COMPLIANCE AND ENFORCEMENT UNDER WTO DISPUTE SETTLEMENT SYSTEM: A CRITICAL APPRAISAL

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Master of Philosophy

Submitted by

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CERTIFICATE

This is to certify that the dissertation entitled **COMPLIANCE AND ENFORCEMENT UNDER THE WTO DISPUTE SETTLEMENT SYSTEM: A CRITICAL APPRAISAL** submitted by **RAJESH BABU RAVINDRAN** is in partial fulfillment of the requirement for the degree of ***Master of Philosophy*** (M.Phil.) of this university. It is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this university or of any other university.

A Barua

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Dedicated to

My Parents

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Rajesh Babu Ravindran

ABBREVIATIONS

AB	Appellate Body
ADA	Anti-Dumping Agreement
BISD	Basic Instruments and Selected Documents
EC	European Communities
EU	European Union
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
GATT	General Agreement in Tariff and Trade
GSP	Generalized System of Preferences
ITO	International Trade Organization
MFN	Most Favored Nation
NAFTA	North American Free Trade Agreement
QR	Quantitative Restrictions
SCM	Subsidies and Countervailing Measures
TRIPS	Trade Related Intellectual Property Rights
UN	United Nations
UNCTAD	UN Commission for Trade and Development
US	United States
USTR	United States Trade Representative
VER	Voluntary Export Restrain
WTO	World Trade Organization

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CHAPTER I

INTRODUCTION

The credibility of any legal system depends on the efficacy of its compliance and enforcement mechanisms, the means through which rights and obligations are upheld. The international legal system does not often incorporate an effective enforcement regime to implement rights and obligations. But the World Trade Organization (WTO), an international institution entrusted with the regulation of international trade, provides for an effective compliance and enforcement mechanism, which is unparalleled in the public international law sphere. Its Dispute Settlement Body (DSB) is given the task of adoption and enforcement of WTO Panel and Appellate Body (AB) reports between member states, after the disputes are resolved in accordance with the 'Understanding on the Procedures Governing the Settlement of Disputes' (DSU). In the case of non-compliance with the DSB ruling, the complaining Member has an automatic right to take countermeasures till the losing party complies or finds a mutually acceptable solution.

The WTO dispute settlement system (DSS) has completed six years of its operation and is considered to be a success in adjudicating international trade disputes. The success of the DSS is proven by the increasing participation of the WTO Member countries, especially the developing countries in the adjudication process. Despite a high record of satisfactory settlement of disputes, the experience with the WTO DSS has revealed certain problems and inequities in its actual working. Therefore, time is ripe for a critical review of the WTO DSS, especially the enforcement mechanism available under it. This study however only addresses certain issues in the procedural and substantive working of the compliance and enforcement mechanisms of the WTO DSS, with special emphasis on the problems faced by the developing countries.[1]

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1 For the purpose of this study "developing country" includes "least developed countries" as well.

I. The WTO Dispute Settlement System

The WTO DSS is considered to be the most fundamental outcome of the Uruguay Round of Trade Negotiations. The DSS represents the change from the 'power oriented' GATT 1947 adjudication to a 'rule based' WTO adjudicatory system, which is expected to provide a more legalistic, time bound, predictable, consistent and binding system. The DSU provides a Dispute Settlement Body (DSB), which is placed under the General Council of the WTO a wide range of functions such as establishment of the panel and Appellate Body, adoption of their reports, making recommendations on the basis of these reports, maintain surveillance on the implementation of these recommendation and authorises the aggrieved member to take retaliatory measures against the offending member. Further, the DSU in order to enhance the enforceability of all commitments and to ensure greater confidence in the quality of the legal findings, provides for a hierarchy of quasi-judicial bodies for the adjudication of disputes i.e., the Panel and the Appellate Body (AB). All WTO members can take automatic recourse to this DSS, and the reports of the Panel and AB are automatically adopted by the DSB through a negative consensus principle. A complex procedure is also provided for ensuring compliance with and enforcement of the Panel and AB reports. It is this implementation part of the WTO dispute settlement that forms the main focus of the study.

Once the report of the panel/AB is adopted by the DSB, it becomes binding on the parties to the dispute and is ready for implementation. The DSU prefers 'prompt compliance' with the recommendations. If the immediate implementation of the report is not practicable, the respondent can ask for a 'reasonable period of time' for the implementation of the recommendations.[2] If the parties to the dispute fail to agree on a reasonable period of time, it shall be left to an arbitrator for determination. The arbitrator determines the reasonable period, which shall not exceed 15 months, unless the party/parties claiming it can

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[2] Article 21.3 (c), Understanding on the Rules and Procedures Governing the Settlement of Disputes (*hereinafter referred to as* 'DSU')

prove "peculiar circumstances". At the end of the reasonable period, if there is disagreement between the parties with respect to the measures taken to comply with the recommendations and rulings, the dispute can be referred to a Panel constituted under Article 21.5 of the DSU for deciding the matter according to the dispute settlement procedure.[3]

When even after the lapse of a reasonable period, the immediate withdrawal of the measure is impracticable (as per Article 3.7 of DSU) the respondent member may offer compensation to the complainant upon request.[4] If there is disagreement regarding the amount of compensation, the parties can refer the matter to arbitration. The final stage of the implementation process starts when no compensation is offered or accepted. The complainant party can request the DSB to authorize retaliation. In case of disagreement as to the permissible limit of retaliation, an arbitrator is appointed to decide on the matter.

II. The Problems of Compliance and Enforcement

Since WTO DSB recommendations/rulings are complied with to the satisfaction of the winning parties most of the time, it has been argued that the implementation procedures are functioning in an effective manner. This may not always reflect the true situation. A large number of compliance with adverse Panel/AB reports may not necessarily reflect the effectiveness of the implementation process. A close analysis of DSU provisions and non-compliance cases has revealed several problems in the actual working of the implementation procedure, which includes ambiguities and drafting oversights that need to be corrected. More importantly, some of the non-compliance cases have put in doubt the very effectiveness of sanction as a tool of enforcing trade obligations.

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3 Article 21.5, DSU
4 Article 22, DSU

II.1. *The Issues in Determination of Reasonable Period of Time*

The system of 'reasonable period of time' has been introduced to bring about flexibility and adaptability to the WTO DSS. However, the evolving trend shows that the Member States are claiming it on a regular basis, as a tactics to delay implementation. This has affected the entire dispute settlement system in providing a speedy settlement of disputes. So there is a need for clarification in the determination of the length of the reasonable period of time and the consequent delay in implementation. Moreover, the related interpretative issues like what constitutes "peculiar circumstance" and the "nature of burden of proof" to be discharged in this regard is worth examining. Further, there is need to analyse whether there exists a duty on the implementing Member to comply or take measures to comply within the reasonable period of time. The study also seeks to analyse the attempt of the Panel and the AB in clarifying through interpretation the meaning of the DSU text and related problems arising from its ambiguity.

II.2. *The Issue of Compensation*

Under the WTO legal system compensation as a remedy is not mandatory. It is left to the respondent to choose who is to be compensated. The problem with compensation is that the losing party can defy the WTO obligation, by deciding to compensate the complainant *ad infinitum*. Furthermore, the DSU does not provide any rule or procedure for governing the issue of compensation.

In GATT/WTO practice, compensation does not mean monetary (money) compensation. Compensation is generally understood as a reduction in tariff or increase in import quotas. Moreover, it is prospective in nature. There has been only one instance in the WTO where compensation was offered and accepted for delayed implementation. In *Japan – Taxes on Alcoholic Beverages*[5] case, compensation

[5] Report on Article 21.3 Arbitration, WT/DS8/15, WT/DS10/15, WT/DS11/13, (15 Feb. 1997).

was granted on an mfn basis and was not pecuniary in character. But this neither settles the issue, nor can be regarded as an established WTO practice. Further, it is necessary to examine whether the remedy of compensation has the effect of inducing compliance and promoting security and predictability to the WTO legal system. An examination of whether the remedy of compensation offers a better solution for the injured sector or industry and the complaining member is also undertaken.

II.3. *Relationship Between Article 21.5 and 22*

When parties to the dispute disagree as to whether the WTO Member at fault has properly implemented the recommendations of the panel/AB, the complaining members are left with two possible procedural recourses. But the DSU fails to specify which of the two procedures will precede in case of conflict between the two. The procedure set out in Article 21.5 of the DSU provides that if there is disagreement with respect to the measures taken to comply with the recommendations and rulings, such disputes shall be decided 'through recourse to these dispute settlement procedure' as provided under the DSU. On the other hand, the second procedure set forth in Article 22 provides that if the losing party has neither implemented the WTO ruling within the compliance period nor negotiated mutually accepted compensation within twenty days after the reasonable period expires, the DSB, upon request, will grant authorization to suspend concessions or other obligations.

The 'sequencing problem' between these two alternative procedures is brought out by the *EC - Bananas* case.[6] The European Communities (EC) argued that in case of disagreement as to implementation of the panel/AB recommendations, the Article 21.5 compliance review should be resorted to before requesting the DSB for suspension of concessions as per Article 22. On the other hand, the US countered that it can request authorisation to suspend concessions within twenty days after the end of the compliance period, without

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6 *European Communities – Regime for the Import and Sale of Bananas*, WT/DS27

resorting to Article 21.5 compliance review. These diametrically opposite interpretations has thrown open a host of issues which has direct consequences on the credibility of the WTO DSS. Can the procedure be followed simultaneously or must the invocation of Article 21.5 procedure precede the Article 22 procedures? Can the deadline for DSB authorization of suspension pursuant to negative consensus rule be suspended until completion of the Article 21.5 proceedings? These issues need clarification. For, any direct recourse to Article 22 could amount to unilateral determination of compliance level and asking to go once again through the dispute settlement process as provided under Article 21.5 in its entirety, could defeat the very purpose of the rule based, time-bound dispute settlement procedure itself.

II.4. *Issues in Enforcement*

Enforcement of Panel/AB report matters since the WTO does not have jurisdiction inside sovereign countries. In the event of the failure of respondent to implement the findings, the only option before a complainant is to retaliate against the respondent, to hurt it to the extent of the loss suffered. If the respondent fails to comply with the recommendations within the reasonable period and if the compensation is not forthcoming, the complainant can make a request the DSB for authorization to retaliate, which the DSB is obliged to give, unless rejected by consensus.

The DSU provides for a hierarchy of responses.[7] The response starts with the complainant seeking suspension of concessions or other obligations within the same sector where the Panel or AB has found a violation. If this is not 'practicable or effective', the complainant may seek to suspend concessions in other sectors under the same agreement. If neither of these options is practicable or effective, it can seek action under other covered agreements. The last two options come under cross-retaliation. The retaliation must be equal to the loss incurred by the complainant. If the losing party feels that the retaliatory measure

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7 Article 22.3, DSU

is excessive or that the underlying principle of the multilateral system has been undermined, the respondent can request for arbitrator or the original panel if available, to decide the matter.

Even though in theory dispute settlement process appears expeditious and predictable, the reality is different. This reality is brought to light by the *EC - Bananas*[8] and *EC – Beef Hormones*[9] cases. These cases demonstrate that winning a case does not necessarily guarantee compliance, especially when the losing party is a powerful trading State. Even though the WTO DSS provides for almost automatic approval for retaliation, this remedy is not practically available for the smaller trading nations because of political and economic considerations. It is also doubtful whether the retaliation is of any utility to most of the developing countries whose economy largely depends on one or two products.[10] These disputes have questioned the credibility of the DSS even against equal trading partners.

Moreover, even if a winning member resorts to retaliation or countermeasures, it will be counterproductive not only for that particular State, but also for the international community at large. The logicality of sanction as an instrument of securing trade rights itself is in question. This is because sanction affects exporters who have done no wrong and it does not create additional revenue for the sanctioning State to compensate its exporters who were affected by the losing States inconsistent measures.

Another issue in enforcement is the use of "carousel" method of retaliation. According to this method, 100% *ad valorem* tariffs shall be imposed on certain goods and continuously rotated among these goods (rotated from one industry to another). The US has signed the carousal retaliation into law[11] and is intended to force the EU to comply with the WTO ruling in the *Bananas* and *Beef-*

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8 WT/DS27
9 WT/DS26
10 *See* Ecuador's attempted retaliation against EC.
11 Section 407, The Trade and Development Act of 2000 (Public Law 106-200)

Hormones cases. The question is whether "carousel" method is consistent with the WTO dispute settlement understanding? This calls for analysis in the light of the DSU.

II.5. *Surveillance of Implementation*

The final phase of the WTO dispute settlement process is the surveillance stage. This is designed to ensure that DSB recommendations are complied with. The DSB is to continue to keep under surveillance the implementation of adopted recommendations, including those cases where compensation has been provided, or concessions or other obligations have been suspended. The issue of implimentation is placed on the agenda of the DSB meeting after six months followed by the date of establishment of the reasonable period of time and remains on the agenda until the issue is resolved. Moreover, the respondent concerned is to provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings. But all these could amount to futile expressions if the member concerned is not willing to implement the recommendation. Moreover, mere demand for status report from the concered member would not yield any result unless positive steps are taken by the WTO DSB to secure compliance.

III. Objectives of the Study

The main objective of the proposed study is to critically analyse the working of the WTO DSS with respect to compliance and enforcement of Panel and AB reports, with special emphasis on the problems faced by the developing countries. In this context, the study will seek:

i. To trace the evolution and working of the compliance and enforcement systems in GATT 1947 / WTO regime.

ii. To examine whether the statement that the legalization of DSU stops where non-compliance begins holds true?

iii. To analyse the overall impact of compliance and enforcement provisions in providing security and predictability to the entire dispute settlement system. In this context an examination of WTO cases, especially the *EC – Bananas* and the *EC – Beef Hormones* is undertaken.

iv. To examine the relationship between the remedies provided under Article 21 and Article 22 of DSU.

v. To examine whether the new dispute settlement mechanism has in any way changed the bargaining position of the developing countries by providing them with a level playing field when compared to stronger trading powers.

IV. Scope of the Study

The study envisages a critical appraisal of the substantive and procedural problems arising out of compliance and enforcement of Panel and AB reports as adopted by the DSB. The Chapter II intends to analyse the evolution of the dispute settlement in the GATT 1947 era, with special emphasis on the enforcement mechanism available under it. It also examines the major developments, both political and legal, which marked the changing attitude of the members towards a stronger enforcement mechanism. The chapter also analyses the developments that took place in the Uruguay Round of Negotiations. Finally, a detailed discussion of the DSU is undertaken. The Chapter III critically examines the substantive and procedural issues in the WTO implementation mechanism, which has given raise to debate and concerns. It also undertakes a detailed discussion of the relevant cases and the interpretation given by the Panels and AB in relation to implementation problems. This chapter also highlights the current practices and positions taken by the member countries to solve some of the implementation problems. Finally, an analysis as to how far the interest of the developing country members is protected under the system and the overall

effectiveness of the enforcement mechanism under the WTO legal system is envisaged. The Chapter IV summarises the findings and put forward some recommendations to improve the existing system and conclude the study. The study excludes from its purview, the general international law implications of the Panel/AB reports, and its direct impact on the domestic legal system of the Member States.

CHAPTER II

LEGAL FRAMEWORK FOR COMPLIANCE AND ENFORCEMENT

I. Introduction

The "Understanding on the Rules and Procedures Governing the Settlement of Disputes" (the 'DSU') as specified in Annex 2 of the Agreement Establishing the World Trade Organization (the WTO Agreement) is considered to be the most significant achievement of the Uruguay Round of the Multilateral Trade Negotiations. The DSU was the product of four decades of 1947 GATT experience in dispute settlement. Along with the GATT practice in dispute settlement, it consolidated and modified the 1979 Understanding[1] and the Annex on customary practices,[2] agreed in the Tokyo Round, the 1982 decision,[3] the 1984 decision,[4] and the 1989 improvement[5]. Moreover, the World Trade Organization (WTO) in its Dispute Settlement Understanding (DSU) acknowledges the fact that it is built on the "adherence to the principle for the management of dispute heretofore applied under Article XXII and XXIII of GATT 1947"[6]. Also, Annex 1A to the WTO Agreement makes explicitly clear that the GATT Dispute Settlement Procedures and dispute settlement rulings since 1948 remain part of the "acquis" of GATT law. So the interpretation and application of the WTO dispute settlement rules shall therefore be strongly influenced by the past evolution of the GATT dispute settlement system since 1948. Hence, a brief

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1 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* of 28 November 1979, GATT BISD, 26th Supp., (1979), p. 210

2 *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement*, GATT BISD 26th Supp., (1979), p. 215

3 *Declaration on Dispute Settlement Procedure* adopted at the 38th Session Ministerial Conference 1982, GATT BISD 29th Supp., (1983), p. 9.

4 *Decision on Dispute Settlement Procedures* adopted at the 40th Session, GATT BISD 31st Supp., (1985), p. 9.

5 *Decision on Improvement to the GATT Dispute Settlement Rules and Procedures*, negotiated at the December 1988 Meeting of the Trade Negotiations Committee of the Uruguay Round and adopted on 12 April 1989, GATT BISD, 36th Supp., (1989), p. 61.

6 Article 3:1, *Understanding on the Rules and Procedure Governing the Settlement of Disputes in the WTO* (DSU)

7 These conferences were intent to establish the World Bank, IMF and ITO, Ernst-Ulrich Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948," *Common Market Law Review*, vol. 31, 1994, pp. 1157-1244 at p.1167

analysis of the GATT 1947 era is indispensable for proper understanding of the WTO dispute settlement provisions.

This chapter intends to analyse the evolution of the dispute settlement in the GATT era, with special emphasis on the enforcement mechanism available under it. It also examines the major developments, both political and legal, which marked the changing attitude of the members towards a stronger enforcement mechanism. The chapter also analyses the developments that took place in the Uruguay Round of Negotiations. Finally, a detailed discussion of the DSU is undertaken.

II. The Havana Charter and the GATT 1947

The traumatic experience in international trade and monetary relations in the 1930's, and the uncertainty in the aftermath of the World War II, led the war-torn European nations and the United States (US) to think about the establishment of international institutions to regulate and monitor international trade and monetary affairs. This lead to the 1944 Bretton Woods Conference, the 1945 San Francisco Conference and the 1948 Havana Conference.[7] But the Havana Conference convened for the establishment of the International Trade Organization (ITO) failed to take off, because of the rejection of the proposal by the US Congress.[8]

The Havana Charter (also called as the Charter for the International Trade Organization) was a large international agreement for economic affairs, which provided for the establishment of the International Trade Organization (ITO). The General Agreement on Tariff and Trade 1947 (GATT 1947) was an annexure to this Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nation Conference on Trade and Employment.

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8 Ibid. p. 1159.

The original signatories of the GATT agreement were the members of a small "Preparatory Committee" that had been assembled to prepare a draft of the ITO Charter for submission to a plenary meeting open to all United Nations (UN) Members, scheduled in Havana from December 1947 to March 1948. Even before the ratification of the ITO Charter, the Preparatory Committee governments decided to have an *ad hoc* arrangement for reducing trade barriers by negotiating a trade agreement between them. On 30 October 1947, they signed a Final Act establishing the text of the agreement and a 'Protocol of Provisional Application' putting the agreement into force "provisionally"[9]. This was intended to be a transitional arrangement, which was to fold into the ITO structure after the Havana Charter was ratified. The non-ratification of the Havana Charter led the progressive transformation of the 1947 GATT, "from a provisional short term contract on the reciprocal liberalization of tariffs into a complex long term system of more than 200 multilateral trade agreements with comprehensive institutions and decision-making powers."[10]

III. The General Agreement on Tariffs and Trade, 1947

The General Agreement in Tariffs and Trade (GATT) is an international trade agreement concluded between 23 governments, consisting of both developed[11] and developing[12] countries, in October 1947. Though GATT 1947 was envisaged only as a transitional arrangement till the ratification of ITO Charter, which did not materialize, it matured over the years into a full fledged and relatively successful international organization. This is in spite of the fact that the GATT never received a formal organizational constitution nor became an official United Nation organization. It nevertheless managed to construct a

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9 Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, (New Hampshire: Butterworth Legal Publishers, 1993)

10 n. 7, p. 1159

11 Australia, Austria, Belgium, Canada, Czechoslovakia, France, Luxembourg, Netherlands, Norway, Rhodesia, the United Kingdom and the United States.

12 Brazil, Burma, Ceylon (Sri Lanka), Chile, China (the pre-1949 government), Cuba, India, Pakistan, Syria and Lebanon.

complete and smoothly functioning international organization, wholly by the decisions of the Contraction Parties.

Initially, the main intent of 1947 GATT agreement was only the achievement of reduction of tariffs and to provide for legal controls on a variety of other non-tariff trade barriers. Over the years the GATT legal and organizational structure has grown considerably. The 80 pages original GATT text (excluding the schedules of tariff concessions) was supplemented by a mountain of additional texts created by the decisions of the Contracting Parties, the six rounds of tariff negotiations conducted under the auspices of the GATT since 1947, the seven "MTN Codes" which were adopted in 1979 and finally, a body of GATT rules on non-tariff measures.[13]

The enforcement of all these rules was left to a rather vaguely defined procedure, which was laid down in Articles XXII and XXIII of 1947 GATT.

III.1. Dispute Settlement in GATT 1947

The 1947 GATT, being a temporary arrangement, contained no elaborate provisions for dispute settlement, except for the bare Articles XXII and XXIII. This dispute settlement provisions in 1947 GATT were derived, historically, from bilateral commercial arbitration from which Article 93 of the Havana Charter[14] and later Article XXIII of the GATT 1947 drew its inspiration[15]. No formal organizational structure was created. The GATT signatories, collectively known as CONTRACTING PARTIES,[16] simply gave themselves the power to make whatever decisions necessary in interpretation and implementation of the GATT agreement. Similarly, in the case of legal complaints a vague procedure entitled

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13 For a detailed study on the subject *see* n. 9.

14 Article 92-97, *Final Act of the United Nations Conference on Trade and Employment, Havana Charter for an International Organization* (governs the settlement of disputes).

15 Patricio Grane, "Remedies Under the WTO Law", *Journal of International Economic Law*, vol. 12, 2001, pp. 755-772 at p.759.

16 Because of the lack of organizational structure within the 1947 GATT, the nations that were signatories to the agreement called themselves so while arriving at a decision or legal interpretation.

"Nullification and Impairment" was provided for in Article XXIII of the 1947 GATT.

The first of the GATT 1947 dispute settlement procedure provides for 'consultation', which was a prerequisite to invoke the multilateral GATT procedure. It provided that "each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting operation of this Agreement."[17] Article XXIII formed the centerpiece of the GATT dispute settlement procedure.[18] It provided that the GATT Contracting Parties could invoke the procedures on grounds of

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17 Article XXII:1, GATT 1947.

18 TEXT OF ARTICLE XXIII

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any object of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry our its obligations under the Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties, which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the Contracting parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

"nullification or impairment" of benefits expected directly or indirectly under the Agreement or the attainment of any objective of the Agreement is being impeded. Under this provision, the Contracting Parties could not only investigate and recommend action but also had the authority to rule on matters. And finally, the Contracting Parties could, in serious cases, authorize a contracting party or parties to suspend obligations to other contracting parties.[19] This procedure was both broader and shallower than enforcement provisions in public international law. It was "broader" in that it allowed the Contracting Parties to rule on governmental actions that did not violate GATT legal obligations, but that nevertheless had interfered with the attainment of some benefit a signatory could reasonably have expected to obtain from the agreement. It was shallower, on the other hand, in that the ultimate remedy, for both legal violations and for other impairment of benefits, was simply the withdrawal of equivalent concessions by the aggrieved party"[20]. The GATT Article XXIII did not elaborate on these principles, which evolved over four decades of GATT practice.[21]

The GATT dispute settlement system got engaged in the adjudication process soon after its inception. Its earlier attempt in this area was tentative and more provisional in nature. Disputes during the initial years of GATT's history, were resolved through diplomatic means, at the semi-annual meetings of the Contracting Parties.[22] Later, disputes were brought to an intercessional committee of the Contracting Parties and subsequently were delegated to a "working party". The mid 1950's saw a major shift in the dispute settlement procedure, largely due to the influence of then Director-General Eric Wyndham-White. Rather than referring the dispute to a 'working party' composed of governmental

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19 For a detailed discussion on Article XXIII, *see* John H Jackson, "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT", *Journal of World Trade Law*, vol.13, no.1, 1979, pp.1-11.

20 n. 9, at p.7

21 John H. Jackson, "The Role and Effectiveness of the WTO Dispute Settlement Mechanism," *Brookings Trade Forum*, 2000, p.181 <http//:mose.jhu.edu/demo/btf>

22 For a detailed examination of the GATT cases *see*, Robert E. Hudec, *The GATT Legal System and the World Trade Diplomacy*, 2nd ed., (New Hampshire: Butterworth Legal Publishers, 1990); Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, (New Hampshire: Butterworth Legal Publishers, 1993)

representatives, a panel of three to five experts acting as individuals started presiding over the disputes. This "development constituted a shift from the negotiating atmosphere of multilateral diplomacy to a more arbitrational or judicial procedure designed to arrive impartially at the truth of the facts and the best interpretation of the law".[23] The report prepared by this 'panel' of five independent experts were to be adopted by the CONTRACTING PARTIES (usually acting through the GATT Council). In GATT practice the report adopted by the Contracting Parties was considered as a 'ruling' and authoritative determination of the existing GATT rights and obligations of the disputants in the instant case. All 'rulings' by the Contracting Parties were to be based on the 'positive' consensus principle (which meant a single negative vote, even if it was of the defendant contracting party, resulted in non-adoption of the report). The procedure was followed in almost all subsequent GATT disputes, till it was replaced by the WTO Dispute Settlement System (WTO DSS) in 1995.

III.2. Compliance and Enforcement in the GATT Era

GATT was considered as one of the most successful international organizations. This was true in the case of settling disputes as well. Of the 230 complaints filed under the GATT dispute settlement system, 88 percent of the cases got settled successfully. Except during the 1960's, the GATT was fairly active in settling trade disputes.

III.2.1. *A Successful Beginning*

In the initial days, when GATT remained a fairly small and cohesive organization, most of the member countries basically shared the same trade policy goals of lowering barriers in international trade. This like-mindedness for a common objective influenced the result of the dispute settlement considerably. Till 1959, GATT entertained 53 complaints (one of the busy period for GATT dispute settlement). The resultant rulings of the GATT were concluded in more

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[23] n. 15, p. 181.

diplomatic language and were legally vague. But the compliance rate of these vague legal rulings was rather high.[24]

III.2.2. *The Nadir of GATT Dispute Settlement*

The 1960's saw a major change in the GATT membership. The number of developing country members expanded three fold, shifting the balance between the developed and developing countries.[25] This period also experienced a dramatic reduction in the number of disputes. After having processed 59 claims up to mid-1963, GATT adjudication system simply vanished. No formal legal claim at all was filed from 1963 to 1969. One major reason was the changed legal attitude of US, which was the largest user of the GATT dispute settlement system, adopting a 'non-legalistic' stand by taking side with the European Communities (EC).[26] One of the main reasons for this joint US-EC "anti-legalism", a view that rejected legal claims as a nonrestrictive way to solve trade problems, was to resist the excessive legal demands by the developing countries bloc. The developing country bloc demanded a far more rigorous enforcement against a broad range of practices. They also proposed adding sterner sanctions for the developing country complaints, in particular things like money damages and collective trade sanctions.[27]

This period also signified the emergence of a political need to take strong legal action in GATT, which became the driving period for a stronger GATT dispute settlement system. Other than the Uruguay's *Recourse to Article XXIII*[28] case, which exposed the position of the developing country in the GATT dispute settlement system, the remaining four cases in this period were filed by the US. In two of the cases, the US explicitly resorted to threats of retaliation.[29] The most

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24 n. 9, p. 13

25 The developed – developing country ratio increased from 21:16 in 1960 to 25:52 in 1970

26 n. 9, p. 13

27 Developing countries proposal of 1966, GATT BISD 14th Supp.18, pp.139-40, n.9,p. 34.

28 GATT BISD 13th Supp., (1965), n.9, p.31

29 *France – Import Restrictions (Phase I)*, complaint no.56 and *Italy – Import Restrictions*, complaint no.57, n. 9, p. 33

highlighted was the case popularly known as the "Chicken War", which arose from a proposed act of retaliation by the US against the EC.[30] Here the US demonstrated its first case of retaliation.

III.2.3. *The Re-emergence*

The 1970's were a period of rebuilding, under the pressure of the United States, which abandoned its antilegalist posture when political developments at home created a need for stronger enforcement of US trade agreement rights. This culminated in the 1979 Tokyo Round reforms. The new Tokyo Round "MTN Codes" provided for stronger dispute settlement procedure to make them credible, and each code contained its own, somewhat advanced dispute settlement procedure for this purpose. The GATT's general dispute settlement procedure was overhauled and restated at the same time.[31] Again, no major improvement of enforcement provisions was made.

