3 Buff. J. Int'l L. 1, 4. David J. Padilla (1993): *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9. Am. U. J. Int'l L. & Pol'y 95. For the text of the American Convention on Human Right, which entered into force on 18 July 1978, see O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) (<http://www.umn.edu/humanrts/oasinstr/zoas3con.htm>).

<sup>4</sup> For the meaning of that expression, see John H. Jackson (1996): *Reflections on International Economic Law*, 17 U. Pa. J. Int'l Econ. L. 17; and John H. Jackson (1995): *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 Am. U. J. Int'l L. & Pol'y 595, 599.



Tariffs and Trade (GATT) disputes at a multilateral level.<sup>5</sup> However, the ITO was a failure, as the ITO charter was not ratified by the United States.<sup>6</sup> The main reasons the ITO never came into being, and the reason why the US Congress in particular objected to the Havana Charter, fall into three categories.<sup>7</sup> First, the world setting between 1945 and 1950 had changed.<sup>8</sup> In 1950, the aspirations of 1945 had been replaced by US intervention in Korea, and military mobilization overshadowed economic discussion.<sup>9</sup> Second, the political situation in the United States, because of the opposition of certain business groups,<sup>10</sup> caused President Truman not to resubmit the proposed Charter of the ITO for approval by the Congress.<sup>11</sup> Finally, there were the defects of the Charter itself from the point of view of US business.<sup>12</sup> Thus, GATT 1947 disputes were resolved by diplomatic rather than legal means.<sup>13</sup>

The World Trade Organization (WTO) (1994) promotes a more systematic adjudication of dispute resolution.<sup>14</sup> This follows a trend to promote the legal standing of governments in the economic field.<sup>15</sup> To promote this process further, there is a strong demand to allow private parties to assert claims before the WTO,<sup>16</sup> as is the case with

<sup>5</sup> See Arts 92–97 of the Final Act of the United Nations Conference On Trade And Employment [Havana Charter] (1948). George Bronz (1949): *The International Trade Organization*, 62 Harv. L. Rev. 1089, 1123; and R. Plaisant (1950): *L'organisation internationale du commerce* [*The International Trade Organization*], 21 *Revue Générale de Droit International Public* [R.G.D.I.P.] 159, at 219.

<sup>6</sup> See Jackson (1989), as note 1, above, 32–34; Jackson (1997), as note 1, above, 31–40; and Robert E. Hudec (1990): *The GATT Legal System and World Trade Diplomacy*, 59 (2nd edn).

<sup>7</sup> See William Diebold, Jr. (Princeton University, New Jersey, 1952): "The End of the I.T.O." in *16 Essays In International Finance*, 3.

<sup>8</sup> As note 7, above.

<sup>9</sup> As note 7, above, at 1, 6.

<sup>10</sup> As note 7, above, at 11. But see the views of the tanning industry, which expected the "elimination of the whole range of discrimination and restrictive artificial trade practices followed by the other countries", although not in favour of changing the rate of the duties. See *Reciprocal Trade Agreements Program, 1947: Hearings on The Operation of the Trade Agreements Act and the Proposed International Trade Organization Before the Comm. on Ways and Means of the House of Representatives*, 80th Cong. 1, at 306, 315 (1947) (statement of Irving R. Glass, representing the Tanners' Council of America and G. Levor & Co., Inc., New York, N.Y.).

<sup>11</sup> As note 7, above, at 1, 24.

<sup>12</sup> One major defect of the Charter is that it does not outlaw cartels or other restrictive business practices. It only condemns those which frustrate the purpose of the Charter. See Hon. James G. Fulton & Hon. Jacob K. Javits of Comm. on Foreign Affairs, 80th Cong., 2d Sess. (1948), H.R. Rep. on the International Trade Organization (An Appraisal of the Havana Charter in Relation to United States Foreign Policy, with a Definitive Study of its Provisions), at 39 (Sub. Comm. Print 1948).

<sup>13</sup> See Frieder Roessler (1991): *Remarks at the Meeting of the American Society of International Law* (18 April 1991), in *Comparative Analysis of International Dispute Resolution Institutions*, 85 Am. Soc'y Int'l L. Proc. 64, 72. See also Jackson (1989), as note 1, above, 85–88, reprinted in John H. Jackson, William J. Davey and Alan O. Sykes, Jr. (West Publishing Co., St. Paul, Minn., 1995): *Legal Problems of International Economic Relations, Cases, Materials and Text*, 333 (3rd edn).

<sup>14</sup> See John H. Jackson (1997): *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 Am. J. Int'l L. 60.

<sup>15</sup> Like the International Court of Justice, the WTO is only for governments: "the only international organization dealing with the global rules of trade between nations" (<http://www.wto.org/wto/inbrief/inbr00.htm>) (22 visited July 1999). See Debra P. Steger (1996): "WTO Dispute Settlement: Revitalization of Multilateralism After the Uruguay Round", Address Before the Conference on The Asia-Pacific Region and the Expanding Borders of the WTO: Implications, Challenges and Opportunities at 1 (7–8 June). See Barry E. Carter (1991): *Comparative Analysis of International Dispute Resolution Institutions*, 85 Am. Soc'y Int'l L. Proc. 64.

<sup>16</sup> See the paper from Jessica Pearlman (1998): "Private Counsel Participation in the Dispute Settlement Process" (Georgetown University Law Center) (spring).

the European Court of Justice (ECJ).<sup>17</sup> Without a forum, private parties are uncertain about the future enforcement of trade agreements and, therefore, hesitate to take full advantage of the benefits of free trade.<sup>18</sup> In cases where private parties cannot assert claims before the WTO, they seek other options. One of these options is to allow individuals to assert treaty-based rights before national courts.<sup>19</sup> Each of these demands under international law faces the problem of sovereignty.<sup>20</sup>

This article advocates something less than permitting private parties to raise claims before the WTO. It argues for allowing a government party to a WTO dispute to request provisional remedies. The reason why provisional measures were not appropriate under the old GATT (1947) system is that the panel (the GATT dispute resolution body) was proposing a solution, but there was no automatic adoption. Contrary to the situation before the International Court of Justice (ICJ) or the ECJ, the GATT 1947 panel was not making any decision. Therefore, provisional measures were not considered appropriate because the party against whom such measures were to be taken would have had to agree to them. In the new system of GATT (1994) however, the automatic adoption by the

<sup>17</sup> For instance, natural and legal persons can bring an action for a failure to act under the EEC Treaty, Art. 175(b). See Albertina Albors-Llorens (1996): *Private Parties in European Community Law*, 210. Moreover, private parties can require a jurisdiction that renders a decision which is not appealable to ask for an advisory opinion from the ECJ. See EEC Treaty, Art. 177(c), Code De Procédures Européennes (European Procedures Code), 150, Litec (1990). See also Henry G. Schermers and Denis F. Waelbroeck (1992): *Judicial Protection In The European Communities*, 394 (5th edn).

<sup>18</sup> See Glen T. Schleyer (1997): *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 Fordham L. Rev. 2275, 2288, 2295, 2311. An intermediary approach would be to allow only non-governmental entities to participate in the WTO process. See, e.g., G. Richard Shell (1996): *Participation of Nongovernmental Parties in the World Trade Organization: The Trade Stakeholders Model and Participation by Non-State Parties in the World Trade Organization*, 17 U. Pa. J. Int'l Econ. L. 359, 361, 372, 376; Philip M. Nichols (1996): *Extension of Standing in World Trade Organization Disputes to Non-Government Parties*, 17 U. Pa. J. Int'l Econ. L. 295; and Roger P. Alford (1991): *Why A Private Right of Action Against Dumping Would Violate GATT*, 66 N.Y.U.L. Rev. 696.

<sup>19</sup> See Carlos Manuel Vazquez (1995): *The Four Doctrines of Self-Executing Treaties*, 89 A.J.I.L. 695, 696. Note that the enforcement provisions of the Agreement on Government Procurement allow private parties to invoke the Agreement on Government Procurement before national courts. See Bernard M. Hoekman and Petros C. Mavroidis (1995): *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, 4 P.P.L.R. 62, 77; John H. Jackson (1992): *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 A.J.I.L. 310; Meinhard Hiff (1997): *New Frontiers in International Trade: The Role of National Courts in International Trade Relations*, 18 Mich. J. Int'l L. 321, 335; Carlos Manuel Vazquez (1992): *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1116; and Geert Zonnekyn (1996): *The Direct Effect of GATT in Community Law: From International Fruit Company to the Banana Cases*, 2 Int'l Trade L. and Reg. 63. Specifically for the legal rationales for and against direct effect of the GATT in Community law, see Ronald A. Brand (1996-1997): *Direct Effect of International Economic Law in the United States and the European Union*, 17 J. Int'l. L. Bus. 556, 599. See also Peter Westen (1987): *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 Harv. L. Rev. 511; Jordan J. Paust (1988): *Self-Executing Treaties*, 82 A.J.I.L. 760; The Right Honorable The Lord Templeman (1991): *Treaty-Making and the British Parliament*, 67 Chi.-Kent. L. Rev. 549, 468; and Lori Fisler Damrosch (1991): *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi.-Kent. L. Rev. 515. For a concise background to the direct effect of European Community law, see Melanie L. Ogren, *Francovich v. Italian Republic: Should Member States Be Directly Liable For Nonimplementation of European Union Directives?*, 7 Transnat'l Law. 583, 589 (1994). See also Jürgen Schwarze, Ulrich Becker and Christiana Pollak (Baden-Baden, Nomos Verlagsgesellschaft, 1994): *The Implementation of Community Law, Studies in the Legislative and Administrative Policies of the European Community and its Member States*, 66-88. However, Art. 2021 of the NAFTA expressly states that private parties do not have a right of action: in Jackson, Davey and Sykes (1995), as note 13, above, 698. See Denis Alland (1998): *L'applicabilité directe du droit international considérée du point de vue de l'office du juge: des habits neufs pour une vieille dame?* [International law and direct applicability from the judge standpoint: new clothes for an old lady?] *Revue Générale de Droit International Public* [R.G.D.I.P.] 203.

<sup>20</sup> See John H. Jackson (1997): *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 Col. J. Trans. L. 157. William J. Aceves (1995): *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 Fordham Int'l L.J. 427, 457.

Dispute Settlement Body (DSB) of the panel report has changed the preceding fact pattern.

To fully understand the implications of the subject, it is first necessary to define what a provisional measure is. Then, a practical illustration for the need for provisional measures at the WTO level will be shown.

First, this article tries to define the expression "provisional measure". After positing the lack of an international definition, this article will try to define the expression by means of defining its goals. Surprisingly enough, there is no definition of "provisional measures" at the international level. Many authors agree that the notion of provisional measures is not very well defined in the international arena.<sup>21</sup> Legal texts use different terms for identifying the same concept. For instance, at the ICJ level, the term used by the statute of the ICJ is "provisional measures", but the relevant provisions of the Rules of the ICJ have always had the sub-title "interim protection".<sup>22</sup> The terms "provisional measures" and "interim relief" are often interchangeable. Some authors have suggested the use of the term "provisional measure" for a remedy granted prior to the proceeding, and "interim measure" for a remedy granted during the proceeding.<sup>23</sup> However, in this article, these terms will be used interchangeably.

The adjective "provisional" excludes the idea of finality.<sup>24</sup> It responds to a present need or for one occasion.<sup>25</sup> "Measure" should be understood to mean "remedy".<sup>26</sup> There is no definition of remedy at the international level. The various dictionaries of international law do not define the term.<sup>27</sup> Some authors, however, have tried to elaborate a "normative theory" of public law remedies.<sup>28</sup> It remains true that a basic definition of a provisional remedy is a remedy provided for a present need or occasion.<sup>29</sup> Examples of such remedies include an injunction,<sup>30</sup> an appointment of a receiver, an attachment<sup>31</sup> or an arrest.<sup>32</sup>

<sup>21</sup> See, e.g., George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 Colum. J. Transnat'l L. 553, 556 (1997).

<sup>22</sup> See Statute of the ICJ, Art. 41, and Rules of the ICJ, subs. 1. See Jerzy Sztucki (Kluwer Law and Taxation, Deventer, 1983): *Interim Measures in the Hague Court: An Attempt at a Scrutiny*, xi.

<sup>23</sup> See Avraham Azrieli (1993): *Improving Arbitration Under The U.S.-Israel Free Trade Agreement: A Framework For A Middle-East Free Trade Zone*, 67 St. John's L. Rev. 187, 238.

<sup>24</sup> 73 C.J.S. *Provisional*, 323 (1983).

<sup>25</sup> As note 24, above.

<sup>26</sup> A measure is defined as "an action taken as a means to an end". *The American Heritage Dictionary of the English Language*, 1116, 1117 (Boston, New York, 3rd edn, 1992).

<sup>27</sup> See C. Parry et al. (1986): *Parry and Grant's Encyclopaedic Dictionary of International Law*; J.R. Fox (1992): *Dictionary of International and Comparative Law; Manual of the Terminology of Public International Law (Law of Peace) and International Organizations* (1983).

<sup>28</sup> See Susan P. Sturm (1991): *A Normative Theory Of Public Law Remedies*, 79 Geo. L.J. 1355.

<sup>29</sup> See *Black's Law Dictionary*, 1224 (West Publishing Co., St. Paul, Minn., 6th edn, 1990).

<sup>30</sup> An injunction is a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Interlocutory injunctions are those issued at any time during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the time that the court will be in a position to either grant or deny permanent relief on the merits. As note 29, above, 784.

<sup>31</sup> An attachment is the legal process of seizing another's property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered. Usually, attachment is available at or after the commencement of the main action until entry of judgment. As note 29, above, 126.

<sup>32</sup> *Id.*

As a result of the lack of definition of provisional measures at the international level, this article will try to define this expression by defining its goals. Provisional measures are aimed primarily at preventing the dissipation or transfer of assets.<sup>33</sup> More generally, allowing provisional measures preserves the rights of the parties until a tribunal renders a final decision.<sup>34</sup> However, provisional measures can serve other functions.<sup>35</sup> In international economic law as in human rights law,<sup>36</sup> they protect against irreparable damage to a party or to the subject-matter of the dispute while it is pending. Additionally, it has also been argued that provisional measures preserve the *status quo ante*,<sup>37</sup> as many articles in the GATT already do.<sup>38</sup> For instance, Article 3:2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that "[t]he Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered Agreements".<sup>39</sup> Accordingly, provisional measures enhance in some fashion the effectiveness of pending litigation.<sup>40</sup> Provisional relief is usually sought from the same tribunal before which the case is pending, but this is not always the case.<sup>41</sup>

Second, for ease of presentation and before proceeding, I would like to posit one hypothetical case. A US company was refused a government contract for supervisory work for a motorway bridge in Germany. Instead, the contract was awarded to a German company. However, the US company, through the United States Trade Representative (USTR) alleged before the WTO that there was a breach of the Agreement on Government Procurement (AGP)<sup>42</sup> in the course of awarding of the contract. The claim will now proceed before a panel. As an action before the WTO does not give a right to

<sup>33</sup> It is also one of the functions of provisional measures in domestic law. See Charles H. Brower (1995): *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 Va. J. Int'l L. 971, 973; and Bermann (1997), as note 21, above, 553, 558.

