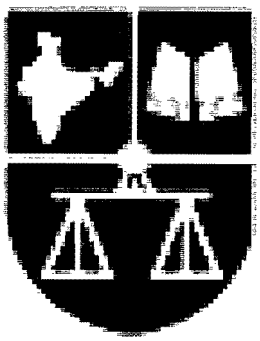


NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Bangalore

Dissertation on Enforcing WTO Rulings and Judgments – Problem and Prospects

Submitted to : Prof A. Jayagovind

Submitted by : Neeraj Singh
2nd year LLM

ID No : 323

2008 - 2010

LL.M.

CERTIFICATE OF THE SUPERVISOR

This is to certify that this dissertation entitled "Enforcing WTO Rulings and Judgments – Problem and Prospects" is a piece of research work done by Mr Neeraj Singh, student of 2008 – 2010 batch LL.M-Business Laws (ID NO 323) at National Law School of India University, Bengaluru under my guidance and supervision for the partial fulfillment of the requirement of LL.M degree at National Law School of India University,Bangalore.

A Jayagovind

Prof. A. Jayagovind
Professor of WTO
NLSIU, Bangalore

DECLARATION

I, Neeraj Singh, do hereby declare that this dissertation titled "Enforcing WTO Rulings and Judgments – Problem and Prospects", is the result of the research undertaken by me in the course of my LL.M. (Business Laws) Programme at the National Law School of India University (NLSIU), Bangalore, under the guidance and supervision of Prof. A. Jayagovind.

This work is my original work, except for such help taken from such authorities as have been referred to at the respective places for which necessary acknowledgements have been made.

I further declare that this work has not been submitted either in part or in whole, for any degree or diploma at any other University or institution.

Neeraj

(Neeraj Singh)
I.D. No. – 323
LL.M. – Final Year
NLSIU, Bangalore

May 28, 2010
NLSIU, Bangalore

CHAPTERIZATION:

Acknowledgement

I am fortunate enough to study in **National Law School of India University, Bangalore** in the guidance of Law Faculty.

I am very thankful to **Prof. Jayagovind**, for suggesting me such an important live project, which can be of some use in the region of International Trade.

It is highly exhilarating for me, to have completed this work under his valuable and efficient guidance. He not only guided me since the premature stage of the work planned round the clock, but also his continuous guidance, valuable suggestions and discussions bring this work to reach to its aims. I wish to express my deep sense of gratitude to such a cheerful, energetic and enthusiastic person.

At last but not the least, I express my sincere sense of gratitude to my **Parents** for their blessings, that is always a source of Inspiration for me, and the **Almighty** without whom there wouldn't have been any existence of mine.

Neeraj Singh

List of Abbreviations

1. Dispute Settlement Understanding or Understanding on Rules and Procedures Governing the Settlement of Disputes - DSU
2. Liberalization, Privatization and Globalization – LPG
3. World Trade Organization - WTO
4. Dispute Settlement Body – DSB
5. Dispute Settlement Mechanism – DSM
6. Dispute Settlement System - DSS
7. General Agreement on Tariffs and Trade – GATT
8. European commission – EC
9. United States – US
10. Memorandum of understanding – MOU
11. Quantitative restrictions – QR
12. Agreement on Textile and Clothing – ATC
13. Trade Related Investment Measures – TRIM

Executive Summary

Today, we can very well see that the world trade is attaining new heights. The history has been evident of the fact that whenever two entities meet, the chances of clashes occurring between them increases. The WTO is no exception to this rule. So, in such a scenario, the relevance of Dispute settlement Body and Dispute settlement understanding further increases. The research has been designed to fulfill four underlying objectives, which could facilitate in better understanding of the dispute settlement mechanism of WTO and its impact on developing countries like India. These objectives could be classified as follows-

1. To study and analyze the Dispute Settlement Mechanism of WTO and bring out its importance in present scenario.

2. To find out the impact of WTO's dispute settlement mechanism on developing countries like India.

3. To suggest measures which could help in better representation of developing countries like India towards settlement of its disputes.

4. To study the WTO rulings and its enforcement.

In first part of the project, an effort was made to first of all understand what actually the Dispute settlement understanding is and what is its relevance in WTO.

The second part of the project deals with the Dispute settlement process or Dispute settlement mechanism. In this part it has been tried to explain the DSM which is currently being followed under WTO.