This decade also experienced the reversal in the EC antilegalist position. The EC filed a case charging that the US Domestic International Sales Corporation (DISC) legislation[32] was granting illegal export subsidies, which was GATT inconsistent. The US replied by filing three counter complaints charging that the if the DISC was a export subsidy, so were the 'territoriality' principles followed in the tax laws of France, Belgium and the Netherlands. This case proved to the lengthiest and the most complicated dispute in GATT legal history (lasted for 12 years), and exposed the ineffectiveness of the enforcement mechanism in the GATT.[33] This case together with other similar cases, which

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30 The Chicken War arose from a proposed act of retaliation by the US against the EC. The EC had withdrawn pre-1957 German tariff bindings on poultry to raise as high as necessary to protect price-supported EC poultry. In protect the US retaliated by withdrawing tariff bindings on an equivalent volume of EC products. This created great tension between the US and the EC, which ultimately ended by agreeing to submit the dispute to a GATT panel, which chose a compromise figure that both parties accepted.

31 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, 29 November.. 1979.

32 GATT BISD (1971), n. 9, p.59-99

33 *See* John H. Jackson, "The Jurisprudence of International Trade: The DISC Case in GATT," *American Journal of International Law*, vol.72, no.4, 1978, pp. 747-782.

failed to attain the desired result, strengthened the demands of the US domestic lobby for an alternative means to enforce US interests.

III.2.4. *The Aggressive U.S. Unilateralism*

The GATT adjudication, which had gone in to abeyance, had started regaining it lost position by the 1970's. The GATT legal system started getting more importance. Propelled by the impetus of the Tokyo Round reforms, the GATT litigation experienced a far higher level of activity and accomplishment than ever before. 115 legal complaints came before the GATT in the 1980's, of which 47 produced legal reports by panels, more than in all the previous peak period of the 1950's.[34] This increase in confidence of the governments in the GATT dispute settlement led to more difficult and highly sensitive legal issues being submitted for GATT adjudication. The increasing ambitions of the legal system eventually brought an increased number of failures. The member countries started using veto power under consensus decision-making practice to block creation of panels, adoption of adverse panel reports and retaliation requests.

This emerging compliance and enforcement problem in the GATT adjudication lead to great apprehension about the credibility and future of the system. The first to react to this increasing negative trend was the US, which had always argued for a strong enforcement regime. In the US, there has been a growing view that the GATT-law was not effectively protecting its national interest. The solution, which the US Congress opted for, was "unilateralism". The "policy involved making demands bilaterally upon governments who maintained illegal or 'unreasonable' restrictions, and demanding corrections under the threat of retaliation, often GATT-illegal retaliation."[35] The results was the new "Section 301" procedure allowing the private interests to file complaints with

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34 n. 9, p. 14.
35 Ibid.

the U.S. Trade Representative (USTR) about GATT violations of other countries.[36]

The Section 301, in US language, was an instant success. It became an effective tool for enforcing trade obligations of other countries, inside and outside the GATT legal system. The US either threatened or actually imposed trade retaliation in several disputes[37] and the GATT was never able to do much about it. In fact, the tools available with GATT legal system were simply not sufficient to deal with this outbreak of US lawlessness.[38] The main target of this lawlessness was the EC, who on its part was notorious for blocking the dispute settlement process.

The GATT dispute settlement system, it was felt, would not stand up very well to the legal battle between the US and the EC. The 1982 GATT Ministerial Conference recognized both side of the dispute settlement controversy – "the U.S. concerns about EC obstruction of the process *and* the EC concerns about US abuse of the process."[39] The Declaration came up with ten recommendations, the final one called directly for a more serious follow-up procedure for rulings of violation, including specific reference to authorize retaliation. But the recommendations reaffirmed the consensus principle on all matters, including the adoption of the rulings and the authorization of retaliation, thereby not changing the earlier position.

36 Trade Act of 1974, 19 USC 2411; *See generally*, C. O'Neal Taylor, The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System, *Vanderbilt Journal of Transnational Law*, vol.30, 1997, pp.209-348; and Judith H. Bello and Alan F Holmer, "US Trade Law and Policy Series No.2: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301", *The International Lawyer*, vol.26, no.2-4, 1992, pp.795-803.

37 Some of the cases are: *EC - Wheat Flour Subsidies, EC- Citrus and Pasta, Japan - Semiconductors, EC - Enlargement Spain & Portugal, Brazil - Pharmaceuticals and EC - Hormone.*

38 The GATT held several debates on the US Section 301 policy, but with not material outcome, n. 9, p. 197.

39 *Ministerial Declaration*, 38th Session, GATT BISD, 29th Supp. (1983), p. 10, n. 9, p. 166.

III.3. The Developing Countries and the GATT Dispute Settlement

The developing country bloc has always been at the receiving end of the GATT dispute settlement system. From the very beginning the developing countries has been demanding reform in the GATT dispute settlement system. But the GATT Contracting Parties never properly addressed their concerns.

Some of the major concerns of the developing countries were firstly, the long time needed to resolve disputes, which affected the developing contracting party more than a developed contracting party. Secondly, the developing countries found that if they tried to make a claim against a developed country, this could lead to a reduction of their benefits either under the Generalized System of Preferences (GSP),[40] or through other retaliatory methods.[41] Moreover, the developed countries could always obstruct panel proceedings or block eventual findings relative to a small country without much consequence. Thirdly, the developing countries felt that instead of developed country compliance with the term of a panel decision, the developing countries could be forced to agree to voluntary export restraints[42] or other non-GATT measures sought by larger members. And finally, the developing countries felt that they would not be possible to effectively retaliate against larger countries after a favorable

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40 The GSP is a programme of non-reciprocal tariff preferences to developing countries. Initiated under the auspices of the UN Conference on Trade and Development (UNCTAD), the United States and nine other developed countries established GSP programmes in the 1970's under a waiver of GATT MFN obligations granted in 1971 and made permanent by one of the Framework Agreements in 1979. *See* generally P. Nicolaides, "Preference for the Developing Countries: A Critique," *Journal of World Trade*, vol. 19, no.4, 1985, p.387.

41 There were two instances where complaints to counter retaliatory actions in the GATT was taken. Both were initiated by Brazil against the US use of Section 301 in *Informatics Disputes* and *Pharmaceutical Retaliation. See* Pretty Elizabeth Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism," *Journal of World Trade*, 1997, vol.31, no.6, pp.171-205, at p.200

42 Voluntary export restraints (VERs) are a sub-set of export restraint arraignments designed to restrain exports from one country to another in response to protectionist pressures from the government or an industry in the importing country in the 1980's. *See,* Kofi Oteng Kufuor, "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes", *Journal of World Trade*, vol. 31, no.5, 1997, pp.117-145 at footnote no.16.

determination of a complaint if the larger loser refused to abide with the terms of the outcome. Moreover, the developing countries did not utilize the 1947 GATT dispute settlement system because of the underlying ideological division among themselves.[43]

Though the developing countries had initiated complaints in the GATT dispute settlement, their participation was limited to low profile cases.[44] One such case filed by Uruguay in the 1960's revealed the developing countries position in the GATT adjudication process. In Uruguay's *Recourse to Article XXIII*[45] case, Uruguay complained against 15 developed countries listing every trade restriction affecting Uruguayan export. The complaint brought to light the main contentious issues in the GATT legal system, as far as developing countries were concerned. The first was the demand of the developing countries for a better level of compliance by developed countries. The second was the improved level of compliance in agriculture in particular, and third the EC Common Agricultural Policy (CAP), which had a damaging effect on the developing countries trade. The panel refused to take a serious look at the dispute and issued a series of recommendations calling to remove only those GATT violations admitted by some of the defendants. Further, the panel refused to decide on the EC CAP, stating that prior debates by the Contracting Parties on this issue had ended in impasse. Another dispute, *Nicaragua v. US*,[46] a case initiated by Nicaragua demonstrated the difficulties of weaker country members in forcing economically powerful countries to comply with GATT decision, in spite of the fact that

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43 *See* Report of the United States International Trade Commission, *Review of the Effectiveness of the of Trade Dispute Settlement under the GATT and the Tokyo Round Agreement*, 1985, *as cited in*, Kofi Oteng Kufuor, "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes", *Journal of World Trade*, vol. 31, no.5, 1997, pp.117-145 at p.119.

44 From 1948 to 1966 the developing countries initiated ten complaints, which is almost 20 percent of the cases.

45 GATT BISD 13th Supp., (1965), n. 9, p. 31

46 GATT BISD 31st Supp., (1984) 67

majority of the contracting parties supported the adoption of the report which was in Nicaragua's favour.[47]

This decision marked the end of developing countries engagement with GATT adjudication process. The increased numerical strength in the GATT and the genuine need for reform lead the developing countries to put forward proposals for reforms in the GATT dispute settlement system in 1965[48] and 1977. The 1965 proposal was put up by Brazil and Uruguay aimed at reforming the GATT Article XXIII procedure in the interests of the developing countries. More specifically, the proposal suggested the need for stronger remedies, including financial compensation in the case of wrongful actions by developed countries against the developing countries. The 1966 Procedures under Article XXIII applying to disputes between a developing country contracting party and developed country contracting party, did not adopt these proposals. But the 1966 Procedure provided that in the case of failure to implement the rulings by a developed country member, the CONTRACTING PARTIES should consider other appropriate remedial measures.[49]

The 1977 proposal, tabled by the Brazilian delegation in the Framework Group aimed specifically at strengthening the dispute settlement procedures available to the developing countries. This proposal sought to reintroduce the additional demands that has been rejected in 1966,[50] chiefly, more active, prosecutorial role for the GATT Secretariat, and stronger remedies for developing country complaints, such as collective retaliation or money damages. The developed countries never seriously considered all these demands of the developing countries.

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47 *See* Pretty Elizabeth Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism," *Journal of World Trade*, vol. 31, no. 6, 1997, pp.171-205, at p. 176

48 Proposal for the improvement of GATT dispute settlement in the interest of developing countries, put up by Brazil and Uruguay.

49 *Decision on Procedure under Article XXIII* applying to disputes between a developing country contracting party and developed country contracting party, BISD 14th Supp., (1966), p. 18 at para.10.

50 GATT, BISD (14th Supp.18), pp.139-140 (1966), *as cited in* n. 9, p. 42

The 1980's once again saw the emergence of developing countries as complainants.[51] This renewed confidence of the developing countries was due to the adoption of revised procedures in the earlier stages of the dispute settlement like the time limits in the dispute resolution process, right to establish panel, etc. But when it came to implementation of adverse rulings, the developing countries were again at the receiving end.

III.4. Suspension of Concessions and Retaliation under 1947 GATT

The provision for retaliation under the 1947 GATT was provided at the end of Article XXIII: 2 and is modeled on the Havana Charter.[52] If the Panel found that the measure in dispute was inconsistent with any of the obligation under the GATT Agreement, it would recommend that inconsistent measures be brought in conformity. Upon adoption of the report by the GATT Contracting Parties on a consensus basis, the recommendations gets the legal backing of GATT, and was ready for implementation. If the defendant contracting party failed to implement this adopted report within a reasonable period of time[53], the 1947 GATT Article XXIII: 2 provided that:

> If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances.

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51 28 of the 117 i.e., 25 percent of the complaints were initiated by the developing countries.

52 The Havana Charter provided for power to authorize retaliation. This provision provided for suspension of obligation which is "appropriate and compensatory" and the Working Party provide for a interpretative paragraph, stating more clearly that the words meant "no more then compensatory", *See* Robert E. Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 2000).

53 Paragraph 22 of the *1979 Understanding* indicates that recommendations by the CONTRACTING PARTIES under Article XXIII:2 are to be implemented "within a reasonable period of time". This obligation has been referred to as "customary GATT practice." This was further clarified in the *1989 Improvement*, providing the prompt compliance with the report is preferred. For details see *Guide to GATT Law and Practice*, vol. 2 (Geneva, 1995), p.684.

The main object of this Article has been stated by one of the drafters as follows: "what we have really provided... is not the retaliation shall be invited or sanctions invoked, but that a balance of interest, once established, shall be maintained."[54] This provision was supplemented by the 'customary' GATT dispute settlement practice described in the 1979 Understanding,[55] agreed in the Tokyo Round. It provided that:

> The last resort which Article XXIII provides to the country invoking this procedure is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, subject to authorization by the CONTRACTING PARTIES. Such action has only rarely been contemplated and cases taken under Article XXIII:2 have led to such action on only one case.[56]

The rationale behind the constitution of this Article XXIII:2 has been clarified in the drafting history of this article which confirms that it was designed to limit the customary law right of unilateral reprisals, whose exercise has contributed so much to the "law of the jungle" in international economic affairs during the 1930's. This Article was correctly introduced by one of the drafter as "a new principle in international economic relations. We have asked the nations of the world to confer upon an international organization the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavored to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order."[57]

As analyzed above, the compliance with the recommendations or the rulings were relatively high in GATT. This is in spite of the problem of 'blockage" of the process at various stages by the respondent member. There was

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54 UN document EPCT/A/PV/6 (1947), at p. 5, *as cited in* n.7, p.1186.

55 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* of 29 November 1979, adopted in the Tokyo Round, *Guide to GATT Law and Practice*, vol. 2, (Geneva: WTO, 1995), p. 632.

56 *Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement* (Article XXIII:2), Annex to *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* of 29 November 1979, adopted in the Tokyo Round, vol. 2, *Guide to GATT Law and Practice* (Geneva: WTO, 1995), p. 635, para. 4.

57 UN Document EPCT/A/PV/6 (1947), at p. 4, n. 7, p. 1184.

only one case in the entire history of GATT where the Contracting Parties authorized suspension of concession. This dispute involved a complaint brought by the Netherlands against the United States alleging a GATT-inconsistent import restraint imposed by the US on dairy products imported from the Netherlands.[58] The Netherlands was authorized to retaliate by imposing restraints on importation of wheat flour from the US.[59] The Netherlands never acted upon this authorization, because, it was felt that the enforcement of quota would hurt the Netherlands itself as much as the US.

But it should be noted that in number of cases, the respondent member had either blocked the adoption of the panel report or the request for authorization for retaliation. Moreover, the US has been using extra-GATT methods to get its rights implemented.[60] It is also interesting to note that all the non-compliance with panel report in the GATT era came from the developed countries. The chief defaulters were the US followed by EC and Canada. One thing that emerges from the analysis is that because of the ineffectiveness of the enforcement mechanism and the veto power available with the members, not many cases reached the retaliation stage.

III.5. The Summary of GATT era

The GATT dispute settlement was said to be a successful international adjudicatory system. But, this success was 'relative'. When a comparison is made between dispute settlement experiences in other international bodies with the GATT dispute settlement system, one may say that it was a success. And, this "success" again is qualified by many other factors inside and outside the GATT legal system.

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58 *Netherlands -- Measures of Suspension of Obligation to the United States*, November 8, 1952, GATT BISD (1st Supp.), p. 32 (1953), *as cited in* n.21, p. 182

59 Interestingly, both the United States and the Netherlands abstained from voting in the decision of the Contracting Parties, which authorized the suspension of concession.

60 *See* 'US Aggressive Unilateralism' at p. 20.

The GATT dispute settlement was one of the highly politicized adjudicatory mechanisms. The power play between the US and the EC dominated the entire GATT legal history. The US and the EC shared the maximum number of disputes between them, and has been either a complainant or respondent in two-third of the total cases that came for GATT adjudication. Moreover, there was always the problem of 'positive consensus', which meant that the respondent could block the establishment of the Panel, adoption of the Panel report and authorization for retaliation. This discouraged countries to come to the GATT adjudication process in the first place. They tried to settle the dispute outside the GATT legal system, thereby taking away a large chunk of cases away from the system. In fact, even the so called 'success story' was the result of the geo-political situation of the countries, rather than the effectiveness of the GATT dispute settlement.

The developing countries, on the other hand, had relatively no role in the GATT dispute settlement. They were marginalized either by the panel or the respondent country. This biased attitude of the panel can be seen when one examines the dispute involving a developing country against a developed country member. Hudec[61] has rightly identified this biased situation of the GATT adjudicatory mechanism. The developing countries problems were never addressed to with seriousness. The very "customary" practice of consensus in decision-making process (while the GATT system provided for two-third majority) in the GATT legal system was a scheme against the numerically large developing countries from interfering in the "smooth" working of the system. In short, the GATT adjudication process worked more in the interest of the stronger than the weak. It was a power-based system where the powerful trading partners decided outcome.

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61 n. 9.

IV. The Uruguay Round: A Rethinking on Compliance and Enforcement

The Uruguay Round was the lengthiest and the most comprehensive round ever in the history of GATT. It not only consolidated the earlier GATT Agreements on goods, but also expanded itself into new areas like trade in services, persons, trade related investment and intellectual property rights. For the administration and implementation of all these agreements a new international organization, the World Trade Organization (WTO), was established. The US, the compelling force behind the new round, proposed a strong enforcement mechanism, to implement the old and new obligations imposed on the GATT member countries. The EC, on the other hand, supported this proposal, but for a different reason. The inability to check growing GATT illegal 'unilateralism' prompted the EC to seek a stronger enforcement mechanism, which prohibits unilateralism and require a multilateral authorization of sanction. The developing countries, again, were never consulted. Except for some procedural concessions, their repeated demand for collective enforcement and money compensation was not heeded to.

The Uruguay Round Dispute Settlement Understanding (DSU) absorbs and consolidates all the earlier GATT agreements on dispute settlement, such as the 1979 Tokyo Round Understanding with its Agreed Description of Customary Practice, the 1982 Ministerial Declaration, the 1984 agreement on panel selection, and the procedural reform adopted in the 1988 Montreal Midterm. But the DSU went beyond what negotiators had believed possible just the year before. It unified the dispute settlement system for all parts of the WTO system, established a unique new appellate procedure, and more importantly, eliminated veto power that parties had enjoyed under the principle of consensus decision-making. On each of the key block points, i.e., creation of the panel, adoption of the panel report and Council authorization of retaliation, the new DSU provided for a negative consensus principle. Moreover, it provided for an elaborate and automatic compliance and enforcement mechanism.

A detailed examination of the WTO DSU, with special emphasis on it compliance and enforcement provision is undertaken below.

V. The World Trade Organization Legal System

The World Trade Organization, an institution entrusted with the task of regulating international trade, provides for a framework agreement and code of conduct, setting out the basic rights and duties for the policies of its member countries. Other than trade in goods, it provides a new legal regime for trade in services (GATS), person, trade related investment (TRIMs), and intellectual property rights (TRIPS). The WTO Agreement provides for a 'single undertaking approach'[62] which aims "to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade (GATT 1994), the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations."[63] Thus, the WTO provides for a common institutional framework for the conduct of trade relations among it member states, and facilitates the implementation, administration and operation of all this agreements.[64]

An effective implementation of all these Agreements requires a strong enforcement mechanism as well. The WTO provides for an "Understanding on the Rules and Procedures Governing the Settlement of Disputes" (DSU or "Understanding"), which is distinct from other Agreements. The rules and procedures of the DSU provides for the modalities of dispute settlement among Members of the WTO under any covered agreement, including the DSU.

The WTO DSU is considered to be the most fundamental outcome of the Uruguay Round of Trade Negotiations. By emphasizing 'adjudication' along with

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62 This means that, a State ratifying WTO Agreement should ratify it as a whole, without reservations.

63 Preamble, *Marrakesh Agreement Establishing the World Trade Organization*, 1995 (Marrakesh Agreement); By this the WTO Agreement integrates the 30 Uruguay Round Agreements and about 200 previous GATT Agreements onto one single legal framework.

64 Article III, *Marrakesh Agreement Establishing the WTO.*

'negotiation' (The GATT 1947 model), the WTO DSU expects to provide a more legalistic, time bound, predictable, consistent and binding system. The WTO dispute settlement mechanism has been in action for seven years and has, in this process, revealed problems and inequities in its actual working. This study seeks to address certain issues in the procedural and substantive working of the compliance and enforcement mechanisms of the WTO dispute settlement system, with special emphasis on the problems faced by developing countries.

V.1. The Dispute Settlement Understanding

Article II:2 of the WTO Agreement states that the "Understanding on Rules and Procedures Governing the Settlement of Disputes" in Annex 2 is an integral part of this Agreement, binding on all Members."[65] It shall apply to all disputes brought pursuant to the consultation and dispute settlement provisions of the 'covered agreements',[66] and shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the Marrakesh Agreement and of this Understanding taken in isolation or in combination with any covered agreement.[67] The rules and procedures of the Understanding are subjected to the special or additional rules or procedures[68] on disputes settlement contained in covered agreements, which shall prevail to the extent of the difference between them.[69] Moreover, in a dispute between the WTO members concerning their rights and obligations under the WTO Agreement and under the DSU, such as the dispute over compliance, the

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65 Article II:2, *Marrakesh Agreement Establishing the WTO.*

66 In *Brazil – Desiccated Coconut*, the Appellate Body held: "The 'covered agreements' include the *WTO Agreement*, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the DSU. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding." WT/D30/AB, para. 13.

67 Article 1, *Understanding of Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as* DSU), Annex 2, *Marrakesh Agreement Establishing the WTO.*

68 Listed as Appendix 2 to the DSU

69 Some the special disputes settlement provision relevant for this study are: Article 11.2, *Agreement on the Application of Sanitary and Phytosanitary Measures*, Article 17.4 to 17.7, *Agreement on Implementation of Article VII of GATT 1994 (Anti-Dumping Agreement)* and Articles 4.2 to 4.12, 6.6, 7.2 to 7.10, 8.5, footnote 35, 24.4, 27.7 and Annex V, *Agreement on Subsidies and Countervailing Measures.*

members are obliged to "have recourse to and abide by, the rules and procedures of this Understanding" and shall not make a unilateral determination to that effect."[70]

The DSU provides for a Dispute Settlement Body (DSB) for purpose of administering the rules and procedures of dispute settlement.[71] The membership of the DSB is essentially the same as the General Council, which is the WTO's overall supervising body. The DSB shall have the authority to establish the Panel; adopt Panel and Appellate Body reports; maintain surveillance of implementation of rulings and recommendations; and authorize suspension of concession and other obligations under the covered agreements.[72] The DSU provides for a hierarchy of quasi-judicial bodies for the adjudication of disputes. There shall be a Panel, and a standing Appellate Body (AB). The AB shall consist of seven members, three of whom shall serve in one case.[73] The AB is to hear appeals from panel cases, but the appeal is to be limited to the issue of law and legal interpretations developed by the panel.[74]

V.1.1. *Object of WTO DSU*

The primary objective of the WTO dispute settlement system is to ensure "security and predictability" to the multilateral trading system.[75] It serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rule of interpretation of public international law.[76]

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70 Article 23, DSU
71 Article 2, DSU
72 Ibid.
73 Article 17.1, DSU
74 Article 17.4, DSU
75 Article 3.2, DSU
76 In *US – Section 301*, the Panel while examining the consistency of Section 301 under Article 23 of the DSU, stated: "Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions

The WTO dispute settlement system is to provide "prompt settlement of situations" in which a Member considers that any benefit accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.[77] This is essential to the effective functioning of the WTO and the maintenance of a proper balance between the right and obligations of Members. It is this objective that the recommendations or rulings of the DSB intents to achieve.

V.1.2. *Locus Standi*

All WTO members can take automatic recourse to this dispute settlement system, unless rejected by consensus in the DSB. A WTO member can approach the dispute settlement system if there is *prima facie* "nullification or impairment"[78] of their rights accruing directly or indirectly under of any of the WTO covered agreement.[79] This situation covers "violation", 'non-violation" and "situation" complaints. The *locus standi* of the States parties to the WTO is much wider than that is available in public international law. In public international law, a State can approach an international adjudicatory forum, only when it can prove a legal interest. But under the WTO, a Member is only required to show 'substantial trade interest' for proceeding under the DSU. This was confirmed by the Panel in *EC - Bananas* case and reiterated by the AB on appeal. In this case the US was neither a significant producer of bananas nor it exported any to the EC. The AB while upholding the Panel report held that:

> We agree with the panel report that 'neither Article 3(3) not 3(7) of the DSU nor any other provision of the DSU contain any explicit

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must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it." *US – Section 301*, Report of the Panel, WT/DS39, para. 7.75.

77 Article 3.3, DSU

78 This means that there is normally a presumption that a breach of the rules has a adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Members against whom the complaint has been brought to rebut the charge, i.e., the burden of proof is on the respondent.

79 *See* Article 3.8, DSU; the Uruguay's *Recourse to Article XXIII* case, GATT BISD (1965); *DISC- United States Tax Legislation*, 12 November 1976, GATT BISD (23rd Supp.), (1977), p. 98

> requirement that a Member must have a legal interest as a prerequisite for requesting a panel'. We do not accept that the need for a legal interest is implied in the DSU or in any other provision of the WTO Agreement.[80]

The Panel again in this case, while considering interest of the US in the context of determination of level of suspension of concession according to Article 22.6 arbitration, held that a legal interest in invoking the WTO dispute settlement process does not necessarily entail the remedy of retaliation. It observed:

> A member's legal interest in compliance by other member does not automatically imply that it is entitled to obtain authorization to suspend concession under Article 22 of the DSU.[81]

Thus, a WTO member who has "substantial trade interest" can invoke the WTO adjudication process almost automatically. In other words, the WTO Panel has compulsory jurisdiction over all WTO matters. This 'substantial trade interest', as clarified by the panel, does not automatically result in authorization for retaliation, if there is non-compliance.

V.1.3. *Remedies under the DSU*

The WTO DSU has introduced a new article, Article 19, which specifically addresses the issue of remedies to be recommended by the WTO adjudicatory body. Article 19.1 provides that:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, *it shall recommend that the Member concerned bring the measure into conformity with that agreement.* In addition to its recommendations, the panel or Appellate Body may *suggest* ways in which the Member concerned could implement the recommendations.[82] (Emphasis added)

This Article obligates the WTO panel/AB to recommend that the Member whose measures have been found not to be in conformity with the relevant WTO rules bring its measure in to compliance with their international obligation. This Article

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80 *EC – Regime for the Importation, Sale and Distribution of Bananas,* Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, at para. 132.

81 Ibid. WT/DS27/ARB, para. 6.10.

82 Article 19.1, DSU

also gives the panel/AB, the opportunity to "suggest" ways in which the Member concerned could bring their measures into compliance with their international obligations.[83]

It is only the recommendation of the panel/AB that is binding upon the parties to the disputes. "Suggestions", on the other hand, are not binding on the parties.[84] They may or may not implement the suggestions.[85] For any attempt to make the suggestions binding would be too much of an intrusion on the national sovereignty. The only recommendation the panel/AB can provide as per the Article 19.1 is 'withdrawal of the inconsistent measure', which forms the ultimate remedy available to the complainant, thereby giving ample discretion on the losing parties to choose the appropriate remedy. This remedy again is *ex nunc* (prospective) in nature.

This means that the remedy is prospective in nature and would not have a retrospective effect, as in the case of public international law.[86] But the Panel in *Australian – Leather* case came to a different conclusion while examining the consistency of the measure taken by Australia in the Agreement on Subsidies and Countervailing Measures (SCM). The panel observed, differing interestingly from the argument advanced by both the complainant (US) and the respondent (Australia), that:

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83 Pertos C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *European Journal of International Law*, vol. 11, no.4, 2000, pp.763-813, at p. 778.

84 *United States – Anti-Dumping Act Of 1916*, Report of the 21.3 Arbitrator, WT/DS136/11, WT/DS162/14, para. 35; for a detailed study on the binding nature of recommendations and suggestions of the panel/AB, *See* n. 64.

85 In *Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico*, the Panel held that "Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member", WT/DS60/R, 19 June 1998, para. 8.2; This does not necessarily mean that there is no value for the panel/AB suggestions. Compliance in accordance with the suggestions may create an irrebuttable presumption of compliance with the panel's decisions.

86 *See* Article 34 –38, *International Law Commission Draft on State Responsibility*, in James Crawford, Jacqueline Peel, Simon Olleson, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading", *European Journal of International Law*, vol. 12, no. 5, 2001, pp. 963-991

> However, we do not believe that Article 19(1) of the DSU, even in conjunction with Article 3(7) of the DSU, requires the limitation of the 'specific remedy provided for in Article 4(7) of the SCM Agreement to purely prospective action.[87]

The panel report was not appealed. This panel report thus did not rule out the possibility of retrospective remedy from the WTO jurisprudence, at least in the specific circumstance such as the Subsidies and Countervailing Measures (SCM) and Anti-Dumping Agreement (ADA). A pure prospective remedy hardly has the deterrent effect against potential violators and a retrospective remedy in appropriate context would provide a "curative" remedy as in the public international law.

V.2. *The Developing Countries and the DSU*

The developing country members, as noted above, were only limited users of the 1947 GATT dispute settlement system. The gradual shift from the power based to the rule based system by the late 1980's has imbibed in the developing countries increased confidence in the dispute settlement system. The developing countries preferred a rule-oriented system, which it was thought would guarantee a level playing ground in the international trading relations. Moreover, the coming into existence of enforcement mechanisms in the present DSU was a leap forward towards ensuring the adjudicative nature of the WTO Dispute Settlement Mechanism (WTO DSM) and thereby making it more attractive to developing countries. This was one of the main reasons behind the developing countries supported the new dispute settlement in the Uruguay Round. Here again it failed, like in the 1947 GATT era, to obtain a stronger enforcement mechanism for the developing countries.