<sup>34</sup> Patricia A. Essoff (1991/1992): *Finland v. Denmark: A Call To Clarify The International Court of Justice's Standards For Provisional Measures*, 15 Fordham Int'l L.J. 842. See, e.g., *Polish Agrarian Reform (Germany v. Pol.)*, 1933 P.C.I.J. (ser. A) no. 58, at 175 (Interim Protection Order of 29 July). The Court stated (at 177) that "the essential condition which must necessarily be fulfilled in order to justify a request for the indication of interim measures, should circumstances require them, is that such measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court." See also Jo M. Pasqualucci (1993): *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 Vand. J. Transnat'l L. 803, 813; and Sztucki, as note 22, above, 80.

<sup>35</sup> See Sztucki, as note 22, above, 12.

<sup>36</sup> See Pasqualucci, as note 34, above; and Edward Dumbauld (M. Nijhoff, The Hague, 1932): *Interim Measures of Protection in International Controversies*, 28.

<sup>37</sup> See Brower, as note 33 above, at 976 (1995); and Sztucki, as note 22, above, 12.

<sup>38</sup> See, e.g., the GATT II:3. See Frieder Roessler (GATT, Geneva, 1977): *Specific Duties, Inflation, and Floating Currencies*, 22.

<sup>39</sup> See Jackson, Davey and Sykes (1995), as note 13, above, 367.

<sup>40</sup> See Bermann (1997), as note 21, above. See, e.g., in the international human rights system, the Order of the *Court-Chunima Case*, Inter-Am. Court 52, 53, 56, O.A.S./ser. L/V/III.25, doc. 7 (1991), where the immediate referral of a case to an international court would focus international attention on the situation, and the resulting publicity could curtail some cases even before the court reaches a judgment.

<sup>41</sup> For instance, and contrary to the situation in the United States, preliminary proceedings in Germany are not part of the main proceedings on the merits. German law does not require that proceedings on the merits be pending nor that the only court with authority to decide on the merits has jurisdiction to decide in preliminary proceedings. See Jürgen Mark (1995): *Provisional Remedies in International Arbitration—Part II: Perspectives From the ICC and Germany*, 6 World Arb. & Mediation Rep. 52, 55.

<sup>42</sup> The AGP is one of the Plurilateral Trade Agreements in Annex 4 to the WTO Agreement. See Jackson, Davey and Sykes (1995), as note 13, above, 395.



suspend national proceedings, the German company will in the meantime, start the supervision of the construction work on the bridge. Even if the AGP provides for a reduced timeframe in the panel proceeding,<sup>43</sup> the work on the bridge will be far advanced when the panel reaches its recommendation. If Germany appeals, then the proceedings might be extended seven additional months<sup>44</sup> and the bridge construction will be finished. Let us assume that the panel or the Appellate Body finds that there was indeed a breach of the AGP. Let us assume further that automatic adoption of the Appellate Body Report occurs. Let us assume finally that Germany implements the panel or Appellate Body recommendation in 15 months.<sup>45</sup> What then is the practical effects of the decision? None. The harm is not remedied by the decision of the panel. The US company will suffer adverse economic effects.

Let us imagine instead that the DSB had the power to adopt provisional measures in the government procurement area. Given the urgency of the irreparable harm, the DSB would probably have issued a preliminary injunction ordering a stay of the commencement of the construction work pending a decision. Then, once the decision was made, the tender could take place again, respecting the AGP. The US company would now have had a true chance to get the contract and to realize the construction work.

This article argues that there is a general trend in international law to allow provisional measures—regardless of whether it is international economic or human rights law or whether it is private or public law. The WTO Agreement does contain certain measures that allow interim relief. However, these measures only allow national authorities to grant provisional relief. Thus, a WTO panel cannot itself grant provisional relief, although it may be appropriate in a given case. This article advocates the availability of additional provisional measures at the WTO level.

Section II will describe the trend towards availability of provisional measures in international law. Section III will show that there is a need for provisional measures in the WTO dispute resolution mechanism. Examples of provisional measures available at other international institutions will be discussed. In particular, the European Union (EU) example will provide guidance on the types of provisional measures to be applied and how to apply them. A special proposal will be made to address emergency relief situations where the timeframe for the formation of a WTO panel does not allow for appropriate relief.

## II. A TREND TOWARDS AVAILABILITY OF PROVISIONAL MEASURES IN INTERNATIONAL LAW

There is a general trend to allow provisional measures to be taken under international law, whether to save lives in the human rights field or to save industries in the economic arena. In view of the WTO dispute settlement mechanism, examples taken from private

<sup>43</sup> See AGP XXII:6 in Jackson, Davey and Sykes (1995), as note 13, above, 417.

<sup>44</sup> As note 43, above.

<sup>45</sup> See DSU 21:3(c) in Jackson, Davey and Sykes (1995), as note 13, above, 380.

international law and public international law are relevant. Indeed, private international law deals mostly with economic concerns. Conversely, public international law usually involves resolving disputes between governments regarding peace and human rights.

A. PROVISIONAL MEASURES IN PRIVATE INTERNATIONAL LAW: TOWARDS A *LEX MERCATORIA* OF INTERIM RELIEF?

In all areas of private international law, observers note a growing trend to make provisional measures available. Most of these measures are made available expressly, but many courts have also implied such power to enhance fairness in the administration of justice. Can we say there is now a *lex mercatoria* of interim relief?

1. *Interim Measures and International Commercial Arbitration and Transnational Litigation*

This section will first review international arbitration rules so far as provisional measures are concerned. Second, it will give an overview of national provisions allowing interim relief in some major trading countries.

Most international arbitration rules<sup>46</sup> and several foreign laws<sup>47</sup> allow interim measures, as it can take several months to constitute the arbitral tribunal and sometimes much longer for the tribunal to make a decision.<sup>48</sup> Both the courts and arbitrators can order provisional relief.<sup>49</sup> In the area of transnational litigation, some authors have identified the growth of crossborder provisional relief.<sup>50</sup>

This discussion is relevant because "[t]he dispute resolution model the WTO panel system most closely resembles is that of international commercial arbitration".<sup>51</sup> The example of the New York Convention is interesting because, in a similar way to the DSU, the Convention is silent on provisional measures.<sup>52</sup> Accordingly, the law of the domestic court in which the measure is sought will control the availability of interim

<sup>46</sup> See American Arbitration Association International Rules, Art. 22; UNCITRAL Arbitration Rules, Art. 26; London Court of International Arbitration Rules, Art. 13; ICSID, Art. 47; International Chamber of Commerce Rules, Art. 8(5); and European Convention on International Commercial Arbitration, Art. VI(4). For the ICC, Art. 8(5), see Eric Schwartz (1995): *Provisional Remedies In International Arbitration—Part II: Perspectives From The ICC And Germany*, 6 World Arb. & Mediation Rep. 52; and Richard H. Kreindler (1994): *Court Intervention In Commercial And Construction Arbitration: Approaches In The U.S. And Europe*, 13-OCT Construction Law 12, 13.

<sup>47</sup> See Coleen C. Higgins (1991): *Interim Measures in Transnational Maritime Arbitration*, 65 Tul. L. Rev. 1519, 1523. See generally Gary B. Born (Kluwer Law and Taxation, Deventer, 1994): *International Commercial Arbitration in the United States*, Chap 8: Provisional Measures in Arbitration. In particular for elements of bibliography, at 753.

<sup>48</sup> See Charles N. Brower and W. Michael Tupman (1980): *Court-Ordered Provisional Measures Under The New York Convention*, 80 A.J.I.L. 24.

<sup>49</sup> See Born, as note 47, above.

<sup>50</sup> See Bernmann, as note 21, above, 553, 554.

<sup>51</sup> See C. O'Neal Taylor (1997): *The Limits Of Economic Power: Section 301 And The World Trade Organization Dispute Settlement System*, 30 Vand. J. Transnat'l L. 209, 252.

<sup>52</sup> See Coleen C. Higgins (1991): *Interim Measures in Transnational Maritime Arbitration*, 65 Tul. L. Rev. 1519, 1526.



relief.<sup>53</sup> As the New York Convention is silent on provisional measures, there has been a debate in the United States on the authority of national courts to grant provisional relief.<sup>54</sup>

In the United States, Chapter 1 of the Federal Arbitration Act (FAA), applies primarily to domestic arbitration, but also to disputes involving "foreign commerce".<sup>55</sup> The Act provides for the validity of arbitration agreements, judicial procedures for their enforcement, and other matters.<sup>56</sup> It expressly authorizes a federal court to order provisional measures in maritime cases.<sup>57</sup> Extending this concept to all commercial cases, Judge Land in *Murray Oil*, stated that "an arbitration clause does not deprive a promisee of the usual provisional remedies, even when he agrees that the dispute is arbitrable".<sup>58</sup> However, applying Chapter 2<sup>59</sup> of the FAA, which republishes the text of the New York Convention,<sup>60</sup> a US court decided that it was precluded from granting provisional remedies to a party to an arbitration agreement.<sup>61</sup> The rationale behind this refusal is contained in Article II(3) of the Convention which provides that the court of a contracting State shall "refer the parties to arbitration" rather than "stay the trial of the action".<sup>62</sup> This requirement was held to forbid the court "from entertaining a suit which violates an agreement to arbitrate".<sup>63</sup> According to this view, interim relief requests are equated with attempts to circumvent the arbitration agreement.<sup>64</sup>

However, in *Uranex*, Chief Judge Peckham decided to award provisional measures under the New York Convention, as under Chapter 1 of the FAA, because "the Supreme Court has concluded that the availability of provisional remedies encourages rather than obstructs the use of agreements to arbitrate".<sup>65</sup> Therefore, he refused to follow the initial preclusion of provisional relief based on the silence of the text.<sup>66</sup> Nevertheless, this trend, which is favourable to provisional measures, has been followed by all courts in the United States.<sup>67</sup> The situation in which the parties provide for interim measures in their arbitration clause has never been tested in court, but, according to some authors, there would be no doubt as to the availability of provisional measures.<sup>68</sup>

<sup>53</sup> As note 52, above.

<sup>54</sup> As note 52, above.

<sup>55</sup> See 9 U.S.C. § 1 (1984); Born, as note 47, above; and Higgins, as note 52, above.

<sup>56</sup> See David E. Wagoner (1996): *Interim Relief In International Arbitration: Enforcement Is A Substantial Problem*, 51-OCT Disp. Resol. J. 68, 70.

<sup>57</sup> See 9 U.S.C. § 8 (1984); Higgins, as note 52, above; and Born, as note 47, above, 887.

<sup>58</sup> See *Murray Oil Products Co. v. Mitsui & Co., Ltd.*, 146 F.2d 381, 384 (2d Cir. 1944).

<sup>59</sup> Chapter 1 applies to the agreements or awards falling under the New York Convention to the extent that it does not conflict with Chapter 2 or the convention. See 9 U.S.C. § 208.

<sup>60</sup> See Born, as note 47, above, 31.

<sup>61</sup> See *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 502 F.2d 1032, 1038 (3d Cir. 1974).

<sup>62</sup> As note 61, above. See also Charles S. Baldwin (1996): *Protecting Confidential and Proprietary Commercial Information in International Arbitration*, 31 Tex. Int'l L.J. 451, 461. Born, as note 47, above, 773: "In short, the McCreary court concluded that McCreary's US judicial action for provisional relief was in fact designed to frustrate the arbitral process that it had agreed to and, therefore, that the New York Convention precluded the suit and the request for attachment."

<sup>63</sup> As note 61, above.

<sup>64</sup> As note 61, above. See also Higgins, as note 52, above.

<sup>65</sup> See *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044, 1052 (N.D. Cal. 1977).

<sup>66</sup> As note 65, above.

<sup>67</sup> See Brower, as note 37, above, 971, 997.

<sup>68</sup> As note 67, above, 1002.

In the UK and France, however, there is no debate on the power of a court to order provisional measures under the New York Convention.<sup>69</sup> In the UK, the 1996 Arbitration Act governs both domestic and international arbitrations, even if Part I applies only to domestic arbitration.<sup>70</sup> It is clear that provisional measures could be ordered by the court in international arbitration under the New York Convention.<sup>71</sup> Besides, this 1996 Act favours provisional measures taken by the arbitrators rather by the court.<sup>72</sup> Unlike the United States and the UK, France did not provide for implementing legislation as the New York Convention is considered to be self-executing by virtue of Article 55 of the French Constitution.<sup>73</sup> Yet, as in the UK, French courts have not had any problem in ordering provisional measures, although there is no direct provision in the New York Convention allowing for them.<sup>74</sup>

The New York Convention's allowance of provisional measures remains unclear in the United States. Although some courts have not granted provisional measures, most have done so in the absence of a legal basis. This is generally referred to in private international law as *lex mercatoria*. Indeed, a US court has defined *lex mercatoria* as "a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate".<sup>75</sup> Moreover, an author has argued that attachments are examples of the *lex mercatoria* found in maritime awards.<sup>76</sup> More generally, some scholars and arbitrators have demonstrated the development of a *lex mercatoria* at the procedural level.<sup>77</sup> This is why it can be argued fairly that there is the beginning of a *lex mercatoria* for provisional measures, based on the decisions of national courts allowing provisional measures despite the silence of the New York Convention.

Second, an overview of national provisions relating to provisional measures in the United States, the UK, Germany and France shows that all these countries have similar types of remedies to respond to emergency situations. In the US legal system, typical

<sup>69</sup> See Brower and Tupman, as note 48, above, 34.

<sup>70</sup> See Robert Morgan (1996): *The English Arbitration Act 1996 And Reform Of Arbitration Law In Hong Kong And Singapore: A Brave New World?*, 12 Mealey's Int'l Arb. Rep. 20.

<sup>71</sup> See *The Rena K.* [1978] 1 Lloyd's L.R. 545.

<sup>72</sup> See Toby Landau (1996): *The Effect of the New English Arbitration Act on Institutional Arbitration*, 13 J. Int. Arb. 113, 125-126.

<sup>73</sup> See Fr. Const., Art. 55.