The third part of the project makes a comparative analysis of the Dispute settlement process previously being followed under GATT 1947 and Dispute settlement process

currently being followed under WTO – which was a result of some further improvements upon GATT 1947 (as explained in the second part of project). It is firstly dealing in this regard about the general improvements which took place during the due course of time, and then attains a track specifically with respect the developing countries.

The fourth part of the study tries to analyze the impact of the dispute settlement on the developing countries, and specifically with respect to India. This section with the help of cases tries to deal with certain substantial issues like most-favoured-nation treatment, the national treatment, quantitative restrictions, agriculture, textiles and clothing, patent protection, the environment, trade-related investment measures, etc.

The fifth and the last part lays its hands on the WTO rulings as well as its enforcement and conclusion and suggestions, which is one of the major ingredients of any project or study. In this part of the study, an attempt was made to further shorten down the dispute settlement process, so that the correct party becomes the beneficiary without further losses, and the cases are also not being delayed unwontedly. Other than this, some alternative course of action were also suggested regarding different matters.

MODE OF CITATION

The researcher has followed a uniform mode of citation throughout this project.

Chapter 1

Introduction to DSU and its relevance in WTO

Today is the world of Liberalization, Privatization and Globalization (LPG). In such conditions, it is but obvious for the trade and business among different countries to flourish. The World Trade Organization (WTO) is the only international organization dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. Disputes in the WTO are essentially about broken promises.[1] WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements. More the trading is done between different countries more are the chances of occurring of disputes between the member countries of WTO. A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. WTO's dispute settlement process thus lays its focus on interpreting agreements and commitments, and to ensure that countries' trade policies conform to them. That way, the risk of disputes spilling over into political or military conflict is reduced.

A unique contribution

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or

[1] (Visited on March 1, 2009) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm>

rejected) by the WTO's full membership. Appeals based on points of law are possible. However, the point is not to pass judgment. The priority is to settle disputes, through consultations if possible. And the agreement through which this is done is called Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Principles followed under the DSU is to be equitable, fast, effective and mutually acceptable.

Dispute Settlement Systems in General

International Treaties normally contain rights and obligations for the signatories to the treaties. There should be mechanism to deal with situations where the right of one signatory is adversely affected because of the actions of another signatory or a signatory fails to fulfill his obligations. Unless there are effective provisions for dispute resolution, a treaty might lose its relevance. As defined before, importance of Dispute Settlement procedures through DSU is increasing in International Economic Relations due to this reason only. Effectiveness, Speed, Legitimacy and Transparency could be the yardsticks for judging a Dispute Settlement System.

Articles XXII and XXIII of GATT 1994 contain procedural matters and substantive provisions relating to starting of dispute settlement process. Understanding on Rules and Procedures Governing the Settlement of Disputes popularly called DSU is - Annex 2 of the Marrakesh Agreement establishing the World Trade Organization. DSU builds on Articles XXII and XXIII of GATT 1994 (I.e. Articles XXII and XXIII of GATT 1947 plus all the decisions taken during the GATT period relating to these Articles).

Increasing number of cases might be taken as good

If the courts find themselves handling an increasing number of criminal cases, does that mean law and order is breaking down? Not necessarily. Sometimes it means that people

have more faith in the courts and the rule of law. They are turning to the courts instead of taking the law into their own hands.