The WTO DSU is postulated on the equality of the parties to the dispute. The idea of 'special and differential treatment' for the developing countries is of limited scope in the DSU. There are only seven Articles, which reflect the concerns

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87 *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Report of the 21.5 Panel, WT/DS126/RW, 21 January 2000.

of the developing countries in the WTO DSU.[88] Article 4.1 provides in abstract terms that special attention should be given to the particular problems of the developing country members at the time of consultation. Article 8.10 deals with the appointment of panelists. It provides that whenever there is a dispute between a developed and developing country, the Panel shall, if the developing country so requests, include a panelist from a developing country. Article 12.10 provides for procedural concession, which states that in case of request from a developing country, the Chairman the DSB or the Panel has the authority to extend the period of consultation. Apart from this, Article 24 provides a special provision for the least developed countries (LDC). In addition, whenever the developing countries bring a complaint against a developed country member they have the right to invoke the 1966 Procedure.[89]

Most of the articles that provide 'special and differential treatment' are only procedural concessions in favor of the developing countries. The remaining are not of much significance in ameliorating the concerns of the developing countries, because it is the discretion of the panel/AB to interpret as to what it really means. For example, in the case of *Korea - Alcoholic Beverages*, Korea claimed in its appeal that the Panel failed to comply with its obligations under Article 12.7 of the DSU to state the basic rationale behind its findings and recommendations, the Appellate Body found:

> In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic

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88 The Article which provides "special and differential" treatment for developing countries are Articles 4.10, 8.10, 12.10, 12.11, 21.2, 21.7 and 21.8, DSU

89 Article 3.12, DSU

> rationale for its findings and recommendations as required by Article 12.7 of the DSU.[90]

Article 12.11 requires the panel to explicitly provide in the panel report, "... the form in which account has been taken of relevant provisions on differential and most-favored treatment for developing country members that form part of the covered agreements... ."[91] This provision does not generally obligate the panel to interpret the WTO agreement in such a way as to promote a compensatory policy towards the developing countries.[92]

The panel again while interpreting the term "particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement" in Article 22.2 exposed the indeterminacy of the these 'special and differential treatment' provisions. The arbitrator in *Indonesia – Autos (21.3 Arbitration Report)*, while taking into account Indonesia's status as a developing country in determining the "reasonable period of time" stated that:

> Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here.[93]

Thus, the Arbitrator limited the scope of Article 21.3. The arbitrator was lenient enough to give six months additional period of time for implementation because of the "near collapse" of the Indonesian economy. Again in *Chile – Alcoholic Beverages (21.3 Arbitration Report)*, the Arbitrator stated:

> It is not necessary to assume that the operation of Article 21.2 will essentially result in the application of 'criteria' for the determination of 'the reasonable period of time' – understood as the *kinds* of considerations that may be taken into account – that would be

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90 *Korea – Alcoholic Beverages*, Report of the AB, para. 168. *See also Chile – Alcoholic Beverages*, Report of the AB, para. 78; *Argentina – Footwear (EC)*, Report of the AB, para.149

91 Article 12 (11), DSU

92 A. Jayagovind, "The Dispute Settlement Understanding: A Critique", *Indian Journal of International Law*, vol. 41, no.3, 2001, pp.418-434, at p.421.

93 *Indonesia – Autos*, Report of the Article 21.3 Arbitrator, para. 24.

> 'qualitatively' different for developed and for developing country Members. I do not believe Chile is making such an assumption. Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB.[94]

In short, all the substantive "special and differential treatment" provisions are soft law and will be determined by the panel at their discretion. And till date the panel did not get the opportunity to interpret Article 24, which specifically deals with the problems and interest of the Least Developed Countries (LDC) in the WTO legal system.

V.3. *The WTO Dispute Settlement Process*

V.3.1. *Consultation Stage*

The WTO dispute settlement process commences with a request by one or more member countries for a consultation, which is a prerequisite before the request for a panel.[95] It is the responsibility of the complainant and the respondent members to consult on the matter of dispute, and the WTO Secretariat shall provide no support. The only requirement is that the consultation shall be notified to the DSB. The defendant member should respond to the request for consultation within 10 days after the date of the receipt and shall enter into consultation in good faith. Consultation shall be confidential.[96] If no response is given after 10 days of receipt of notice, or does not enter into consultations within 30 days, the complainant member can directly request the

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94 *Chile – Alcoholic Beverages*, Report of the Article 21.3 Arbitrator, para. 45.

95 Article 4, DSU

96 In *Korea – Alcoholic Beverages*, the Panel held that the information acquired during consultations could subsequently be used by any party in the ensuing proceedings, WT/DS75, para. 10.23.

DSB for the establishment of a panel.[97] The DSB shall establish the panel, unless it is rejected by consensus.[98]

V.3.2. *The Panel/AB Stage*

The Panel shall compose governmental and/or non-governmental individuals with long standing in international trade law and policy. Ideally, the panelists shall be selected from the roster maintained by the WTO Secretariat, on a consensus basis by the parties to the dispute. If the parties fail to reach a consensus, the matter is referred to the WTO's Director General, who has the authority to oblige a panel upon the parties.[99] In majority of the cases recourse to the Director General's decision has been necessary. The Panel operates upon the terms of reference and if this is not provided, the standard terms of reference are used.[100] The parties shall make their submissions within the time limit set by the panel. The panel after hearing both the parties would "make an objective assessment of the matter before it... and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[101] The panel shall issue an interim report and after the comment period on the interim report has expired, the panel completes the final report, which goes to the DSB for adoption.

The reports of the Panel are automatically adopted through a negative consensus principle, unless the report is appealed on issue of law or there is a consensus of the DSB against the adoption of the report.[102] If appealed, the AB goes through the similar proceedings as the Panel and then issues an AB report. This report is sent to the DSB for adoption, which adopts the report, through the "reverse consensus" process. Once the report of the Panel or AB is adopted by

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97 Article 4.3, DSU
98 Article 6.1, DSU
99 Article 8.7, DSU
100 Article 7.1, DSU
101 Article 11, DSU
102 Article 16, DSU

the DSB, it is ready for implementation. A complex procedure is provided for ensuring compliance with and enforcement of the Panel and AB reports.[103]

V.4. Compliance and Enforcement of the Adopted Report: *The Implementation Stage*

Compliance and enforcement of the adverse panel/AB report is the most challenging and important aspect of the entire WTO dispute settlement system. This is because the report in itself is of no value unless the parties to the dispute implement it. The very objective of attaining 'security and predictability' of the entire WTO legal system depends on the compliance and enforcement of these reports. The DSU, for this purpose, provides a rule-based, time-bound procedure, which is enumerated in Article 21 and 22 of the DSU. The most important achievement of the compliance and enforcement procedure is that it provides an automatic remedy of suspension of concession in case of non-compliance, and the determination of whether there is non-compliance and the amount of retaliation is to be made by WTO panel, rather than any national authority. Thus, the DSU explicitly prohibits unilateral sanctions by WTO members.[104]

V.4.1. *Reasonable Period of Time*

The recommendations or rulings of the panel/AB shall be adopted by the DSB, unless there is a consensus against the adoption. The report is ready for implementation once it is adopted by the DSB. In normal cases recommendations are one requiring the losing Member to bring the measure into conformity with the covered agreement.[105] Upon adoption of the report by the DSB, the losing party express its intention to implement the recommendation. The DSU prefers prompt compliance. This intention is expressed in Article 3.3 and Article 21.1 of the DSU, which provides that "prompt compliance with recommendations or

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103 Article 21 and 22 of the DSU deals with this procedure.
104 Article 23, DSU
105 Article 19.1, DSU

rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."

If the implementing Member feels that it is impracticable to comply immediately with the recommendations and rulings, it shall have a 'reasonable period of time' to do so.[106] The Member concerned shall propose the reasonable period of time, provided that such period is approved by the DSB. In the absence of such an approval, the parties to the dispute may enter into negotiation and agree on the reasonable period of time for implementation, within 45 days after the adoption of the recommendations and ruling. If these two procedures do not come through, the reasonable period shall be determined by a binding arbitration within ninety days of adoption of the report.[107] In practice, a member of the Appellate Body acts as 21.3 (c) arbitrator.[108] In *Japan--Alcoholic Beverages (21.3 Arbitration)*, the Arbitrator while determining the reasonable period of time noted that as full review of the matter is not possible within the stipulated time, the deadline for the arbitrator's award was extended by two weeks. The parties gave written assurances that they would nevertheless accept the arbitrator's award as 'binding arbitration' within the meaning of Article 21(3)(c).[109] In *Korea – Alcoholic Beverages (21.3 Arbitration Report)* the arbitrator took the opportunity in defining his mandate.

> My mandate in this arbitration relates exclusively to determining the reasonable period of time for implementation under Article 21.3(c) of the DSU. It is not within my mandate to suggest ways and means to implement the recommendations and rulings of the DSB. Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements. I consider it, therefore, inappropriate to determine whether, and to what extent, amendments to various regulatory

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106 Article 21.3, DSU

107 Article 21.3 (c), DSU (*hereinafter referred to as* '21.3 (c) arbitration.'); If the parties cannot agree upon an arbitrator within ten days, the Director General shall appoint him, after consulting with the parties, footnote 12, DSU.

108 Gabrielle Marceau, "Implementation of the Panel and Appellate Body Reports", *Focus WTO*, vol. 2, no. 6, 2001, pp. 2-13, at p.4

109 *Japan--Alcoholic Beverages*, Report of the Article 21.3 Arbitrator, para. 3.

> instruments are required before the new tax legislation comes into effect.[110]

In determining the reasonable period of time, the Article provides that arbitrators should use fifteen months as standard guideline. However, the period may be shorter or longer depending on the 'particular circumstance', and it is for the parties who claim the shorter or longer period to prove the existence of the 'particular circumstance'. In *EC – Bananas III (21.3 Arbitration)*, the EC requested a period of 15 months and one week based on the complexity and difficulty of amending the existing EC import regime for bananas. The Arbitrator stated that:

> When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'.
>
> The Complaining Parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the 'reasonable period' of time for implementation would expire by 1 January 1999.[111]

There are around seven cases where the 21.3 (c) arbitration has been called for in determining the reasonable period of time.[112] In most of the cases, it was the complainant who invoked this procedure. But in the *Beef - Hormones*[113] and the

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110 *Korea – Alcoholic Beverages*, Report of the Article 21.3 Arbitrator, para. 45. See also on *Canada – Pharmaceutical Patents*, Report of the 21.3 Arbitrator, para. 42.

111 *EC – Bananas III*, Report of the Article 21.3 Arbitrator, paras. 18-20. See also *Australia – Salmon*, Reports of the 21.3 Arbitrator, para. 30; and *Canada – Auto Pact*, para. 39.

112 *Japan – Tax on Alcoholic Beverages*, WT/DS8, 10 and 11; *Indonesia— Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, and 64; *Korea— Taxes on Alcoholic Beverages*, DS75 and 84; *Australia— Measures Affecting the Importation of Salmon*, DS18; *European Communities— Measures Affecting Meat and Meat Products (Hormones)*, DS26 and 48; *European Communities— Regime for the Importation, Sale and Distribution of Bananas*, DS27; and *Chile— Taxes on Alcoholic Beverages*, WT/DS87 and 110.

113 WT/DS26 and 48

Chile - Alcoholic Beverages[114] case, it was the respondents who resorted to this procedure. In three cases[115] involving prohibited subsidy, this procedure was not relevant because the panel has recommended that the subsidizing member "withdraw the subsidy without delay."[116]

V.4.2. *The Compliance Review Procedure*

Compliance review is one of the most important stages of the WTO adjudicatory proceedings. It transfers the compliance determination of adverse Panel/AB reports from the national adjudicatory mechanism (as in the Section 301 proceedings in the US) to the WTO adjudicatory system. Article 22.5 of the DSU provides that:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it.

The Member concerned, who has requested for the reasonable period of time, shall implement the adverse Panel/AB report within the time period allotted to them for this purpose. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to the dispute settlement procedure under the WTO. The Panel in *United States - Certain Measures* case explained:

> ... when an assessment of the WTO compatibility of a measures taken to comply with panel and Appellate Body recommendations (an "implementation measure") is necessary (because parties disagree),... Members are obliged to have recourse exclusively to a WTO/DSU dispute settlement mechanism to obtain a determination that

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114 WT/DS87 and 110

115 *United States— Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/ARB, *Australia— Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/ARB and *Brazil— Export Financing Programme for Aircraft*, WT/DS46/ARB,

116 Article 4.7, SCM Agreement; In all the three cases listed above, a ninety days time period was given for implementation of the report.

> [the] measure is WTO inconsistent. We consider that the obligation to use the WTO multilateral dispute settlement mechanism (i.e. as opposed to unilateral or even regional mechanisms) to obtain any determination of WTO compatibility, is a fundamental obligation that finds application through the DSU. ... We do not consider that the first sentence of Article 21.5 is only of a procedural nature but rather contains a substantive obligation... .[117]

The Appellate Body reaffirmed this.[118] An Article 21.5 Panel (Compliance Review Panel) shall be established to examine the consistency of the implemented measure.[119] The original panel (first level panel) shall be resorted to as compliance panel, wherever possible. It is to submit its report within ninety days after the date of referral of the matter to it. In practice, an appeal shall lie from the report of the compliance panel to the Appellate Body.

(a) *Scope of Article 21.5 Review*

In *Australia – Salmon* case, the Article 21.5 Arbitrator examined the scope of the review mechanism of implementation measure. Here the Arbitration panel observed that the mandate given to the original panel pursuant to Article 21.5 of the DSU includes the consideration of issue relating to two types of disagreements, namely disagreements as to the *existence* or the *consistency* with a covered agreement of measures taken to comply with the recommendations and ruling.[120] The reference to "disagreement as to the ... consistency with the covered agreement" of certain measures, implies that an Article 21. 5 compliance panel can potentially examine the consistency of the measures taken to comply with a DSB recommendation or ruling with any provision of any of the covered agreements. The Article 21.5 compliance review panel observed:

> Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific

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117 *United States – Import measures on Certain Products from the European Communities*, Report of the Panel, WT/DS165/R, 17 July 2000, para. 6.92.

118 *United States – Import measures on Certain Products from the European Communities*, Report of the Appellate Body, WT/DS165/AB, paras.125-127.

119 Article 21.5, DSU

120 n. 107, p. 6.

> provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violation. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement". The *rationale* behind this is obvious: a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member is seeking to comply with DSB recommendations under a covered agreement is breached, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU.[121]

The Appellate Body again in *Brazil – Aircraft (21.5 Appellate Body Proceeding)*, while examining the consistency of the measure taken by Brazil observed that:

> ... in our view, the obligation of the Article 21.5 Panel, in reviewing 'consistency' under Article 21.5 of the DSU, was to examine whether the new measure – the revised TPC programme – was 'in conformity with', 'adhering to the same principles of' or 'compatible with' Article 3.1(a) of the *SCM Agreement*.[122] In short, both the DSU and the Article 21.5 Panel's terms of reference required the Article 21.5 Panel to determine whether the revised TPC programme involved prohibited export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement*.[123]
> ....
>
> We have already noted that these proceedings, under Article 21.5 of the DSU, concern the 'consistency' of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*. Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada *has implemented the DSB recommendation*'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the

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121 *Australia – Salmon*, Report of the Article 21.5 Arbitration Panel, WT/DS126/RW, para. 7.19

122 (original footnote) See the dictionary meanings of "consistency" and "consistent" in *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, p. 486 and *The Concise Oxford Dictionary* (Clarendon Press, 1995), p. 285. The dictionary meaning of "consistency" includes the "quality" or "state" of "being consistent".

123 *Brazil – Aircraft*, Report of the 21.5 Appellate Body, para.37.

new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the *SCM Agreement*.

Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU.

Consequently, in these proceedings, the task of the Article 21.5 Panel was not limited solely to determining whether the revised TPC programme had been rid of those aspects of the original measure – the TPC programme, as previously constituted – that had been identified in the original proceedings, in the context of all of the facts, as not being consistent with Canada's WTO obligations. Rather, the Article 21.5 Panel was obliged to examine the revised TPC programme for its consistency with Article 3.1(a) of the *SCM Agreement*. The fact that Brazil's argument in these Article 21.5 proceedings 'did not form part' of the original panel's reasoning relating to the *previous* TPC programme does not necessarily mean that this argument is 'not relevant' to the Article 21.5 proceedings, which relate to the *revised* TPC programme. In our view, the Article 21.5 Panel should have examined the merits of Brazil's argument as it relates to the *revised* TPC programme. We conclude, therefore, that the Article 21.5 Panel erred by declining to examine Brazil's argument that the revised TPC programme 'specifically targeted' the Canadian regional aircraft industry for assistance because of its export-orientation.[124]

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124 Ibid, paras.40-42.

(b) *"Measures taken to comply"*

The Appellate Body in *Brazil – Aircraft (21.5 Appellate Body Proceeding)*, interpreting and clarified the meaning and scope of the term 'measure taken to comply' which is the object of Article 21.5 process. The AB observed

> Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[125]: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a 'measure taken to comply with the recommendations and rulings' of the DSB.[126]

Further, the panel in *Australia – Salmon* stated that an Article 21.5 panel couldn't leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". The Panel observed:

> We are of the view that in the context of this dispute at least any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and within a more or less limited period of time thereafter – that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply". Several elements have prompted us to decide that the Panel request does, indeed, cover the Tasmanian ban even though the ban was only established and therefore not *expressis verbis* mentioned in Canada's Panel request. Previous panels have examined measures not explicitly mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to measures that were specifically mentioned, that the responding party could reasonably be found to have received adequate notice of the scope

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125 (original footnote) We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

126 *Brazil – Aircraft*, Report of the 21.5 Appellate Body, para. 36.

> of the claims asserted by the complainant....[127] What is referred in this Article 21.5 panel is basically a disagreement as to implementation. One measure was explicitly identified, with the knowledge, however, that further measures from our mandate once we have found that they are "measures taken to comply", would go against the objective of "prompt compliance" set out in Article 3.3 and 21.1 of the DSU.... We do not consider that measures taken subsequently to the establishment of an Article 21.5 compliance panel should *per force* be excluded from its mandate. Even before an original panel such were found to fall within the panel's mandate because, in that specific case, the new measures did not alter the substance - only the legal form - of the original measure that was explicitly mentioned in the request. In compliance panels we are of the view that there may be different and, arguably, even more compelling reasons to examine measures introduced during the proceedings. As noted earlier, compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measure taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to. Especially under the fist leg of Article 21.5 when it comes to disagreements on the existence of measures taken to comply, one can hardly expect that all such measures - when there is no clarity on their very existence - be explicitly mentioned up-front in the panel request."[128]

As to the issue of whether or not the new measure "exist" the same panel in *Australia - Salmon* observed: "... a new regime of implementation measure can be said to "exist" when this regime sets out all requirements and criteria under which the product concerned *can* enter the market of the implementing Member".

Till date there have been ten instances where the service of the compliance review panel has been resorted. The issues relating to the interpretation of the term 'shall take recourse to these dispute settlement procedures' and the problem of 'sequencing' between Article 21.6 and 22 of the DSU has been dealt with elaborately in the third chapter.

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127 (original footnote) *EC - Banana III*, para.7.27 and para.140; *Japan - Film*, above n.71, para.10.8; *Australia - Salmon*, para. 90-105; and *Argentina - Footwear*, paras.8.23-8.46.

128 *Australia - Salmon*, Report of the Article 21.5 Panel, WT/DS126/RW, para.7.19

V.4.3. *Remedies for Non-Compliance*

Under the DSU, if there is non-compliance even after the reasonable period of time or if the compliance review panel finds that the recommendations and rulings of the first level panel or AB is not complied with, the complaining member country has two options in hand to restore the negotiated rights and obligations. The two remedial measures that the complainant can seek are (a) compensation, and (b) suspension of concessions. This is provided under Article 22 of the DSU. But the DSU emphasises that compensation and suspension of concession are only temporary measures available in the event of non-compliance with the recommendations or rulings.[129] The DSU prefers full implementation of the recommendation or the rulings than compensation or suspension of concession.

(a) Compensation

Compensation under the WTO DSU is voluntary and, if granted, shall be consistent with the covered agreements.[130] It is left to the discretion of the respondent to offer compensation and for the complainant to accept it. Article 22.2 of the DSU states:

> If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter

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129 Article 22.1, DSU

130 Ibid. In the Uruguay Round Negotiations, the developing countries like Korea and Nicaragua stressed the need for compensation as an alternative remedy for suspension of concession. Compensation will enhance the developing countries confidence in the international trading system, but by making it voluntary its usefulness is taken away. *See* Kofi Oteng Kufuor, "From the GATT to the WTO: The Developing Countries and the Reform of the Procedures for the Settlement of International Trade Disputes", *Journal of World Trade*, vol. 31, no.5, 1997, pp.117-145, at p.139

into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.

The term 'compensation' is generally understood as the payment of money, as a valuation of the injury or damage caused thought the unlawful act.[131] But in the WTO legal system, the term compensation is understood normally as concessions in the form of greater market access and not monetary compensation, as in the general international law sense.[132] The compensation under general international law is retrospective in nature, where as the compensation under the WTO is a prospective measure since it offers relief for the harm that the complainant will presumably suffer due to lack of implementation of the adopted recommendations by the respondent.[133] The parties may enter into negotiations to agree on mutually acceptable compensation.

While compensation is one of the widely used remedy in general international law, it is a rarity in the WTO. There is only one case in the history of WTO where compensation was accepted as a remedy. In *Japan – Alcoholic Beverages* case, Japan offered compensation for delayed implementation of the recommendations and the EC accepted the offer.[134] In this case, compensation was granted by adhering to the 'most favored nation' principle. The compensation so offered and accepted was not pecuniary in character, rather Japan agreed to reduce tariffs once the reasonable period of time set by the arbitrator expired.[135]

(b) Suspension of Concessions or other Obligations

In the event of the failure of respondent to implement the findings, the only option before a complainant is to retaliate against the respondent, to hurt

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131 Patricio Grane, "Remedies Under the WTO Law", *Journal of International Economic Law*, vol. 12, 2001, pp. 755-772 at p. 758.

132 Article 36, *ILC Draft on State Responsibility*, n. 86.

133 Ibid, p. 762.

134 WT/DS8/20.

135 Gabrielle Marceau, "Implementation of the Panel and Appellate Body Reports", *Focus WTO*, vol. 2, no. 6, 2001, pp. 2-13, at p. 8

him to the extent of the loss suffered. If the respondent fails to comply with the recommendations within the reasonable period and if the compensation is not forthcoming, the complainant can make a request to the DSB for authorization to retaliate, which the DSB is obliged to give, unless rejected by consensus. This is the final remedy available for the complainant under the WTO DSU in case of non-compliance with the recommendations. Article 22 of the DSU provides that:

> If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

The remedy of suspension of concessions or retaliation is one of the unique features of the WTO legal system. It gives the complaining member the authority to retaliate to the extent of the loss suffered due to the inconsistent measure of the respondent and most importantly, it is automatic in nature, unless rejected by consensus in the DSB. Any request for suspension of concessions or other obligations must specify the nature of suspension of concession requested. The Arbitrators in *EC - Hormones (22.6 Arbitration, United States)*, clarified this point and stated that the minimum requirements attached to a request to suspend concessions or other obligations are:

> ... (1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.[136]

The Arbitrators further observed that:

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136 *EC – Hormones*, Report of the Article 22.6 Arbitrators, WT/DS26, para. 16.

> The more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc..., the better. Such precision can only be encouraged in pursuit of the DSU objectives of "providing security and predictability to the multilateral trading system" (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that "all Members will engage in [DSU] procedures in good faith in an effort to resolve the dispute.[137]

Article 22.3 under the DSU provides for a hierarchy of responses.[138] The response starts with the complainant seeking for suspension of concessions or other obligation within the same sector where the Panel or AB has found a violation. The complainant may seek to suspend concessions in other sectors under the same agreement, if it is not 'practicable or effective'. If neither of these

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137 Ibid, footnote to para. 16.

138 TEXT OF ARTICLE 22.3:

> In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
>
> (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
>
> (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
>
> (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
>
> (d) in applying the above principles, that party shall take into account:
>
> (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
>
> (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

options is practicable or effective and the circumstances are serious enough, it can seek action under other covered agreements. In *EC – Bananas III (22.6 Arbitration, Ecuador)*, the Arbitrators while examining Ecuador's request for suspension of concessions or other obligations in the area of GATS and the TRIPS Agreement stated that:

> ... we further recall the general principle set forth in Article 22.3(a) that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for Ecuador to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner.[139]

The last two options come under cross-retaliation.[140] While applying retaliation or cross-retaliation, the party shall take into consideration "the trade in the sector or under the agreement under which the panel or AB has found a violation" and "the importance of such trade to that party."[141] Moreover, the party applying retaliation should also take into consideration "the broader economic elements relating to the nullification and impairment" and "the broader economic consequence of the suspension of concession or other obligation".[142] Further, the DSU provides that in case of cross-retaliation, the party so requesting shall state the reasons therefore in its request.[143] The retaliation or cross-retaliation must be "equivalent" to the loss incurred by the complainant.[144] If the losing party feels that the retaliatory measure is excessive or that the underlying principle of the multilateral system has been undermined, the respondent can request for arbitrator to decide on the matter. Such arbitration shall be carried out by the original panel, if they are available, or by an arbitrator appointed by the Director-

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139 *EC – Bananas III (Ecuador)*, Report of the 22.6 Arbitrators, WT/DS27, para. 33.

140 The concept of cross-retaliation in DSU drew its inspiration from Article 2019.3 of North American Free Trade Agreement (NAFTA).

141 Article 22.3(d) (i), DSU

142 Article 22.3 (d)(ii), DSU

143 Article 22.3 (e), DSU

144 Article 22.4, DSU

General, which shall be completed within 60 days of the expiry of the reasonable period of time.

The arbitrator "shall not examine the nature of concessions or other obligations to be suspended but shall determine whether the level of suspension is equivalent to the level of nullification or impairment."[145] He may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. The Arbitrators in *EC - Bananas III (22.6 Arbitration, Ecuador)* while examining their authority under Article 22.7, clarified this point and stated:

> ... the jurisdiction of the Arbitrators includes the power to determine (i) whether the level of suspension of concessions or other obligations requested is *equivalent* to the level of nullification or impairment; and (ii) whether the principles or procedures concerning the suspension of concessions or other obligations across sectors and/or agreements pursuant to Article 22.3 of the DSU have been followed.[146]

The DSU while reiterating it commitment for "prompt compliance"[147] with the DSB rulings, observes that suspension of concession is a temporary measure and shall be applied until such time as the measure found to be inconsistent with a covered agreement is removed or a mutually satisfactory solution is reached.[148]

V.5. Surveillance of Implementation

The surveillance of implementation is a continuing monitory mechanism available under the DSS, which comes in to effect after six months into the reasonable period of time. This is intended to ensure the defaulting Members comply with the DSB recommendations. Here the DSB shall continue to keep under surveillance, the implementation of adopted recommendations, including those cases where compensation has been provided, or concessions or other

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145 Article 22.7, DSU
146 *EC - Bananas III (Ecuador)*, Report of the Article 22.6 Arbitrators, WT/DS/27, para. 11.
147 Article 22.9, DSU
148 Article 22.8, DSU

obligations have been suspended.[149] The "issue of implementation is placed on the agenda of the DSB meeting after six months followed with the date of establishment of the reasonable period of time and remains on the agenda until the issue is resolved."[150] Moreover, the respondent concerned is to provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings. In practice, this submission of the periodical report or the discussion of the issue in the DSB has no value in inducing compliance, except that the dispute will be kept as 'live' in the WTO dispute settlement annual report.

V.6. Prohibition of Unilateralism

Article 23 of the DSU imposes a general obligation on the WTO Members to resort to WTO Dispute Settlement Understanding in case of violation of obligations or other nullification or impairment of benefits under the covered agreement. This Article was the direct implication of the United States use of Section 301 proceedings in the 1947 GATT period. Article 23.1 provides that:

> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.[151]

The Panel while interpreting the term "recourse to, and abide by" in *US – Section 301*, made the following observation regarding the nature of obligation under Article 23.1 of the DSU:

> Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a

149 Ibid.
150 Article 21.6, DSU
151 Article 23.1, DSU

> system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU.[152]

The Panel reiterated this point again in *US – Certain Measures*, while considering the EC's argument that the United States unilaterally imposed trade sanctions and thereby violated Article 23 of the DSU, and stated that:

> The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation[153], they shall do so only through the DSU. This is a general obligation. Any attempt to seek 'redress' can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU.[154]

Article 23.2, on the other hand, provides for a more specific obligation. It provides that the Member states shall, in case of violation, take recourse to the WTO dispute settlement understanding and shall not make any unilateral determination of the violation. For this purpose the Member shall take recourse to the procedure provided for in Article 21 and 22 of the DSU. The Panel in *US – Section 301* noted that Article 23.2 has to be read together with Article 23.1 as evidenced by the fact that Article 23.2 starts with the words "in such cases". It went on to state:

> The text of Article 23.1 is simple enough: Members are obligated generally to (a) have recourse to and (b) abide by DSU rules and procedures. These rules and procedures include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings.[155]

The Panel again clarified this point in *US – Certain Measures*, where it states that:

> The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the

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152 *US – Section 301*, Report of the Panel, para. 7.43.

153 (original footnote) Article 23.1 of the DSU refers more accurately to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", i.e. the three causes of actions under WTO. In this Panel Report, the expression "WTO violation(s)" refers to all three causes of actions mentioned in Article 23.1 of the DSU.

154 *US – Certain Measures*, Report of the Panel, para. 6.17

155 *US – Section 301*, Report of the Panel, para. 7.59.