<sup>74</sup> As note 69, above, 39. The authors gives the example of the case *Société d'Exploitation du Cinéma REX*, Cass 3e civ., 7 June 1979, 1979 Bull. Civ. III, no. 93, where it was decided that "the existence of a compromissory clause does not, in case of urgency duly established, deprive the jurisdiction of Courts *en référé* from exercising their powers". See generally, Emmanuel Jeuland (1996): *Les Effets des Jugements Provisoires Hors du Territoire du For [Effects of Provisional Orders Outside the For]*, 64 Revue de la Recherche Juridique [R.R.R.], 173.

<sup>75</sup> See *Bank of Conway v. Stary*, 200 N.W. 505, 508-09 (N.D. 1924), cited in Karyn S. Weinberg (1994): *Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. Int'l L.J. 227, 228.

<sup>76</sup> See William Tetley (1994): *The General Maritime Law—The Lex Maritima*, 20 Syracuse J. Int'l L. & Com. 105, 106.

<sup>77</sup> See Professor Hans Smit (Columbia University), Remarks at the Annual Lunch of the American Foreign Lawyers Association, at the occasion of the election of its new President, Professor Roger Goebel (Fordham University), New York, June 1997. See also Hans Smit (1991): *Substance and Procedure in International Arbitration: the Development of a New Legal Order*, 65 Tul. L. Rev. 1309, 1313.

provisional measures take the form of interlocutory injunctions. Interlocutory injunctions are those issued during the pendency of a litigation.<sup>78</sup> These injunctions are for the purpose of preventing irreparable injury to the petitioner.<sup>79</sup> This injury may occur prior to the time a court grants or denies permanent relief.<sup>80</sup> There are two types of interlocutory injunctions: preliminary injunctions<sup>81</sup> and temporary restraining orders (TRO).<sup>82</sup> A preliminary injunction includes any interlocutory injunction granted after the hearing on the injunction.<sup>83</sup> However, a TRO differs from a preliminary injunction in that it is issued *ex parte*, without notice or an opportunity to be heard.<sup>84</sup>

At the US federal level, the Federal Rules of Civil Procedure Title VIII, entitled "Provisional and Final Remedies",<sup>85</sup> encompass preliminary injunctions and TROs.<sup>86</sup> The same pattern is found at the state level. For example, the New York Civil Practice Law and Rules contains a list of provisional remedies.<sup>87</sup>

Similarly, in English courts, a Mareva injunction<sup>88</sup> is comparable to a preliminary injunction in the United States, although it is more personal rather than being directed at an object.<sup>89</sup>

France's *ordonnance de référé*<sup>90</sup> confers upon a judge who has not been empowered to hear the main issue, the power to order an immediate provisional measure.<sup>91</sup> It is similar to the US preliminary injunction, except that a judge other than the judge of the case is empowered to make the decision.<sup>92</sup> French civil procedure encompasses a provisional measure similar to the US TRO with the *ordonnance sur requête*, where the order can be

<sup>78</sup> As note 29, above, 784.

<sup>79</sup> As note 78, above.

<sup>80</sup> As note 78, above.

<sup>81</sup> A preliminary injunction is also called provisional injunction, temporary injunction or injunction *pendente lite*. As note 29, above, 785.

<sup>82</sup> As note 29, above, 785.

<sup>83</sup> As note 82, above.

<sup>84</sup> As note 82, above.

<sup>85</sup> See Table of Rules in *Federal Rules of Civil Procedure*, 21 (Foundation Press, New York, 1996). See also Richard H. Field, Benjamin Kaplan and Kevin M. Clermont (Foundation Press, New York, 1997): *Civil Procedure*, 107 (7th edn). The provisional remedies are under Rules 64 and 65 of the Federal Rules of Civil Procedure, under Title VIII "Provisional and Final Remedies".

<sup>86</sup> U.S.C.S. Fed. Rules Civ. Proc. R. 65 (1997) has nearly 200 pages of developments on this particular rule, whereas the text itself is reproduced in two pages only.

<sup>87</sup> They are attachment, injunction, receivership and notice of pendency (*lis pendens*). The provisional remedy of replevin is not listed in New York Civil Practice Law and Rules (CPLR) 6001. For provisional remedy when an arbitration is pending, see CPLR 7502(c).

<sup>88</sup> From the case *Mareva Compania Naviera, S.A. v. International Bulkcarriers, S.A.*, [1980] 1 All E.R. 213 (C.A. 1975).

<sup>89</sup> See Charles H. Brower, as note 37, above, 971, 1006 (1995). See generally Bermann, as note 21, above, 553, 560; and Campbell McLachlan (1987): *Transnational Applications of Mareva Injunctions and Anton Piller Orders*, 36 Int'l & Comp. L. Q. 669.

<sup>90</sup> It is a provisional order rendered at the request of one party, the other party present or having been summoned. See Brower and Tupman, as note 48, above, 40.

<sup>91</sup> See Brower and Tupman, as note 48, above, 40.

<sup>92</sup> See Jean Vincent and Serge Guinchard (Daloz, Paris, 1994): *Procédure Civile [Civil Procedure]*, 204 (23rd edn). See generally Peter Herzog and Martha Weser (Martinus Nijhoff, The Hague, 1967): *Civil Procedure In France*, 238; Philippe Jestaz (Librairie Générale de Droit et de Jurisprudence, Paris, 1968): *L'Urgence Et Les Principes Classiques Du Droit Civil [Urgency And Traditional Civil Law Principles]*, 53.

issued *ex parte*.<sup>93</sup> As a result of its efficiency and rapidity, the French *référé* has been described as a "legal miracle".<sup>94</sup> Finally, many administrative bodies in France allow provisional measures in the area of trade and competition.<sup>95</sup>

In Germany, the procedures for obtaining provisional protection in the civil courts is found in the Code of Civil Procedure.<sup>96</sup> A plaintiff seeking provisional relief may choose seizure or a provisional injunction as a remedy. A provisional injunction is used to preserve personal rights or to tentatively resolve a disputed legal relationship, while seizures are used to ensure that property is preserved for execution.<sup>97</sup>

## 2. *Interim Relief, the International Centre for the Settlement of Investment Disputes and the World Intellectual Property Organization*

The review of interim relief provisions of the International Centre for the Settlement of Investment Disputes (ICSID) and the World Intellectual Property Organization (WIPO) shows that international organizations have adopted provisional measures. First, the Washington Convention organizing the ICSID is an enlightening source for the WTO, as it deals both with investments and governments.<sup>98</sup> Article 47 of the Convention provides for provisional measures "to preserve the respective rights of either party".<sup>99</sup> The ICSID tribunals can be asked by host countries to enjoin private investors from acting restrictively against a foreign governments.<sup>100</sup> Such a request, for instance, was ultimately unsuccessful in *Amco v. Indonesia*.<sup>101</sup> There has been some debate as to whether Article 26 of the Convention precludes parties from seeking provisional remedies from national courts, because the respondent is almost invariably a State and States are always capable of paying an award rendered against them.<sup>102</sup>

<sup>93</sup> N.C. Pr. Civ., Art. 812 in civil matters and Art. 875 in commercial matters.

<sup>94</sup> See Wallace R. Baker (1997): *The French Refere Procedure—A Legal Miracle* in Roger Pinto, Elisabeth Zoller, Henri Ader and Wallace Baker, *A Primer on French Constitutional Law and the French Court System*, 5 Tul. J. Int'l & Comp. L. 365, 386.

<sup>95</sup> For instance the French Competition Council has the power to order provisional measures. See Philippe Nouel (ESC Publ., Oxford, 1988): "French Competition Law" in Julian Maitland-Walker (ed.) *International Anti-trust Law, Towards 1992—The Development of International Anti-trust*, 152, 154–158.

<sup>96</sup> See Zivilprozessordnung (F.R.G.) (Code of Civil Procedure), §§ 916–945.

<sup>97</sup> See Manuel Juan Dominguez (1995): *Using Prejudgment Attachments in the European Community and the U.S.*, 5 J. Transnat'l L. & Pol'y 41, 47.

<sup>98</sup> See Born, as note 47, above, 21, for a background on the ICSID. In the WTO, the TRIMs, in Art. 8, refers to the DSU as far as consultation and dispute settlement is concerned. Thus, no provisional measures is available for breach of the TRIMs. See TRIMs, Art. 8, in Jackson, Davey and Sykes, as note 13, above, 372.

<sup>99</sup> See Bertrand P. Marchais (1986): *ICSID Tribunals and Provisional Measures—Introductory Note to Decisions of the Tribunals of Antwerp and Geneva*, 2 ICSID Rev. Foreign Investment Law Journal, 372.

<sup>100</sup> See Paul D. Friedland (1986): *Provisional Measures And ICSID Arbitration*, 2 Arbitration International, 335, 336. This author cites Massod (1972): *Provisional Measures of Protection in Arbitration under the World Bank Convention*, 1 Delhi L. Rev. 138. See also Bertrand P. Marchais (1986): *ICSID Tribunals and Provisional Measures—Introductory Note to Decisions of the Tribunals of Antwerp and Geneva*, 2 ICSID Rev. Foreign Investment Law Journal, 372.

<sup>101</sup> See *Amco Award on the Merits*, 23 November 1984, excerpted in 24 I.L.M. 1022 (1985); *Amco Award on Jurisdiction*, 25 September 1983, excerpted in 23 I.L.M. 351 (1984); and *Decision Rejecting Indonesia Request*, 9 December 1983, 24 I.L.M. 365 (1985). See also Georges R. Delaume (1986): *ICSID Tribunals and Provisional Measures—A Review of the Cases*, 2 ICSID Rev. Foreign Investment Law Journal, 392, 394.

<sup>102</sup> Marco E. Schnabl, Dana H. Freyer, Steven J. Kolleeny and Troy E. Elder (1997): *Resolution of Investment Disputes with Foreign Nations Via ICSID Arbitration*, at 12 (Skadden, Arps, Slate, Meagher & Flom LLP).



Second, the case of the newly created WIPO Arbitration Centre is also instructive, as it emphasizes this trend towards allowing provisional measures in private international economic law.<sup>103</sup> Attached to its existing Rules of Arbitration, the WIPO Arbitration Centre has adopted Supplementary Emergency Interim Relief, which gives it, with the previous agreement of the parties to that rule, the power to appoint an emergency arbitrator to preserve the rights of the parties pending the outcome of the case.<sup>104</sup>

Recently, the developed countries have focused on the WTO for resolution of intellectual property disputes.<sup>105</sup> However, the advantages of the new Arbitration Rules, including its interim relief procedure, may well attract them to the WIPO.<sup>106</sup> Moreover, the developing countries prefer the WIPO for resolving intellectual property disputes.<sup>107</sup> Therefore, it is important that the WTO (not the national authorities, which already have such power under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)) arm itself with the powerful means to be competitive, such as by adopting provisional measures.

## B. PROVISIONAL MEASURES IN PUBLIC INTERNATIONAL LAW

A review of interim relief provisions in private international law has demonstrated the importance of provisional measures. This is also true at the public international law level and at the ICJ level as well as in the field of human rights.

### 1. *Interim Measures at the ICJ*

The example of the ICJ is pertinent, as that body decides disputes between governments, as does the WTO. Article 41:1 of the statute of the ICJ provides that it "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either

<sup>103</sup> See William K. Slate II (1996): *International Arbitration: Do Institutions Make A Difference?*, 31 Wake Forest L. Rev. 41, 51. For a basic introduction to the WIPO Arbitration and Mediation Centre, see, <http://www.wipo.org/eng/arbit/arbit.htm>; *The Services of the WIPO Arbitration Center*, 30 Copyright 297, 305 (1994).

<sup>104</sup> For the rules, see 10 BNA's World Intellectual Property Report, 181, 185 (1996). See Mladen Singer (1996): *New Boundary: Arbitration In Various Discipline: Commercial Arbitration As A Means For Resolving Industrial Property And Transfer of Technology Disputes*, 3 Croat. Arbit. Yearb. 107, 116; Julia A. Martin (1997): *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantage of International Property-Specific Alternative Dispute Resolution*, 49 Stan. L. Rev. 917, 920, 948; and Toby Landau (1996): *The Effect of the New English Arbitration Act on Institutional Arbitration*, 13 J. Int. Arb. 113, 126.

<sup>105</sup> See *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS79/R), dated 24 August 1998, complaint by the European Communities (EC) (WT/DS79/1). India indicated at the DSB meeting of 21 October 1998, that it needed a reasonable period of time to comply with the DSB recommendations and that it intended to have bilateral consultations with the EC to agree on a mutually acceptable period of time. At the DSB meeting on 25 November 1998, India read out a joint statement with the EC, in which it was agreed that the implementation period in this dispute would correspond to the implementation period in a similar dispute brought by the United States (DS50). See <http://www.wto.org>.

<sup>106</sup> See Camille A. Laturno (1996): *International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules*, 9 Transnat'l Law. 357, 391.

<sup>107</sup> As note 106, above, 376. In particular, the author looks at the differences between the WIPO and the GATT as to the dispute settlement approach.

party".<sup>108</sup> However, Paragraph 2 states that such measures cannot be granted *ex parte*.<sup>109</sup> One might think that the ICJ would deal mostly with provisional measures affecting people's lives. This is not the case. Among the cases decided by the predecessor of the ICJ, the Permanent Court of International Justice (PCIJ),<sup>110</sup> one is of particular interest (from the point of view of the WTO), as it concerned the collection of income tax. Tax collection is probably the closest example we can find in the jurisprudence of the ICJ to the imposition of duties as exemplified in the WTO system.

The *Pless* case concerned an attachment of the Prince of Pless's claim against the Polish State Railways, taken by the Polish Taxation Office to cover the amount of the Prince's income tax.<sup>111</sup> The Prince of Pless was a Polish national belonging to the German minority in Polish Upper Silesia.<sup>112</sup> Germany alleged before the PCIJ that the measures taken by the Polish fiscal authority were null, and requested that pending the delivery of the judgment the Court indicate as a measure of interim protection that the Polish government should abstain from any measure of restraint in respect of the property of the Prince of Pless.<sup>113</sup> The collection of income tax can be compared easily to the imposition of duties. Analogizing tax collection to the imposition of duties, an international body was asked to suspend the imposition of a tax until a final judgment on the merits had been rendered. This is a good example of a precedent for an international court to grant provisional measures against a government in the economic field. Accordingly, this example could be transposed usefully to the dumping area under the WTO, as an argument supporting the availability of interim relief, together with the *Auto parts* dispute.<sup>114</sup>

The legal basis of the newly formed ICJ's power to allow provisional measures was not fundamentally changed by the United Nations.<sup>115</sup> The ICJ uses a four-part test for granting provisional measures.<sup>116</sup> First, the party seeking this type of remedy must show the prospect of a finding of substantive jurisdiction.<sup>117</sup> This question of jurisdiction was

<sup>108</sup> Statute of the ICJ (<http://www.cij.org/Basicdoc/Basetext/istatute.htm#CHAPTERIII>). Arts 73–78 of the Rules of the ICJ regulate provisional measures. The Rules cited are the Revised Rules of the ICJ, 1978 ICJ Acts & Docs. 4. See generally, Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 *Collected Courses of the Hague Academy of International Law* 9–238 (1992 III), Martinus Nijhoff, Dordrecht. See also Rudolf Bernhardt, *Interim Measures Indicated by International Courts* (1994, Springer-Verlag, Berlin).