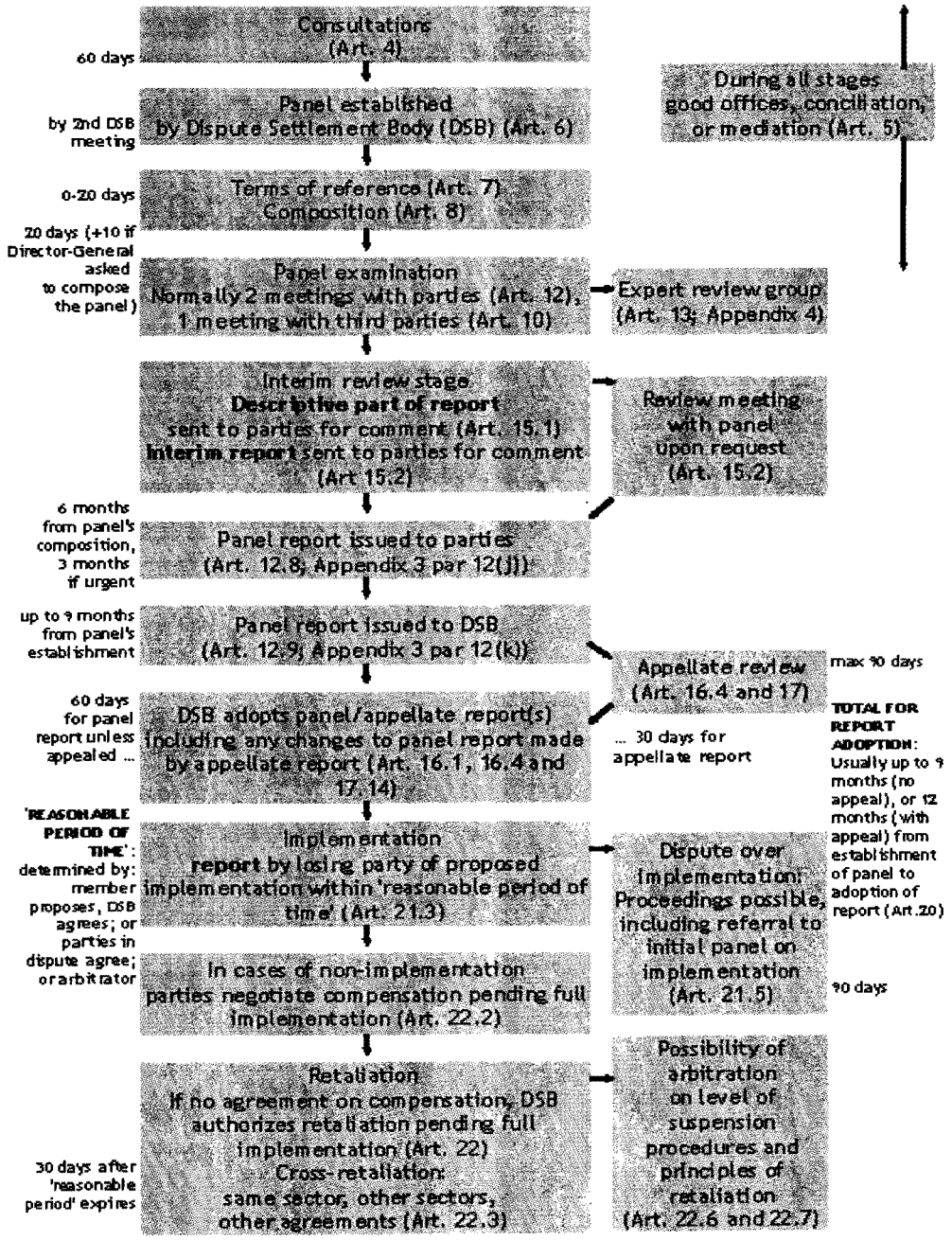
For the most part, that is what is happening in the WTO. No one likes to see countries quarrel. But if there are going to be trade disputes anyway, it is healthier that the cases are handled according to internationally agreed rules. There are strong grounds for arguing that the increasing number of disputes is simply the result of expanding world trade and the stricter rules negotiated in the Uruguay Round; and that the fact that more are coming to the WTO reflects a growing faith in the system. And this is all due to the faith of the countries in the DSU of WTO.

In coming times, developing countries like India who are already a member of WTO are going to play a tremendous role in the world economics due to their huge potential in various fields. An effort is made to thrive into the various aspects of the dispute settlement mechanism of WTO and to study its impact on developing countries like India.

Chapter 2

Dispute Settlement Process

The Dispute settlement process currently being followed under WTO is as follows[2]-



[2] (Visited on March 1, 2009)
<http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm>

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

● **First stage:** Consultation (up to **60 days**). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.

● **Second stage:** The panel (up to **45 days** for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.

The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

- **Before the first hearing:** each side in the dispute presents its case in writing to the panel.

- **First hearing: the case for the complaining country and defense:** the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.

- **Rebuttals:** the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.

- **Experts:** if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.

- **First draft:** the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.

- **Interim report:** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.

- **Review:** The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.

- **Final report:** A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.

- **The report becomes a ruling:** The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

Thus, the next **important question** which arise in front of us is that how long does it take to settle a dispute? The question can be answered with the help of following Table-

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	**(without appeal)**
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	**(with appeal)**

Once The case has been decided: what next?

If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that "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".