> ordinary meaning of the terms used in the chapeau of Article 23.2 ('in such cases, Members shall'), it is also clear that the second paragraph of Article 23 is 'explicitly linked to, and has to be read together with and subject to, Article 23.1'. That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, i.e. when such action is performed by a WTO Member with a view to redressing a WTO violation.[156]

Thus the WTO DSU prohibits unilateral sanction by the WTO Member countries. Moreover, it prohibits unilateral determination of inconsistency with the covered agreement, unilateral determination of level of suspension and threat of sanction by the WTO member states. This forms the most cardinal principle in the entire WTO legal system.

VI. Preliminary Conclusion

Thus, one may summarise here that the GATT/WTO dispute settlement system has matured over the years from a temporary arrangement to a full-fledged adjudicatory mechanism in settling international trade disputes. The transformation of the system from the power-diplomatic model to the rule-oriented system has been a process of decades. This transformation became complete with the adoption of the DSU in the Uruguay Round Negotiations. The DSU provides for a rule based, time-bound, predictable system with a hierarchy of adjudicatory bodies. The revolutionary change that happened with the adoption of the DSU is the almost automatic right to retaliation in case of non-compliance with adverse panel or AB reports. This revolutionary change was the result of US demand for a strong enforcement mechanism and the EC accepted this to curtail the use of Section 301 procedure by the US. This, with the prohibition of unilateralism under Article 23, was the single most remarkable achievement of the Uruguay Round Negotiations.

The working of the WTO dispute settlement system for the past seven years has revealed certain problems in the procedural and substantive aspect of implementation of adverse WTO rulings. This draft oversight and concerns

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156 *US – Certain Measures*, Report of the Panel, paras. 6.17-6.18

threatens not only the credibility of the WTO dispute settlement system but also the entire WTO legal system. The next chapter concentrates on highlighting these concerns in the implementation procedure as exposed by the WTO cases and the reaction of the panel/AB and the WTO members to these problems.

CHAPTER III

PROBLEMS IN COMPLIANCE AND ENFORCEMENT

I. Introduction

Today, as the WTO concludes its seventh year of operation, its dispute settlement and implementation procedures have revealed problems and inequities in its actual working. It is felt that time is ripe for a critical appraisal of the WTO dispute settlement mechanism, especially its enforcement mechanism and the remedies it provides. Thus far, less than 10% of the total case load (255 cases[1]), have even reached the point where the implementation procedures established under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) apply. Only five cases have reached the point of suspension of concession or retaliation.[2]

Since WTO rulings have been implemented to the satisfaction of the winning parties more often than not under the new WTO procedures, some may insist on the basis of that record that the implementation procedures are functioning in an effective manner. However, the record of compliance with adverse panel/AB reports may not necessarily reflect the effectiveness of the implementation process.[3] This argument is validated by the fact that the number of cases involving non-compliance problem has increased over the short six years period of its existence. The disputes over non-compliance that have cast doubt on the system are principally those that have led to formal non-compliance action, which thus far have included *EC – Bananas*,[4] *EC - Beef Hormones*,[5] *Australia –*

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1 This figure encompasses all request for consultation notified to the WTO, including those requests which have led to panel and appellate review procedure since 1.1.1995, *Update of the WTO Dispute Settlement Cases*, 3 May 2002, WT/DS/OV/6.

2 Ibid.

3 This not surprisingly, is similar to the GATT era, where the compliance in low profile cases was rather high.

4 *European Communities- Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (May 22, 1997) and WT/DS27/AB/R (Sept. 9, 1997)

5 *European Communities- Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R (August 18, 1997), WT/DS48/R (Aug. 18, 1997), WT/DS26/AB/R (January 16, 1998) and WT/DS48/AB/R (Jan. 16, 1998),

Salmon,[6] *US – DRAMs*[7], *Australia – Leather*,[8] *Brazil - Export Financing Programme for Aircraft*,[9] *Canada - Measures Affecting the Export of Civilian Aircraft*[10] and *US – Foreign Sales Corporation*.[11] Because these more contentious high profile cases are the ones that have required fullest recourse to the new WTO implementation procedures, they offer the best barometer of what has worked under the system and what has not.

A close analysis of the non-compliance cases reveals several problems in the actual working of the implementation procedures. Firstly, the existing DSU text contains obvious ambiguities and drafting oversights that need to be corrected. Secondly, the implementation procedures, when used to their fullest extent, create an undesirably long timetable for the injured party. Thirdly, improved incentives and/or sanctions are needed under the DSU to help achieve the WTO's implementation objective of "prompt compliance", thereby providing "security and predictability" to the WTO dispute settlement system. Fourthly, the non-conformity cases raise challenging questions about the future of the WTO system. They pose in particular the issue of whether the European Communities (EC), the largest WTO member, will ever properly implement dispute settlement rulings, especially in the area of agriculture, and what it will imply for the system if it does not. More broadly, they pose the question of whether the WTO, faced now and in the future with a growing array of challenging cases from *U.S – "Foreign Sales Corporations"*, to recurring challenges against U.S. trade laws, to potential cases involving genetically altered foods or the practices of new members, such as China, will be able to resolve those challenges without undue

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6 *Australia- Measures Affecting Importation of Salmon*, WT/DS18/R (Jun. 12, 1998) and WT/DS18/AB/R (Oct. 20, 1998),

7 *United States – Anti-Dumping Duties on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabyte or above from Korea*, WT/DS99/RW (7 November 2000)

8 *Australia- Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R (May 25, 1999),

9 *Brazil- Export Financing Programme for Aircraft*, WT/DS46/R (Apr. 14, 1999), WT/DS46/AB/R (Aug. 2, 1999), and WT/DS46/13 (Nov. 26, 1999),

10 *Canada- Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (Apr. 14, 1999), WT/DS70/AB/R (Aug. 2, 1999) and WT/DS70/9 (Nov. 23, 1999),

11 *United States- Tax Treatment for "Foreign Sales Corporations,"* WT/DS108 (Oct. 8, 1999)

controversy and maintain its credibility as a system premised on the effective implementation of its disciplines and rulings.[12]

In this Chapter, a critical analysis of the substantive and procedural issues in the WTO implementation mechanism, which has given raise to debate and concerns, is undertaken. It also offers a detailed discussion of the relevant cases and the interpretation given by the panels and Appellate Body in relation to implementation problems. It also highlights the current practices and positions taken by the member countries to solve some of the implementation problems. Finally, an analysis as to how far the interest of the developing country members is protected under the system and the overall effectiveness of the enforcement mechanism under the WTO legal system is envisaged.

II. Problems in Compliance and Enforcement

An important reason for introducing the present DSU rule concerning implementation of adverse WTO rulings was to correct the most common criticism of the previously ineffective 1947 GATT procedures that losing parties could permanently evade compliance without fear of adverse consequences. The DSU addresses this problem by providing for three distinct procedures, with an automatic right to invoke each one of them. As has been seen in detail in the previous Chapter, the first procedure provides for the determination of "reasonable period of time", thereby determining the deadline for the implementation of the adverse WTO rulings. The second becomes relevant when there is a disagreement over whether the losing member has complied with the DSU ruling, thereby providing for a compliance review. The last procedure provides for "suspension of concessions or other obligations" of the losing party if it fails to implement the WTO rulings or otherwise satisfy the winning party with a reasonable time period.

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[12] Carolyn B. Gleason and Pamela D. Walther, "The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform," *Law and Policy in International Business*, vol. 31, 2000, pp.709-738, at p. 712.

All the three procedures has uncounted problems in its actual working. The issue regarding the reasonable period of time has centered on the length of the time period, determination of the criteria of 'peculiar circumstances', the nature of burden of proof and what is required of a losing party while the reasonable period is underway. With respect to the 'compliance panel review', the controversy as to when it should be undertaken is still to be settled. The procedure governing the suspension of concessions have sparked an interrelated controversy over when retaliation authority may be requested if there is disagreement over compliance, and after the *EC – Bananas* and *EC – Hormones*, the very effectiveness of the enforcement mechanism is in question. The major controversy has been with respect to the last two procedures. While in the case of 'reasonable period of time', the panel/AB has in a limited way, solved the problem through progressive interpretation. Whereas in the other two cases, the member countries have addressed the issues through *ad hoc* arrangements, without much success. The member countries have put forward a number of proposals in the earlier unfinished DSU Review, the Seattle Ministerial Conference and the Doha Ministerial Conference. Hopefully, these issues may be successfully addressed in the Doha Development Round.

II.1. Issues in 'Reasonable Period of Time'

As elaborated in the previous chapter, if the immediate implementation of the adopted panel recommendation is impossible, the implementing member can request for a reasonable period of time for implementation.[13] If there is no agreement on the period, an Arbitrator under Article 21.3 (c) can be appointed to determine this period.[14] A number of problems have arisen in the course of the WTO's experience with the determination of the reasonable period of time. Some of these problems are discussed in detail below.

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13 Article 21.3, DSU

14 Article 21.3 (c), DSU

II.1.1. *Length of the Reasonable Period of Time and the Consequent Delay in Implementation*

The most important problem faced by this procedural recourse is the issue of deliberate delaying by the member concerned on the pretext of requiring a reasonable time for implementation. Though the system of 'reasonable period of time' has been introduced to bring about flexibility and adaptability to the dispute settlement system, the evolving trend shows that the Member States are claiming it on a regular basis, as a tactic to delay implementation. This has delayed the entire process of dispute settlement by another 15 months on an average. This has direct impact on one of the main object of the DSU, i.e., effective and speedy settlement of disputes.

Article 21 of the DSU does not precisely define the term 'reasonable period of time'. Apart from the general requirement that the "prompt compliance" is essential, the only other interpretative guidance provided by the article is the suggestion that the reasonable period should not exceed fifteen months from the date the ruling was adopted, but "may be shorter or longer, depending upon the particular circumstances."[15] The Arbitrator in *EC- Bananas III (21.3 Arbitration)*,[16] has reiterated on this point. In the early reasonable period awards, the arbitrator has been consistently granting a fifteen months period, thereby establishing a belief that the losing parties were automatically entitled to a compliance period of fifteen months. This trend was seen as contrary to the "prompt compliance" standard established under Article 21 of the DSU.

The first of the reasonable period arbitration was the *Japan - Taxes on Alcohol*,[17] where the US argued for a five months implementation period, while Japan claimed five years. The Arbitrator, without offering any reasons, decided that the arguments advanced by US and Japan did not prove any particular circumstance and stuck to the fifteen months 'guideline'. This fifteen months

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15 Article 21.1 and 21.3 (c), DSU

16 *EC - Bananas III*, Report of the Article 21.3 Arbitrator, para. 18.

17 *Japan - Taxes on Alcoholic Beverages*, Report of the Article 21.3 Arbitrator, WT/DS8/15, WT/DS10/15, WT/DS11/13, (Feb. 15, 1997)

'guideline' was again used in the *EC – Bananas*[18] where the Arbitrator gave weight to the complexities of the EC's implementation process. Again in *EC – Hormones (21.3 Arbitration)* the Arbitrator while granting the fifteen months implementation period to EC interpreted Article 21.3 and stated:

> The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule. This guideline is stated expressly to be that 'the reasonable period of time ... *should not exceed* 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).

The Arbitrator further noted that:

> Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. Article 21.1 stipulates that: '*Prompt compliance* with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members' (emphasis added). Article 3.3 states: 'The *prompt* settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (emphasis added). *The Concise Oxford Dictionary* defines the word, 'prompt', as meaning 'a. acting with alacrity; ready. b. made, done, etc. readily or at once'. Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less.[19]

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18 *EC – Regime for the Importation, Sale, and Distribution of Bananas III*, Report of the Article 21.3 Arbitrator, WT/DS27/15 (Jan. 7, 1998)

19 *EC – Hormones*, Report of the Article 21.3 Arbitrator, paras.25-26. *See* also *Chile – Alcoholic Beverages*, Reports of the 21.3 Arbitrator, WT/DS87/15, WT/DS110/14, 23 May 2000, para. 38-39; *Canada – Certain Measures Affecting the Automotive Industry*, Report of the 21.3 Arbitrator, WT/DS139/12, WT/DS142/12, 4 October 2000, para. 39; *Canada – Patent Protection of Pharmaceutical Products* ("*Canada – Pharmaceutical Patents*"), Report of the 21.3 Arbitrator, WT/DS114/13, 18 August 2000, para. 48.)

The reasoning of this arbitral award for "the shortest period possible" in calculating the reasonable period of time began to establish the analytical framework for shorter periods in future "reasonable period awards." The arbitral award further made it clear that the losing party cannot use "the shorter period possible" to develop additional justifications for its inconsistent measures.

Interestingly, the first case where a reasonable period of less than fifteen months was awarded was in the *Indonesia – Automobiles* case, where Indonesia invoked the "special and differential treatment" rule available to the developing countries under Article 21.2.[20] The Arbitrator by taking into consideration the near collapse of the Indonesian economy, allowed a twelve months compliance period, which was an additional six-month over and above the six months reasonable period of time.[21] The remaining cases have shown a trend of shorter implementation period. For example, the arbitrator settled for an eight months period in *Australia – Salmon*[22] and a six months period in *Canada – Patent*[23] case.

The trend for a shorter implementation period, of course, is to be welcomed and would certainly promote speedy settlement of disputes in WTO. But the question left open is what criteria does the arbitrator follow in ruling for a shorter period. What other guidelines can the arbitrator be offered in determining whether the 'particular circumstance' exists for granting a shorter or longer implementation period? This question is examined in the next sub-section.

II.1.2. *Interpretation of the Term "Particular Circumstances"*

Article 21.3 of the DSU provides that the guideline for the arbitrators is that the reasonable period of time should not exceed 15 months unless the parties to the dispute agree otherwise. However, this period may be shorter or longer

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20 *Indonesia – Certain Measures Affecting the Automobile Industry,* Report of the Article 21.3 Arbitration WT/DS55/14, WT/DS59/13 (Dec. 7, 1998)

21 The developing countries interest is dealt in detail in part II.V.5 of this Chapter.

22 *Australia – Measures Affecting Importation of Salmon,* Report of the Article 21.3 Arbitrator, WT/DS18/9, (Feb. 23, 1999)

23 *Canada – Pharmaceutical Patents,* Report of the Article 21.3 Arbitrator, WT/DS170/8 (Dec. 20, 2000)

depending on the "particular circumstance". The DSU does not provide any guideline as to what constitutes "particular circumstance". This has been clarified and developed by the arbitrators on a case-to-case basis. In the *Canada— Patent*, Mr. Bacchus defined "particular circumstance" as "those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member".[24]

In *Japan - Alcoholic Beverages II (21.3 Arbitration)*, Japan argued that a period of 23 months was a "reasonable period of time" on the basis that there were "particular circumstances". Japan claimed that the limited powers of the executive branch over tax matters and the need for a formal adoption of a legislation by the Parliament, the adverse effects of the tax increases on Japanese consumers of *shochu*, and the administrative constraints on the execution of taxation are "particular circumstances" justifying a 23-month period needed to implement the recommendations and rulings of the DSB. The Arbitrator observed:

> Article 21(3)(c), which stipulates that a 'reasonable period of time' for implementation should not exceed 15 months unless there are 'particular circumstances' justifying a longer or shorter period. In this case, I am not persuaded that the 'particular circumstances' advanced by Japan and the United States justify a departure from the 15-month 'guideline' either way. I conclude, therefore, that a 'reasonable period of time' within the meaning of Article 21(3)(c)... is 15 months.[25]

The Arbitrator in *Canada - Pharmaceutical Patents (Article 21.3 Arbitration Report)*, for the first time provided a guideline as to what would constitute a "particular circumstance". It concluded that such "particular circumstance" could include whether the implementation will be done by administrative or legislative means, the complexity of the proposed implementation and whether the component steps

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24 *Canada— Patent Protection of Pharmaceutical Products*, WT/DS114/13 (18 August 2000), para. 47.

25 *Japan - Alcoholic Beverages II*, Report of the Article 21.3 Arbitration, para. 27. *See* also on *EC - Bananas III*, Report of the 21.3 Arbitration, paras. 6-10.

leading to implementation were legally binding or discretionary.[26] The Arbitrator stated:

> The 'particular circumstances' mentioned in Article 21.3 are, therefore, those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member.
>
> ... if implementation is by *administrative* means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through *legislative* means.
>
> Likewise, the *complexity* of the proposed implementation can be a relevant factor. If implementation is accomplished through extensive new regulations affecting many sectors of activity, then adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed. On the other hand, if the proposed implementation is the simple repeal of a single provision of perhaps a sentence or two, then, obviously, less time will be needed for drafting, consulting, and finalizing the procedure. To be sure, complexity is not merely a matter of the number of pages in a proposed regulation; yet it seems reasonable to assume that, in most cases, the shorter a proposed regulation, the less its likely complexity.
>
> In addition, the *legally binding*, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account. If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other hand, if there is no such mandate, then a Member asserting the need for a certain period of time must bear a much more imposing burden of proof. Something required by law must be done; something not required by law need not necessarily be done, depending on the facts and the circumstances in a particular case.[27]

However, the arbitrator maintained that these guidelines are only examples. The Arbitrator then proceeded to describe the considerations that should be excluded while considering the "particular circumstance":

> However, in my view, the 'particular circumstance' mentioned in Article 21.3 *do not* include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member.

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[26] Gabrielle Marceau, "Implementation of the Panel and Appellate Body Reports", *Focus WTO*, vol. 2, no. 6, 2001, pp. 2-13, at p. 4.

[27] *Canada – Patents*, Report of the Article 21.3 Arbitration, WT/DS114/13, paras. 48-51.

> Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation. For example, as others have ruled in previous Article 21.3 arbitrations, any proposed period intended to allow for the "structural adjustment" of an affected domestic industry will not be relevant to an assessment of the legal process. The determination of a 'reasonable period of time' *must be a legal judgement based on an examination of relevant legal requirements.*[28] (Emphasis added)

The Arbitrator further observed:

> I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation.[29]

Similarly, in *US - Anti-dumping Act 1916* case the Arbitrator while granting a 10 months period for implementation, rejected the US argument that the volume of the legislative works, Members legislative practice and the "additional special circumstance" of transition period for newly elected President are "particular circumstance" to qualify for a longer implementation period.[30]

In short, the conclusion that one may draw after the analysis of these arbitration awards is that "prompt compliance" with the adopted reports remains the rule under the DSU. The members shall be entitled for a reasonable period of time for the implementation of the recommendations, except in specific instances such as the prohibited subsides where the DSU demands compliance "without delay." But the time period for the implementation of these reports may be shorter or longer than 15 months, and depends on the existence of the "particular circumstance." And, it is for the interested party to prove, and the Arbitrator to determine, as to whether there is "particular circumstance," which "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."[31]

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28 Ibid. para. 52.

29 Ibid. para. 60.

30 *US - Anti-Dumping Act 1916*, Report of the Article 21.3 Arbitration, WT/DS136/11, WT/DS162/14, paras.37-40

31 Ibid.

II.1.3. *Nature of Burden of Proof*

Article 21.3 (c) of the DSU provides that fifteen months shall be the guideline for the determining the implementation period, whereas the time may be shorter or longer depending on the proof of "particular circumstances." In the earlier arbitral awards, as seen above, the trend was for providing a 15 months implementation period in normal course, unless the complaining member proved that the "particular circumstance" demands a shorter implementation period. It was initially thought that only when the implementing member needs an implementation period more than 15 months, should it prove "particular circumstance." This was the line of argument taken by Australia in *Australia – Salmon (21.3 Arbitration)* case.[32] Australia argued that as it is only claiming 15 months (which according to Australia, it is naturally entitled to), it is for the member who is arguing for a shorter implementation period to prove the existence of "particular circumstances." This argument was rejected by the arbitrator, who took the same line of approach taken by the arbitrator in *EC – Hormones (21.3 Arbitration)* case. In *EC – Hormones (21.3 Arbitration)*, the Arbitrator clarified the issue of burden of proof and stated:

> In my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable.[33]

This interpretation should be seen from within the confines of the basic principle set by the Arbitrator in *Canada – Pharmaceutical Patents*:

> ... it is ... for the implementing Member to bear the burden of proof in showing – '[i]f it is impracticable to comply immediately' – that the

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32 *Australia – Salmon*, Report of the Article 21.3 Arbitration, WT/DS18/9 (June 4, 1999).

33 *EC – Hormones*, Report of the Article 21.3 Arbitration, para. 27.

> duration of any proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time.[34]

Thus, it has been settled beyond doubt that the burden of proof rests on both the parties who claims a shorter or longer period. This interpretation, though, makes the purpose of 15 months guideline in Article 21.3 irrelevant. Moreover, this line of interpretation has a minor contradiction with the implementation procedure, like the provision for surveillance. Article 21.6 provides that surveillance of implementation will begin after six months of commencement of the reasonable period. But if the panel gave, for example, a reasonable period of less than six months, no surveillance is possible till the end of the reasonable period of time or even after the date of implementation.

II.1.4. *Members Duty to Comply within the Reasonable Period*

Under Article 21.3 of the DSU, a member has right to reasonable period of time for implementing adverse panel/AB reports. Once the reasonable period is underway, the DSB is required to keep the losing party "under surveillance."[35] For this purpose, Article 21 provides that the "issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time" and the "Member concerned shall provide the DSB with a status report" of the progress in implementation.[36] Other than this, no interim requirements are imposed on that member by the DSU. The members are not required to identify the measures it will seek to remove or implement, nor is it required to specify any sort of implementation schedule. Thus, the losing member can simply sit idle till the end of the reasonable period of time and the DSU demands only a "status report" on every DSB meeting. This status report again, may be specific or vague as the losing party elects to make it.

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34 *Canada – Pharmaceutical Patents*, Report of the Article 21.3 Arbitrator, para. 47.

35 Article 21.6, DSU

36 Ibid.

The fact that some losing member countries use its reasonable period merely as a tool for buying several months of additional time to evade it obligations is proven by the cases before the WTO itself, and nothing in the DSU prevents this either. The best possible example is the *EC – Bananas* and *EC – Hormone* where the European Communities showed from the very start, a clear reluctance to lift the inconsistent measures. In each of the two disputes there existed an initial question as to how long the reasonable time for compliance would be. Each case went to arbitration to determine the issue and each resulted in a fifteen-month time frame. While these decisions helped to clarify the WTO's interpretation of a reasonable time, they also saw the losing party fail to achieve full compliance within that time frame. A clear definition of reasonable time will be of little consequence if the losing party has no intention of complying with the WTO decision. Though the "shortest possible time" interpretation developed by the Arbitrators may check the time period to a certain extent, much more is needed on the part of the DSB to make the implementing member accountable within the reasonable period of time.

II.1.5. *Reasonable Period of Time and the Developing Countries Interest*

Article 21.2 of the DSU provides:

> Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.[37]

The DSU does not elaborate this provision as to what it really means. The Arbitrator in *Indonesia – Autos (21.3 Arbitration Report)*, for the first time, interpreted this article in the context of Article 21.3, taking into account Indonesia's status as a developing country in determining the "reasonable period of time." In this case Indonesia argued for an additional period of nine months following the issuance of its implementing measure as a "transition" period to

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37 Article 21.2, DSU

allow the affected companies/industries to make structural adjustments under the direction of the IMF. The Arbitrator while rejecting Indonesia's claim, stated:

> In virtually every case in which a measure has been found to be inconsistent with a Member's obligations under the GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or developing country. Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a "particular circumstance" that can be taken into account in determining the reasonable period of time under Article 21.3 (c).[38]

After rejecting the Indonesian request under the general criteria, the Arbitrator invoked the "special and differential treatment" provision under Article 21.2, which states that particular attention should be paid to the interest of the developing country Members with respect to measures which has been subject to disputes settlement. The Arbitrator observed:

> Although the language of this provision is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3(c) of the DSU and which I believe is important to take into account here. Indonesia has indicated that in a 'normal situation', a measure such as the one required to implement the recommendations and rulings of the DSB in this case would become effective on the date of issuance. However, this is not a 'normal situation'. Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is 'near collapse'. In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.[39]

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38 *Indonesia – Autos*, Report of the Article 21.3 Arbitration, WT/DS54, (December 7, 1998), para. 23.

39 *Indonesia – Autos*, Report of the Article 21.3 Arbitration, para. 24.

The Arbitrator in *Chile – Alcoholic Beverages (21.3 Arbitration Report)* further clarified (or rather limited) the scope of Article 21.2 in determining the reasonable period of time. The Arbitrator observed:

> It is not necessary to assume that the operation of Article 21.2 will essentially result in the application of 'criteria' for the determination of 'the reasonable period of time' - understood as the *kinds* of considerations that may be taken into account - that would be 'qualitatively' different for developed and for developing country Members. I do not believe Chile is making such an assumption. Nevertheless, although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded. As I read it, Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and rulings of the DSB.[40]

These two interpretations of Article 21.2 with respect to Article 21.3 by the Arbitrators have far reaching implications. Both arbitrators recognize the fact that article 21.2 is couched in very general terms, but as it is in DSU, it cannot be disregarded. As the Arbitrator in Chile's case points out that the Arbitrator should only be "*generally* mindful of the great difficulties that a developing country Member may, in a particular case, face as it proceeds to implement the recommendations and ruling of the DSB" (emphasis added). But in both these cases, the Arbitrator failed to be *generally* mindful of the problems of the developing countries, and emphasized the fact that Article 21.2 will not be a "criteria" in determining the reasonable period of time. The intention behind Article 21.2 is to provide "special and differential treatment" for the developing countries in a "normal situation." An existence of "special or particular circumstance" is not a precondition for invoking this provision. If there exist a "particular circumstance" every WTO member, irrespective of being developed or developing, is entitled for a longer implementation period. The Arbitrators in both the case failed to take note of this while interpreting Article 21.2. The approach of the Arbitrators is evident from their observation that

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40 *Chile – Alcoholic Beverages*, Report of the Article 21.3 Arbitration, para. 45.

> it is not necessary to assume that the operation of Article 21.2 will essentially result in the application of 'criteria' for the determination of 'the reasonable period of time' - understood as the *kinds* of considerations that may be taken into account - that would be 'qualitatively' different for developed and for developing country Members.[41]

and

> some degree of adjustment by the domestic industry of the Member concerned will be necessary. This will be the case regardless of whether the Member concerned is a developed or developing country.[42]

For, the impact of this adjustment (here IMF authorized) on the developing country Member is much heavier than on a developed country and the very purpose of Article 21.2 is to take this particular fact into consideration.

II.2. The Issue of Compensation

Compensation is a temporary measure available in the event that the recommendations and rulings of the DSB are not implemented within a reasonable period of time. However, the DSU makes it clear that full implementation of a recommendation to bring a measure into conformity with the covered agreements is preferred over compensation. Compensation is voluntary and, if granted, must be consistent with the covered agreements. Though the procedural recourse of compensation has been resorted to only once in the history of WTO, i.e. in *Japan - Taxes on Alcoholic Beverage*[43] case, it has number of limitations in its actual working. Some of this limitation of compensation as a remedy under the WTO legal system is analysed below. An analysis is also made as to what extent the remedy of compensation can promote "security and predictability" of the WTO dispute settlement system.

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41 *Chile - Alcoholic Beverages*, Report of the Article 21.3 Arbitration, para. 45.

42 *Indonesia - Autos*, Report of the Article 21.3 Arbitration, WT/DS54, (Dec. 7, 1998), para. 23.

43 WT/DS8/20, WT/DS10/20, WT/DS11/18

One of the foremost problems with compensation is that it is voluntary. It is left to the respondent (not the complainant) to choose whether or not to offer compensation. Again, the respondent has the choice of deciding who is to be compensated. Another limitation of the compensation remedy is that the losing party can defy the WTO obligation (full implementation of recommendations), by deciding to compensate the complainant *ad infinitum*. Furthermore, the DSU does not provide any rule or procedure for governing the issue of compensation.

In GATT/WTO practice, compensation was never understood in the international law sense of monetary (money) compensation. The International Law Commission (ILC) Draft on State Responsibility provides for hierarchy in forms of remedies available to the injured state.[44] It provides that the first attempt should be to provide reparation. And "reparation must, as far as possible, wipe out all consequence of the illegal act."[45] Compensation, on the other hand, should be favored where re-establishment of the *status quo ante* is excessively onerous. Compensation is defined to cover "any financially assessable damage including loss of profit insofar as it is established."[46] Thus, the objective of compensation in public international law is to compensate financially assessable damage including loss of profit. But in the WTO legal system, compensation is generally understood as a reduction in tariff or increase in import quotas. It entails the respondent party to reducing tariffs on products of export interest to the complaining party or offering concessions in either service or intellectual property in equal value to the level of nullification and impairment of benefits.[47] This means that under the WTO system compensation may not benefit the sector or industry, which has suffered damage as a result of the implementation of WTO-

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44 Article 31, ILC Draft on State Responsibility, n. 12.

45 *Chorzow Factory* Case, 1929 PCIJ Series A, No. 8, 4, at p. 21 *as cited in* Pertos C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *European Journal of International Law*, vol. 11, no.4, 2000, pp.763-813.

46 Article 36 (1), ILC Draft on State Responsibility, n. 12.

47 Edwini Kessie, "Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO," *Journal of World Trade*, vol.34, no.6, 2000, pp.1-17, at p. 6.

consistent measures of the respondent party. Rather, the compensation benefits a sector or industry that has nothing to do with the particular dispute.