<sup>109</sup> As note 108, above.

<sup>110</sup> See, e.g., *Case Concerning the Factory at Chorzow (Indemnité—Interim Measures of Protection)*, Ser. A/No. 12 – Series C 15-II, order of 21 November 1927.

<sup>111</sup> See *Administration of the Prince of Pless (Germany v. Poland)*, 1933 P.C.I.J. Ser. A/B/No. 42, at 122 (11 May). For a summary of the case, see Sztucki, as note 22, above, 38.

<sup>112</sup> As note 111, above, 123.

<sup>113</sup> Higgins, as note 108, above, 91; and note 111, above, 140.

<sup>114</sup> See note 229, below.

<sup>115</sup> Sztucki, as note 22, above, 23, 106.

<sup>116</sup> Essoff, as note 34, above, 839.

<sup>117</sup> The ICJ held that, when considering a request for provisional measures and a corresponding objection to jurisdiction, the ICJ need only satisfy itself that there appears to be a *prima facie* basis for the ICJ's jurisdiction. *Military and Paramilitary Activities in and against Nicaragua*, 23 I.L.M. 468, 473 (I.C.J. 1984), reprinted in 78 A.J.I.L. 750 (1984). See also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, I.C.J. Reports 1993, p. 3, at 12–13.



discussed, by way of example, in the *Nicaragua* case.<sup>118</sup> The ICJ decided unanimously that provisional measures would apply, requesting the United States to cease and then refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports.<sup>119</sup> Second, the complainant must prove the risk or likelihood of irreparable prejudice. For example, in the *Lockerbie* case, the ICJ refused to grant interim measures because of the lack of an imminent threat to international peace in Libya's refusal of extradition.<sup>120</sup> Third, the party seeking provisional measures must show urgency. Unlike EU law however,<sup>121</sup> urgency is not shown by the risk of irreparable harm.<sup>122</sup> For instance, in the pending case of *Cameroon v. Nigeria*, relating to the questions of sovereignty over the Bakassi Peninsula and over a part of the territory of Cameroon in the area of Lake Chad,<sup>123</sup> the agent of Cameroon, referring to the "grave incidents which have taken place between the ... forces [of the two Parties] in the Bakassi Peninsula since ... 3 February 1996", requested provisional measures based upon the "urgency and gravity of the situation".<sup>124</sup> The ICJ in that case ordered provisional measures.<sup>125</sup> However, in the *Lockerbie* case, the ICJ refused to grant interim measures because of the lack of an imminent threat to international peace in Libya's refusal of extradition.<sup>126</sup> Finally, the country asking interim relief must show a *prima facie* case on the merits, even if, unlike EU law, the ICJ statute does not provide expressly for this requirement.<sup>127</sup>

An interesting feature of the provisional measures system before the ICJ is that the judge can indicate provisional measures *proprio motu*.<sup>128</sup> In other words, the ICJ can decide from its own volition,<sup>129</sup> even in the case of non-appearance.<sup>130</sup> The decision of the ICJ, like the ones of the various courts of human rights; is not legally binding.<sup>131</sup> However, even if binding only between the parties,<sup>132</sup> the decisions of the

<sup>118</sup> As note 117, above, 763. See also Ilene R. Cohn (1985): *Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague*, 46 Ohio St. L.J. 699, 705.

<sup>119</sup> See *Military and Paramilitary Activities in and against Nicaragua*, as note 117, above.

<sup>120</sup> See Robert F Kennedy (1993): *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 Va. J. Int'l L. 899, 904.

<sup>121</sup> See joined Cases 24/80 R. and 97/80 R., *Commission v. France*, (1980) E.C.R. 1319.

<sup>122</sup> Sztucki, as note 22, above, 104, 112.

<sup>123</sup> For a summary of Cameroon's requests, see Press Communiqué 94/12 of 30 March 1994 (<http://www.icj.org/Presscom/ipr9412.html>).

<sup>124</sup> See order of the ICJ dated 15 March 1996, para. 17 (<http://www.icj-cij.org/idocket/icn/icnorders/Icnorder960315.htm>).

<sup>125</sup> As note 124, above.

<sup>126</sup> As note 120, above.

<sup>127</sup> Essoff, as note 34, above, 839.

<sup>128</sup> See Vera Gowlland-Debbas (1994): *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 Am. J. Int'l L. 643, 647.

<sup>129</sup> To use another latin expression, the ICJ can order provisional measure even if not requested by a party: it can decide *ultra petita*.

<sup>130</sup> See Stanimir A. Alexandrov (1993): *Non-Appearance Before the International Court of Justice*, 33 Colum. J. Transnat'l L. 41, 51; Monroe Leigh (1984): *Case Concerning Military and Paramilitary Activities In And Against Nicaragua*, 78 A.J.I.L. 894; and Jerzy Sztucki (1985): *Intervention Under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The "Salvadoran Incident"*, 79 A.J.I.L. 1005.

<sup>131</sup> Sztucki, as note 22, above, 14, 140.

<sup>132</sup> Article 59 of the statute of the ICJ provides that: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".

ICJ have a political effect, which becomes stronger with the decisions of the human rights' courts.<sup>133</sup>

## 2. *Interim Measures in the Field of Human Rights*

Delay is one of the main problems of the European human rights system, as it is in its US counterpart.<sup>134</sup> However, and unlike the ICJ<sup>135</sup> or the Inter-American Court,<sup>136</sup> there is no statutory authority in the European system to provide for the adoption of provisional measures by either the European Court or the European Commission.<sup>137</sup> At present, the authority for the adoption of provisional measures lies in the Rules of Procedure of the European Commission<sup>138</sup> and the European Court of Human Rights (ECHR).<sup>139</sup> The European Commission rule on interim measures provides that the Commission "may indicate" interim measures which seem "desirable".<sup>140</sup> The rule also authorizes the President of the Commission to indicate interim measures when the Commission is not in session.<sup>141</sup> The ECHR has ruled that provisional measures adopted by the European Commission are not binding.<sup>142</sup> The ECHR rule is similar and provides that the Court, or the President of the Court, may, at the request of any party concerned, or *proprio motu*, indicate any interim measure which is advisable.<sup>143</sup> The use of the word "indicate" implies that the measures are mere suggestions to be complied with in good faith, rather than binding orders.<sup>144</sup> As in the ICJ and European Court, the adoption of provisional measures is discretionary.<sup>145</sup> Provisional measures in the ICJ and in the European human rights system have served as models for provisional measures in the developing Inter-American system.<sup>146</sup> This is evidenced by the fact that the two-tiered system to enforce human rights is very similar to that of the ECHR—individuals must first direct their complaints to the Inter-American Commission<sup>147</sup> which determines the

<sup>133</sup> Sztucki, as note 22, above, 14.

<sup>134</sup> It takes an average of five years for a case to be judged. See Heribert Golsong (1992): *On the Reform Of the Supervisory System of the European Convention On Human Rights*, 13 Hum. Rts. L.J. 265, 265 (citing Council of Europe Document MDH (85) 1, 5); Pasqualucci, as note 34, above, 803, 811.

<sup>135</sup> See Art. 41.

<sup>136</sup> See note 150, below.

<sup>137</sup> Carl A. Norgaard and Hans C. Kruger (Kehl am Rhein, Arlington, Va., 1988): "Interim and Conservatory Measures Under the European System of Protection of Human Rights" in *Progress In The Spirit Of Human Rights*, 109.

<sup>138</sup> See Rules of Procedure of the European Commission of Human Rights, r. 36.

<sup>139</sup> See Rules of Procedure of the European Court of Human Rights, r. 36.

<sup>140</sup> See Rules of Procedure of the European Commission of Human Rights, r. 36.

<sup>141</sup> As note 140, above.

<sup>142</sup> See George Kahale III and William A. Schabas (1993): *Canada-Extradition-Death Penalty-International Human Right Treaties*, 87 Am. J. Int'l L. 128, 132, citing *Cruz Varaz v. Sweden*, 20 March 1991, reprinted in 12 Hum. Rts. L.J. 142.

<sup>143</sup> See Rules of Procedure of the European Court of Human Rights, r. 36.

<sup>144</sup> Pasqualucci, as note 34, above, 803, 819 (1993).

<sup>145</sup> The Court's Rules of Procedure support this discretionary nature by providing that "the Court may ... order whatever provisional measures it deems appropriate". Rules of Procedure of the Inter-American Court of Human Rights, adopted by the Court at its Twenty-Third Regular Session, held on 9-18 January 1991, reprinted in Basic Documents Pertaining To Human Rights In The Inter-American System 117, 48 O.A.S. Ser.L/V/II.71, doc. 6 rev. 1 (1988).

<sup>146</sup> Pasqualucci, as note 34, above, 803, 809.

<sup>147</sup> See the American Convention, Art. 37.

admissibility.<sup>148</sup> Indeed, the American Convention specifies that provisional measures shall be granted when “necessary to avoid irreparable damage to persons” and in the case of “extreme gravity and urgency”.<sup>149</sup>

The relevant provision of the American Convention on Human Rights authorizes the Inter-American Commission in “cases of extreme gravity and urgency” to circumvent its time-consuming intermediary procedures and to immediately request that the Inter-American Court of Human Rights adopt provisional measures.<sup>150</sup> In adopting provisional measures, the Court orders the State to take or to refrain from taking certain actions. In the *Chunima* case, the Court ordered the Guatemalan government to protect the lives and personal safety of those who were threatened.<sup>151</sup> This measure was successful and prevented future and irreparable harm, such as the death of people.<sup>152</sup> However, the African Banjul Charter on Human and Peoples’ Rights does not provide for provisional measures.<sup>153</sup> As demonstrated, almost all legal mechanisms provide for provisional measures. However, the WTO does not have the provisional measures advocated in this article.

### III. THE NEED FOR PROVISIONAL MEASURES IN THE WTO DISPUTE SETTLEMENT MECHANISM

Provisions allowing interim relief do exist in the WTO. However, they exist either to impose provisional duties or to prevent the entry into the channels of commerce of goods affecting intellectual property rights, and they are taken by the national authorities, not at the WTO level. Several disputes illustrate the need for provisional measures to be taken at the WTO level. Furthermore, some trade dispute resolutions, such as EU law, already provide for such measures. The final question then is how and in what document or documents should such a provision be included.

#### A. THE EXISTING PROVISIONS ALLOWING INTERIM MEASURES IN THE WTO

Three possible remedies are invoked for violations of GATT Agreements: compliance is a preferred remedy, while compensation or retaliation (suspension) are fallbacks.<sup>154</sup> There is no mention, however, of provisional remedies in the DSU. From the publicly

<sup>148</sup> As note 147, above, Art. 48(1)(a).

<sup>149</sup> As note 147, above, Art. 63(2). See David J. Padilla (1993): *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 Am. U. J. Int’l L. & Pol’y 95, 112.

<sup>150</sup> As note 147, above, Art. 63(2).

<sup>151</sup> See Order of the *Court-Chunima* Case, Inter-Am. Court 52, 53, 56, O.A.S. Ser. L/V/III.25, doc. 7 (1991).

<sup>152</sup> Pasqualucci, as note 34, above, 803, 809.

<sup>153</sup> See Banjul Charter on Human and Peoples Rights, reprinted in 21 I.L.M. 58 (1982). See, generally, Makau wa Mutua (1995): *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int’l L. 339; and Richard N. Kiwanuka (1988): *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 A.J.I.L. 80.

<sup>154</sup> See Curtis Reitz (1996): *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. Pa. J. Int’l Econ. L. 555, 587. See also John H. Jackson (1997): *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 Am. J. Int’l L. 60; Judith Hippler Bello (1996): *The WTO Dispute Settlement Understanding: Less Is More*, 90 Am. J. Int’l L. 416; and Azar M. Khansari (1996): *Searching For The Perfect Solution: International Dispute Resolution And The New World Trade Organization*, 20 Hastings Int’l & Comp. L. Rev. 183, 194.

available sources on the negotiations in the Uruguay Round, it does not seem that the idea of provisional measures at the WTO level was referred to during the discussion of the draft of the DSU.<sup>155</sup> This is not surprising as, in its overall observations, the Report to the Senate on the Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements does not address as a recommendation the allowance of provisional measures in the dispute settlement process.<sup>156</sup> The reason why the compliance remedy is preferred is that it restores the equilibrium of the international economic order.<sup>157</sup> This is the same rationale which is behind the allowance of provisional measures: to keep the *status quo ante*. This is a further argument for the allowance of provisional measures, because it will favour the same purpose as compliance—the equilibrium of the international economic order.

The WTO, however, does contain several provisions dealing with interim relief. The Subsidies and Antidumping Codes, the TRIPs and the Agreement on Safeguards provide for interim relief.<sup>158</sup> However, this is not the kind of interim relief called for in this article. These agreements provide for interim relief such as the imposition of provisional duties, or to prevent the entry into the channels of commerce of goods infringing intellectual property rights or to prevent irreparable harm. Moreover, these remedies are to be taken by national authorities.<sup>159</sup> This article calls for provisional measures to be taken by the DSB, to prevent, for instance, the imposition of a duty (and not to impose a provisional duty) or the enforcement of a contract.

Provisional duties are imposed by local authorities, and not by the WTO. However, there is a specific procedure in the Agreement on Preshipment Inspection that has the same effect as that of provisional measures and is made, if the parties agree, by an independent expert. The Agreement on Preshipment Inspection provides for an independent review procedure, which must be expeditious.<sup>160</sup> Indeed, “[t]he decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute”.<sup>161</sup> This represents a type of *de facto* interim measure.<sup>162</sup>

<sup>155</sup> See Terence P. Stewart (ed.) Kluwer Law and Taxation, Deventer, *Vol. II: The GATT Uruguay Round, A Negotiating History (1986–1992)*, 2669, 2769.

<sup>156</sup> See Report to the Committee on Finance, US Senate, on Investigation No. 332-212 Under s. 332(g) of the Tariff Act 1930, *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements*, USITC Publication 1783, December 1985, 82.

<sup>157</sup> See Curtis Reitz (1996): *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. Pa. J. Int'l Econ. L. 555, 588.

<sup>158</sup> See Annex below, which provides a comparison chart between provisional measures relating to subsidies/countervailing, antidumping and the TRIPs.