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If complying with the recommendation immediately proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the DSB for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The DSB must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the DSB monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

Chapter 3

Dispute Settlement – The improvement upon GATT 1947

(specifically with reference to developing countries)

Despite debuting to little fanfare under the General Agreement on Tariffs and Trade (GATT), dispute settlement under the World Trade Organization (WTO) has been called the "backbone of the multilateral trading system." Indeed, whereas GATT dispute settlement could scarcely have seemed more flawed, the WTO's Dispute Settlement Understanding (DSU) is widely publicized for boosting confidence in an increasingly rules-based global economy. Why such starkly different views of GATT and WTO dispute settlement? The conventional wisdom is that the GATT's diplomatic norms have been supplanted by the WTO's more legalistic architecture, resulting in a system in which "right perseveres over might." Perhaps unsurprisingly, many observers insist that a wider variety of Members— and developing countries, in particular—are achieving more favourable results in dispute settlement due to the reforms introduced with the DSU and the WTO's greater clarity of law.

The Dispute Settlement Understanding presents a significant improvement over the previous GATT dispute resolution system and solves many of its shortcomings. There are three main improvements to the system. First, the DSU creates a "unified" dispute settlement system, which overcomes the problem of uncertainty in determining which procedure should apply. Second, it establishes a new organ, the Appellate Body, for review of legal issues decided by panels. Third, the new system virtually ensures the establishment of panels and Appellate Bodies and adoption of their decisions unmodified through a type of reverse or inverted consensus. Any legal system, especially an international system, must have credibility to function properly. Consequently, it must provide an efficient enforcement mechanism; a means through which rights and obligations can be upheld. The strengthened Dispute Settlement Mechanism (DSM) of the World Trade Organisation (WTO), embodied in the Understanding on Rules and

Procedures Governing the Settlement of Disputes (DSU), which came into force in 1994 has a complete set of formal and informal enforcement tools including mediation, consultation procedures, required reporting, and periodic reviews.

However, what gives the DSM its strength is the credibility of its formal adjudication of legal claims by an impartial panel. This feature is the result of fifty years of improvements in which developing countries have played a significant role. An analysis of the experiences of developing countries in the evolution of the dispute settlement procedure is tried to made in this section of the project.

To Begin With

The fact that some weaker developing countries are not in a position, either economically or politically, unilaterally to address non-compliance by other members, means it is essential for them to have recourse to a system that can do so on their behalf. An effective enforcement mechanism is therefore a major factor enabling the fuller participation of developing countries in the multilateral trading system.

The DSM strengthens the ability of panels to interpret trade rules and increases the adjudicatory nature of the process. With the establishment of an impartial, judicial review of violation complaints, the confidence of developing nations has appeared to increase. The 'rule-based' organization of the WTO seems to have decreased the risk that economic and political pressures will hamper the system.

Nevertheless, one of the difficulties the GATT has always faced is evolving a dispute settlement system that takes into account the various and diverse needs of its members, and provides workable solutions for all. In effect, comprehensive reform in response to the needs of economic development has always been, and remains, a sensitive and difficult area.

Overview of GATT Dispute Settlement History

Early Diplomatic Model

Of the 23 nations that founded GATT in 1947, ten were developing nations. These founding members, developed and developing alike shared a common goal. Their aim was to create a multilateral agreement, which would improve trade by removing high tariffs and balance-of-payment restrictions. Naturally this shared vision did not eliminate disputes. However, the cohesion made political settlement of these disputes quite manageable.

The enforcement procedure laid out in the original GATT 1947 Agreement was a diplomatic model in which the 23 Contracting Parties assumed the power to rule on violation claims and make recommendations to remedy those found to be valid. Later, Working Parties were established. These were groups of independent experts who were drawn from among the contracting parties to rule on the validity and interpretation of GATT rules.

As the number of cases increased, the GATT introduced 'panels' with clear adjudicatory powers to settle legal disputes. This marked a major improvement for the settlement of disputes; yet, the panel mechanism was informal and remained vulnerable to political and economic might. Consensus based decision making allowed defendant members to hinder the dispute settlement process. Over the years, however, the dispute settlement procedure has been strengthened by restricting the ability of member nations to interfere with the formation and operation of panels.

Attempting to distinguish separate "developing nation's issues" under GATT during the first decade is quite futile. The early involvement by developing nations in the dispute settlement procedure did not present any distinguishing characteristics; indeed 4 out of the initial 8 cases involved developing countries. And the nature of these complaints was identical to those of the other founding countries: they addressed concerns of balancing

tariff concessions rather than attempting to enforce legal obligations. Developing countries were both complainants and defendants.