Indeed, the compensation under the WTO system may not even benefit the complaining Member itself. This is because trade concessions accepted by the complaining party are granted on a most-favored-nation (MFN) basis. This means that the trade concession is available to all the WTO members. Thus, if a complaining member accepts compensation, it does not necessarily mean that it would increase its market share in the respondent country. It depends on the relative strength of its competitors.[48] Another limitation of the compensation regime under the WTO system is that it is prospective in nature (*ex nunc*). So there is no compensation for loss of profit or the illegal duties collected by the respondent member, thereby severely limiting the scope of compensation.

The developing countries have been arguing right from the 1960's for compulsory money compensation. In the Seattle Ministerial Conference, a group of developing countries again mooted the argument for financial compensation as an alternative remedy. If this proposal is accepted, then the developing countries may also be asked to pay monetary compensation. This will be an additional burden on the developing countries. Furthermore, if the compensation is monetary in nature, questions will arise as to whether it should be paid on a most-favored-nation basis or would it represent an exception to this principle. For any attempt to make financial compensation on an MFN basis would result in overload of complaints from all the members having 'substantial trade interest' to determine the level of compensation owed to them.

II.3. The Relationship Between Article 21.5 and 22

Under the WTO DSU, the members are left with two possible procedural recourses if the losing party fails to observe full compliance. This procedural

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48 Ibid.

recourse is provided in Article 21.5 and 22 of the DSU. But the DSU fails to specify the relationship between the two procedures.

The procedure set forth in Article 21.5 provides that if there is disagreement with respect to the measures taken to comply with the recommendations and rulings, such disputes shall be decided 'through recourse to these dispute settlement procedures' as provided under the DSU.[49] On the other hand, the second procedure set forth in Article 22 provides that if the losing party has neither implemented the WTO ruling within the compliance period nor negotiated mutually accepted compensation within twenty days after the reasonable period expires, the DSB, upon request, shall grant authorization to suspend concessions or other obligations.[50]

II.3.1. A Statement of the Problem

The conflict between these two alternative procedures is brought out by the *EC - Bananas*[51] case. The EC argued that Article 21.5 compliance review should be resorted to before requesting the DSB for suspension of concessions as per Article 22. On the other hand, the US countered that it can request authorisation to suspend concessions within twenty days after the end of the compliance period, without resorting to Article 21.5 compliance review. These wholly opposite interpretations has thrown open a host of issues which has direct consequences on the credibility of the WTO dispute settlement system.[52] Can the procedure be followed simultaneously or must the Article 21.5 procedure precede the Article 22 procedures? Can the deadline for DSB authorization of suspension pursuant to negative consensus rule be suspended until completion of the Article 21.5 proceedings? These issues need clarification. For, any direct recourse to Article 22 could amount to unilateral determination of compliance level. On the

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49 Article 21.5, DSU

50 Article 22.2, DSU

51 WT/DS27

52 Mauricio Salas and John H Jackson, "Procedural Overview of the WTO *EC - Banana* Dispute," *Journal of International Economic Law*, vol. 11, 2000, pp.145-166, p. 153.

other hand, a requirement to go once again through the dispute settlement process as provided under Article 21.5 in its entirety, could defeat the very purpose of the rule based, time-bound dispute settlement procedure itself.

II.3.2. The EC - US Controversy: *The "Sequencing" Problem*

The *EC - Bananas* case was initiated by the US joined by Ecuador, Guatemala, Honduras and Mexico in 1996. On 25 September 1997, the DSB adopted the panel[53] and Appellate Body[54] reports, and recommended that the EC bring its banana regime into conformity with its WTO obligations. The reasonable period allotted for the implementation of the report ended on 1 January 1999.[55] During the implementation period, the EC came up with a new banana regime, which was strongly criticized by the US as WTO inconsistent. On the other hand, the EC maintained that the new banana regime was WTO consistent. The standoff led to the US request for authorization from the DSB for suspension of concessions to the EC. This led to a debate in the WTO as to whether the Article 21.5 procedure was a mandatory condition to the successful invocation of the right to request for suspension of concessions under Article 22.[56]

(a) The *US Position*

The US interpreted Article 22.2 and 22.6 as providing the complainant with a ten day "window of opportunity" to seek authorization of suspension of concessions. Accordingly, the US argued that Article 22.2 allows a prevailing party to request authorization from the DSB within 20 days after the expiry of the implementation period. Article 22.6 requires the DSB to grant authorization

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53 *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R

54 *EC - Bananas*, WT/DS27/AB/R

55 *EC - Bananas*, Report of the 21.3 Arbitration WT/DS27/15

56 *See* generally Cherise M. Valles and Brendan P. McGivern, "The Right to Retaliate under the WTO Agreement: The "Sequencing" Problem, *Journal of World Trade*, vol. 34, no. 2, 2000, pp.63-84.

within 30 days of the expiry of that period, unless there is consensus to reject, or the implementing Member request authorization.

The US argued that given the narrow window of opportunity (10 days according to US in this case), recourse to the 90-day procedure under Article 21.5, it could not be a precondition for invoking Article 22. The remedy of suspension of concessions would be frustrated because if Article 21.5 is resorted to, the panel will render a decision long after the "window of opportunity" had closed. According to the US, once the "window of opportunity" is closed, the negative consensus rule will lapse and thereafter, the DSB shall authorize suspension of concession only by positive consensus principle.

Further, the US noted that if the EC interpretation of "these dispute settlement procedures" in Article 21.5 encompassed regular DSU procedures such as prior consultation and appeal, with an additional reasonable period of time, could result in an "endless loop of litigation."[57]

(b) *The EC's Position*

The EC, on the other hand, argued that any decision of the DSB to authorize suspension of concessions has to be based on a multilateral determination of non-compliance and not on unilateral assertion of the complaining party.[58] According to EC, the DSB was not in a position to authorize the suspension of concession, as until the completion of the article 21.5 procedure the DSB could not know whether the EC's implementing measures were in compliance with the DSB recommendations. The EC also rejected the "window of opportunity' thesis developed by the US.

The right to seek authorization for suspension of concession is a "conditional' right and not an "absolute" right. The condition being the fulfillment of the 21.5 procedure if there is any disagreement as to the

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57 Ibid.

58 Ibid. p. 73.

implementation of the recommendations. Thus, the EC concluded that the as this precondition is not fulfilled by the US, no DSB decision for the suspension of concessions would be made.

(c) *The Conundrum*

On 12 January 1999, EC requested the DSB to establish a panel under Article 21.5 with a mandate to find that the EC measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures."[59] Ecuador also requested for the 21.5 panel to determine the WTO consistency of the modified EC banana regime.[60] Both the panels were established by the DSB. The US on the other hand, requested the DSB for authorization of suspension of tariff concessions worth US$ 520 million, against the EC and its Member states.[61] This move of the US met with stern opposition from the EC, which lead to the suspension of the DSB meeting without an agenda having been adopted. This crisis in the WTO came to rest after weeks of negotiation between the US and the EC, which led to the EC request for Arbitration under Article 22.6 for determining the level of suspension.

Thus, by the end of January, 1999 two concurrent and parallel procedure were underway. One under Article 22.6 arbitration to determine the level of suspension of concession and whether the principles set out in Article 22.3 had been followed, which was scheduled to report with 90 days. The other, a Article 21.5 panel, established to determine the WTO consistency of the new banana regime, which was to submit a report in 60 days. All the three proceedings (two 21.5 panels and one 22.6 arbitration) were conducted by the same three persons, who were the panelists in the original panel on *EC – Bananas*.[62] This gave rise to an anomalous situation where the decision on the quantum of retaliation was scheduled to be released before the determination of the WTO-consistency of the

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59 WT/DS27/40
60 WT/DS27/41
61 WT/DS27/43
62 Both Article 21.5 and 22.6 mandates the "recourse to original were ever possible".

implementing measures.[63] The Chairman of the DSB while stating that these proceedings would be occurring simultaneously observed:

> There remains the problem of how the panel and the arbitrators would co-ordinate their work, but as they will be the same individuals, the reality is they will *find a logical way forward* in consultation with the parties.[64](*emphasis added*)

The panel and arbitrators issued the reports by merging the deadlines for the Article 21.5 and 22.6 proceedings. This was achieved by issuing an "initial decision" under Article 22.6 arbitration stating that there was need for more information before they were able to release their final report. No provision for "initial decision" was contemplated under the DSU. Thus a procedural set back was averted by the timely reaction of the panel and arbitrators.

(d) *The Panel/Arbitration Decision and After*

The 22.6 Arbitrator came to the conclusion that authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB. The arbitrator observed:

> it is our opinion that the concept of *equivalence* between the two levels (i.e. of the proposed suspension and the nullification or impairment) remains a concept devoid of any meaning if either of the two variables in our comparison between the proposed suspension and the nullification or impairment would remain unknown. In essence, we would be left with the option to declare the level of nullification or impairment to be tantamount to the proposed level of suspension, i.e. to equate one variable in the equation with the other. To do that would mean that any proposed level of suspension would necessarily be deemed equivalent to the level of nullification or impairment so equated. Or, we could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.

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63 n. 50, p.75

64 Statement of the DSB Chair on *EC- Bananas*, DSB meeting of 29 January 1999, n.50, p.75

> Consequently, we cannot fulfil our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States.[65]

Further, the Arbitrator while rejecting the EC argument that by considering the WTO consistency of its banana regime in an arbitration proceeding under Article 22, it will deprive Article 21.5 of its *raison d'être*. The Arbitrator held that "for those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures." Thus, the arbitrators found a "logical way forward" in deciding the dispute by extending the time limit of 22.6 arbitration in such a way that it falls after the 21.5 determination of the consistency of the measure taken by the EC with the WTO Agreement.

In the *US – Certain Measures,*[66] a direct fallout of the *EC – Bananas* case, the panel attempted to solve the problem of "sequencing." The panel observed that retaliation could not be authorized by the DSB until the WTO has been able to assess whether retaliation was justified by the continuing nullification of benefits caused by the incompatible measures. The panel further held that the determination of compatibility of the implementation measures could be performed by any of the WTO adjudicating bodies, including the 22.6 arbitration panel:

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65 (original footnote) In this connection, we note that Article 23.2(a) of the DSU provides that Members shall make any determination to the effect that a violation has occurred or that benefits have been nullified or impaired "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB *or an arbitration award* rendered under this Understanding" (emphasis added). This by implication suggests that issues of violation and nullification or impairment can be determined by arbitration.; WT/DS27/ARB, paras. 4.7-4.8

66 *US – Import Measures on Certain Products from the European Communities*, WT/DS165/R (17 July 2000)

> We note that both Article 22.6 and the first sentence of Article 21.5 refer to the possibility of recourse to the original panel; there is only one original panel for each dispute. It is, therefore, not unreasonable to consider that the same original panel, through its arbitration procedure would, first, assess the WTO compatibility of the new measures, secondly, assess the impact, if any, of such WTO incompatible measure, and thirdly determine the equivalent level of suspension of concessions or other obligations. We understand that such is the present practice of the DSB as it has developed under the DSU: the members of the original panel are mandated to act pursuant to Article 21.5 and/or 22.6-22.7 of the DSU.[67] It is therefore reasonable to interpret the DSU so as to allow a single WTO adjudication body to perform both the WTO compatibility determination of the implementing measure (Article 21.5 and 23.2 (a)) and the assessment of the appropriate level of suspension (pursuant to Article 22.6-227).[68]

Thus, the panel concluded that nothing in the DSU prevents parties from agreeing that the 22.6 arbitration panel, prior to the assessment of the level of nullification and impairment, first assess the WTO compatibility of the implementation measures. On appeal, the Appellate Body rejected the "solution"[69] of the panel as unwarranted. It concluded that:

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67 (Original footnote) In the following cases, the DSB decided that the matter would be referred to the original panel under Article 21.5 of the DSU: (i) *EC-Bananas III*, Recourse to Article 21.5 by Ecuador (Communication dated 18 December 1998, WT/DS27/42), WT/DSB/M/53; (ii) *EC-Bananas III*, Recourse to Article 21.5 by the European Communities, WT/DSB/M/53; (iii) *Australia - Salmon*, Recourse to Article 21.5 by Canada (Communication dated 3 August 1999, WT/DS18/14), WT/DSB/M/66; (iv) *Canada - Measures Affecting the Export of Civilian Aircraft*, Recourse to Article 21.5by Brazil (Communication dated 26 November 1999, WT/DS46/13), WT/DSB/M/72; (v) *Brazil - Export financing Programme for Aircraft*, Recourse to Article 21.5 by Canada (Communication dated 23 November 1999, WT/DS70/9), WT/DSB/M/72; and (vi) *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5 by United States (Communication dated 4 October 1999, WT/DS126/8), WT/DSB/M/69). In those cases except for (ii) above, the Member invoking the procedure requested specifically that the matter be referred to the original panel. Also, in the following arbitration proceedings under Article 22.6, the original panel members were appointed as arbitrators in (i) *EC - Bananas III*, Recourse to Arbitration by European Communities under Article 22.6 of the DSUY, WT/DSB/M/54; (ii) *Australia - Salmon*, Recourse to Arbitration by Australia under Article 22.6 of the DSU, WT/DS18/16; and (iii) Decisions by the Arbitrators on *EC - Hormones*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, op. cit., para.2. In this case (i) above, the European Communities specifically requested that the original panel carry out the arbitration. Communication, dated 3 February 1999, from European Communities to the Chairman of the DSB, WT/DS27/46.

68 *US - Certain Measures*, Report of the Panel, WT/DS165, paras. 6.122-6.123

69 The solution offered was that as the Panelist/Arbitrator dealing with Article 21.5 compliance review and Article 22.6 Arbitration being the same, both compliance review and

> ... it is certainly not the task of either the panel or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article XI:2 of the *WTO Agreement*. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law." (emphasis added). Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility of the Members of the WTO.[70]

(e) *The Ad hoc Solutions*

In the subsequent cases, starting from *Australia - Salmon*[71] to *Australian - Leather*,[72] *Brazil - Aircraft*[73], *Canada - Aircraft*,[74] the parties to the dispute either agreed to initiate concurrent procedures under Article 21.5 and Article 22.6 or agreed to undertake an Article 21.5 review prior to initiating procedures to suspend concessions, thereby waiving the Article 22 timetable for negative-consensus approval. In *Canada - Milk*[75] and *US - Foreign Sales Corporation*,[76] the parties to the dispute concluded bilateral agreements on how to deal with the sequence of procedures.

Thus, the temporary solution found in the WTO for the problem of "sequencing" is to appoint the same original panel to act as the compliance review panel under Article 21.5 and as Article 22.6 Arbitrators. Both the adjudication procedures are triggered at the same time but pursued sequentially: the Article

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determination of level of suspension of concession can be dealt with one after another by the same panel or arbitrator.

70 Ibid. Report of the AB, para.92.

71 *Australian - Measures Affecting the Importation of Salmon*, Report of 21.5 Panel, WT/DS18/17 (Dec. 13, 1999).

72 *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Report of Article 21.5 Panel, WR/DS126/8

73 *Brazil - Export Financing Programme for Aircraft*, Report of Article 21.5 Panel, WT/DS46/13 (Nov. 26, 1999)

74 *Canada - measures Affecting the Export of Civilian Aircraft*, Report of Art. 21.5 Panel, WT/DS70/9, (Nov.23, 1999)

75 WT/DS113/14

76 WT/DS108/12

22.6 arbitration process is suspended until the implementation review process has been completed.[77] Till now there is no clarification as to whether the term "these dispute settlement process" includes all the procedures of the original dispute settlement process like consultation, reasonable period of time etc. Though a number of suggestions have come up from the Member countries, especially from Japan, nothing concrete has emerged so far. The principle part of the Japanese proposal was that "if a disagreement over compliance arises, the disagreement would be referred to a compliance panel (the Appellate Body, if the underlying panel report had been appealed, or the original panel, it had not been appealed). The compliance panel is to submit its report within 90 days of the referral and the report is to be adopted at a DSB meeting held 10 days thereafter, absent a consensus to the contrary. If the concerned Member is found not to have brought the measure into conformity, the prevailing party may request authorization to suspend concessions at that same meeting".[78] Further, Article 22 would be revised to make it clear that a request to suspend concessions can be made only if a Member fails to indicate that it will comply with the DSB recommendations, fails to report that it has implemented or is found not to have complied by a compliance panel.

The EC and US have rejected the proposal submitted by the Japan, and stated so in the General Council meeting of 8-9 February 2001.[79] Moreover, the attempt by the panel in *US – Certain Measures* case, to put an end to the sequencing problem, was rejected by the AB on the ground of over-activism by the panel, though the panel was merely trying to highlight the existing practice in the WTO DSU. Moreover, one can argue that the panel was acting on the implied consent of the DSB to find a "logical way forward". Furthermore, it may be added that if the panel's solution is accepted, it would not only settle the issue of "sequencing", but also save the time taken by the 21.5 compliance review panel.

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77 Gabrielle Marceau, "Implementation of the Panel and Appellate Body Reports", *Focus WTO*, vol.2, no.6, 2001, pp. 2-13, at p.8

78 William J. Davey, "Japan, the WTO Dispute Settlement and the Millennium Round", 10 September, 2000, p. 6.

79 Ibid.

II.4. The Issues in Enforcement of Adverse WTO Rulings

Enforcement of Panel/AB report is the final stage of the implementation process provided by the DSU. Since the WTO does not have jurisdiction inside sovereign countries, it is for the complaining member to initiate enforcement of the recommendations according to the procedures provided by the DSU. In the event of the failure of respondent to implement the findings, the only option before a complainant is to retaliate against the respondent, to hurt him to the extent of the loss suffered. If the respondent fails to comply with the recommendations within the reasonable period and if the compensation is not forthcoming, the complainant can make a request to the DSB for authorization to retaliate, which the DSB is obliged to give, unless rejected by consensus.

Even though in theory dispute settlement process appears expeditious and predictable, the reality is different. This reality is brought to light by the *EC - Bananas* and *EC - Beef Hormones* cases. These cases demonstrate that winning a case does not necessarily guarantee compliance, especially when the losing party is a powerful trading State. Even though the WTO dispute settlement system provides for almost automatic approval for retaliation, this remedy is not practically available for the smaller trading nations because of political and economic considerations. It is also doubtful whether the retaliation is of any utility to most of the developing countries whose economy largely depends on one or two products.[80] These disputes have questioned the credibility of the dispute settlement system even against equal trading partners. Moreover, even if a winning member resorts to retaliation or countermeasures, it will be counterproductive not only for that particular State, but also for the international community at large. The logicality of sanctions as an instrument of securing trade rights itself is in question. This is because sanctions affects exporters who have done no wrong and it does not create additional revenue for the sanctioning State

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80 *See* Ecuador's attempted retaliation against EC in *EC - Bananas*.

to compensate its exporters who were effected by the losing States inconsistent measures.

Since 1 January 1995, there have been five cases where the authorization of suspension of concessions has been granted.[81] This includes authorization granted by the WTO pursuant to Article 22.7 of the DSU and Article 4.10 of the Agreement on Subsidies and Countervailing Measures.[82] Active arbitration on the level of suspension of concessions has been undertaken in two cases. This covers arbitration proceedings pursuant to Article 22.6 and 22.7 of the DSU and Article 4.11 of the SCM Agreement.[83]

II.4.a. *Object of Retaliation*

Under the WTO Dispute Settlement Mechanism, if a member fails to bring the measure, found to be inconsistent by the DSB recommendation and rulings, the party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the member, of concessions or obligations under the covered agreements.[84] The condition for suspension of concession is that it must be "equivalent to the level of nullification or impairment". This is because under WTO DSU the suspension of concession is seen as an interim measure pending implementation of the Panel or AB report. This provision is based on the idea of restoring the balance of concessions (proportional to the injury suffered) ruptured by the measure found to be inconsistent with a covered agreement and so there is no room for punitive sanctions. The Arbitrator in *EC - Bananas (Article 22.6 Arbitration)* while determining the level of suspension of concession stated that the main object of retaliation is to induce compliance. The Arbitrator observed:

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81 *EC - Bananas*, WT/DS27; *EC - Hormones*,WT/DS26; *Australia - Salmon*,WT/DS18; *Brazil - Aircrafts*, WT/DS46

82 Source: *Update of WTO Dispute Settlement Cases*, 17 January 2002, WT/DS/OV/3, p.2

83 Ibid.

84 Article 22.2, DSU

> We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature.[85]

However, what if the "equivalent" suspension of concession did not "induce compliance"? This problem is yet to be addressed.

II.4.2. *Scope of Review by Arbitrators*

Under the WTO DSU Article 22, a Member's right to retaliate is almost automatic. If there is a disagreement as to the level of suspension of concession, an arbitrator shall be appointed to determine this level. In the case of retaliation request in the same sector, the scope of review of the 22.6 Arbitrator is limited to the determining the level of retaliation. But when the request involves cross-retaliation, the arbitrator has much wider scope of review. The Arbitrators in *EC – Bananas III (22.6 Arbitration, US)*, examined the scope of the authority of arbitrators to review the choice made by a complaining Member pursuant to Article 22.3 (Cross-retaliation). The Arbitrators stated:

> Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators of such examination to cases where a request for authorization to suspend concessions is made under subparagraphs (b) or (c) of Article 22.3 of the DSU. However, we believe that there is no contradiction between paragraphs 6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.
>
> If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement,

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85 *EC – Bananas III*, Report of the Article 22.6 Arbitrators, para. 6.2

> outside of the scope of the sectors or agreements to which a Panel's findings relate, paragraphs (b)-(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective.
>
> We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of sub-paragraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made – in full or in part – under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether.[86]

Thus, the Arbitrator concluded that the DSU has given implied authority to the 22.6 arbitrator to examine whether suspension of concession under the same sectors is enough or whether there is a need to cross-retaliate under different sector in the same agreement or a different agreement altogether.

II.4.3. *Burden of Proof*

The Arbitrator in *EC – Hormones*, on the point of who bears the burden of proof in an arbitration proceeding for the determination of level of suspension of concession under Article 22.6 of the DSU, observed:

> WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that

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86 *EC – Bananas III (US)*, Report of the 22.6 Arbitration, paras. 3.5-3.7.

> the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is not equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.
>
> The same rules apply where the existence of a specific *fact* is alleged; ... it is for the party alleging the fact to prove its existence.
>
> The duty that rests on all parties to produce evidence and to collaborate in presenting evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof – is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is *not* equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal *is* equivalent to the trade impairment it has suffered. Some of the evidence – such as data on trade with third countries, export capabilities and affected exporters – may, indeed, be in the sole possession of the US, being the party that suffered the trade impairment. This explains why we requested the US to submit a so-called methodology paper.[87]

Thus, the ultimate burden of proof in an arbitration proceeding is on the party challenging the conformity of the request for retaliation with Article 22. The Arbitrator in *EC- Bananas (22.6 Arbitration, Ecuador)* found the considerations of the Arbitrators in the *Hormones* arbitration proceedings persuasive. However, the Arbitrator in *EC – Bananas (22.6 Arbitration, Ecuador)* was of the view that "some evidence may be in the sole possession of the party suffering nullification or impairment. This explains why we requested Ecuador to submit a methodology document in this case."[88] Further, while examining the effectiveness of the suspension of concession in other sector or agreement the arbitrator observed:

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87 Decision by the Arbitrators in *EC - Hormones* (Original Complaint by the United States) Recourse to Arbitration by the EC under Article 22.6 of the DSU (WT/DS26/ARB) of 12 July 1999, paras. 9-11.

88 WT/DS27/ARB/ECU, para. 38.

> We emphasize that Article 22.3(b) and (c) does not require Ecuador, nor us, to establish that suspension of concessions or other obligations is practicable and/or effective under another agreement (i.e. the TRIPS Agreement) than those under which violations have been found (i.e. the GATT and the GATS). The burden is on the European Communities to establish that suspension within the same sector(s) and/or the same agreement(s) is effective and practicable. However, according to subparagraph (c) of Article 22.3, it is our task to review Ecuador's consideration that the "circumstances are serious enough" to warrant suspension across agreements.[89]

II.4.4. *Cross-Retaliation*

The general principle set forth in Article 22.3(a) of the DSU is that suspension of concessions or other obligations should be sought first with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. Given this principle, it remains the preferred option under Article 22.3 for the Member to request suspension of concessions under the GATT as one of the same agreements where a violation was found, if it considers that such suspension could be applied in a practicable and effective manner. Only when this is not "practicable or effective" may concessions be suspended in a different sector covered by the same agreement.[90] If this is not practicable or effective and the "circumstances are serious enough", retaliation can be authorized under different Agreement. In case of a request for cross-retaliation, the requesting party shall take in to account "the importance of such trade to that party", "the broader economic element relating to nullification and impairment" and "the broader economic consequence of the suspension of concessions or other obligations".[91]

(a) *Interpretation of the term "Practicable and effective"*

The meaning and scope of the term "practicable and effective" has been a matter of contention before the Article 22.6 Arbitration panel and has in this

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89 Report of the Article 22.6 Arbitration, WT/DS27/ARB/ECU, para.78
90 Article 22.3 (b), DSU
91 Article 22.3 (d), DSU

process clarified the meaning of the term. In *EC – Bananas III (22.6 Arbitration, Ecuador)*, the European Communities argued that Ecuador did not demonstrate why it is not practicable or effective for it to suspend concessions under the GATT or commitments under the GATS in service sectors other than distribution services. Ecuador claimed that" it did not request suspension entirely under the GATT and/or in service sectors under the GATS other than distribution services because it considered that it would not be practicable or effective in the meaning of Article 22.3(b) and (c) of the DSU, that circumstances in Ecuador's bananas trade sector and the economy on the whole are serious enough to justify suspension under another agreement, and that the parameters in Article 22.3(d)(i)-(ii) corroborate this conclusion."[92] The Arbitrator observed:

> ... an examination of the 'practicability' of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case.
>
> To give an obvious example, suspension of commitments in service sub-sectors or in respect of modes of service supply which a particular complaining party has not bound in its GATS Schedule is not available for application in practice and thus cannot be considered as practicable. But also other case-specific and country-specific situations may exist where suspension of concessions or other obligations in a particular trade sector or area of WTO law may not be 'practicable'.
>
> In contrast, the term 'effective' connotes 'powerful in effect', 'making a strong impression', 'having an effect or result'. Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time.
>
> One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law. In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party. In these circumstances, a consideration by the

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92 *EC – Bananas III (Ecuador)*, Report of the Article 22.6 Arbitration, para. 68.

> complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.[93]

The Arbitrator further observed that the "practicability" and "effectiveness" criteria should be:

> consistent with the object and purpose of Article 22 which is to induce compliance. If a complaining party seeking the DSB's authorization to suspend certain concessions or certain other obligations were required to select the concessions or other obligations to be suspended in sectors or under agreements where such suspension would be either not available in practice or would not be powerful in effect, the objective of inducing compliance could not be accomplished and the enforcement mechanism of the WTO dispute settlement system could not function properly.[94]

Ecuador, in the same case argued that given the wording of subparagraphs (b) and (c) of Article 22.3 of the DSU, it is essentially the prerogative of the Member suffering nullification or impairment to decide whether it is "practicable or effective" to choose the same sector, another sector or another agreement for purposes of suspending concessions or other obligations. The Arbitrator while rejecting this interpretation of Ecuador noted that "Article 22.3(a) leaves discretion to the complaining party concerned first to select concessions or other obligations to be suspended up to the level of nullification or impairment allegedly suffered within the same sector(s) where a violation has been found, while the discretion to seek suspension across sectors and/or agreements remains limited by the requirements of Article 22.3(b)-(e) and, if challenged by the other party, is subject to review by the Arbitrators as described above."[95] But the Arbitrator also rejected the EC's argument that Ecuador bears the burden of establishing that it has respected the principles and procedures set forth in Article 22.3.[96]

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93 Ibid. paras. 70-73

94 *EC – Bananas III*, Report of the Article 22.6 Arbitration, WT/DS27/ARB/ECU, para. 76

95 Report of the Article 22.6 Arbitration, WT/DS27/ARB/ECU, para. 57

96 Ibid. para.59

(b) *Interpretation of the phrase "Circumstances are Serious Enough"*

Suspension across sectors under the same agreement is permitted if suspension within the same sector is "not practicable or effective". However, an additional condition applies when the complaining party considers a request for suspension across agreements.[97] Such suspension under another agreement is not justified unless "circumstances are serious enough."

> "The concepts of "circumstances" and the degree of "seriousness" that are relevant for the analysis of this condition remain undefined in subparagraph (c). The provision specifies no threshold as to which circumstances are deemed "serious" enough so as to justify suspension under another agreement. We find useful guidance in the ordinary meaning of the term "serious" which connotes "important, grave, having (potentially) important, especially undesired, consequences; giving cause for concern; of significant degree or amount worthy of consideration".[98] Arguably, the factors listed in subparagraph (d) provide at least part of the context for further defining these meanings.
>
> More specifically, subparagraphs (i) of Article 22.3(d) provide that, in applying the principles set forth in subparagraph (a-c), the complaining party seeking authorization shall take into account, *inter alia*, the trade in the sector or under the agreement under which WTO-inconsistencies were found, as well as the "importance of ... trade" to that party.
>
> We do not exclude the possibility that trade in the relevant sector(s) and/or agreement(s) in their entirety may be relevant under subparagraph (d)(i). In particular, we deem it appropriate to consider the proportion of the trade area(s) affected by WTO-inconsistent measure(s) covered by the terms of reference of the reconvened panel in relation to the entire trade under the sector(s) and/or agreement(s) in question. However, we believe that the criteria of "such trade" and the "importance of such trade" to the complaining party relate primarily to trade nullified or impaired by the WTO-inconsistent measure at issue. In the light of this interpretation, we attribute particular significance to the factors listed in subparagraph (i) in the case before us, where the party seeking suspension is a developing country Member, where trade in bananas and wholesale service supply with respect to bananas are much more important for that developing country Member than for the Member with respect to which the requested suspension would apply.[99]

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97 Article 22.3 (c), DSU

98 (original footnote) Oxford English Dictionary, p. 2785.