<sup>159</sup> For instance, the International Trade Commission in the United States can issue a Temporary Exclusion Order during the pendency of a § 337 proceeding upon a complainant's petition to prohibit the entry of merchandise into the United States. See Peter D. Ehrenhaft (1996): *Remedies Against "Unfair" International Trade Practices*, SB04 ALI-ABA 463, 509).

<sup>160</sup> See the Agreement on Preshipment Inspection, Art. 4, reprinted in Jackson, Davey and Sykes, as note 13, above, 226, 232–233.

<sup>161</sup> Agreement on Preshipment Inspection, Art. 4(g). Moreover, Art. 8 of this Agreement provides that Art. XXIII of the GATT 1994, as elaborated and interpreted by the DSU, shall be applied.

<sup>162</sup> Interview with Frieder Roessler, Professor of Law, Georgetown University Law Center, in Washington, D.C. (14 April 1998).



In the Antidumping and Subsidies Code, provisional duties themselves can cause an irreparable injury. The provisional measures are imposed after a preliminary affirmative determination has been made of an injury<sup>163</sup> because of a subsidy or dumping.<sup>164</sup> In the Antidumping and Subsidies Code,<sup>165</sup> the provisional measures are aimed at preventing injury being caused during the investigation.<sup>166</sup> Consequently, and contrary to the TRIPs, there is a need for a pending action before a domestic authority.<sup>167</sup>

By analogy, in the TRIPs provisional measures are ordered by the judicial authorities of the country and not by the WTO itself.<sup>168</sup> However, unlike provisional measures in the countervailing/subsidies or antidumping areas, the ones under the TRIPs can be taken *ex parte* where appropriate,<sup>169</sup> although notice is required without delay after the execution of the measures.<sup>170</sup> Article 50:2 of the TRIPs provides that an *ex parte* order may be taken "where any delay is likely to cause irreparable harm to the right holder ...".<sup>171</sup> One of the aims of the provisional measures under the TRIPs is to prevent an infringement of any intellectual property right from occurring, and, in particular, to prevent the entry into channels of commerce of goods.<sup>172</sup> The wording of the TRIPs provisional measure does not differ fundamentally from the Dunkel draft.<sup>173</sup>

Unlike provisional duties and provisional safeguards measures, provisional measures under the TRIPs can be taken without the pendency of a proceeding on the merits.<sup>174</sup> However, a complaint has to be initiated for a decision on the merits within a reasonable time.<sup>175</sup> The domestic court has to refer to its national law for determining what is a reasonable time.<sup>176</sup>

<sup>163</sup> The text of the Draft Final Document Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN/W/FA, 20 December 1991 required *material injury* or the threat thereof.

<sup>164</sup> Subsidies, Art. 17.1(b) and Antidumping, Art. 7.1(ii).

<sup>165</sup> There are no significant changes from the text of the 1979 GATT Code or the Draft Final Document Embodying the Results of the Uruguay Round Negotiations to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations of December 15, 1993. See Terence P. Stewart (1995): *The Countervailing Duty Law And the Subsidies Code: A Domestic Counsel's Perspective*, 722 PLI/Comm. 263, 339.

<sup>166</sup> Subsidies, Art. 17.1(c) and Antidumping, Art. 7.1(iii).

<sup>167</sup> Subsidies, Art. 17.1(a) and Antidumping, Art. 7.1(i).

<sup>168</sup> See TRIPs, Art. 50.1, in Jackson, Davey and Sykes, as note 13, above, 355.

<sup>169</sup> TRIPs, Art. 50.2.

<sup>170</sup> TRIPs, Art. 50.4.

<sup>171</sup> TRIPs, Art. 50.2.

<sup>172</sup> TRIPs, Art. 50.1(a).

<sup>173</sup> On 20 December 1991, Chairman Arthur Dunkel released the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" in an effort to move the negotiations to a conclusion. This draft is also called "the Dunkel draft." See note 155, above. Al J. Daniel, Jr. (1993): *Intellectual Property in the Uruguay Round: The Dunkel Draft and a Comparison of United States Intellectual Property Rights, Remedies, and Border Measures*, 25 N.Y.U. J. Int'l L. & Pol. 751, 797. For the Dunkel Draft, see generally John H. Jackson (1995): *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 Am. U.J. Int'l L. & Pol'y 595, 599.

<sup>174</sup> TRIPs, Art. 50.6, in Jackson, Davey and Sykes, as note 13, above, 356.

<sup>175</sup> As note 174, above.

<sup>176</sup> Under US federal law, there is a way to determine the reasonable time: it is no more than 10 days that can be extended for the same period or for a longer period with the consent of the defendant. There is a safeguard for the imposition of provisional measures: they cannot be imposed sooner than 60 days from the date of initiation of the investigation, and are limited to a short period not exceeding four months. See Subsidies, Art. 17.4 and Antidumping Art. 7.5. However, the Antidumping Code allows this to go up to six months.

If there is no provision for the determination of a reasonable time, the proceedings must be initiated within "20 working days or 31 calendar days, whichever is longer".<sup>177</sup>

Finally, if subsequently it is found that there has been no infringement, then the applicant, upon request of the defendant before the national authorities, must order compensation for any injury cause by these measures.<sup>178</sup>

The AGP<sup>179</sup> includes a challenge procedure at the domestic level which "shall provide for rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities".<sup>180</sup> For example, at the WTO level, a private party can invoke a WTO agreement before its domestic court.<sup>181</sup> The time-limits applicable to an AGP dispute settlement are shorter than in the DSU.<sup>182</sup> However, it is a best-efforts clause which is not legally binding.<sup>183</sup> Consequently, the timeframe for resolving a dispute under the AGP can be as long as a non-AGP dispute. The North American Free Trade Agreement (NAFTA) is also silent and does not authorize its panel to grant interim relief. However, and like the WTO,<sup>184</sup> the NAFTA provides for deadlines to assure that resolution by a panel may be completed before the United States takes unilateral action under Section 301 of the Trade Act of 1974.<sup>185</sup> However, and as exemplified in the *Auto parts* dispute, discussed below, the fact that Section 301 deadlines are outer limits means that the statute does not require the USTR to wait for a GATT panel to complete its review before retaliation.<sup>186</sup>

#### B. OTHER INTERNATIONAL ORGANIZATIONS, REGIONAL OR BILATERAL TRADE AGREEMENTS CALL FOR PROVISIONAL MEASURES

EU law is not the only trade agreement which was intended to provide for interim relief. Indeed, on the one hand, the ITO did contain a provisional measure mechanism.<sup>187</sup> In case of a dispute followed by unsuccessful negotiations, the matter had to "be referred

<sup>177</sup> TRIPs, Art. 50.6, in Jackson, Davey and Sykes, as note 13, above, 356. See also Al J. Daniel, Jr. (1993): *Intellectual Property in the Uruguay Round: The Dunkel Draft and a Comparison of United States Intellectual Property Rights, Remedies, and Border Measures*, 25 N.Y.U.J. Int'l L. & Pol. 751, 804.

<sup>178</sup> TRIPs, Art. 50.7, in Jackson, Davey and Sykes, as note 13, above, 355.

<sup>179</sup> See note 42, above.

<sup>180</sup> See AGP, Art. XX:7, in Jackson, Davey and Sykes, as note 13, above, 415.

<sup>181</sup> See Bernard M. Hoekman and Petros C. Mavroidis (1995): *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, 4 P.P.L.R. 62, 70.

<sup>182</sup> See above.

<sup>183</sup> See Hoekman and Mavroidis, as note 181, above.

<sup>184</sup> See C. O'Neal Taylor (1997): *The Limits Of Economic Power: Section 301 And The World Trade Organization Dispute Settlement System*, 30 Vand. J. Transnat'l L. 209, 266.

<sup>185</sup> See Deborah E. Siegel (1993): *Dispute Resolution Under The NAFTA: The Newer And Improved Model*, 27 Int'l Law, 603, 608.

<sup>186</sup> As note 185, above.

<sup>187</sup> For a comparison between the Dispute Settlement Procedures of the Proposed ITO and the WTO, see Chad Conwell, J.D. Paper Georgetown University Law Centre (spring 1998).



by any Member concerned to the Executive Board".<sup>188</sup> If the Executive Board found an adverse decision against a member, and the conference confirmed the decision, a review of "legal questions" would be available from the ICJ which would be binding.<sup>189</sup> The principle was that the review by the ICJ of the decision of the conference did not suspend the effectiveness of the decision.<sup>190</sup> However, the conference was entitled to suspend the operation of its decision during the ICJ review, where "damage difficult to repair would otherwise be caused to a Member concerned".<sup>191</sup>

On the other hand, the US-Israel Free Trade Agreement (FTA) does not give a panel any authority apart from issuing its non-binding report.<sup>192</sup> However, as it is argued in this article from the WTO standpoint, the need for provisional measures has been argued for the US-Israel FTA.<sup>193</sup>

The former English judge at the ECJ, Lord Slynn of Hadley, considers interim measures "of greater importance".<sup>194</sup> Indeed, similar to actions brought before a WTO panel, actions brought before the ECJ do not have the effect of an automatic stay.<sup>195</sup> However, unlike the WTO panel, the court "may if it considers that circumstances so require", order that the application of the contested act be suspended or "it may prescribe in any cases before it, any necessary interim measures".<sup>196</sup>

The Rules of the ICJ have inspired the statute of the ECJ and its Rules of Procedure.<sup>197</sup> According to Article 36 of the statute of the court and Articles 83-89 of the Rules of Procedure, there must be a main procedure before the ECJ in the context of which an application for interim measures is made, for it to grant interim relief.<sup>198</sup> Furthermore, the award of interim measures is conditional on the criterion of urgency. It means that interim measures "are necessary in order to avoid serious and irreparable

<sup>188</sup> See Art. 94:1 of the Havana Charter, which provides that "[a]ny matter arising under sub-paragraphs (a) or (b) of paragraph 1 of Article 93 which is not satisfactorily settled and any matter which arises under paragraph 1(c) of Article 93 may be referred by any Member concerned to the Executive Board". Final Act of the United Nations Conference On Trade And Employment (Havana Charter) (1948). See also George Bronz (1949): *The International Trade Organization*, 62 Harv. L. Rev. 1089, 1124.

<sup>189</sup> Bronz, as note 188, above, 1089, 1124.

<sup>190</sup> Art. 96:4 of the Havana Charter provides that "[p]ending the delivery of the opinion of the Court, the decision of the Conference shall have full force and effect ...". Final Act of the United Nations Conference On Trade And Employment (Havana Charter) (1948). This provision was included in the *Travaux Préparatoires* of the Charter. See Sixth Committee: Organization, Report of Sub-Committee G on Chapter VIII, Doc. E/CONF.2/C.6/83, 25 February 1948, p. 8. See, generally, Bronz, as note 188, above, 1089, 1123.

<sup>191</sup> See Art. 96:4 of the Havana Charter, note 190, above, *in fine*.

<sup>192</sup> Art. 19, §1(e), of the US-Israel Free Trade Area Agreement, 22 April 1985, US-Isr., 24 I.L.M. 657 at 664.

<sup>193</sup> See Avraham Azrieli (1993): *Improving Arbitration Under The US-Israel Free Trade Agreement: A Framework For A Middle-East Free Trade Zone*, 67 St. John's L. Rev. 187, 238.

<sup>194</sup> "Foreword" to K.P.E. Lasok (1984): *The European Court of Justice, Practice and Procedure*, at v.

<sup>195</sup> As note 194, above.

<sup>196</sup> See EEC Treaty, Arts 185 and 186; ECSC Treaty, Art. 39; Euratom Treaty, Arts 157 and 158; and <http://www.hri.org/docs/Rome57/Part5Title1.htm1#Art186>. The President of the Court of First Instance can also grant provisional measures. See, e.g., Order of the President of the Court of First Instance of the EC in the Proceedings for Interim Relief in Case T-610/97 R, *Hanne Nonup Carlsen and Others v. Council*, 3 March 1998, Press Release No. 8/98 (<http://europa.eu.int/cj/en/cp/cp9808en.htm>).

<sup>197</sup> Lord Slynn of Hadley, in the "Foreword" to Lasok, as note 194, above, states that "English lawyers often think that they are rather based on the Rules of the *Conseil d'Etat*!" However, the expression "if it considers that circumstances so require" is the same in the ICJ and in the ECJ. See also Sztucki, as note 22, above, 102.

<sup>198</sup> See, e.g., Cases 4-13/59, *Mannesmann* (1960) E.C.R. 162.

harm before the decision of the Court in the main case".<sup>199</sup> Also, it is stated expressly that there should be factual and legal grounds establishing a *prima facie* case for the interim measures to be available.<sup>200</sup> Finally, no appeal is possible.<sup>201</sup>

In some cases the ECJ balances the harm, or the interests, that would be caused to the applicant if the interim measures applied for are refused, against that to the defendant or third parties if the interim measures are allowed.<sup>202</sup> Moreover, in *Factortame*, the ECJ decided that national courts must refuse to apply national law which prevents provisional measures where the conflict between the national law and EU law is invoked before the national court.<sup>203</sup> In *Zuckerfabrik*, the ECJ held that national courts are also able to order suspension of enforcement of a national administrative measure based on EU measures, where the legality of that national measure is being contested.<sup>204</sup> In *Atlanta*,<sup>205</sup> the Court declared that an order refusing to grant a license and provisionally disapplying a EU measure was valid.<sup>206</sup> However, the national judge cannot grant provisional measures in a situation where the scope of traders' rights still has to be established by a EU institution.<sup>207</sup> The ECJ has extended the European provisional measures system towards the Member States themselves.<sup>208</sup>

Additionally, the 1994 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services provides for the suspension of procurement proceedings.<sup>209</sup> If an *ex parte* complaint is submitted, a seven-day stay is allowed.<sup>210</sup> The complainant must demonstrate "that the supplier or contractor will suffer irreparable injury in the absence of a suspension" and "that the

<sup>199</sup> See joined Cases 24/80 R and 97/80 R, *Commission v France* (1980) E.C.R. 1319.

<sup>200</sup> See Art. 83, para. 2 of the Rules of Procedure.

<sup>201</sup> See Guus Borchardt (1985): *The Award of Interim Measures by the European Court of Justice*, 22 Common Mkt. L. Rev. 203, 206.

<sup>202</sup> As note 201, above, 221.

<sup>203</sup> See Case C-213/89, *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, 1990 E.C.R. I-2433 at 24, [1990] 3 C.M.L.R. 1 (1990). See also Bernard Mongin (Institut européen d'administration publique, Maastricht, 1994): "Le Juge National et les Mesures Provisoires Ordonnées en Vertu du Droit Communautaire [The National Judge and Provisional Measures Ordered by Virtue of Community Law]" in *Evolution Récente du Droit Judiciaire Communautaire*, Vol. 1, 125.