Thereafter, however, there was a period of inactivity. Developing countries interpreted this relatively small number of legal complaints as a sign that they faced difficulties in enforcing legal claims against developed countries, principally because their dependent economic position made them vulnerable to counter-attack through retaliation in various ways. More significantly, small and developing countries believed they were better off avoiding the dispute settlement process because they could not effectively retaliate if the larger 'loser' refused to comply with the outcome.

It is important to remember that in the early stages, the GATT did not recognize developing countries as a separate group, with different needs and concerns from developed countries. This fundamental premise shaped the nature of GATT dispute settlement throughout the 1950s as GATT membership grew by 14 nations, 6 of which were developing. During the 1970s, however, developing nations expanded their membership in GATT more than three-fold. By 1970, there were 25 developed to 52 developing nations. This brought change to the GATT.

Growing Calls for Reform

By the 1960s the original goals of GATT, to reduce tariffs and remove balance-of-payment restrictions, had been fairly well realized. This provided an opportunity for new members to bring a new agenda to GATT, one that reflected the specific needs of developing nations. This included the call to replace the informal dispute settlement with a stricter enforcement system. There were two major reasons for this.

First, politically, developing nations could not hope to match the strength of developed nations. A 'rule-based' system would make economic and political might less of an advantage in voicing complaints against legal violations. Second, the informal system was designed not to analyze legal complaints but rather to address imbalances in tariff concessions.

As the increase in the membership level of developing nations in the 1960s brought a higher demand for improving the level of compliance of developed nation's GATT obligations, the focus became stricter enforcement of the obligations concerning export of developing countries' products. In most cases, these were primary products. In theory, GATT rules applied to non-tariff measures even if a tariff concession had not been made. However, for some sectors, especially agriculture, rules permitted inconsistencies with basic GATT policy. This frustrated developing nations, and correcting the discrepancy with firmer obligations and improved compliance became one of their primary goals. This legal pursuit to ensure that developed nations kept their obligations was exemplified in a complaint by Uruguay in 1961 against 15 developed countries, which were accused of violating the terms of the GATT.

It listed well over 500 trade restrictions that affected Uruguayan exports. High on the list of targets was the European Community's (EC) Common Agriculture Policy (CAP). Although Uruguay never actively prosecuted the case, it was seen as a symbolic attempt to draw attention to the fact that developing countries' trade positions were steadily growing weaker. When the complaint failed, many developing countries drew the conclusion that the dispute settlement system was not designed to tackle the problems they faced in the world trading system, or to protect their interests.

Other GATT members like the EC thought the system was open to abuse by those who relied on overly-legalistic arguments in situations where negotiations were the more appropriate remedy. However, if the dispute settlement process was partly a negotiation process, it meant that the deciding factors would be economic and political might. In that scenario smaller and less-developed countries would always be at a disadvantage.

Nevertheless at that time, both the EC and the US adopted non-legalistic policies in the dispute settlement procedure, and any formal legal claims were viewed as unfriendly acts of aggression. This incapacitated the dispute settlement procedure from 1963 until 1969 and as a result closed this avenue for developing nations effectively to pursue their interests under GATT.

Attempts at Reform

During this period of legal inactivity, little progress was made in the area of agriculture on the political front. The EC refused to compromise in its defense of the CAP throughout the Kennedy Round. However, progress was made in giving developing nations the legal means of ensuring a better level of compliance. The Brazilian and Uruguayan delegations proposed an amendment to GATT Article XXIII to improve the dispute settlement process for developing countries. The proposal contained, inter alia, the following elements:

- more technical assistance for developing countries in the dispute settlement procedures;
- fixed deadlines for different stages of the procedures;
- involvement of the Director-General in the consultation process; and
- a series of proposals to strengthen the remedies available to developing countries including,
  compensation and collective action against GATT violators.

The initiative led to the adoption of a decision providing special procedures for developing nations under Article XXIII. The 1966 Decision introduced a procedure exclusively designed for disputes between developing and developed countries.

The procedures started with bilateral consultations, involved the Director-General as a mediator/conciliator, included the appointment of a panel, and ended with possible sanctions in the event of non-compliance with a panel's recommendations. Strict timelines were significant additions to the procedures. But the issues of compensation and automatic suspension of developing countries' obligations were not addressed in the Decision.