99 (original footnote) Moreover, the proportion of trade in bananas and related services in relation to trade in goods and services overall is comparably high for Ecuador, and certainly

> In contrast, subparagraph (ii) of Article 22.3(d) requires the complaining party to take into account in addition "broader economic elements" related to the nullification or impairment as well as "broader economic consequences" of the suspension of concessions or other obligations. The fact that the former criterion relates to "nullification or impairment" indicates in our view that this factor primarily concerns "broader economic elements" relating to the Member suffering such nullification or impairment, i.e. in this case Ecuador.
>
> We believe, however, that the fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that "broader economic consequences" relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial.[100]

Thus, the Arbitrator came to the conclusion that the "circumstances are serious enough" within the meaning of subparagraph (c) for Ecuador to seek suspension under the TRIPS Agreement in the context of the factors set forth in subparagraphs (i) and (ii) of Article 22.3(d). Further, the Arbitrator noted that in determining whether the "circumstances are serious enough", there is a need to examine whether the trade in the sector(s) or under the agreement(s) where violations were found and the "importance of such trade to the party" suffering nullification or impairment was taken into account by party requesting the suspension. Furthermore, there is also a need to analyze whether "broader economic elements" related to nullification or impairment and "broader economic consequences" of the requested suspension within the meaning of subparagraph (ii) of Article 22.3(d) were taken into account by party, here Ecuador.

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higher than the proportion of banana imports relative to total imports to the European Communities.

100 *EC – Hormones*, Report of the Article 22.6 Arbitration, paras.80-82

(c) *The "broader economic elements" and the "broader economic consequences"*

Article 22.3 (d) mandates that the parties to the dispute should take in to account the "broader economic elements" related to nullification or impairment and the "broader economic consequences" of the requested suspension.[101] While granting cross-retaliation under TRIPS the arbitrator noted that fact that Ecuador, a small developing country, only accounts for a negligible proportion of the EC's exports of these products, the suspension of concessions by Ecuador *vis-à-vis* the EC is unlikely to have any significant effect on demand for these EC exports.[102] The arbitrator also noted the inequalities that exist between the EC and Ecuador.[103] The arbitrator further noted the "importance of such trade to the party,"[104] i.e., banana trade to Ecuador.[105] The Arbitrator observed:

> Finally, we review whether Ecuador has taken into account "broader economic elements" related to nullification or impairment and "broader economic consequences" of the requested suspension within the meaning of subparagraph (ii) of Article 22.3(d) in applying the principles and procedures of Article 22.3, and in particular in considering that "circumstances are serious enough" to justify suspension under another agreement than those where violations were found.
>
> In these respects, Ecuador offered the following argumentation. On the one hand, Ecuador argued that it currently faces the worst economic crisis in its history. Ecuador pointed at the fact that its economy shrank by 7 per cent in 1999 and that total imports declined by 52 per cent. Unemployment rose to 17 per cent. We do not question the alarming

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101 Article 22.3 (d) (ii), DSU

102 (original footnote) The EC's exports to Ecuador are less than 0.1 per cent of the EC's total merchandise exports (excluding intra EC exports).

103 Ecuador's population is 12 million, while the EC's population is 375 million. Ecuador's share of world merchandise trade is below 0.1 per cent, whereas the EC's world merchandise trade share is in the area of 20 per cent. In terms of world trade in services, the EC's share is 25 per cent, while no data are available for Ecuador because its share would be so small. The GDP at market prices in 1998 was US$20 billion for Ecuador and US$7,996 billion for the 15 EC member States. In 1998, the EC's GDP per capita is US$22,500, whereas per capita income is US$1,600 in the case of Ecuador. para.125

104 Article 22.3 (d)(i), DSU

105 Ecuador is the largest exporter of bananas in the world and the largest exporter to the European market. Banana production is also the largest source of employment and the largest source of foreign earnings. Nearly 11 per cent of Ecuador's population is totally dependent on this sector. Banana exports (in goods only) represent 25.45 per cent of Ecuador's total merchandise exports. Banana production represents nearly 5.2 per cent of the GDP.

> nature of these economic indicators. However, the European Communities contended that Ecuador has not clearly established a causal link between the EC's failure to comply with the DSB rulings within the reasonable period of time and the economic crisis in Ecuador. In the EC's view, this crisis may be due to multiple reasons, including natural disasters and domestic political problems.
>
> We note that subparagraph (ii) of Article 22.3(d) does not require the complaining party to establish a causal connection between nullification or impairment suffered and "broader economic elements" to be taken into account. It is sufficient to show that there is a relation between the "broader economic elements" considered by Ecuador and the nullification and impairment caused by the EC import regime for bananas. We consider Ecuador's argument plausible that the nullification and impairment caused by the WTO-inconsistent aspects of that EC import regime have aggravated these economic problems, especially in view of the importance of trade in bananas and related distribution services for Ecuador's economy. [106]

The Arbitrator thus concluded that Ecuador has taken into account, within the meaning of subparagraph (ii) of Article 22.3(d) "broader economic elements" and "broader economic consequences" in applying the principles and procedures set forth in Article 22.3. The Arbitrator further observed that in interpreting and applying factors listed in subparagraph (d) of Article 22.3, it has taken into consideration the provisions of Article 21.8[107] which require the DSB, "in considering which action might be appropriate if a case is brought by a developing country Member, to take into account not only the trade coverage of the measures complained of, but also their impact on the economy of the developing country Members concerned."

II.4.5. *Determination of the Level of Retaliation*

If the WTO ruling is not complied with even after the reasonable period of time, the complaining Member can request for authorization of suspension of concessions, which shall be granted within 30 days of the end of the reasonable

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106 paras.131-134.

107 Article 21.8 of the DSU: "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."

period of time, unless rejected by consensus or "if the Member concerned objects to the level of suspension proposed."[108] If the complaining Member objects to the level of suspension proposed, the matter shall be referred to an arbitrator for determination. The arbitrator so appointed shall not examine the nature of the concessions or other obligations to be suspended but "shall determine whether the level of such suspension is *equivalent* to the level of nullification or impairment."[109](emphasis added). In other words, the level of suspension should be "equivalent" to the level of nullification and impairment.[110]

The use of the term "equivalent" in Article 22.4, rules out the possibility of punitive damages in the WTO system.[111] Moreover, it is questionable whether there is room for 'proportionate' damages, as 'equivalent' is a much stricter term than 'proportionate'. Equivalence again, should be judged by reference to the level of nullification and impairment, because proportionality in WTO context is to be judged by reference to the effect then the gravity of the act.[112] In the 1947 GATT regime the term used in the place of 'equivalent' was 'appropriate',[113] which had wider connotations.[114] The difference in the ambit of these two terms was pointed out then by the Legal Advisor to the Director-General of the GATT in the context of *Superfund* case,[115] where he observed:

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108 Article 22.6, DSU

109 Article 22.7, DSU

110 Article 22.4, DSU

111 Under public international law, as per Article 49 of the ILC Draft on State Responsibility, a countermeasure should be proportional to the damage suffered and should be proportional to the gravity of the act. But in WTO the "gravity" is not taken into consideration. See generally Enzo Cannizzaro, "The Role of Proportionality in Law of International Countermeasures", *European Journal of International Law*, vol.12, no.5, 2001, pp.889-916; Axel Desmedt, "Proportionality in WTO Law", *Journal of International Economic Law*, vol.11, 2000, pp.441-480.

112 Patros Mavroidis, "Remedies in the WTO Legal System," *European Journal of International Law*, vol. 11, 2000, pp.763-813, at p. 800.

113 Article XXIII:2, GATT 1947.

114 *See Netherlands – Measures of Suspension of Obligation to the United States*, Report of the panel, GATT BISD, 1S/32-33.

115 Where the EC was requesting authorization of suspension of concession against the US. Panel report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, GATT BISD 34S/136, p. 158.

> "there were a few provisions in the General Agreement where retaliation was foreseen. In two of those, Article XIX and XXVII, retaliation was defined as the withdrawal of substantially equivalent concessions. In the case of Article XXIII, the wording was wider, referring to measures determined to be appropriate in the circumstance, which meant that there was a wider leeway in calculating the retaliatory measures under Article XXIII than under Articles XIX and XXVIII... A working party in the present case would examine whether the retaliatory measures proposed by the Community would be appropriate in the circumstances; that would include the question of *how* to calculate the damage and the compensation."[116]

Thus by substituting the word "appropriate" with "equivalent" in Article 22.4, the WTO DSU has strictly limited the level of countermeasure available to the complaining party, to the damage incurred.

The Arbitrator in *EC – Hormones*, while deciding the level of suspension of concession addressed the issue of the limitation in time of remedies. The EC import ban on hormone-treated-beef, which was found to be inconsistent, has been in place since 1989. The WTO Agreement on Sanitary and Phytosanitary Measures came to force only on 1 January 1995. The panel by applying the maxim *nullum crimen nulla poena sine lege*, rejected the idea of extending the remedy beyond 1 January 1995 and accepted the date marking the end of the reasonable period of time (implementation date) as the cut-off date. It then calculated the level of suspension of concession by asking the question "what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999?"[117] (i.e., the implementation date). The panel concluded that:

> this question like any question about future events, can only be a reasonable estimate.[118]

In *EC – Bananas*, the Arbitrator while determining the level of suspension of concession clarified the meaning of the term "equivalent". The arbitrator stated:

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116 *GATT Analytical Index, Guide to GATT Law and Practice* (Geneva, 1995), p. 651.
117 *EC – Hormones*, Report of the Article 22.6 arbitration, para.38
118 Ibid. para. 41.

> "We note that the ordinary meaning of the word "*equivalence*" is "equal in value, significance or meaning", "having the same effect", "having the same relative position or function", corresponding to", "something equal in value or worth", also "something tantamount or virtually identical".[119] Obviously, this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other."
>
> ... as a prerequisite for ensuring equivalence between the two levels at issue we have to determine the level of nullification or impairment." [120]

Thus, the arbitrators ruled out the possibility of retroactiveness in the commutation of damage. The arbitrators in this case measured the level of nullification and impairment by constructing a counterfactual basis i.e., the EC adopts a WTO-consistent banana import regime. Then they calculated the difference between the counterfactual situation and the actual situation in order to decide the amount of equivalent countermeasures.[121]

In the *EC - Bananas III (22.6 Arbitration Report, US)*, the arbitrator had requested the US to submit documents revealing the methodology used by the party for calculating the level of nullification or impairment. In *EC – Bananas III (22.6 Arbitration Report, Ecuador)*, the EC requested that the Arbitrators disregard certain information contained in Ecuador's methodology document on the basis that such information was included in Ecuador's first submission only and not in the methodology document. The Panel clarified the importance of methodology document in calculating the level of suspension and stated:

> ... we introduced the procedural step of submitting a methodology document in the US/EC *Bananas III* arbitration proceeding because we reckoned that certain information about the methodology used by the party for calculating the level of nullification or impairment would logically only be in the possession of that Member and that it would not be possible for the Member requesting arbitration pursuant to Article 22 of the DSU to challenge this information unless it was disclosed.

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119 (original footnote) The New Shorter Oxford English Dictionary on Historic Principles (1993), page 843.

120 *European Communities - Regime For The Importation, Sale And Distribution Of Bananas*, Report of the Article 22.6 arbitration, WT/DS27/ARB, paras. 4.2-4.3

121 n. 112, p. 805.

> Obviously, if such information were to be disclosed by the Member suffering impairment only in its first submission, the Member requesting arbitration could only rebut that information in its rebuttal submission, while its first submission would become necessarily less meaningful and due process concerns could arise. It was out of these concerns that the United States was requested to submit a document explaining the methodology used for calculating impairment before the filing of the first submission by both parties. Unlike in panel proceedings, where parties do not file their first submissions simultaneously, it has been the practice in past arbitration proceedings under Article 22 that both rounds of submissions take place before a single oral hearing of the parties by the Arbitrators and that in both these rounds parties file their submissions simultaneously.
>
> However, we agree with Ecuador that such a methodology document is nowhere mentioned in the DSU. Nor do we believe, as explained in detail above, that the specificity requirements of Article 6.2 relate to that methodology document rather than to requests for suspension pursuant to Article 22.2, and to requests for the referral of such matters to arbitration pursuant to Article 22.6. For these reasons, we reject the idea that the specificity requirements of Article 6.2 apply *mutatis mutandis* to the methodology document. In our view, questions concerning the amount, usefulness and relevance of information contained in a methodology document are more closely related to the questions of who is required at what point in time to present evidence and in which form, or in other words, the issue of the burden of proof in an arbitration proceeding under Article 22.6."[122]

The special and additional rules for dispute settlement under the WTO Agreement on Subsidies and Countervailing Measures (SCM) provides for a special provision in calculating the level of suspension. Article 4(10) of the SCM allows the WTO members to take countermeasures "appropriate" to the damage inflicted. The footnote to Article 4 (10) explains "appropriate means not disproportionate." Moreover, Article 4 (10) uses the term "countermeasures" rather than suspension of concessions. The Arbitration panel (Article 22.6 DSU and 4.11 SCM) on *Brazil - Aircraft* concluded that, contrary to the countermeasures adopted under Article 22.6 DSU, the concept of nullification and impairment is not to be found in Article 3 and 4 of the SCM Agreement and the only limitation to any countermeasures implemented pursuant to Article 4.10 and 4.11 SCM and footnotes 10 and 11, is that they be "appropriate".

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122 *EC – Bananas III (Ecuador)*, Report of the Article 22.6 Arbitration, paras. 35-36.

> While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification and impairment will be appropriate, we recall that the concept of nullification and impairment is absent from Article 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.[123]

Thus far, the arbitrator under Article 22.6 has shown a tendency to reduce the level of suspension claimed by the complainants. This practice can be seen as a tendency of the complainants to make inflated claims or the arbitrators attempt to make the level of suspension of concession "equivalent." In the *EC - Bananas III*,[124] the US and the Ecuador requested for US$ 520 million and US$ 450 million respectively. But the panel reduced the amount of retaliation to US$ 191.4 million and US$ 206.6 million respectively. In the *EC - Hormones*,[125] the arbitrator reduced the US claim of US$ 202 million to US$ 116.8 million and the Canada request was reduced from US$ 75 million to US$ 11.3 million. In the *Brazil - Aircraft*[126] case, Canada requested retaliation for an amount of C$700 million per annum and was authorized to do so for an amount of C$334.2 million per annum.

III. The Effectiveness of "Sanction" in WTO: A Case Study

In recent years the WTO has been faced with many tests in regulating international trade and settling disputes between member countries. One of the key factors that determine the success of the WTO's dispute settlement mechanism is the compliance achieved from member countries on the losing end of disputes. Already, clashes between the United States and the European Union, have begun to result in delay and incomplete compliance. Specifically, the current trade wars between these two superpowers involving beef and bananas demonstrate the difficulty the WTO may face in achieving compliance from member countries on the losing end of a dispute. If the WTO fails to adequately

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123 *Brazil - Aircraft*, Report of the Article 22.6 Arbitration, WT/DS46/ABR, para. 3.57
124 *EC - Bananas*, Article 22.6 Arbitration, WT/DS27/ARB/US, WT/DS27/ARB/ECU
125 *EC - Hormones*, Article 22.6 Arbitration, WT/DS26/ARB/US, WT/DS48/ARB/CAN
126 *Brazil - Aircrafts*, Article 22.6 Arbitration, WT/DS46/ABR

deal with these compliance problems they could undermine the entire new dispute resolution system and the organization's credibility. The task here is to examine some of the cases where countermeasures or sanctions have been authorised by the WTO DSB and the result it achieved. In this context an examination of WTO cases, the *EU – Bananas* and the *EU – Beef Hormones* is being undertaken.

III.1. *The EC – Bananas case*

A Brief History

The conflict between the European Union and the United States over bananas began in July 1993. Several European countries had been providing their ex-colonies in Africa, the Caribbean, and the Pacific with preferential access to EU banana exports. These countries effectively discriminated against banana imports from Central America. In 1993 the European Union decided to unify its member countries policies on bananas by introducing a single common market called the European Union Banana Regime. This new regime set up a structured tariff quota system to imports from countries that were not ex-colonies. It also established import licenses preferential to former colonial lands. Europe's new banana regime angered leading United States distributors of Central American bananas, who saw a decline in their profits after the introduction of the new tariffs and quotas.

Prior to the 1993 adoption of the European Union Banana Regime, the United States, in conjunction with several Central American banana producers,[127] complained to the GATT regarding Europe's patchwork of preferential treatment. Initial consultations failed between the then European Economic Community (EEC) and the United States. Although a GATT panel eventually held that the various EEC banana import regimes violated certain GATT provisions,[128] the

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127 Costa Rica, Nicaragua, Colombia, Guatemala and Venezuela.

128 Specifically, the panel found that the "quota restrictions on bananas were inconsistent with Article XII's prohibition of quantitative restrictions.", Zsolt K. Bessko, "Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding on

contracting parties did not adopt the report, due to continual blocks by the EEC.[129] The Caribbean banana producers brought another complaint to the GATT shortly after the adoption of the European Union Banana Regime. Once again the GATT panel ruled that the new regime remained inconsistent with GATT provisions, but the EEC blocked adoption of the panel report.[130]

With the creation of the WTO and its new dispute resolution mechanism, the US joined with Ecuador, Guatemala, Honduras, and Mexico in the year 1996 to challenge the EU Banana Regime before the WTO. In May of 1997 the WTO issued a panel report finding that the EU's "banana import regime and its licensing procedures for the importation of bananas were inconsistent with various obligations of the GATT 1994 and related WTO agreements."[131]

Refusing to accept the initial decision of the WTO dispute settlement process, the EU soon announced its decision to appeal the ruling. By September of 1997 the WTO Appellate Body had issued and adopted a report upholding most aspects of the panel decision.[132] This decision meant that the EU either had to comply with the WTO ruling or face retaliation from the US.

Initially the EU split as to the implementation of the required changes. Some countries pushed for alternatives to compliance, such as payment of compensation to the complaining members, while other countries expressed support for implementation. Despite the split, the EU announced that it would accept the verdict of the WTO and would make future decisions regarding implementation of the ruling. While the EU refused to disclose any details of its implementation plan, it insisted on maintaining some trade preferences established in its banana regime. In response the US commented that it would settle for

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Rules and Procedures Governing the Settlement of Disputes," *Case Western Reserve Journal of International Law*, vol.28, 1996, p.274

129 *EEC – Member States Import Regime for Bananas*, GATT Unadopted Report of the Panel, (3 June 1993) (*Bananas I Panel Report)*

130 *EEC –Import Regime for Bananas*, GATT Unadopted Report of the Panel, (18 January 1994) (*Bananas II Panel Report)*

131 *EC – Bananas III*, Report of the Panel, WT/DS26/R

132 *EC – Bananas III*, Report of the AB, WT/DS27/ABR

nothing less than full implementation of the WTO ruling and that compensation would not be acceptable.

Dissatisfied with the EU's failure to specify its plans for implementation, the United States, Honduras, Guatemala, Ecuador and Mexico requested binding arbitration in November 1997. The arbitrator held that "the EC would have fifteen months and one week to implement the WTO decision and bring its banana import regime into compliance."[133] In January 1998, the EU adopted a proposal to modify its banana regime. While the new proposal contained some changes, the US contended that it remained just as discriminatory as the previous regime. Based on its belief that the EU plan for implementation failed "to make any significant changes to bring the (EU) regime in line with WTO provisions," the US in July 1998 asked to go back to the WTO panel for a ruling. The US further maintained that if the EU did not comply with the WTO ruling by the January 1999 deadline, it would impose sanctions no later than March 1999. The EU responded by stating that it would only agree to the panel if the US dropped its threat of sanctions, thus delaying the establishment of such a panel.[134]

In January 1999, the US notified the WTO that it would not back away from its intentions to suspend concessions on particular products totaling almost $ 570 million in trade. The WTO agreed that a panel should rule on whether the EU's amended banana import regime complied with the previous WTO judgments. By the end of January, the EU asked for WTO arbitration to review the proposed sanctions and the US suspended the threatened trade sanctions until March. The WTO stated that the arbitrator would produce a decision regarding the proposed sanctions on March 2, 1999 and the panel would reach a result regarding the new banana import regime by April 12, 1999.

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133 Report of the Article 21.3 (c) Arbitration, WT/DS27/ARB

134 Benjamin L. Brimeyer, "Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations," *Minnesota Journal of Global Trade*, vol.10, 2001, p. 133

On March 2, 1999 the WTO arbitrator returned with an unexpected delay and requested more time and information to assess the amount of sanctions. Frustrated by the delays, the United States announced that it would begin imposing 100 percent duties on $ 520 million of selected European exports. The United States stated, "it is time for the EU to bear some of the consequences for its complete disregard for its GATT and WTO obligations."[135] The EU responded that the US could not impose such sanctions until the WTO had pronounced its amended regime illegal. It further contended that the sanctions displayed "blatant disregard" for the WTO's multilateral settlement procedures.[136]

Worried that the standoff between the EU and the US regarding the banana regime would undermine the authority of the dispute settlement system, the WTO members urged the two superpowers to resolve their dispute. The standoff continued, however, until an April 1999 ruling by the WTO holding that the amended banana import regime failed to comply with previous WTO rulings. The arbitration panel did rule, however, that the United States had over-estimated the costs of the regime to the US economy. By the end of April, the WTO had formally authorized the United States to impose $ 191.4 million in trade sanctions against European goods as retaliation. This represented the first time in more than fifty years that authorization to retaliate against a member country has been granted by the WTO or the GATT. The US insisted that retaliation was only a last resort measure designed to push the EU into compliance.

In response to the negative ruling, the EU announced that it would comply with the WTO's previous ruling. The WTO formally adopted the panel verdict in May 1999. While the EU decided not to appeal the verdict, it claimed it might take until January 2000 to find a solution. The EU began consulting with other WTO members regarding the solution to the banana import regime, but admitted in July 1999 that further delays in implementing reforms remained likely.

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135 *Press Release*: Office of the United States Trade Representative, United States Takes Customs Action on European Imports, Press Release 99-17 (Mar. 3 1999), n.97.

136 The EC initiated a case against the US with regard to this sanction in *US – Certain Measures*, where the panel found that the action of the US amounts to unilateral sanction.

Again in September 1999 the EU warned that they were experiencing difficulties in devising changes to the EU's banana imports regime. There remained a split between those European countries that wanted to maintain a strong protection for former colonies and those European countries pushing for compliance with the WTO ruling. By the end of September the EU announced that it would implement a tariff-only system if trading partners and EU members continued to disagree on how to change the current illegal import regime. In November 1999, the Caribbean banana exporters and Ecuador agreed to a tariff rate quota arrangement that they hoped would satisfy US concerns about the EU's import regime. Unfortunately, this arrangement appeared to be possibly incompatible with the rules of the WTO. As a result, the EU proposed a "first come, first serve" tariff-only regime, which would eliminate all quotas by 2006. This discriminatory tariff-only policy, however, was likely to reduce EU imports of Latin American bananas. By mid-November the EU stood firmly by its tariff-only system despite acknowledging that the banana exporting countries would prefer a tariff rate regime.

Frustrated with the EU's latest unsatisfactory proposal to end its current import regime, Ecuador "became the first developing country to use the sanctions provisions of the WTO when it asked the WTO to approve retaliation worth $ 450 million for what it described as "blatant non-compliance."[137] By March of 2000 tensions had only increased. First, a WTO panel ruled in favor of the EU in its complaint that the United States violated international trade rules in their on-going banana dispute by imposing sanctions against EU companies before obtaining WTO authorization.[138] Second, in a landmark ruling by the WTO, Ecuador had been given approval to administer its requested trade sanctions against the EU.[139]

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137 Frances Williams, "Ecuador Seeks to Retaliate in Banana Dispute," *Financial Times*, Nov. 20, 1999, at 7

138 *US – Certain Measures*, WT/DS165.

139 *EC – Bananas*, Article 22.6 Arbitration, WT/DS27/ARB/ECU

By the summer of 2000 the EU had not reached a satisfactory decision on how to implement the WTO ruling that its banana import regime illegally discriminated against certain Central American countries. Indeed, the EU seems content to continue implementing discriminatory regimes to the dissatisfaction of the banana exporters. The US expects continued delays and compliance may not be reached until sometime later in the decade. Similarly, the US banana industry has begun placing increased pressure on the United States government to impose strict sanctions. As a result the US sanctions imposed in retaliation appear likely to stay in place for several months.

In 2001, the EC, US and the Ecuador reached an agreement regarding the implementation of the adverse recommendations. In parallel to an Understanding between the EC and the US, an "Understanding on Bananas between the EC and Ecuador" was reached and notified on 30 April 2001. There was also a linkage with the waiver requested for the EC-ACP Convention of Cotonou, which remained blocked for a long time but was finally granted at the Doha Ministerial Conference.[140] When the EC implemented the second stage of its Understandings with the US and Ecuador on 1 January 2002, the matter was finally dropped from the DSB agenda. The waiver was granted till the year 2007 within which the EC shall put the new banana regime in place.[141]

Analysis

Thus, the first case in the WTO where sanction was authorized ended not by WTO dispute settlement system but by finding a political solution. The US, the most powerful trading nation, implemented trade sanctions by setting 100%

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140 WT/L/436

141 For a detailed study on the subject see generally: Mauricio Salas and John H Jackson, "Procedural Overview of the WTO EC - Banana Dispute," *Journal of International Economic Law*, vol. 11, 2000, pp.145-166; John H. Jackson and Paticio Grane, "The Saga Continues: The An Update of the Banana Dispute and its Procedural offspring," *Journal of International Economic Law*, vol. 12, 2001, pp.581-595; Norio Komuro, "The EC Banana Regime and Judicial Control," *Journal of World Trade*, vol.34, no.5, pp.1-87; Aisha L. Joseph, "The Banana Split: Has the stalemate been broken in the WTO banana dispute? The global trade community's "a-peel" for justice," *Fordham International Law Journal*, vol. 24, 2000, p. 744.

customs duties on an equivalent amount of trade for a variety of EC products. Since March 1999, the US has taken countervailing measures worth US$ 382.8 million, with no result. This amount to 0.08% of the total EU exports to the US each year. The welfare implications of this retaliation were minimal upon the EU. The retaliation ended in a welfare loss to the EU consumers of 0.005% GDP. The trade between the US and the EU dampened. The overall welfare loss over the period 1993-1998 amounted to Euro 68 million or 0.001% of GDP.[142] On the other hand there was a slight gain for the US. The US suspended the trade sanctions, which were in effect for over two years in July 1, 2001 by agreeing with the EU on a new Banana regime, which came into effect on July 1, 2001.[143] Ecuador, on the other hand, decided not to implement sanctions against the EU as it felt that sanction would affect Ecuador more than the EU.

III.2. *The EC - Hormones case*

A Brief History

The hormone dispute has its origin in the 1980s when the presence of certain growth hormones in European meat products used in baby food caused severe health defects in infants. The EC reacted by proposing a ban on the use of certain hormones in European cattle and imported beef.[144] While the health effects of the residual hormones in beef consumed by humans remains unknown, some scientific research has suggested that such consumption may be carcinogenic, may increase the effects of other carcinogens, and may reduce male fertility. The US considered the regulation unjustified on health grounds and a burden on the US exporters. The US filed a complaint in GATT in March 1987

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142 Fritz Breuss, "WTO Dispute Settlement from a Economic Perspective - More Failure than Success," *Institute for European Affairs Working Paper No. 39*, October 2001, pp. 29-34.

143 *Press Release*: EU welcomes suspension of US Sanctions following resolution of WTO banana dispute, Press Release, 2 July 2001 <www.europa.eu.int>

144 The specific hormone believed to have caused the defects was diethylstilbene (DES). This was found to cause premature development of breasts and menstruation in infants. *See* Layla Hughes, "Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision," *Georgetown International Environmental Law Review*, vol. 10, 1998, at p. 916.

and also asked the Standard Code technical panel to adjudicate the health justification for the measures.[145] The EC and US differed in the establishment of the technical panel and this deadlock lasted till the end of 1987. The hormone legislation was scheduled to come into force at the beginning of 1988. In late December 1987, the US President proclaimed tariff increases on $100 million of imports from the EC, and then suspended the proclamation immediately, leaving it ready to come into force the moment the EC hormone regulation came into force.[146] In January 1989 the EC hormone legislation came into force, thereby triggering the already proclaimed US tariff increase on EC export. The EC filed a GATT complaint stating that the US retaliation is illegal, but the US blocked the establishment of the panel. Discussions continued in the meanwhile, and the quantum of retaliation was eventually reduced in response to certain exceptions made from the EC regulation for things like dog food. The hormone legislation and the remaining retaliation continued till it was again brought before the WTO.[147]

As members of the WTO, the EU and US are obligated to prevent trade discrimination by treating domestic and foreign products similarly. At the same time, however, WTO member countries may discriminate in order to protect public health.[148] The ability of a member to adopt food safety measures falls under the WTO Agreement on the application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement allows a member to lawfully discriminate in situations that help protect health and the environment. The SPS Agreement presumes the legality of protectionist measures based on internationally accepted standards. For those measures not supported by internationally accepted standards, the SPS Agreement requires that the measure be justified by scientific evidence of harmful effects of the regulated product. The purpose of requiring

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145 Robert E. Hudec, *Enforcing international Trade Law: The Evolution of the Modern GATT Legal System*, (New Hampshire: Butterworth Legal Publishers, 1993), p. 225

146 Ibid. p.226

147 Ibid. p.229

148 Article XX, GATT 1994

such scientific evidence is to prevent the use of these measures as disguised discriminatory barriers to trade. [149]

In 1996, the US filed a complaint with the WTO alleging that the EU import ban on hormone-induced beef could not be sustained under the SPS Agreement. In August 1997, the WTO panel addressing the US complaint ruled that the EU ban on meat produced with growth promoting hormones created an unfair trade barrier.[150] The US hailed the victory as a signal that the WTO can handle complex disputes in which a WTO member attempts to justify trade barriers by disguising them as health measures. On the other hand, the EU expressed concern that the panel's conclusions limit the right of governments to determine the level of protection that they deem to be appropriate for their consumers. In September 1997, the EU launched its appeal of the panel ruling. It defended the ban on the grounds that governments have the fundamental right to choose the level of health protection they consider necessary for their citizens. The EU also argued that the WTO ignored the testimony of two experts supporting the claim that hormone consumption posed legitimate health risks.