<sup>204</sup> See joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, 1991 E.C.R. I-415.

<sup>205</sup> See C-465/93, *Atlanta Fruchthandlungsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft*, 1995 E.C.R. I-3761.

<sup>206</sup> See Rostane Mehdi (1996): *Le Droit Communautaire et les Pouvoirs du Juge National de l'Urgence [Community Law and the Powers of the National Judge Concerning Provisional Measures]*, 32 RTD eur. 77.

<sup>207</sup> See Petra Foubert, Case C-68/95, *T. Port GmbH & Co. KG v. Bundesanstalt Für Landwirtschaft Und Ernährung*, 26 November 1996, reprinted in Recueil de la Cour [European Court Reporter], fascicule 11, at 6065, 3 Colum. J. Eur. L. 125, 130 (1996-1997).

<sup>208</sup> See C-68/85, *T. Port* of 26 November 1996; C-334/95, *Krüger* and C-130/95, *Giloy*, of 17 July 1997. See also Bernadette Le Baut-Ferrarese, *Arrêts récents de la Cour de justice des Communautés européennes en matière de mesures provisoires: réflexions sur l'effet de "modèle" des procédures issues de la Communauté européenne*, [Recent European Court of Justice cases relating to provisional measures], D. [1998] Chron., 306-310.

<sup>209</sup> See Don Wallace, Jr. (1994): *UNCITRAL Model Law on Procurement of Goods and Construction*, 3 Public Procurement Law Review, CS2, CS7. See also, generally, Don Wallace, Jr. (1994): *UNCITRAL Model Law on Procurement of Goods, Construction and Services: the Addition of Services*, 6 Public Procurement Law Review, CS218; and Gösta Westring (1994): *Multilateral and Unilateral Procurement Regimes—to which Camp does the UNCITRAL Model Law on Procurement Belong?*, 3 Public Procurement Law Review, 142.

<sup>210</sup> As note 209, above.

complaint is not frivolous".<sup>211</sup> Yet the UNCITRAL Model is a model for domestic rules, not for international ones.

### C. THE NEED FOR PROVISIONAL MEASURES IN THE DSU

Under both the old GATT of 1947 and the newly created WTO of 1994, several cases have shown the need for provisional measures.<sup>212</sup> I will focus on two examples in this article to demonstrate the interest of giving a panel the power to order provisional measures: first, the *Trondheim* case and, second, the *Auto parts* dispute.

#### 1. *The Trondheim Case*

The *Trondheim* case exemplifies the need for provisional measures. It produced an unsatisfactory reaction in the AGP.

In this case, a Norwegian public authority awarded a research and development contract to a Norwegian company for a new toll collection system for the city of Trondheim.<sup>213</sup> Norway excluded a US supplier from the procurement process because research and development were exempted from the obligation to secure national treatment and non-discrimination.<sup>214</sup> However, the panel followed the United States' arguments in deciding that the procurement could not be justified under any provision of the AGP, because Norway failed to demonstrate that the principal purpose of the contract was research and development.<sup>215</sup> The United States also suggested remedies such as "annulment of the contract, the provision of additional opportunities to bid for future contracts, assurances about future contract etc."<sup>216</sup>

However, the panel followed Norway's arguments that no compensation was available. Indeed, annulling the awarded contract was not considered as an appropriate solution because the non-compliance had taken place in the past.

Interestingly enough, the panel's reasoning followed, without saying it, the balance of interests test used in the EU.<sup>217</sup> The panel considered that annulling the awarded contract "might be disproportionate, involving waste of resources and possible damage

<sup>211</sup> See Art. 56 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994 (<http://itl.irv.uit.no/tradelaw/doc/UN.Procurement.Model.Law.1994.html#NR53>).

<sup>212</sup> See, e.g., Report of the Panel on *European Economic Community—Restrictions on Imports of Dessert Apples—Complaint by Chile*, adopted 2 June 1989, GATT doc. L/6491, reprinted in GATT, BISD 32S/55, at 93 [1988–1989]. See also Pierre Pescatore, William J. Davey and Andreas F. Lowenfeld (Kluwer Law International, The Hague, 1995): *Handbook of WTO/GATT Dispute Settlement*, Vol. 1, CS 69.

<sup>213</sup> See Report of the Panel on *Norway—Procurement of Toll Collection Equipment for the City of Trondheim*, GATT doc. GPRD.S2/R, 28 April 1992, adopted by the AGP Committee on 13 May 1992, GATT doc. GPR/M/46, GATT doc. L/7121, Report of the Committee on Government Procurement, reprinted in GATT, BISD 39S/398, 400 [hereinafter panel Report on Trondheim]. See also Inside US Trade, Special Report, 15 May 1992 S-1 and 22 May 1992 S-2; Pescatore, Davey and Lowenfeld, as note 212, above, CS 87.

<sup>214</sup> See Panel Report on Trondheim, available in LEXIS, Int'l L. Library, GATTWTODEC File, point 4.1.

<sup>215</sup> As note 214, above, 4.12.

<sup>216</sup> As note 215, above.

<sup>217</sup> See note 202, above.

to the interests of third parties".<sup>218</sup> This case is the origin of a new provision in the AGP, sometimes called the Trondheim provision, which empowers the DSB to "authorize suspension of concessions and other obligations under this Agreement or consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible".<sup>219</sup>

If the DSB had been able to provide for interim measures in the *Trondheim* case, the panel would not have had to find that the annulling of awarded contract might be disproportionate. Indeed, the balance of interests test would have been applied at the implementation stage of the award, not at its conclusion. This can easily be extracted from the EU law. Besides, prior to this case, a satisfactory resolution had been achieved between the United States and Norway in relation to the awarding of a contract for electronic toll equipment to a domestic supplier in preference to a US bidder.<sup>220</sup> Indeed, as some authors remark, "[e]ven in cases where panels are bold enough to suggest *restitutio in integrum* as a remedy for illegally awarded contracts, there is always the possibility of excessive onerousness. Moreover, as a general rule, preventive action is, in principle, more effective than corrective action *ex post*".<sup>221</sup>

Article XX:7 of the AGP introduces a challenge procedure according to which the bodies will be required to provide rapid interim measures to correct breaches of the Agreement.<sup>222</sup> However, this opportunity remains with domestic bodies.<sup>223</sup> Moreover, the AGP does not indicate under which conditions interim measures are to be granted.<sup>224</sup> Accordingly, signatories have been put in a position to interpret the Agreement in what could be divergent ways.<sup>225</sup> As a result of the *Trondheim* case, Article XXII:3 has been introduced in the AGP. This Article empowers the DSB, *inter alia*, to "authorize ... consultations regarding remedies when withdrawal of measures found to be in contravention of the Agreement is not possible". This has sometimes been referred as "the Trondheim provision".<sup>226</sup> This provision has little practical value as the most the DSB can authorize is consultation between the parties to the dispute.<sup>227</sup>

<sup>218</sup> As note 215, above.

<sup>219</sup> See AGP XXII:3.

<sup>220</sup> See Section 302 Investigation Captioned Procurement of Electronic Highway Toll Identification Systems by the Government of Norway (Docket No. 301-79), 7 Int'l Trade Rep. (BNA), at 630-631 (20 May 1990). GATT doc. GPR/M/34.

<sup>221</sup> See Bernard M. Hoekman and Petros C. Mavroidis (1995): *The WTO's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?*, 4 Public Procurement Law Review 62, 70.

<sup>222</sup> As note 221, above.

<sup>223</sup> See Christian Schede (1996): *The "Trondheim Provision" in the WTO Agreement on Government Procurement: Does This "Major Revision" Live up to the Needs of the Private Sector?*, 5 Public Procurement Law Review 161, 185.

<sup>224</sup> See Mary Footer (1995): *Remedies Under the New GATT Agreement on Government Procurement*, 4 Public Procurement Law Review, 80, 88-90.

<sup>225</sup> See Hoekman and Mavroidis, as note 221, above, 63, 70.

<sup>226</sup> See Schede, as note 223, above, 161, 173.

<sup>227</sup> See Schede, as note 223, above, 174, 185.



## 2. *The Auto Parts Dispute*

The first aborted case of the WTO, the *Auto parts* dispute, exemplifies a situation in which provisional measures should have been applied. Professor Jackson said that "the Japanese have a 'cold, flat-out easy case' against the US, but the US may be able to win its own case before the WTO".<sup>228</sup> With provisional measures, this should not have been possible. In this dispute, the USTR was concerned that Americans buy more Japanese cars than Japanese buy US-made cars.<sup>229</sup> As a result, Japan has a substantial surplus in the bilateral trade in autos and auto parts.<sup>230</sup> Accordingly, since the beginning of 1992, the United States has required that Japan reach import targets.<sup>231</sup> In 1994, the United States and Japan concluded an agreement on some issues, but failed to strike a deal in the biggest area of contention, autos and auto parts.<sup>232</sup>

On 5 May 1995, USTR's Mickey Kantor and Japanese Trade Minister Tyutaro Hashimoto announced that five days of negotiations in Canada had failed to break the deadlock in the auto talks. The Japanese said they would never accept US demands to extend the 1992 parts purchasing plans, branding them the equivalent of coerced import goals.<sup>233</sup>

This is the reason why, on 16 May 1995, the United States announced that it would impose 100 percent tariffs on 13 brands of Japanese luxury cars imported on or after 20 May 1995 following a Section 301 investigation. The punitive tariffs were scheduled to take effect on 29 June 1995.<sup>234</sup> The threatened duties were estimated at US\$ 5.9 billion,<sup>235</sup> as autos and auto parts account for about two-thirds of Japan's US\$ 66 billion trade surplus with the United States.<sup>236</sup> However, the resolution of the dispute occurred on 28 June 1995, a few hours before the sanctions were to apply.<sup>237</sup> US and Japanese car manufacturers finally signed an auto and auto parts trade agreement to give US auto makers and suppliers greater access to the Japanese market.<sup>238</sup> Some believe it illustrates "many of the improvements that the new WTO has brought to the dispute settlement process".<sup>239</sup>

<sup>228</sup> See Bob Davis (1995): *U.S. Launches Trade Offensive Against Japan—Two-Track Effort to Open Auto Market Includes Sanctions, WTO Filing*, *The Wall Street Journal*, 11 May 11, A2.

<sup>229</sup> See MITI Chief Rejects U.S. Proposal to Resume Auto Talks on June 20–21, 12 *Int'l Trade Rep.* (BNA) 920 (31 May 1995).

<sup>230</sup> US\$ 37 billion in 1994, equivalent to 60 percent of the bilateral trade deficit. See Carolyn Henson (1995): *Japan, U.S. Go To WTO*, *New Orleans Times-Picayune* A10 (12 June).

<sup>231</sup> See Clare Nullis (1995): *WTO gets U.S.–Japan Trade Flap*, *News & Observer* (Raleigh NC) C8 (18 May).

<sup>232</sup> As note 231, above.

<sup>233</sup> As note 231, above.

<sup>234</sup> See Martin Crutsinger (1995): *U.S. Declines Auto Talks*, *News & Observer* (Raleigh NC) D1 (27 May).

<sup>235</sup> 12 *Int'l Trade Rep.* (BNA) 848 (17 May 1995).

<sup>236</sup> See Clay Chandler (1995): *U.S., Japan Break Off Trade Negotiations; Dispute May Be Headed to Arbitration Panel*, *Wash. Post* C01 (6 May).

<sup>237</sup> See Clare Nullis, *Associated Press* (29 June 1995), available in WESTLAW, Allnews database. *Japan, U.S. Report on Auto Accord, Say Dispute is Now Removed from WTO*, 12 *Int'l Trade Rep.* (BNA) 1176 (12 July).

<sup>238</sup> See *U.S., Japan Set to Ink Auto Trade Pact U.S. & Japanese Car Manufacturers Sign Auto and Auto Parts Trade Agreement*, *Ward's Automotive Rep.* 1 (21 August 1995). (The pact allowed Detroit car manufacturers to export 300,000 cars per year to Japan and requires Japanese carmakers to import more parts for their domestic and transplant factories.)

<sup>239</sup> See William E. Scanlan (1997): *A Test Case For The New World Trade Organization's Dispute Settlement Understanding: The Japan–United States Auto Parts Dispute*, 45 *U. Kan. L. Rev.* 591.

During the WTO proceeding, the duties could have been applied and Japanese luxury car sales in the United States would have dropped to zero.<sup>240</sup> Japanese car dealers would have started to close down, and Japanese automakers would have lost substantive profits.<sup>241</sup> However, the WTO had no power to stop, by interim order, the imposition of such duties by the United States.

One day after the USTR announcement, Japan formally filed a request for consultations with US representatives in Geneva about the planned sanctions. As in the case of the NAFTA, the WTO establishes time-limits to ensure prompt resolution.<sup>242</sup> However, to resolve a dispute in the WTO can take up to a year and, during that time, selected Japanese imports would have been subject to a 100 percent duty. Consequently, the only way was for Japan to go as quickly as possible before the WTO to mitigate its losses. This is why Japan requested immediate consultations.<sup>243</sup> The normal timeframe for entering into consultation after the receipt of a request is 30 days.<sup>244</sup> However, threatened by the potentially huge loss, Japan requested immediate consultation within ten days, pursuant to DSU 4:8, which allows a reduced period in cases of urgency.<sup>245</sup> The United States, however, blocked this proposal on 26 May, claiming that because the punitive tariffs to be effective on 28 June had not yet been imposed, Japan's claim of urgency was inapplicable.<sup>246</sup>

Under WTO rules, both sides in a dispute have 60 days to consult in order to resolve the issue. If they cannot reach agreement, then the WTO appoints a hearing panel which,<sup>247</sup> under normal procedures, has six months to issue its findings.<sup>248</sup> The finding of the panel can be appealed in a process that can delay a final ruling for a year after the initial complaint is filed.<sup>249</sup>

<sup>240</sup> See Paul Blustein (1995): *This Trade Dispute Isn't About Cars; It's About Japan's Agenda, Open Markets and Our Mistakes*, Wash. Post, C01 (28 May).

<sup>241</sup> As note 240, above.

<sup>242</sup> See Deborah E. Siegel (1993): *Dispute Resolution Under The NAFTA: The Newer And Improved Model*, 27 Int'l Law. 603, 616.

<sup>243</sup> See *MITI Chief Rejects U.S. Proposal to Resume Auto Talks on 20-21 June*, 12 Int'l Trade Rep. (BNA) 920 (31 May 1995) (noting Japan filed its complaint with the WTO on 17 May 1995).

<sup>244</sup> See DSU, Art. 4:8, in Jackson, Davey and Sykes, as note 13, above, 369.