The impact of the special procedure, in terms of assisting developing countries to initiate legal complaints or aiding them during the dispute settlement process, is unclear. It was not used for over ten years after it was established. Then in 1977, Chile invoked the procedure in a claim against the EC concerning export refunds on malted barley. The case ended abruptly when Chile withdrew the complaint.

The special procedure was invoked again by India in 1980 in a complaint against Japan concerning measures on leather imports. This case ended with a three-year agreement, which promised increased quota access to India, however, Indian exports actually decreased during those three years. In 1986, Mexico invoked the 1966 Decision procedures against the US Superfund tax; however, it was persuaded to participate in an identical complaint by the EU and Canada under the general dispute settlement procedure.

Perhaps the limited use of the procedures under the decision can be explained by the fact that developing countries were never really interested in piecemeal concessions under the dispute settlement system. Special concessions could weaken the strength and credibility of a legal system. Instead, developing nations sought legal reforms to the dispute settlement system as a whole.

A dispute settlement system with a more formal legal structure and predictable outcomes would guarantee stricter enforcement of developed nations' obligations and also protect any exceptions from GATT obligations extended to developing nations in the agreements. However, the 1966 Decision probably indirectly contributed to the goal of a stronger system by serving as a model for incorporating automatic processing and timelines into the general dispute settlement procedures during the Tokyo Round.

Troubles with the System

Quantitative Restrictions on 'Sensitive' Products

After the Tokyo Round of GATT negotiations, dispute settlement increased in importance and participation by developing nations rose during the late 1970s and 1980s. But during this time, developing countries had suffered from the imposition of a growing network of quantitative restrictions. These restrictions were placed on 'sensitive' or 'disruptive' exports from developing countries. Many were in the form of voluntary export restraints (VERs) where the threat of quantitative restrictions on imports would induce developing countries to agree to limit exports at the source.

The effect of this was that the tariff liberalization won by developing countries during the 1970s was being eroded in certain important industries, notably textiles and electronics. Since the restrictions operated to curtail products where developing country producers had the greatest competitive advantage, developing countries were thus unable to fully realize the gains they had won.

Significantly, these quantitative restrictions operated outside normal GATT rules, which meant that no remedy was available to them through the dispute settlement system. Between 1967 and 1971, efforts were made to create a 'self-starting' panel procedure which would evaluate the impact of quantitative restrictions on the trade of developing countries. However, the language of the proposed text conveyed no legally binding obligation on contracting parties to use the procedure. Developed countries resisted the creation of these panels, claiming that bilateral negotiations were preferable in such cases.

Agriculture

The revised dispute settlement procedure of the Tokyo Round was so highly regarded that contracting parties, especially the US, began to utilize it to pursue the concessions which could not be procured during the Round. For developing nations, as well as others, this meant attempting to open up agricultural trade. In the decade following the Tokyo Round, nearly half of the cases under GATT involved agricultural trade measures.

Of those complaints, 44 per cent were lodged against the EC and its members. During the Tokyo Round, the EC had again refused to consider any modifications that had implications for its CAP. As a result, the elaborate CAP was targeted through the dispute settlement process; thus, during this time disputes concerning CAP placed the most pressure on the dispute settlement system.

The panels were still searching for conduits to compromise rather than producing legal analysis of disputes. It seemed that panels were more eager to avoid a confrontation with the EC concerning CAP than in making legally sound decisions. This resulted in very poor results from complaints filed by developing nations concerning agriculture.

To the extent, therefore, that developing countries could protect their interests by opening up developed country markets, agriculture remained out of the reach of the dispute settlement system. The fundamental problem was that most of the key restrictions that distorted agricultural trade were either outside the rules altogether or not effectively regulated by them. Not surprisingly then, agriculture was one of the major issues for reform in the Uruguay Round negotiations.

Structural Changes Brought by the WTO

The statistics on cases brought since January 1995 indicate that the DSU has increased the confidence of developing countries in GATT dispute settlement.

Procedural Issues

The significant procedural changes in the DSU offer potential benefits to developing and least-developed countries. The most important is the right to a panel; one will be established when requested unless there is a consensus against it. This reverse consensus formula and the built-in timelines virtually guarantee speedy panel formation.

Developing countries' particular interests and problems are to be taken into consideration, from consultation to ruling, and least-developed countries merit special procedures. These Special and Differential provisions for developing and least-developed members are rather declaratory in nature and it may be difficult to assess how practical they have been to developing countries.