The WTO issued an Appellate Body decision in January 1998 affirming the result of the earlier panel ruling, but overturning some aspects of its reasoning. Both the US and the EU claimed victories based on the decision. The EU claimed that the decision gives it the right to establish a scientific basis for its hormone ban. As such the EU initially stated that it would maintain the ban for at least fifteen months while it conducted scientific studies and considered plans to implement the WTO ruling. The EU then proposed an implementation timetable of two and one half years. Conversely, the US interpreted the appellate ruling as requiring immediate termination of the hormone ban. According to the United States, failure to remove the ban would seriously threaten the effectiveness of the WTO dispute settlement mechanism.

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149 Article 5, SPS

150 WT/DS26

As in the banana dispute both parties were frustrated with the inability to agree upon an implementation time period and submitted the controversy to WTO arbitration. In April 1998 the arbitrator ruled that the EU had fifteen months to comply with the WTO ruling.[151] Again the US claimed that this ruling required the EU to lift its ban. Similarly, the EU responded that the ruling showed it could keep the ban intact while it pursued scientific evidence in its support. Throughout the latter months of 1998 tensions increased between the US and the EU. Each party threatened to retaliate against the other's exports. By the end of the year the US began considering trade sanctions against the EU. At the same time the EU remained insistent that it would not repeal the ban until it had completed a scientific risk assessment.

After European veterinary experts found hormone residues in meat certified as hormone free, the EU, in April 1999, announced plans to ban all beef imported from the US. This decision increased tensions with the US who claimed that the proposed ban would violate WTO rules because it was not supported by scientific evidence that all beef from the US posed a health risk. Furthermore, in May 1999, the EU categorically ruled out lifting its ban on meat treated with hormones. The EU claimed that it based its decision on a new study identifying the health risks of hormones. In response, the United States labeled the study's findings as misleading and stated, "the EU appeared not to be serious about meeting its WTO obligations."[152] The US further announced that there would be a "price to pay" if the EU failed to comply with its May 13, 1999 deadline.

Indeed, the US announced on May 14, 1999 that it would seek authorization from the WTO to impose 100 percent tariffs on $ 202 million of EU exports. The EU immediately labeled the amount as excessive and announced that it would ask a WTO arbitrator to review the US claim. In June 1999, WTO

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151 *EC- Hormones*, Article 21.3 Arbitration, WT/DS26/ARB

152 The European Union further commented that it would not be able to comply with its May 13 deadline because the results of further scientific studies would not be ready until the end of 1999. The European Union has said, however, that it would offer temporary compensation for lost exports until the studies are completed. *See* Guy de Jonquieres, "EU Digs in for Beef War with the U.S.," *Financial Times*, May 5, 1999, at 5, n.

arbitrators authorized the United States to implement sanctions on $ 128 million in European exports.[153] At the same time, the EU agreed to postpone its ban on all US beef after assurance from the US that the beef would be more closely monitored to ensure that it did not contain hormones.

This concession was short lived as the EU again angered the US in September 1999 by announcing that it would need a year before returning to the WTO to seek a resolution of the hormone dispute. As of March 2000, the EU had not completed the seventeen studies it ordered to find scientific support for its hormone ban. It did, however, state its desire to renew serious negotiations in 2000 and establish clear criteria for banning products on health and safety grounds when there is no conclusive evidence that they are dangerous. The EU continues to assert its opinion that there is a growing body of evidence supporting the proposition that consumption of hormone induced beef can lead to serious health risks. Similarly, the US continues to assert its disappointment with the EU's failure to comply with the WTO ruling. Till date the retaliation by the US against EC imports are continuing, though desperate attempt has been made by both the countries to settle the issue.

Analysis

The US has been taking countervailing measures worth against the EC since the authorization of the same by the DSB. It amounts to 0.05% of the total EU exports to the US each year. The effect of this retaliation on the EU was small due to the low amount of impairment involved relative to total trade between both partners. The retaliation leading to a slight welfare loss in the EU (not all EC members were losers) whereas, the US gained a little. But the overall impact was retaliation lead to welfare loss in both sides, because the bilateral trade volume decreased by more than 0.1%.[154]

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153 Article 22.6 Arbitration, WT/DS26

154 Fritz Breuss, "WTO Dispute Settlement from a Economic Perspective - More Failure than Success," *Institute for European Affairs Working Paper No. 39*, October 2001, pp. 36-38.

III.3. *The Issues Raised by these Cases*

The two cases analyzed above, formed the toughest cases in the GATT/WTO history. It was fought between powerful trading "nations", the US and the EU, which tested the ability of the "rules based" WTO dispute settlement system to achieve compliance in "sensitive cases", the one area where the 1947 GATT miserably failed. As each of these disputes have run the course of the dispute settlement process and remained unresolved, they suggested several areas of concern regarding the rule of compliance. These cases shows that more powerful countries will choose to accept sanctions rather than comply with unfavorable WTO rulings. Moreover, the cases show the ineffectiveness of the WTO disputes settlement system when it comes to implementation of adverse WTO rulings. Furthermore, the cases expose the weak position of the developing countries to enforce adverse rulings even in case where cross-retaliation is authorized. Above all, the much praised "security and predictability" of the entire WTO dispute settlement system is under question.

The *EC – Bananas* dispute also demonstrates the difficulties caused by disagreements among parties as to what constitutes full compliance. While the United States demanded abolition of the banana import regime, the European Union attempted to interpret the WTO ruling in a manner that would allow an amended regime to continue. However, its new regime remained just as discriminatory as the first, and was again struck down by the WTO DSB. Ultimately, the inability of the European Union and the United States to come to an agreement regarding compliance with the WTO ruling led to delays and non-compliance. Without more specific rulings detailing what is meant by full compliance, losing members will continue to interpret the rulings in a way that leads to non-compliance.

The banana dispute also demonstrates the role of politics in WTO compliance. Political dynamics within the EU compounded the difficulties in

achieving compliance and added to the delays. Similarly, the implementation process itself provides opportunities for the losing party to delay compliance through the use of political strategies within the WTO. For example, it may convince one of the winning members that full compliance would not be in its best interest.[155] Politics external and internal to the WTO will continue to play a key role in future compliance issues.

The beef hormone dispute also demonstrates the difficulties confronted by disagreements over the proper interpretation of WTO decisions. Specifically, the hormone case calls into question the proper procedure for dealing with such disagreements. The US insists that the decision of the WTO requires the EU to lift its hormone ban, while the EU believes that the decision allows it to keep the ban in place and attempt to justify it by conducting scientific research. Because the two parties disagreed on how the fifteen-month implementation period should be used, further delays occurred and the hormone ban was not brought into compliance. Again the US instituted sanctions, despite its desire to see the ban lifted. Some commentators have argued that the implementation period will become "a *de facto* remand to the losing member, in which, at the end of the implementation period, the member's action is reviewed by the original panel for adequacy with the panel and/or AB's original decision." Such a consequence would render the reasonable time requirement of the DSU ineffective. The losing party to a WTO decision would know that it has over a year to reinterpret the decision and find an implementation method that skirts the desire of the winning party and falls short of full compliance. Without more stringent application of the DSU procedure, non-compliance will become more common.

Finally, the disputes over beef and bananas show that the EU, and possibly others, may prefer to see the imposition of sanctions rather than comply with the WTO ruling. This disturbing trend will seriously undermine the effectiveness of the WTO dispute settlement process. Although the EU has stopped short of

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155 n. 129

outright rejection of the negative decisions, it has interpreted decisions in a way that falls short of full compliance and has caused lengthy delays. If disputes between the US and EU continually follow a lengthy process and result simply in the imposition of sanctions, member countries may be deterred from utilizing the WTO as the proper method of dispute resolution. So, under the WTO legal system, if compliance is not achieved even after retaliation and cross-retaliation "the present text of the DSU does not offer a solution for such an eventuality.... We trust that in this eventuality the parties to this dispute will find a mutually satisfactory solution."[156]

Thus, one can conclude that the overall impact of retaliation suffered by the EU in these two cases has been negligible. In the process of retaliation the US trade has suffered. It is also certain that the EU will make good the loss it suffered by the US retaliation, in the up coming *US - "Foreign Sales Corporation"* (FSC) case where the EU has demanded US$ 4.043 billion for retaliation. But any "retaliation by the EU, which would affect business giants such as Microsoft, GE and Boeing, could thoroughly disrupt trade between the world's two trading giants. Mr. Zoellick (USTR) said last year that FSC retaliation could set off 'a nuclear weapon' on the trading system"[157]

III.4. The "Carousel" type Retaliation and the DSU

Another upshot of non-compliance by EC in *Hormones* and *Bananas* cases was the introduction of Section 407, the "carousel" amendment of the Trade and Development Act of 2000 (Public Law 106-200) enacted by the US in May 2000[158]. This Section 407 amends Section 301[159] of the Trade Act of 1974 directing the USTR to periodically revise (carousel) the list of products subject to suspension of WTO concessions as a result of a country's non-compliance with

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156 *EC - Bananas*, Report of the 22.6 Arbitrators (Ecuador), WT/DS27.

157 *International Herald Tribune*, Tuesday, January 15, 2002 <www.iht.com/articles/44850.html>

158 http//:www.rgit-usa.com/PDFs/pl~012001.pdf

159 Section 301 of the Trade Act of 1974 authorizes the USTR to take responsive action when another WTO Member fails to implement WTO Dispute Settlement Body (DSB) recommendations in a dispute settlement proceeding.

WTO rulings and recommendations made pursuant to dispute settlement procedure.

The apprehension about the use of "carousel" type of suspension of concessions was expressed by the EC before the Article 22.6 Arbitrators in the *EC-Hormones*[160] case. The EC submits before the Arbitrators that the US claim to be free to resort to a "carousel" type of suspension where the concessions and other obligations subject to suspension would change every now and then, in particular in terms of product coverage. The EC claims that in doing so the US would decide not only which concessions or other obligations would be suspended, but also unilaterally decide whether the level of such suspension of concessions or other obligations is in fact equivalent to the level of nullification and impairment determined by arbitration.[161] The US, on the other hand, submitted that nothing in the DSU prevents future changes to the list of products subject to suspension, but assured the Arbitrators that the US has no current intent to make such changes.[162] On the basis of this unilateral promise by the US not to implement the suspension of concessions in a "carousel" manner, the Arbitrator decided not to consider the consistency of the proposed "carousel" measure with the DSU.

But a broader reading of the interpretations given by the 22.6 Arbitrators in *EC - Hormones* and similar cases, one may draw a conclusion that the Arbitrators has impliedly ruled against the consistency of the "carousel" type retaliation with the WTO DSU. Under the DSU the suspension of concession should be "equivalent" to the level of nullification and impairment.[163] According to the 22.6 Arbitrators in *EC - Hormones*

> this involves a *quantitative* - not a qualitative - assessment of the proposed suspension. As noted by the arbitrators in the *Bananas* case, "[i]t is impossible to ensure correspondence or identity between two levels if one

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160 *EC - Hormones*, Recourse by EC under Article 22.6 of DSU, WT/DS26/ARB

161 Ibid. para.22.

162 US answer to arbitrators' Question 11. Ibid. para 22.

163 Article 22.4, DSU

> of the two is not clearly defined".[164] Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the "level of the nullification and impairment", but also the "level of the suspension of concessions or other obligations". To give effect to the obligation of equivalence in Article 22.4, the Member requesting suspension thus has to identify the level of suspension of concessions it proposes in a way that allows us to determine equivalence.[165]

So for determining "the level of nullification and impairment", the Arbitrator is also required to determine "the level of the suspension of concessions" to find out the "equivalence". But the DSU explicitly prohibits the Arbitrators from "examining *the nature* of the concessions or other obligations to be suspended".[166] The Arbitrators clarified the nature of this prohibition in *EC- Hormones*. The Arbitrators observed that

> in case a proposal for suspension were to target, for example, only biscuits with a 100 per cent tariff *ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not *ad valorem*. All of these are *qualitative* aspects of the proposed suspension touching upon the "nature" of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction.

While recognizing this restriction imposed by the DSU, the Article 22.6 Arbitrators in *EC- Hormones* further noted that in order to determine the level of suspension of concessions, the concerned Member (here the US) should identify the list of products on which the suspension of concession is to be imposed. The Arbitrator observed:

> In this case the US has to – and did -- identify the products that may be subject to suspension in a way that allowed us to attribute an annual trade value to each of these products when subject to the additional tariff proposed, namely a 100 per cent tariff.[167]

So the Member seeking retaliation should be specific in their request. It should not only specify the sectors/agreements in which suspension of

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164 (original footnote) WT/DS/ARB, para. 4.2.

165 *EC – Hormones*, Recourse by EC under Article 22.6 of DSU, WT/DS26/ARB, para. 19.

166 Article 22.4, DSU

167 *EC – Hormones*, Recourse by EC under Article 22.6 of DSU, WT/DS26/ARB, para. 21

concessions has to be undertaken, but also should list the product that may be subject of retaliation. This is absolutely necessary for the Arbitrators in determining the level of suspension of concessions.

> Once this is done, however, the US is free to pick products from that list – *not outside the list* -- equalling a total trade value that does not exceed the amount of trade impairment we find. In our view, this obligation to sufficiently specify the level of suspension flows directly from the requirement of ensuring equivalence in Article 22.4, the substantive provision we have to enforce here. It is part of the first element under the minimum requirements we outlined above, namely to set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO inconsistent measure.[168] (emphasis added)

Thus, in the event tariff concessions are to be suspended, only products that appear on the product list attached to the request for suspension can be subject to suspension. This follows from the minimum requirements attached to a request to suspend concessions or other obligations.

The cumulative effect of this interpretation is that the Member seeking retaliation should specify the products, which are subject of retaliation. It is on the basis of this proposed product list that the Arbitrators establishes the level of suspension of concessions. As the Arbitrators observed above, only products that appear on the product list and *not outside the list* can be subject to suspension of concessions. This necessarily mean that any future change in the list of product subjected to retaliation can only be undertaken by going back to the Article 22.6 Arbitration for authorization. And so it is not for a national body like the USTR to choose a product outside the list and determine the level of suspension of concession.[169] This if permitted, would amount to unilateral determination of the

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168 Ibid.

169 The USTR has provided a list of products currently subjected to increased duty and products under consideration for the imposition of increased duties. The head note to the product list maintains that products listed are not intended to delimit in any way the scope of the products that would be subject to increased duties. The only possible restriction would be the Section 407 requirement that retaliation lists -- both initially and after each of the periodic changes -- include reciprocal goods of the U.S. industries affected by a WTO Member's noncompliance. *USTR Press Release*: USTR Announces Procedures for Modifying Measures in EC Beef and Bananas Cases, May 26, 2000. <http://www.ustr.gov.us>

level of suspension of concessions, which is prohibited under Article 23.2 of the DSU.

Though the "carousel" amendment came in to force on May 18, 2000 the implementation of the sanctions has been delayed.[170] Meanwhile, the EC has requested the WTO consultations, which was held in Geneva on July 5, 2000. Moreover, the 133 Committee has decided in July 2000 that the EC would request the establishment of a panel against the US legislation as soon as sanctions are rotated.

IV. The WTO Sanctions and the Developing Country Members

One reason the developing country members favored a 'rule based', rather than a 'power based' dispute settlement system in the WTO, was because they felt that they would not be able to unilaterally address non-compliance by other members. They needed a system to do the enforcement on their behalf. An effective enforcement mechanism is therefore a major factor enabling the fuller participation of developing countries in the multilateral trading system. Moreover, it is argued that the WTO DSS provides economically weak countries to challenge trade measures taken by economically powerful Members.[171] This section intends to analyse the enforcement provisions of the WTO Dispute Settlement Understanding from a developing countries perspective.

The developing countries have been consistent users of the WTO dispute settlement system. There is only one case involving a developing country, where retaliation against a developed country was authorised. In the *EC – Bananas*[172] the Ecuador, one of the complainants, requested authorization from the DSB, to retaliate against the EC for non-compliance. This case represents the true

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170 The two situations where the USTR is not obliged by law to rotate the carousel are (1) when there is a determination of imminent compliance, or (2) when the affected industry agrees not to rotate the sanctions.

171 Julio Lacarte - Muro and Petina Gappah, "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench", *Journal of International Economic Law*, vol. 11, 2000, pp. 395-401.

172 For facts of the case *see* page 104.

position of a developing country attempting to retaliate against a developed country in the present system. Here, Ecuador requested authorization by the DSB to suspend concessions or other obligations under the TRIPS Agreement, the GATS and GATT 1994 for an amount of US$450 million.[173] With respect to the withdrawal of concessions in the goods sector, Ecuador submitted that such suspension is at present not practicable or effective, and that the circumstances are serious enough to request authorization to suspend concessions and other obligations under the GATS[174] and the TRIPS Agreement.[175] Ecuador reserved its right to retaliate in the goods sector. The EC requested 22.6 Arbitration to determine the level of suspension of concessions, which was duly appointed.

Ecuador submitted before the Arbitrator, that the direct and indirect harm and macro-economic repercussions for its entire economy amount to altogether US$ 1 billion. Ecuador stated that though it did not intend to increase its initial request for suspension, the Arbitrators should take the total economic impact of the EC banana regime into account by applying a multiplier when calculating the level of nullification and impairment suffered by Ecuador. In this respect, Ecuador made reference to Article 21.8 of the DSU.[176] The arbitrators after considering all the factor such as the "practicability and effectiveness", "importance of banana trade to Ecuador" and "the broader economic elements relating to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations"[177], concluded that Ecuador could suspend concessions or other obligations to the EC

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173 WTO document WT/DS27/52, dated 9 November 1999.

174 As regards trade in services, Ecuador proposed to suspend the following sub-sector in its GATS Schedule of specific commitments: B. Wholesale trade services (CPC 622).

175 Article 22.6 Arbitration, WT/DS27/ARB/ECU, p. 1; As regards intellectual property rights, Ecuador specified that its request concerned the following categories set out in Part II of the TRIPS Agreement: Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations"; Section 3: Geographical indications; Section 4: Industrial designs, p.1

176 Article 21.8 of the DSU: "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."

177 Article 22.3 (d) (ii), DSU

for a total value of US$ 201.6 million in the area of GATT, GATS and TRIPS. Thus, for the first time in the 52-year history of the multilateral trading system that a developing country sought and obtained authorization for trade retaliation, and cross-retaliation, under the WTO DSU.[178]

Ecuador was give authorization by the DSB to retaliate against the EC from 1 January 1999. But Ecuador told the DSB that it still sought a solution through compensation rather than applying sanctions. Ecuador, as the arbitrator agreed, felt that trade sanctions by it against the EC in respect of primary goods would have an adverse economic impact on Ecuador and were not practicable. The arbitrator also agreed that the "resulting price increase from the suspension of concessions on consumer goods could cause welfare losses to end consumers"[179] in Ecuador, but still the arbitrator insisted on retaliating for an amount of US$ 60.8 million in consumer goods. Ecuador never resorted to this option.

In the case of cross-retaliation in TRIPS sector, Ecuador was again at the receiving end.[180] Some have argued that retaliation in TRIPS, where the developed countries have a major interest, can be an effective weapon in the hands of the developing countries to retaliate against the developed countries. According to this argument, TRIPS is one of the area where the developing countries has undertaken serious commitment and the developed countries and its

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178 Chakaravarthi Raghavan, "Ecuador Authorized to Retaliate Against EC", *Third World Economics*, Issue no. 234, 1-15 June, 2000, p.4

179 *EC – Bananas*, Report of the Article 22.6 Arbitrator, WT/DS27/ECU

180 If the suspension requested under the GATT and the GATS, is insufficient to reach the level of nullification and impairment, Ecuador was permitted by the 22.6 Arbitrator, pursuant to subparagraph (c) of Article 22.3, to obtain authorization by the DSB to suspend its obligations under the TRIPS Agreement with respect to the following sectors of that Agreement:

> Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organisations";
>
> Section 3: Geographical indications;
>
> Section 4: Industrial designs.

multinational corporations stands to benefit enormously.[181] Any attempt to withdraw TRIPS commitments could be costly and painful for them, thereby satisfying the main objective of retaliation in WTO. But this luxury is not available to most of the developing countries, and the Ecuador's attempt to retaliate in TRIPS tends to prove this.[182] Moreover, as the Article 22.6 Arbitrators themselves points out: "we are aware that the implementation of the suspension of certain TRIPS obligation may give rise to legal difficulties or conflicts within the domestic legal system of the Member so authorized".[183] This was because, while retaliating in TRIPS sector against the EC, Ecuador would still have obligations under the agreement to other members. Also, other members cannot benefit from Ecuador's suspension of it TRIPS obligation to the EC. In other words, Ecuador could authorize its enterprise to produce, for example CD-ROMs and sell them inside Ecuador, but the other WTO members, however cannot import these from Ecuador since they may then be violating the right of EC intellectual property right holders.[184] The Arbitrator observed on this point as follows:

> We note that, as a result of an authorization by the DSB of Ecuador's request to suspend Article 14 of the TRIPS Agreement, phonograms would be produced in Ecuador consistent with WTO law. However, such phonograms would still be copies made without the consent of the right holder or a person duly authorized by the right holder in the country of production. Pursuant to footnote 13 to Article 51,[185] WTO Members are under no obligation to apply procedures concerning "special requirements related to border measures" to imports of goods put on the market in another country by or with the consent of the right holder. However, with respect to phonograms produced in Ecuador without the consent of the right holder, but consistent with an authorization by the DSB under Article 22.7 of the DSU, the obligations of Article 51 of the

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181 Arvind Subramaniam and Jayashree Watal, "Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?" *Journal of International Economic Law*, vol. 11, 2000, pp. 403-416, p. 406.

182 A major developing country like India or Brazil may successfully retaliate in TRIPS sector. But again it for the 22.6 Arbitrator to decide whether the "situation is serious enough".

183 *EC – Bananas*, Report of the Article 22.6 Arbitration, WT/DS27/ARB/ECU, para. 158.

184 Chakrabarthi Raghavan, "Ecuador Authorized to Retaliate against EC", *Third World Economics*, Issue n.234, 2000, pp.1-5, at p.4

185 (original footnote) Footnote 13 to Article 51 of the TRIPS Agreement: "It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit."

> TRIPS Agreement to apply such procedures would remain in force for all WTO Members.
>
> Distortions in third-country markets could be avoided if Ecuador would suspend the intellectual property rights in question only for the purposes of supply destined for the domestic market. An authorization of a suspension requested by Ecuador does of course not entitle other WTO Members to derogate from any of their obligations under the TRIPS Agreement. Consequently, such DSB authorization to Ecuador cannot be construed by other WTO Members to reduce their obligations under Part III of the TRIPS Agreement in regard to imports entering their customs territories.[186]

The arbitration panel thus asserted the right of the sanctioned EC members in other countries and their markets, without referring to the views of third countries where such violations, and obligations at the border to prevent them, might take place.[187] The arbitration went further and stated in plain language the position of a developing country attempting retaliation, in this case Ecuador. It stated:

> We have made extensive remarks above on the suspension of obligations under the TRIPS Agreement and in particular concerning the legal and practical difficulties arising in this context. Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorized by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined. The present text of the DSU does not offer a solution for such an eventuality. Article 22.8 of the DSU merely provides that the suspension of concession or other obligations is temporary and shall only be applied until the WTO-inconsistent measure in question has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. We trust that in this eventuality the parties to this dispute will find a mutually satisfactory solution.[188]

To quote again the final solution offered by the arbitration panel to a developing country is "the present text of the DSU does not offer a solution for such an eventuality.... We trust that in this eventuality the parties to this dispute will find

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186 *EC – Bananas*, Report of Art. 22.6 Arbitration, WT/DS27/ARB/ECU, paras.155-156.

187 n. 161, p.4

188 *EC – Bananas*, Report of Art. 22.6 Arbitration, WT/DS27/ARB/ECU, para. 177.

a mutually satisfactory solution." A mutually satisfactory "political" solution? It is interesting that this opinion comes from an adjudicatory body of a "rule based" dispute settlement system. Paradoxically, the solution offered by the arbitration panel in this case raises another question – What if even cross-retaliation is not "practicable or effective" enough to induce compliance?

The attempt of the Ecuador to seek compensation also ended in failure. This failure of Ecuador throws the plight of many small developing country Members into focus. While they play by the DSU implementation rules they may not necessarily be served by it.[189] Another general problem one must add here is that even if compensation is offered or attempted retaliation has succeeded, not a single banana exporter in Ecuador will be benefited, rather, the more affluent music industry which has nothing to do with the dispute will stand as the beneficiary.[190] Thus, the first attempt of a developing country to retaliate under the WTO dispute settlement system ended in utter failure.

V. The Effectiveness of "Sanction" in WTO: A Debate

A sanction or countermeasure is a means of inducing compliance. It should persuade a State that has committed an international wrongful act to withdraw that act. For a countermeasure to be effective it should inflict loss or pain swiftly on the party being retaliated against and it must be beneficial to the country taking the action or else it will not be credible enough. Thus, for a countermeasure (or the threat thereof) to be credible it should persuade the WTO members to abandon their WTO-inconsistent practices. Game theory suggests that a threat is credible if players know *ex ante* that it will materialize.[191] The task

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189 Mary E. Footer, "Developing Country Practice in the Matter ofWTO Dispute Settlement", *Journal of World Trade*, vol. 35, no. 1, 2001, pp. 55–98, p. 96.

190 Parth J Shah, "Disputes and the WTO," *The Economic Times*, 2 June 2001, p.6

191 n. 106, p. 807

here is to examine whether the countermeasure or sanctions authorised by the WTO DSB is effective enough to induce compliance.[192]

V.1. *The Positive Aspects*

In the first place, it is said that sanction in itself, may discourage unlawful behaviour. This is evident from the fact that of the 250 odd complaints that came before the WTO DSS, only very few went to the extent of retaliation.[193] Moreover, the sanctioning power of the WTO has acquired the confidence of the developing countries. When compared to the earlier diplomatic model (the GATT model) the developing countries participation in the dispute settlement process has increased dramatically. Eventhough the sanction in WTO is not punitive in nature, it has the effect of partially compensating the complainant. Moreover, through sanctions the plaintiff Government can signal its outrage; thereby placating the injured domestic constituency.[194]

The WTO pays no attention to the democratic process in a member country. The WTO members are obliged to comply with rules, and no thought is given to whether congress or parliament of a member will approve such action. This kind of retaliation gives the countries the option (the needed flexibility) to either compensate the injured or face sanction. Moreover, the WTO authorised sanctions act as an excuse for the Governments wanting to comply with the rulings but cannot because of domestic politics. The threat of external sanction (especially by those suffer because of retaliation) shall work for a policy change. And the most important contribution of the WTO dispute settlement system is the total elimination of the unilateralism by member states.

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192 In *EC – Bananas*, the 22.6 Arbitrator has observed that the object of countermeasure in WTO is to "induce compliance."

193 But one much understand that similar situation existed in the dispute settlement under the 1947 GATT also, where the overall percentage of compliance was very high.

194 But this does not benefit the domestic country and the international trade. The use of "carousal" like methods shows that effected domestic interests are not satisfied with the current level of retaliation.

V.2. *The Negative Aspects*

The six years of working of the WTO DSS has exposed certain inadequacies, which may question the very effectiveness of the enforcement mechanism. There is a growing trend among the members towards non-compliance with the WTO DSB recommendations, especially by the developed countries. The number of disputes where retaliation has been authorised or is awaiting authorisation by the DSB, is rather alarming, especially when compared with the authorisation of retaliation under the GATT 1947.[195]

It is a universally agreed fact that sanctions have a negative impact on international trade. Sanctions not only impose a burden on the system of free trade and affect the targeted country, but also the instigator of the retaliation. While the detrimental effects on the instigator may not be immediate, an economic backlash in today's interdependent world would surely follow. The fact that sanctions may not work has been proven by the cases in the WTO DSU where retaliation has been authorised (especially *EC-Hormones* and *EC-Bananas*). This has made the member countries think more about punitive sanctions, like the carousel method proposed by the US.