<sup>245</sup> Jackson, Davey and Sykes, as note 13, above, 370.

<sup>246</sup> See *MITI Chief Rejects U.S. Proposal to Resume Auto Talks on June 20-21*, 12 Int'l Trade Rep. (BNA) 920 (31 May 1995) (noting that Japan filed its complaint with the WTO on 17 May 1995). *U.S. Rejects Japan's Request For Talks On Auto Trade Dispute*, San Antonio Express-News (27 May 1995). *U.S. Denies Japanese Request, Delays Talks on Luxury Car Tariffs*, Star. Trib. (Minneapolis-St. Paul) 03D (27 May 1995).

<sup>247</sup> Under the old GATT 1947, it took nearly three years to agree on composition of the domestic international sales corporation (DISC) case panel. See GATT Doc. No. L/4422; GATT, 23d Supp. BISD 98 (1977). See John H. Jackson (1978): *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 Am. J. Int'l L. 747, 762.

<sup>248</sup> See also Martin Crutsinger (1995): *U.S. Declines Auto Talks*, News & Observer (Raleigh NC) D1 (27 May).

<sup>249</sup> See DSU, Art. 12:8, in Jackson, Davey and Sykes, as note 13, above 375. See *U.S. Denies Japanese Request, Delays Talks on Luxury Car Tariffs*, Star. Trib. (Minneapolis-St. Paul) 03D (27 May 1995).



The adoption of the panel report by the DSB is made 20–60 days after the report has been circulated to the members.<sup>250</sup> That means the US sanctions would have been in effect for at least a year before Japan would have received a final ruling on their legality under the world trade rules.<sup>251</sup>

Under the generally admitted tests for grant of provisional measures, and as proposed later in this article, several elements should be taken into account: irreparable harm, urgency and the balance of interests.<sup>252</sup> There was a potentially irreparable harm here, which was located both in Japan and in the United States. First, most retailers of Japanese cars in the United States (who are mostly Americans) would have suffered severely and might have started to close down. Second, if the Japanese car manufacturers ultimately had won at the WTO, their harm could not have been repaired, as the WTO panel only makes prospective decisions.<sup>253</sup> The urgency was also present because of the huge consequences involved. Indeed, besides the Japanese auto manufacturers, consumers and workers in the United States would have suffered because of the US unilateral measures, as more than 600,000 Americans are working for Japanese auto-related companies, and 2.5 million jobs would have been affected throughout the country.<sup>254</sup> Moreover, under a balance of interests test, Japan could have argued that negotiations with the United States had been pending for more than three years, so Japan could have waited a little longer until the WTO decision.

As the President of the American International Automobile Dealers Association (AIADA) pointed out, “[t]he WTO does not represent a viable solution for [AIADA] members”.<sup>255</sup> He further argued that:

“It will take the WTO by all accounts six months to a year and a half to issue a ruling and come to a decision.<sup>256</sup> When the smoke clears and that decision comes down, none of these dealers will still be in business and the damage will have been done.”

<sup>250</sup> See DSU, Art. 16, in Jackson, Davey and Sykes, as note 13, above 369. *U.S. Rejects Japan's Request For Talks On Auto Trade Dispute*, San Antonio Express-News (27 May 1995). Hereafter is the time to decision for panels: *Reformulated Gas* (nine months), *Japan-Liquor* (eight months), *Costa Rica Underwear* (six months), *Brazil Coconuts* (six months), *India Blouses* (six months), *Canada Split-Run* (seven months), *EC-Bananas* (14 months), *EC-Hormones* (13 months), *India Patents* (seven months), *Argentina-Footwear* (seven months), *EC-LAN* (nine months) and *Japan-Film* (11 months). Hereafter is the time to decision for the appellate body: *Reformulated Gas* (61 days), *Japan-Liquor* (58 days), *Costa Rica Underwear* (92 days), *Brazil Coconuts* (68 days), *India Blouses* (61 days), *Canada Split-Run* (63 days), *EC-Bananas* (90 days), *EC-Hormones* (114 days) and *India Patents* (65 days). See Terence P. Stewart and Mara M. Burr (1998): *The WTO Panel Process: An Evaluation Of The First Three Years*, Symposium, *The First Three Years Of The WTO Dispute Settlement System, 1995–1997*, 32 Int'l L. 709.

<sup>251</sup> See the prospective diary of the dispute which leads up to the end of 1996, Guy de Jonquieres (1995): *World Trade News: WTO's dispute rules face baptism of fire—U.S.—Japan car trade row may set stamp on future of the new world body*, *Financial Times* 6 (12 May).

<sup>252</sup> See note 266 below and section III.C.1, above.

<sup>253</sup> See Schede, as note 223, above, 161.

<sup>254</sup> See Tsukasa Furukawa (1995): *Auto Sanctions Bring U.S.—Japan Trade Stew To A Boil*, *Am. Metal Mkt.* 5 (14 June). Note that in the article of Ryutaro Hashimoto (1995): *Japan will not relent on the U.S. push to manage trade*, 12 *New Persp. Q.* 44 (22 June), it is mentioned 60,000 Americans will be affected by the sanction. This is probably a mistake.

<sup>255</sup> See *WTO Cannot Give “Viable” Solution To Row: U.S. Dealers*, *Japan Wkly Monitor* (19 June 1995).

<sup>256</sup> As note 255, above.

He cautioned that “[e]conomically, the dealers will face devastation and their employees will face layoffs”.<sup>257</sup> Even if there is a reduction of the time period for a decision from the earlier GATT,<sup>258</sup> Japan was not in a position to refuse the US request because of the duties deadline. Moreover, it was widely reported in the press that “[a]s a tactical matter, the United States had to push the Japanese case off the urgent track or it could have been settled in a few months”.<sup>259</sup> The losers would have been Japan, the United States and the WTO.<sup>260</sup> Thus, it is possible to imagine a system where Japan could have gone before the WTO and asked for interim relief. The WTO would have urged the United States to stop the 301 measures provisionally until the WTO panel had reached a recommendation. If the recommendations had been in Japan’s favour (which probably would have been the case), then no harm would have been done, as the United States would have been forced by provisional measures not to apply its unilateral sanctions. However, if the recommendations had favoured the United States, then the United States could have requested that Japan comply and ordered damages for the period from the application of provisional measures to the panel decision.

Provisional measures under a regional trade order such as that of the EU offer good guidance for proposing interim relief at the WTO level.

#### D. EXAMPLES OF INTERIM MEASURES AT THE EC LEVEL: THE COMPELLING ITALIAN WINE AND WALLONIA BUSES CASES

As EU law has been described as a new order in international law,<sup>261</sup> some authors have argued now that international law “should take advantage” of EU law.<sup>262</sup> Why should this not be the case in the area of provisional measures? Indeed, as has been demonstrated before, the EU law allows provisional measures.<sup>263</sup> The two cases described below exemplify the adequate answer the ECJ gave to the type of situations raised in the *Trondheim* and *Auto parts* disputes.

<sup>257</sup> As note 255, above.

<sup>258</sup> See William E. Scanlan (1997): *A Test Case For The New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, 45 U. Kan. L. Rev. 591, 609.

<sup>259</sup> See U.S. Rebuffs Japan's Try At Urgent Talks The White House Instead Proposed Meeting A Week Before Punitive Tariffs Are To Take Effect, Orlando Sentinel, B1 (27 May 1995). See also Martin Crutsinger (1995): *U.S. Declines Auto Talks*, News & Observer (Raleigh NC) D1 (27 May).

<sup>260</sup> See Paul Blustein (1995): *This Trade Dispute Isn't About Cars; It's About Japan's Agenda, Open Markets and Our Mistakes*, Wash. Post C01 (28 May).

<sup>261</sup> See ECJ, 5 February 1963, 26/62, *Van Gend en Loos*.

<sup>262</sup> See Yves Daudet (Dalloz, Paris, 1991): “Le Droit International Tire-t-il Profit du Droit Communautaire? [Does International Law take Advantage of Community Law?]” in *L'Europe et le Droit [Europe and the Law]*, *Mélanges en Hommage à Jean Boulois*, 97, 99.

<sup>263</sup> See note 198, above, and the text accompanying the note. For an overview of provisional measures in the area of government procurement in the EU, see José M<sup>a</sup>. Fernandez Martin (1993): *The European Commission's Centralised Enforcement of Public Procurement Rules: A Critical View*, 2 Public Procurement Law Review, 40, 54-59.

1. *The Wallonian Buses Case: An Answer to the Trondheim Case*

In the *Wallonian Buses* case the Commission alleged a breach of the procurement rules by a Belgian entity in its placement of certain orders for public transport buses.<sup>264</sup> Following the institution of these proceedings, the Commission sought interim measures from the ECJ in order to suspend implementation of the award decision, pending the final hearing of the case by the Court.<sup>265</sup> However, the President of the Court, by an order of 22 April 1994, refused to grant interim relief because of the Commission's delay in requesting interim relief.<sup>266</sup> Although interim relief was denied, this example shows the benefits the US companies would have enjoyed if the WTO had been able to suspend the implementation of the award decision in the *Trondheim* case.<sup>267</sup> Indeed, if the Court had finally decided that there was an actual breach of the EC government procurement rules, then the companies that were excluded during the first process could have had a true chance to be selected for the award of the contract.

2. *The Italian Wine Case: An Answer to the Auto Parts Dispute*

In a similar way to the *Auto parts* dispute, where the United States threatened the use of unilateral measures against Japan, France adopted unilateral measures against the importation of Italian wine suspected not to comply with EU Regulations.<sup>268</sup> Indeed, France delayed the customs clearance of Italian wine from two weeks to four months.<sup>269</sup> The Commission brought an action against the French Republic under Article 169 of the EEC Treaty.<sup>270</sup>

Lord Slynn of Hadley, who delivered the opinion as Advocate-General in that case, recommended that provisional measures be granted.<sup>271</sup> First, he determined that the Commission had established a *prima facie* case that Article 30 of the Treaty had been violated.<sup>272</sup> Second, he found the threat of both serious and irreparable effects because of the substantial quantities involved, and the need for urgent action because of the possibility of loss.<sup>273</sup> The Court followed its Advocate-General and concluded that the

<sup>264</sup> See Case C-87/94R, *Commission v. Belgium*, Order of the President of 22 April 1994.

<sup>265</sup> See also written question No. 2673/96 by Marianne Thyssen to the Commission. Application by the Commission of review procedures under Art. 3 of Directive 89/665/EEC on the award of public works contracts, 1997 OJ/C 72.

<sup>266</sup> It was also noted by the President that in any event the balance of interests in the case indicated that such relief should be denied.

<sup>267</sup> See, generally, Sue Arrowsmith (ed.) (1993): *Remedies For Enforcing The Public Procurement Rules*, 24.

<sup>268</sup> See Case 42/82 R, *Commission of the European Communities v. French Republic*, 1982 E.C.R. 841, 850 (Order of the Court for Provisional Measures).

<sup>269</sup> As note 268, above, 848.

<sup>270</sup> See Case 42/82, *Commission of the European Communities v. French Republic*, 1983 E.C.R. 1013, 1. C.M.L.R. 160 (1984) (decision of the Court).

<sup>271</sup> See Case 42/82 R, *Commission of the European Communities v. French Republic*, 1982 E.C.R. 841, 860, 867 (Order of the Court for Provisional Measures).

<sup>272</sup> As note 271, above, 864.

<sup>273</sup> As note 271, above, 865.

balance of interests test did not require a checking of the wine in a period exceeding 21 days.<sup>274</sup>

This case is one where interim relief was granted on behalf of a government against another to prevent irreparable harm.

E. IN WHAT DOCUMENT AND HOW TO INCLUDE ADDITIONAL PROVISIONAL MEASURES IN THE WTO AGREEMENT?

The previous examples show that there is a need at the WTO level for provisional measures. It has also been demonstrated that the EC has adopted provisional measures to remedy such situations. The need having been identified and the guidance for a solution having been proposed, there are numerous questions to ask. First, in what document or documents should a provision be included allowing interim relief? Second, who should have the power to grant interim relief at the WTO level? Third, what would be the test for granting provisional measures? Finally, what would be the timing of any provisional measure and would an appeal be possible?

1. *In What Document should Interim Relief Provisions be Included?*

As a preliminary consideration, we have to ask whether it is necessary to insert specific provisions to allow provisional measures. Indeed, as we have seen in the New York Convention, the majority of courts have found no difficulty in recognizing the power to grant provisional measures despite the silence of the Convention. However, the situation at the WTO level is different, as it is not a national court, or even a court at all. It is an international organization. Nevertheless, the rationale behind *Carolina Power & Light Co. v. Uranex* could be applied usefully in the WTO context. Would interim relief favour the resolution of a dispute? It can be answered in the affirmative, in the sense that it could suspend, for instance, the unilateral use of Section 301. Moreover, and in light of the first part of this inquiry, one could say that there is a tendency to develop a *lex mercatoria* allowing provisional measures in international law. Why could a WTO panel not recognize this general principle of international law? Indeed, Article 3:2 of the DSU expressly provides that "Members recognize that [the dispute settlement system of the WTO] serves ... to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."<sup>275</sup> Moreover, some authors have argued that "The WTO Understanding nowhere specifies applicable remedies, implying that all public international law remedies are applicable in the WTO context."<sup>276</sup> However, this reasoning is not convincing on two counts: first, because *lex mercatoria* is more a matter of private than public international law; and, second, because almost all of

<sup>274</sup> As note 271, above, 858.

<sup>275</sup> Jackson, Davey and Sykes, as note 13, above, 367.

<sup>276</sup> See Hoekman and Mavroidis, as note 221, above 63, 71.



the provisional measures described above had either a statutory or written basis. Further, Article 3:2 of the DSU states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”.<sup>277</sup> And allowing provisional measures by recognizing that there are “customary rules of interpretation of public international law”, would go far beyond “interpretation” and would be considered to add rights (or diminish obligations) for a party. Ultimately, the Appellate Body decided in the recent *Gasoline* case that it is important not to disregard the words actually used in the Treaty text to express intent and purpose.<sup>278</sup> However, it has been argued that an “internationally accepted set of norms and ideas of good practice is coming into being, and that for one reason or another more and more governments will subject their procedures to its standards”.<sup>279</sup> Is such notice also indicating the beginning of a *lex mercatoria* of government contracts?

Another solution could be that the parties to a dispute at the WTO level could agree at the time of the dispute to grant power to the DSB to order or not to order provisional measures. This could be done, as indirectly suggested in the *Trondheim* case,<sup>280</sup> if the parties to the dispute were to agree to give the panel power to order provisional measures in the Terms of Reference.<sup>281</sup> However, this solution is only theoretical, as one can hardly imagine a party like the United States in the *Auto parts* dispute agreeing that provisional measures should be available against them.