The DSM is much less vulnerable to the delay that undermined the authority and legal integrity of the GATT process. Assurance that a panel will be formed expeditiously when requested and promptly deliver its decision inspires confidence in the whole dispute settlement system. With this, developing countries can enter consultations with more confidence that there will be resolution to their complaints.

Undermining the legal authority of a ruling by blocking adoption of a panel report has also been curbed by the DSU. Panel reports must be adopted within 60 days of the ruling

unless there is a consensus against it, or a party to the dispute appeals it. Formal appeal has been instituted through the establishment of an Appellate Body, further judicialzing the WTO process.

Furthermore, the overall message from the judicialized process is that full conformity with WTO rules is the preferred option. While compensation or suspension of concessions may be used, they are merely temporary, until an inconsistent measure is brought into conformity with the WTO rules. This contrasts with the former procedure under the GATT system, which stressed political compromises to correct imbalances in tariff concessions rather than structural corrections to violations.

Substantive Issues

All these new features seek to provide assurance that the DSM will work with an element of automaticity and equality. Since its inception, it has been fairly tested by developing countries. In a number of these cases, the developing country complainant has won its case against a major developed country.

One of the first cases was that brought by Brazil and Venezuela against the United States, where both the panel and the Appellate Body found that the US regulation was inconsistent with GATT Article III.4. Similar results have been produced in cases between Costa Rica and the US, India and the US, and in the recent Shrimp/Turtle case between a group of Asian countries and the US.

The Reformulated Gasoline case acted as the litmus test for proving whether the new dispute settlement system could detect and address protectionist measures. It communicated the message that a more level "playing field" had been created in which developing countries' interests had a better chance of being protected, even against some of the major players in world trade.

But developing countries are also testing the system as against each other, where their interests clash. In other areas, even where developing countries do not directly challenge each other, the conflicts between their interests may be just as sharp. One of the most

significant tests of the DSU occurred in the Bananas dispute between the EU on the one hand, and the US and several Latin American countries on the other.

An added complication came in the form of several Caribbean and African banana producing countries with vested interest in the maintenance of the current EU banana system. The dispute pitted the interests of two distinct groups of developing countries against each other, by attacking the fundamental trade and developmental co-operation arrangement of the Lome Convention under which the EU extends assistance to 70 developing and least-developed countries in the Caribbean, Africa and the Pacific. The complaint by the US and Latin American countries was upheld by the panel and Appellate Body.

Compliance and Enforcement

Even under the new rules, winning a case, especially against a major trading nation, may not necessarily guarantee that compliance with the ruling will develop. The DSU does not expressly rule out compensation as a remedy for violation. The language of Article 22 is sufficiently ambiguous for countries to argue that they have the option of providing compensation, rather than bringing their measures into conformity with WTO rules. Until there is full compensation, the matter stays before the DSB.

One of the most important issues relating to the effective use of the dispute settlement system by developing countries is the issue of retaliation in case of non compliance with a ruling by the panel or Appellate Body. In practical terms, this option is not available to most developing countries. Many developing countries from both a financial and political standpoint would find it extremely difficult to suspend concessions against a developed country trading partner, since they may not have sufficient concessions to suspend.

Indeed, they continue to depend on developed countries for improvement in their terms of trade and continued integration into the multilateral trading system. It has been suggested that Article 22 could be amended to provide, either for joint retaliation by all WTO members against the defendant, or a ruling by the panel that the offending measure must be removed.

Legal Assistance and Technical Cooperation

The real challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. Far more resources must be made available by the international community to ensure that this is done, so that the vision of WTO, where developing countries are real and active participants becomes a reality.

But, despite the theoretical level playing field created by WTO procedures, in practice, a country's ability to pursue and defend its trading interests lie in its capacity to make full use of the dispute settlement process. From their steady use of the new integrated dispute settlement system, it appears that developing countries now have increased confidence in the process.

Article 27.2 offers developing countries secretariat legal advice and assistance. The Technical Co-operation and Training Division (TCTD) has two full time legal officers and two consultants who provide legal advice. Occasionally, other consultants are hired to provide advice in a specific dispute. This has contributed to the promotion of equity in the dispute settlement system.

Thus, in conclusion it can be said that a procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible. The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the

ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view. Thus a binding effect is being given in this regard.