It is obvious that there is little to gain from retaliation. It hurts both the member countries. On the other hand, by sanctioning trade, the WTO seems to suggest that the sanctioning government can improve its economy by doing so. Thus, sanction tent to undermine the WTO. Moreover, the DSU by providing for retaliation bows towards protectionism.[196] This would also encourage domestic interest groups to lobby for maintaining the restriction. Furthermore, industries may look for WTO violations and encourage the government to file against the countries with the express purpose of using retaliation to secure new protections.

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195 The only instance where retaliation was authorise by the Contracting Parties where in favour of Netherlands against USA, which was never put in to effect.

196 Steve Charnovitz, "Should the Teeth be Pulled? A Preliminary Assessment of WTO Sanctions," September 15, 2000 <www.geocities.com/charnovitz>

One another problem encountered by the WTO DSU is that the withdrawal of concessions is normally intended to be undertaken by the complainant alone. Though withdrawal of concession may help minimise the loss suffered by the complainant, it restricts the effectiveness of the withdrawal to induce compliance and to deter unlawful acts. The DSU not only rules out explicit countermeasure by third parties, but also fails to provide the complainant with any means to enforce the ruling alone. The DSU doesn't even provide financial support to complainants that undertake costly countermeasures. Moreover, the countermeasure should be "equivalent to the level of nullification or impairment" and so should not be punitive in nature.

One of the important functions of the international trade institutions like the WTO is to neutralize the imbalances of power in world trade. But under the WTO DSU, the power of sanction favours the larger economies over the smaller ones. This is exposed by the Ecuador's inability to retaliate against the EU in *Bananas* case even in intellectual property, though argument has been advanced that IPRs can be made an effective weapon of retaliation for the developing countries.[197] The reason is that the retaliation by a developing country will not harm the developed country in a significant manner, that the developing country is apprehensive of the fact the developed country has other means to penalise developing countries and the unknown implication to a developing country about its act of retaliation preempt any steps towards retaliation.

Another problem with the State centric WTO DSU is that it does not provide relief to the injured private economic actors. The DSB has no requirement that the sanctioning country choose categories that will help the complaining private economic actors.[198] Moreover, sanctions are aimed at the innocent domestic industry of another member, which has nothing to do with the

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197 Aravind Subrahmanian, and Jayashree Watal, "Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?", *Journal of International Economic Law*, vol. 11, 2000, pp.403-416.

198 Edwini Kessie, "Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO," *Journal of World Trade*, vol. 34, no. 6, 2000, pp. 1-17

subject matter of the dispute, and has not violated any WTO obligations. Most importantly, the ultimate impact of the sanction is upon the consumers. The imposition of high tariff on exports from targeted country would frustrate domestic users who suffer a loss of choice and probably have to pay higher prices for substitute products.

Finally, the limited availability of countermeasure limits the scope of liberalization, since the further it would go, the more tempting for member to cheat, and thus stronger countermeasures that are needed to enforce the agreement. Moreover, a sanction also carries a reputation cost and may provoke counter retaliation.[199]

VI. Preliminary Conclusion

Thus one may conclude that a close analysis of the implementation procedures and non-compliance cases has indeed revealed several problems in the actual working of the implementation procedure. The existing DSU text contains obvious ambiguities and drafting oversights such as the relationship between Article 21.5 and 22; the duties of the implementing member within the reasonable period of time; the interpretation of various terms in the text especially one pertaining to the interest of the developing countries etc. All these need clarification and correction. One another problem noted above is that when implementation procedures is used to their fullest extent, it creates an undesirably long timetable for the injured party, which delays the entire proceeding for another two or more years. This unforeseen delay in implementation will effect the "security and predictability" of the system. The *Bananas* and *Hormones* dispute highlighted this. Still another problem is the effectiveness of the suspension of concession itself. The *Bananas* and the *Hormone* has exposed the fact that it is not

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199 For a detailed discussion on the effectiveness of Sanctions, see generally, Steve Charnovitz, "Should the Teeth be Pulled? A Preliminary Assessment of WTO Sanctions", September 15, 2000 <*www.geocities.com/charnovitz/hudec.htm*>; Henrik Horn, and Petros C. Mavroidis, "Remedies in the WTO Dispute Settlement System and Developing Countries Interests," April 11, 1999, pp. 18-20; Bozena Ziedalski, "The World Trade Organisation and the Transatlantic Banana Split," *New England International and Comparative Law Annual*, 1999, pp. 5-6.

even effective against the equal trading partners. As the debate shows there is a need for improved incentives and/or sanctions needed under the DSU to help achieve the WTO's implementation objective of "prompt compliance", thereby providing "security and predictability" to the WTO dispute settlement system. Moreover, these non-compliance cases such as the *US – Foreign Sales Corporations* have raised more challenging questions about the future of the WTO system itself. In the case of developing countries, of course, the WTO implementation procedure provided a better deal then in the GATT system. But once it comes to suspension of concession or retaliation in case of non-compliance, the developing countries are once again at loss. With the inherent inequalities that exist in the international trading system, it is impossible for a developing member country to retaliate on its own, especially against a developed country. Because this would amount to "shooting oneself in the foot". Moreover, the increasing delay and the inadequate remedy available under the system has questioned the creditworthiness of the system. Thus, one may conclude that the legalization of the WTO dispute settlement stops where the implementation begins.

The next chapter attempts to puts forward some of the findings and the solutions for the problems identified above and conclude the study. For this purpose, a detailed study of the proposals submitted by the WTO Member country to improve the implementation procedure, in the DSU Review and various Ministerial conferences is undertaken.

CHAPTER IV

CONCLUSION AND RECOMMENDATIONS

The incentive for the government to negotiate and abide by WTO rules depends in part on the effectiveness of enforcement provisions. Enforcement mechanisms are particularly important for developing countries, as they will rarely be able to exert credible threats against larger trading partners that do not abide by the negotiated rules. An analysis of the WTO DSU implementation procedure proves that decisive improvements have been made in the compliance and enforcement provisions. It provides for a quasi-automatic, rule based and time bound implementation process. The result is a drastic growth in the number of disputes that have come up for adjudication, including politically sensitive one's that failed to get settled in the GATT period. Moreover, most of the decisions of the WTO DSB have been implemented to the satisfaction of the winning party. But as highlighted in the last chapter, this record does not necessarily reflect the real situation.

The short six years has revealed several problems in the actual working of the implementation procedure, like the existence in the DSU text of ambiguities and drafting oversights. More importantly, the proliferation of rules and the legalization of the dispute settlement procedure have not been supported by a strong enough enforcement mechanism. The result is the ever-increasing number of cases with a compliance problem. Cases which were unsuccessful in GATT and which were brought to the WTO DSS failed once again when it came to their enforcement. Thus, it may be concluded that the "legalization of disputes under the WTO stops, in effect, roughly where noncompliance starts".[1]

The intention behind introducing the present DSU rules concerning implementation of adverse WTO rulings is to induce the losing party to comply promptly with panel/AB recommendations. The rules for implementation imbibed in Article 21 and 22 of the DSU have provided flexibility in their implementation procedure by giving a reasonable period of time for

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1 Joost Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach", *American Journal of International Law*, vol. 94, 2000, pp. 335-347, at p.338.

implementation and also options for the disputing parties to choose the kind of remedies that are appropriate for the case. These entire procedural and substantive rules have met with problems in their actual working and their effectiveness is in doubt.

The first problem is in the determination of a reasonable period of time. Though the system of 'reasonable period of time' has been introduced to bring about flexibility and adaptability to the WTO DSS, this has been misutilized by the Member countries to deny the right of the complaining Member. This has delayed the entire process and has had a direct impact on one of the main object of the DSU i.e., effective and speedy settlement of disputes. Article 21.3 Panels have to a certain extent been effective in curtailing this trend by evolving "the shortest period possible" in calculating the reasonable period of time. Further, the meaning of the words "particular circumstance" set forth in Article 21.3(c) DSU has been elaborated step by step by the Arbitrators through interpretations in case laws. But this area still needs more clarification.

For instance, the question as to whether there is a duty on the implementing member to do 'something' within the reasonable period of time needs clarification. It is a fact that losing Member countries often use their reasonable period merely as a tool for buying several months of additional time to evade their obligations. The best possible examples are the *EC – Bananas* and *EC – Hormones* cases where the EC showed from the very start a clear reluctance to lift the inconsistent measures. A clear definition of a reasonable period of time will be of little consequence if the losing party has no intention of complying with the DSB decision. Though the "shortest possible time" interpretation developed by the Arbitrators may check the time period to a certain extent, much more is needed from the DSB to make the implementing member accountable within the prescribed reasonable period of time. As the remedies under the present text is prospective, there is an incentive initially to delay the time at which the rulings might be implemented, such as by seeking a long reasonable period of time for

compliance and then forcing the victor to go through an Article 21.5 panel (and Appellate Body) proceeding. This incentive needs to be curtailed.

Another problem that threatens the entire WTO legal system is the divergent US-EC interpretations of the relationship between Article 21.5 and 22 of the DSU. Both interpretation have its problems and would affect the credibility of the WTO DSS. Because, on the one hand, any direct recourse to Article 22 could amount to unilateral determination of compliance level. And, on the other hand, asking to go once again through the dispute settlement process as provided under Article 21.5 in its entirety, could defeat the very purpose of the rule based, time-bound dispute settlement procedure itself. Almost all Member States have rejected the US position, but accepting EC interpretation in its entirety would result in an "endless loop" of litigation. Till now, this problem of "sequencing" has been dealt with using temporary arrangements like triggering both the adjudication procedures at the same time but pursued sequentially: the Article 22.6 arbitration process is suspended until the implementation review process has been completed or by bilateral agreement between the disputing parties. Moreover, there is no clarification as to what the term "these dispute settlement process" in Article 21.5 means. Whether it includes all the procedures of the original dispute settlement process like consultation, reasonable period of time etc., need clarification.

Another major problem with the implementation procedure under the WTO DSU is the nature and effectiveness of remedies available under it. As seen in chapters II and III, the DSU provides two types of remedies in case of non-compliance with WTO rulings: one is compensation and the other is suspension of concession and other obligation. Both these remedies have raised serious questions as to its effectiveness. One of the foremost problems with compensation as a remedy is that it is voluntary. It is left to the respondent (not the complainant) to choose whether or not to offer compensation. Again, the respondent has the choice of deciding whom to be compensated. Another limitation of the compensation remedy is that the losing party can defy the WTO

obligation (full implementation of recommendations) by deciding to compensate the complainant *ad infinitum*. Furthermore, the DSU does not provide any rule or procedure for governing the issue of compensation.

Moreover, compensation in the WTO is not monetary, and only entails the respondent party to reducing tariffs on product of export interest to the complaining party or offering concessions in either service or intellectual property in equal value to the level of nullification and impairment of benefits. This may neither benefit the affected sector nor create any additional revenue for the complaining Member. Further, compensation under the WTO system is prospective in nature. This deprive the complaining Member compensation for loss of profit or the illegal duties collected by the respondent member, thereby severely limiting the scope of compensation as a remedy under the WTO system.

The second remedy available under the WTO DSU is suspension of concession or retaliation, the object of which is to induce compliance. This provision is based on the idea of restoring the balance of concessions (proportional to the injury suffered) ruptured by the measure found to be consistent with a covered agreement and so there is no room for punitive sanctions. Moreover, it excludes from its preview any retroactive remedy, which means that no remedy shall be available for loss causes before the date of implementation. While retaliation seems to work when threatened by a large country against a smaller one, it may not be an effective remedy for a small country (even if it can target sensitive large country sectors such as copyright holders). Moreover, the *Bananas* and *Hormones* cases show that it is not always effective between the large players. Its inefficacy and the unfavorable position in which it leaves developing countries may soon combine to create a serious credibility problem for the system that must be confronted. Moreover, if the threat of retaliation does not work, it is possible that the actual existence of retaliation will become viewed as the *status quo* and a long-term solution, even though the WTO rules in theory require compliance.

Further, there is a need for clarification of the phrases "practicable and effective", "circumstances are serious enough" etc., in Article 22.3, for improving the remedy of cross-retaliation. The Article 22.6 Arbitrator's authority to review and interpret these provisions also needs more clarification.

I. Developing Countries and the Implementation Provisions

The main object of every legal system is to balance the economic and political inequalities that exist between its members. This is true with respect the WTO legal system as well. And it is the main reason for the developing countries preference for a rule-based system with a strong enforcement mechanism. This expectation of the developing countries goes astray when it comes to implementation of an adverse WTO ruling, especially when it is against a developed country. The *Bananas* dispute has exposed most of the problems that a developing country may encounter in the implementation process. The first is the considerable delay in implementation even after getting a favorable ruling in its favor. In most of the cases, it may take up to thirty months from the start of the dispute settlement process and the withdrawal of the offending measure. The export opportunities for the complaining developing country in the developed country concerned may suffer irreparably during this time. The export loss to the developing country during the intervening thirty-month period can be substantial but there is no provision for compensation for this loss even when the measure in question is found to be in contravention of the WTO rules. This can be particularly damaging for smaller developing countries, which are highly dependent on a limited number of export products/markets.

Moreover, there is no guarantee that the report shall be implemented even after this long delay. And the only option that is left for the developing country in case of non-compliance is to retaliate. But again is this option really available to a developing country? All the co-complainants in the bananas dispute were developing countries. But no matter how frustrated they feel with the EC implementation of the DSB recommendations, not one of them opted for

retaliation like the US. The fact is that hardly any developing country can afford to seek, or effectively employ, retaliation against a major developed country. Retaliation is an instrument in the multilateral trading system that is more likely to be used against them than by them. Thus, under the WTO legal system the remedy of retaliation is not practically available to the developing countries not only because of political considerations but also to the unequal economic relationship where, generally, developing countries are more dependent on the continuing relationship with developed countries for their economic growth and development.

Further, the interpretation of the AB in *Bananas*, in giving *locus standi* to the US has great implication for the developing countries. It is a fact that the US is not a major exporter of bananas. Admittedly, the US is defending the rights of its multinational corporations engaged in the production of bananas in Latin American countries and their export to the EC. But allowing the US to bring this case also opens the door for disputes in the future that are filed not in the defense of a country's own exports, but in order to open markets for the exports of its multinational corporations, no matter where these exports have been produced.

Furthermore, various provisions regarding special and differential treatment in the DSU have not been implemented with equal effectiveness. This is due to the fact such provisions are of a declaratory nature and have no implementation modalities. Special and differential treatment had been provided in order to facilitate equal participation by developing countries in the dispute settlement process. In spite of improvement in the recent past, participation by developing countries in dispute settlement is still far from being equal to that of developed countries. Further, there is a tendency among the Panel/AB/Arbitrator to curtail the scope of these special and differential treatment provisions, rather than interpreting them for the benefit of the developing countries.

II. Improving the Implementation Process: Some Recommendations

At the end of the Uruguay Round, it was decided to have a full review of the DSU before the end of 1998 and to have the WTO Ministerial Conference decide thereafter whether to continue, modify or terminate the DSU. Almost all WTO Members participated in the review process and expressed their general opinion as to the operation of the dispute settlement system. Some of the Member countries have submitted proposals for major and minor changes in the DSU, which was intended to solve most of the above-mentioned problems.[2] As nothing fruitful came out of the DSU Review, which formally ended in 1999,[3] some of these changes were included in a proposal made to the Seattle Ministerial Conference and the Doha Ministerial Conference as well. No action on any matter was taken at Seattle. At the Doha Ministerial Conference the WTO Members agreed to negotiate on improvements and clarifications of the DSU. The negotiations shall be based on the work done thus far as well as any additional proposals by Members, and aims to complete the improvements and clarifications not later than May 2003.[4]

Prior to Doha, the principal part of the proposed amendments were on the modification of DSU Articles 21.5 and 22 to clarify the relationship between them so as to avoid the problems that arose in the *Bananas* case because of the split between the EC and the US as to how those articles should be interpreted, the time frame in compliance procedure and altering or terminating suspension of

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2 The DSU review formally ended in July 1999. But a small group of Members, including the active users of the DSU, continued to work on a package of amendments to the DSU for adoption at the Seattle Ministerial. This work, which was led by Japan, culminated in a proposed amendment co-sponsored by Canada, Costa Rica, Czech Republic, Ecuador, the EC and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela.

3 See *Decision Regarding the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/MIN(99) (Draft) (Dec.2, 1999), *as cited in* Carolyn B. Gleason and Pamela D. Walther, "The WTO Dispute Settlement Implementation Procedure: A System in Need of Reform", *Law and Policy in International Business*, vol.31, no.3, 2000.

4 *Ministerial Declaration*, Doha Ministerial Conference, 14 November 2001, WT/MIN (01)/DEC/W/1; At the initiation of the former Chairman of the DSB, Ambassador Farrell, the DSB meeting of 8 December 2001 had a discussion on the negotiations on improvements and clarification of the DSU.

concessions. A reading of the proposals relating to the review of the DSU shows that all Member countries accept the view that there is a need to clarify and strengthen the DSU. But the members differ widely on the kind of amendments that have to be incorporated into the DSU. Although these draft DSU review amendments and member proposals are still awaiting approval and remain the subject of controversy, they nevertheless provide a useful guide on the changes likely to come.

II.1 *Clarification in the relationship between Article 21.5 and 22*

Under the draft Decision Regarding the DSU Review Article 21.5 procedure shall be concluded prior to requesting an Article 22 authorization to suspend concessions, but delimited the Article 21.5 review to entail substantially less the "normal" dispute settlement procedure. In the case of disagreement as to compliance, the complaining party must request a review within ten to twenty days prior to the expiry of the reasonable period of time. Ten days thereafter the panel will be established and submit it report in ninety days. On the day of adoption of the report, the complaining party, if it prevails, may go forward under Article 22 to request authorization to suspend concessions. If there is a disagreement as to the level of damages, an arbitrator shall be appointed who shall render a report within forty-five days of referral.[5]

Apart from the proposals in the DSU Review, the WTO Members has also offered a number of amendments. Japan was instrumental in providing number of suggestions.[6] Almost a similar proposal for amendment of the DSU was filed

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5 n. 3, p. 730

6 Under the proposed amendment, if a disagreement over compliance arises, the disagreement would be referred to a compliance panel (the Appellate Body, if the underlying panel report had been appealed, or the original panel, it had not been appealed). The compliance panel is to submit its report within 90 days of the referral and the report is to be adopted at a DSB meeting held 10 days thereafter, absent a consensus to the contrary. If the concerned Member is found not to have brought the measure into conformity, the prevailing party may request authorization to suspend concessions at that same meeting. Article 22 would be revised to make it clear that a request to suspend concessions can be made only if a Member fails to indicate that it will comply with the DSB recommendations, fails to report that it has implemented or is found not to have complied by a compliance panel.

officially by a group of WTO member countries for the Doha Conference, which aimed to save a few essential elements of the earlier proposal of Japan and others, presented in a way which was more palatable to developing countries (Japan and others having added elements of transparency and openness to their original proposal which were difficult to accept to these countries).[7] Here a new article, Article 21*bis* titled 'Determination of Compliance' was proposed. None of these amendments were considered at Doha and it remains to be seen whether they will be revived in the upcoming negotiations on improvements and clarifications of the DSU.

But it is felt that the Panel in *US – Certain Measures*[8] case provided the best possible solution. As the Panelist/Arbitrator dealing with Article 21.5 compliance review and Article 22.6 Arbitration being the same, both compliance review and determination of level of suspension of concession can be dealt with one after another by the same panel or arbitrator. By this one can forgo any one of the procedural recourse. Thus, by amending the DSU in such a way as to deal with the compliance review and determination of level of suspension of concession by a single adjudicatory body will not only solve the problem of "sequencing" but can also save a lot of time.

II.2 *Adjustments in Timings*

Japan in its proposal for solving the sequencing problem, also devised a way to cut the overall time taken in the implementation procedure. For Japan the compliance procedures would enable a determined complainant to obtain authority to suspend concessions about 145 days after the expiration of the reasonable period of time. In order to avoid lengthening the dispute settlement process, the proposed amendment made a number of adjustments to offset the 85 days added at the end of the process. The consultation requirement was cut from 60 to 30 days (saving 30 days), the number of DSB meetings to have a panel

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7 Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela, WT/MIN(01)/W/6

8 WT/DS165

established was cut from two to one (saving at least 10 days), the time allotted for a panel's preparation of the interim report was cut by two weeks (saving 14 days), the time for the interim review process was cut from 5 weeks to 20 days (saving 15 days) and the period between the circulation of the report to the parties and to WTO Members generally was cut by 18 days.[9] Thus, there was an overall time savings of 87 days. Nearly all this proposals were incorporated in the joint proposal submitted by the Member countries in Doha Ministerial Conference.

II.3 *Improving Remedies under the WTO*

The principal aim of the remedies under the WTO is to restore the balance of concessions that was upset when one Member violates its obligations and also to give the Members an incentive to comply. The remedies are prospective in nature, whether in the form of compensation or retaliation. The present DSU text and the remedy available under it does not fulfill these two aims. Moreover, the principal issues of interest to developing countries in the DSU review include the undue delay caused by the implementation process, the clarification the effective implementation of provisions on special and differential treatment in favor of developing countries and the implementation of decisions regarding cases brought by developing countries against developed countries and the related issue of compensation. A number of suggestions have come up from the WTO member countries and scholars to modify and strengthen the existing remedy available under the WTO. Surprisingly, this issue received little attention in the DSU Review.

(a) *Monetary/financial Compensation*

Right from the 1960's monetary or money compensation has been has been one of the foremost demands of the developing member countries. This demand has been mooted again in the DSU review and the Seattle and Doha

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[9] William J. Davey, "Japan, WTO Dispute Settlement & the Millennium Round", September 10, 2000.

Ministerial Conferences. Many member countries have argued that compensation should be made a pre-requisite to a request for authorization of suspension of concession.[10] The potential advantage of monetary compensation is that it has the potential advantage of being used to compensate the exporters in the plaintiff country in order to secure trade justice.[11] Moreover, it hurts the violator. But the problem is that the developing countries may also be asked to pay compensation. This will be an additional burden on them. In any case, there is no mechanism in the WTO to compel payment.

(b) *Direct Effect of WTO Rulings*

The direct effect of the awards of the DSB is one of the possible options that can be explored. It will allow the recommendations of the DSB can be directly invoked in the domestic courts of the violating country. The private parties affected by the measures of the defendant member can approach their domestic courts for implementing the awards of the DSB. This would enable the injured person or industry to approach the national courts for enforcing the WTO decisions without outside effort (taking the analogy from the enforcement of the decision of international commercial arbitration). The European Court of Justice has ruled out such direct effect for GATT 1947 and again reaffirmed this in *Portugal v Council* in 1999, thereby denying the individuals and also the EU Member States the right to invoke directly a WTO agreement to challenge the legality of a community legal act. So there is no scope for 'direct effect' in the present text, but can be included with a suitable amendment. The developing countries can explore this option because it can be used as an effective weapon for enforcing adverse WTO rulings against the developed countries. The developed countries can be compelled to comply with the WTO rulings by their own legal system.

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10 Pakistan, Philippines, Japan, Singapore and EC, *Review of the DSU*, Compilation of Comments Submitted be Members - Rev. 3, Job No. 6645, para 310, 311(WT/GC/W/162 (Annex V)), and 314 (document in file with the author); "Review of the DSU", *Discussion Paper from the EC*, 28 October 1998 <www.europa.eu.int> (Annex VII and VIII)

11 *See* generally, Pieter Jan Kuyper, "Remedies and Retaliation in the WTO: Are they likely to be Effective", *Proceedings of the 91st Annual Meeting of ASIL*, April 1997, p.282.

(c) *Joint or Collective Retaliation*

Collective retaliation is another area where the developing countries have a long-standing demand. In this case it would be the WTO as an organization, not one specific member, that will enforce the DSB recommendations rules against the offending member, which has refused, either to remove the offending measure or pay compensation.[12] But this method also has it shortcomings. Retaliation under the WTO involves increase in tariffs or decrease in quotas. And it is for the individual members to decide when and where the suspension of concession has to take place. They may or may not suspend concession and the WTO DSB has no mechanism except moral pressure to make all the members to take action. This problem needs to be addressed in detail before the remedy of collective action is adopted.

(d) *Retrospective Effect*

The retrospective affect of WTO rulings is another way to induce member countries to comply with adverse WTO rulings promptly. Moreover, giving retrospective effect reduces the incentive to delay the adoption of the report by the member countries. To avoid confusion the DSU may suggest a specific date from which the calculation of the injury may start. In *Australian – Leather* [13] the Panel held that the obligation to withdraw the subsidy in Article 4.7 of the Agreement on Subsides and Countervailing Measures Agreement (SCM) is not limited to purely prospective action but may encompass repayment of prohibited subsidies. Though this ruling has opened the possibility of retroactive remedy in SCM (and possibly in Anti-Dumping Agreement), the panel has ruled out the possibility of this remedy in other sectors.

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12 See, Joost Pauwelyn, "Enforcement and Countermeasures in the WTO: Rules are Rules – Towards a More Collective Approach", *American Journal of International Law*, vol. 94, 2000, p.343; Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance", *World Bank Working Paper*, Nov. 19, 1999 <www.worldbank.org/trade>

13 *Australian – Subsidies Provided to Producers and Exporters of Automotive Leather*, Report of Article 21.5 Panel, WT/DS126/RW.

Other than this specific recommendation for improving the effectiveness of the remedies available under the WTO, scholars and trade experts have also been making suggestions to make the remedies attractive. The Panel can be requested to make specific recommendations. This can reduce the scope for implementation avoidance and interpretive problems. Also, if the respondent follows the Panel's specific suggestions, this should automatically create an irrefutable presumption of legality/adequacy as far as implementation measures are concerned.[14]

III. General Recommendations for Improvement of Implementation Mechanism

Apart for these specific recommendations, other minor recommendations have also been proposed by many Members. In relation to determination of reasonable period of time the EC felt that the Arbitrator under Article 21.3 is ill suited to interpret what amounts to "peculiar circumstance" because those circumstances may include the measures needed to implement the ruling, which may depend on an interpretation of the ruling of the Panel or AB. It has suggested that Article 21.3 (c) could state that when the arbitrator considers that a clarification of the ruling is needed to determine the reasonable period of time for implementation, he or she should ask such clarification from the body that issued the ruling. Such clarification would have to be given within a short period of time, for instance 14 days. Guatemala suggested that while requesting for reasonable period of time the Member concerned should explain why it is impracticable to immediately comply with the ruling. The EC further felt that there is a need for clarification of the arbitration procedure on the level of suspension of concessions and the establishment of a procedure to lift suspension of concessions once a losing party has implemented changes.[15] Further the EC has insisted upon an amendment that would preclude the winning party from substantively changing its retaliation measure, even if those measures proved

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14 n. 14, p.13

15 "Dispute Settlement: A Cornerstone of the WTO", <www.europa.eu.int>

ineffective at inducing compliance after an extended period of time (this reflects EC concern over the proposed "carousal" method by the US). Singapore has suggested that compensation and suspension of concessions are temporary measures and so time limit should be prescribed for full implementation.

In the case of developing countries, India argued that the special and differential treatment clauses lack clarity regarding the manner in which such provisions are implemented. So there is a need for a monitoring mechanism to assess whether such requirements are adhered to. India suggested that strengthening the language of DSU articles such as Article 4.10 and 21.2 by replacing the word "should" by "shall" may redress this. India further suggested that if the WTO rulings are not in favor of the developing countries, the reasonable period for implementation should be increased from 15 to 30 months. In case of a favorable ruling, and if there is disagreement as to the existence or consistency of the measure taken to comply, such dispute shall be resolved by the original panel within 30 days without any procedural requirement.

Further, India proposed that if a developing country cannot implement the ruling within the reasonable period due to circumstances beyond the control of the developing country, the matter should be considered by the DSB and additional time should be granted to implement the commitment. In the case of cross-retaliation, Pakistan suggested that since the provision of cross retaliation is heavily weighted against the developing countries, it would be fair to remove this provision from the DSU.

Finally, one can conclude that though these and other ambitious amendments to the WTO dispute settlement understanding would add more accountability to the system, it cannot be oblivious to the reality within which the WTO system operates. In the end it is up to the WTO member's willingness to comply with its WTO obligations that determines the credibility of the DSS. The benefits of the system shall be prejudiced if the implementation procedure is flawed or ineffective. If the present system cannot induce compliance, the

reaction will be one like the proposed "carousal" method (a present variant of Section 301), which represents the concern of the US over the effectiveness of the enforcement mechanism under the WTO DSU.

ANNEX I

MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the eliminations of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V

Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities

of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII

Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and

(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII

Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and

immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[1] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[2] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[3]

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths[4] of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths[4] of the Members.

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[1] The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[2] The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

[3] Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

[4] A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the re questing Member has not performed by the end of the relevant period shall be taken only by consensus.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X

Amendments

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;

Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. 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. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XIII

Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

Article XIV

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Explanatory Notes

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

ANNEX II

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby *agree* as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of

implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[1]

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

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[1] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO

Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[2]

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for

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[2] This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

[3] Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed

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[4] The corresponding consultation provisions in the covered agreements are listed hereunder:

Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6

Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[5]

[5] If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. 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.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

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[6] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first

submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the

written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

Article 17

Appellate Review
Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the

[7] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18

Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into

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[8] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[9] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

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[10] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

[11] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

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[12] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.
[13] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the

[14] The list in document MTN.GNS/W/120 identifies 11 sectors.

reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered

[15] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

[16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in

[17] Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a

covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

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