A more practicable solution would be for the parties to agree to allow provisional measures before the dispute. Such an agreement could be achieved in the form of a plurilateral agreement under Annex 4 to the WTO. Only the parties signing the agreement would be affected. This system would parallel the newly adopted WIPO Supplementary Emergency Interim Relief Rules, where, in the case of arbitration, private parties would agree in their arbitration clause whether or not they would apply the Supplementary Emergency Interim Relief Rules.<sup>282</sup>

Another solution could be to add interim relief provisions to the rules of procedures of the panel, as with the European human rights system. Indeed, the DSU gives the panel great latitude on how to organize its procedures.<sup>283</sup> Moreover, it can be argued that interim measures have to be indicated “in the interest of the procedure alone”.<sup>284</sup> As such, the introduction of this concept into the rules of procedure should be sufficient.

<sup>277</sup> As note 276, above.

<sup>278</sup> Pescatore, Davey and Lowenfeld, as note 212, above, CS98A/2; *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Panel, 17 January 1996 and of the Appellate Body 29 April 1996. The International Trade Law Reports, at 14; *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R 1996 GATTPD LEXIS 3.

<sup>279</sup> See Don Wallace, Jr. (1995): *The Changing World of National Procurement Systems: Global Reformation*, 4 PPLR 57, 62.

<sup>280</sup> See Panel Report on *Trondheim*, available in LEXIS, Int'l L. Library, GATTWTODEC File, point 4.17.

<sup>281</sup> See DSU, Art. 7:1. See Jackson, Davey and Sykes, as note 13, above, 369, 371.

<sup>282</sup> See 10 BNA's World Intellectual Property Report, 181, 183 (1996).

<sup>283</sup> See DSU, Art. 12:1, which provides that “Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute”. See Jackson, Davey and Sykes, as note 13, above, 369, 374.

<sup>284</sup> See Sztucki, as note 22, above, 155.

An alternative is to introduce the provisional measures in the working procedures of the Appellate Body, as Article 17:9 of the DSU leaves to the Appellate Body itself, in consultation with the Chairman of the DSB and the WTO Director-General, the power to develop its working procedure. One can argue that provisional measures are not part of working procedure, however. Otherwise, one can envisage such provisions in only specific agreements, such as the Antidumping or Subsidies Code. The drawback of the latter solution is that provisional measures would only apply to the specific agreement of which they are part.

Accordingly, the only satisfactory solution is to insert a provisional measures provision in the DSU itself. The question is whether there is a majority in favour of such an amendment? The DSU is drafted under Annex 2 to the Agreement establishing the WTO.<sup>285</sup> Moreover, Article X:8 of the Agreement establishing the WTO, entitled "Amendment", provides that "the decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all members upon approval by the Ministerial Conference".<sup>286</sup> Consequently, a decision to amend the DSU would have to be taken by full consensus.

## 2. *Who Should have the Power to order Provisional Measures?*

In a similar way to the newly created emergency system in WIPO, a special *ad hoc* panel would order the provisional measures. This *ad hoc* panel would be the Appellate Body of the dispute settlement mechanism. However, this eliminates the possibility of an appeal. The permanent nature of the Appellate Body would avoid the delays in constituting the panel.<sup>287</sup> The proposed mechanism would be that after a consultation period of five days, the *ad hoc* panel of the Appellate Body would render a decision within five days. Indeed, it is necessary to adopt a reduced timeframe to have a practically realistic mechanism. If the existing system were maintained by just adding a provisional measure power, it would not be effective because of the delay necessary to render a decision.<sup>288</sup> The *ad hoc* panel's decision would be automatically effective as soon as recommended. There would be no need for DSB adoption to avoid any delay.

As we have seen, in many systems such as the ECJ or the French *référé*, a provisional measure is taken by the President of the Court, who is usually a practitioner with a high level of expertise.<sup>289</sup> However, at the ICJ level, although there has been a debate on whether an *ad hoc* chamber could order interim measures or whether only the full Court could,<sup>290</sup> provisional measures are usually taken by the full Court. As one of the feature

<sup>285</sup> See Jackson, Davey and Sykes, as note 13, above, 2.

<sup>286</sup> See Jackson, Davey and Sykes, as note 13, above, 10.

<sup>287</sup> See DSU, Art. 4, which provides for consultations. DSU, Art. 6 provides for the establishment of the panel. See Jackson, Davey and Sykes, as note 13, above, 369, 371.

<sup>288</sup> See notes 248 and 249, above and the text accompanying the notes.

<sup>289</sup> See Baker, as note 94, above.

<sup>290</sup> See Andreas Zimmermann (1989): *Ad Hoc Chambers of the International Court of Justice*, 8 Dick. J. Int'l L. 1, 24.

of the decision-making in the WTO is collegiality, I think that provisional measures should be ordered by a panel as a whole.<sup>291</sup> This collegiality is reinforced by the fact that the panel does not issue dissenting opinions. Moreover, and because the President of the panel changes for every dispute, a system of collegiality would better serve to attenuate the effect of changes in the identity of the President. Indeed like the full ICJ, which renders a provisional measure by 15 votes, or, in chamber, by six votes, the *ad hoc* panel would render provisional measures only by three votes.<sup>292</sup>

Moreover, and unlike the ICJ or the European Court, the WTO *ad hoc* panel should not decide provisional measures *proprio motu*, because the question of provisional measures would add to the dispute and would deflect the panel from its role to play down the litigious climate.<sup>293</sup> There are however arguments in favour of *proprio motu* powers. One argument is that it can give to the provisional measures ordered without "inspiration" by any party a higher authority as emanating entirely from an impartial organ.<sup>294</sup> This is not necessary, as there is no doubt of the independence of the panel's members, as required by Article 17:3 of the DSU.<sup>295</sup>

3. *What Standard Should Be Applied for Exercising Interim Power at the WTO Level?*  
 $P \times H_p > (1 - P) \times H_d$ ?<sup>296</sup>

The test should be as loose as possible, while some guidance should be provided, such as a *prima facie* case on the merits, urgency or likelihood of irreparable injury. The balance of interests test would be applied to leave ample opportunity to the panel to decide without legal constraint the availability of the provisional measures. Moreover, and as reflected in most provisional measures goals, the complaint should be *prima facie* sufficient, and urgency should be shown.

First, there should be a *prima facie* case on the merits to avoid numerous demands. Moreover, the common denominator observed in international law is urgency and/or the likelihood of irreparable injury. Second, because it is of the essence of provisional measures, the applicant should show urgency. It is normally interpreted as requiring the suffering of "serious and irreparable harm". This could be concrete damage, such as the damage caused to the industry targeted by a duty or to the individual contractors interested in government contract. Alternatively, it could be a breach of a WTO Agreement which

<sup>291</sup> See Deborah P. Steger (1996): "WTO Dispute Settlement: The Role of the Appellate Body", working paper (14 June).

<sup>292</sup> See Arthur Eyffinger (Kluwer Law International, The Hague, 1996): *The International Court of Justice 1946-1996*, 152.

<sup>293</sup> See Sztucki, as note 22, above, 155.

<sup>294</sup> As note 293, above.

<sup>295</sup> See DSU, Art. 8:2, which provides that "Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience", reprinted in Jackson, Davey and Sykes, as note 13, above, 372.

<sup>296</sup> "[O]r in other words, only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error." *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589 (7th Cir. 1986).

in itself constitutes an irreparable harm. Unlike EU law, which decided that only the breach of EU law is sufficient,<sup>297</sup> the panel should take into consideration actual damage, because otherwise every *prima facie* breach would allow interim measures.

Third, if both the *prima facie* and urgency requirements are fulfilled, then the panel should consider the balance of interests test, as in EU law. Such a test could allow the panel great latitude. In that sense, its power should be discretionary. This means that even if the requirements are met, the panel would still have the right not to order provisional measures. This discretionary power does not need to be expressly stated as the balance of interest test gives the panel ample opportunity to exercise such power.

#### 4. *What Timing Should There Be For the Provisional Measures and What Order for the Panel?*

The provisional measures should be available as soon as practicable, and as in EU law, the conclusion of a contract in the government procurement area should not preclude the recommendation of provisional measures by the panel.<sup>298</sup> In the proposed framework, and as mentioned earlier, the *ad hoc* panel should be able to issue a decision within ten days.<sup>299</sup>

The panel could order suspension of an action. For instance, the suspension of the imposition of the 100 per cent duties in the *Auto parts* dispute, or, for instance, the suspension of the effect of the government contract which *prima facie* breaches the government procurement rules.<sup>300</sup> Even more than in the main system, the *ad hoc* panel will not create rights and obligations because only the DSB can definitively interpret the legal meaning of WTO Agreement.<sup>301</sup>

In any case, an action on the merits would have to be undertaken. The provisions relating to safeguard measures provide that the national authority can order safeguard measures for up to 200 days.<sup>302</sup> At the WTO level, such provisional measures should last until the decision of the panel is reached, or earlier, if the panel deems it appropriate.<sup>303</sup>

#### 5. *The Legal Effect of a Provisional Measure and its Appealability*

The legal effect of a provisional measure should be the same as that of a panel report. It should be legally binding. The provisional measure, which could be issued either by the panel or by the Appellate Body, exclusively, should not be appealable in order not to

<sup>297</sup> See para. 31 of the Order.

<sup>298</sup> See Case C-272/91R, Orders of 31 January 1992 and 12 June 1992 state that the Court is able to award interim measures even once a contract has actually been concluded.

<sup>299</sup> See note 176, above and the text accompanying the note.

<sup>300</sup> See Guus Borchardt (1985): *The Award of Interim Measures by the European Court of Justice*, 22 Common Mkt. L. Rev. 203, 226.

<sup>301</sup> See O'Neal Taylor (1997): *The Limits Of Economic Power: Section 301 And The World Trade Organization Dispute Settlement System*, 30 Vand. J. Transnat'l L. 209, 248.

<sup>302</sup> See Agreement on Safeguards, Art. 6, reprinted Jackson, Davey and Sykes, as note 13, above, 298.

<sup>303</sup> See, generally, Sztucki, as note 22, above, 195.



delay this rapid procedure. Moreover, and for the reasons explained, the fact that the *ad hoc* panel is constituted at the Appellate Body level would complicate the procedure to the detriment of efficiency. The structure proposed above would follow the model of the EU law. In France, the *référé* decision is appealable for a short period of time (15 days).<sup>304</sup> There would be no obligation to implement the *ad hoc* panel decision allowing provisional measures, but in case a party chose not to implement it, then the other party would have the possibility of retaliating from the beginning of the interim measures proceeding.<sup>305</sup> This would be a significant step forward as the present system only authorizes retaliation from the beginning of a panel decision, and not prior to it.<sup>306</sup>

6. *Would the Creation and Operation of Provisional Measures in the WTO Dispute Settlement System Deprive the United States of its Right to Use its Unilateral Power Under Section 301?*

The allowance of provisional measures at the WTO level would not by itself deprive the United States of its right to use the mechanism of Section 301. Indeed, if no provisional measures are allowed, I can see no reason why the United States could not use Section 301 while a WTO request is pending, as it threatened to do in the *Auto parts* dispute. The same pattern could occur in the near future with the Korean auto market.<sup>307</sup> However, if a provisional measure were to be ordered by the *ad hoc* panel, then the use of Section 301 would be "frozen" until the end of the interim order.

#### IV. CONCLUSION

As shown by the *Auto parts* and the *City of Trondheim* cases, the WTO grants rights to its members but there can be a lack of an adequate remedy in certain situations. To use the expression of Professor Lowenfeld, "a right without a remedy is not a right at all".<sup>308</sup> Allowing provisional measures at the WTO level would enhance the dispute mechanism and ultimately fair trade and the effectiveness of international law.<sup>309</sup> It would foster dispute resolution on a legal basis, putting aside unilateral sanctions or the threat thereof during the time of the interim relief. In sum, allowing provisional measures at the WTO level would complete the range of remedies available to resolve an international trade dispute. It would contribute to the quality of this organization and the welfare of its members.

<sup>304</sup> N.C. Pr. Civ., Art. 490(3).

<sup>305</sup> Interview with Frieder Roessler, Professor of Law, Georgetown University Law Center, in Washington, D.C. (14 April 1998).

<sup>306</sup> Schede, as note 223, above, 161 (1996).

<sup>307</sup> *AAMA Chief Says Korean Auto Market Tough, But Will Press 301 Case*, Inside U.S. Trade, 20 March 1998 ([http://www.insidetrade.com/sec-cgi/as\\_web.exe?SEC\\_RECENT+D+100401](http://www.insidetrade.com/sec-cgi/as_web.exe?SEC_RECENT+D+100401)).

<sup>308</sup> See Andreas F. Lowenfeld (1994): *Remedies Along With Rights: Institutional Reform In The New GATT*, 88 A.J.I.L. 477, 488.

<sup>309</sup> See Jean Touscoz, *Le Principe D'effectivite Dans L'ordre International*, Librairie Générale de Droit et de Jurisprudence, Paris (1964). This principle differs however from the rule of effectiveness (*principe de l'effet utile*) in Community law. Id. at 166.

ANNEX  
COMPARISON OF PROVISIONAL MEASURES  
RELATING TO  
SUBSIDIES/COUNTERVAILING, ANTIDUMPING AND THE TRIPS

Subsidies/Countervailing	Antidumping	TRIPs
<p>17.1 Provisional measures may be applied only if:</p> <p>(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;</p> <p>(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and</p> <p>(c) the authorities concerned judge <i>such measures</i> necessary to prevent injury being caused during the investigation.</p> <p>17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.</p>	<p>7.1 Provisional measures may be applied only if:</p> <p>(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;</p> <p>(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and</p> <p>(iii) the authorities concerned judge <i>such measures</i> necessary to prevent injury being caused during the investigation.</p> <p>7.2 Provisional measures may take the form of a provisional duty <i>or</i>, preferably, a security by cash deposit or bond equal to the amount of the antidumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the antidumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.</p>	<p>1. The judicial authorities shall have the authority to order prompt and effective provisional measures:</p> <p>(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;</p> <p>(b) to preserve relevant evidence in regard to the alleged infringement.</p> <p>2. The judicial authorities shall have the authority to adopt provisional measures <i>inaudita altera parte</i>, where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.</p>

Subsidies/Countervailing	Antidumping	TRIPs
17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.	7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.	3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.
17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.	7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.	4. Where provisional measures have been adopted <i>inaudita altera parte</i> , the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a rights to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

Subsidies/Countervailing	Antidumping	TRIPs
17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.	7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.	5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.
		6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.
		7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.
		8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to the principles equivalent in substance to those set forth in this Section.



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