Chapter 4

DSU – Impact on developing countries like India

In earlier chapters we have seen what actually dispute settlement is and what its relevance in WTO is. The impact of DSU can further be understood on the developing countries like India with the help of cases being referred under the substantial issues like most-favoured-nation treatment, the national treatment, quantitative restrictions, agriculture, textiles and clothing, patent protection, the environment, trade-related investment measures, etc.

1. *Most-Favoured-Nation Treatment*

To call a principle of non-discrimination as the most-favoured-nation principle sounds like a contradiction in terms. No country is most favoured in the literal sense, since all are favoured equally. Generally, the MFN treatment implies that every time a Member lowers a trade barrier or opens up its market, it has to do so for the like goods or services from all its trading partners.

In ***Indonesia – Auto*** case it was argued that even if a particular regulation did not mention a country by name but its effect was to benefit a particular producer or a country, it violated the MFN principle.[4] India found no legal strength in this argument, since, according to it, any automobile manufacturers based in any country could have availed of the specific benefits and subsidization programme introduced by Indonesia, provided they fulfilled the conditions specified in the Indonesian regulation. The fact that none had approached Indonesia in that regard, according to India, could not be construed as an indication that the regulation violated the MFN principle. The Panel set for itself a three-fold test: whether the tax and customs duty benefits were advantages of the types covered by GATT Article I; whether the advantages were offered to all like products; and whether the advantages were offered unconditionally. According to the Panel, for the purpose of the MFN obligation, National Cars and the parts and components thereof imported into

Indonesia from Korea were to be considered "like" other similar motor vehicles and parts and components imported from other Members. The Panel found that under the February 1996 car programme the granting of customs duty benefits to parts and components was conditional on their being used in the assembly in Indonesia of a National Car. The granting of tax benefits was conditional and limited to the Pioneer Company producing National Cars. And there was also a third condition for these benefits: the meeting of certain local content targets." For these reasons, the Panel found Indonesia's Car Programme inconsistent with Article I.

In ***Canada – Auto*** **case**, India argued that the Panel would need to determine whether the 1965 Auto Pact between Canada and the US was consistent with the MFN obligation. The important issue in India's view was whether the Auto Pact provided any advantage to imports of automobiles originating in the US and Mexico in relation to imports of like products originating from other Member countries. According to India, even though on its face value the tariff exemption provided by the Auto Pact appeared to be non-discriminatory, the Panel would need to examine whether the beneficiaries of the exemption had largely been companies based in the US and Mexico, or whether companies based outside the NAFTA parties had also been able to benefit from what Canada termed as an instrument which had helped transform Canada "from a highly protective market into one of the most open markets in the world for automotive products and investment, both as a matter of law and practice".[14] Thus, the question before the Panel was whether the import duty exemption was consistent with GATT Article 1:1. Here also, the Panel applied a three-fold test: whether the import duty exemption was awarded "immediately and unconditionally"; whether the import duty exemption discriminated in favour of motor vehicles of certain countries; and the applicability of GATT Article XXIV. The Panel found that by reserving the import duty exemption to certain importers, Canada accords an advantage to products originating in certain countries which advantage is not accorded immediately and unconditionally to like products originating in the territories of all other WTO Members. Canada was therefore found in violation of the MFN treatment obligation. The Panel clarified that

Article XXIV could not justify a measure which granted a WTO-inconsistent duty-free treatment to products originating in third countries not parties to a customs union or free trade area.

2. *National Treatment*

The national treatment implies that imported goods, once they have cleared customs and border procedures, are to be accorded "treatment no less favourable than that accorded to like products of national origin in respect of all laws, affecting their internal sale."[3] The aim is to prevent domestic tax and regulatory policies from being used as protectionist measures that would defeat the purpose of tariff bindings."[4] The choice of the no-less-favorable standard is to "ensure an effective equality of treatment"[5]. This implies that contracting parties have "an obligation to accord formally different treatment to domestic and imported products".

In ***India – Auto* case** the EC and the US claimed that the indigenization obligation was inconsistent with Article III:4. In order to determine whether the Indian measure was inconsistent with Article III:4, the Panel found it necessary to examine whether imported products and domestic products were like products; whether the measure constituted a "law, regulation or requirement"; whether it affected the internal sale, offering for sale, purchase, transportation, distribution or use; and whether imported products were accorded a less favourable treatment than the treatment accorded to like domestic products.

---

[3] GATT Art. III:4
[4] Jackson (1997), edition. 1, pg.213
5 Roessler, *Diverging Domestic Policies and Multilateral Trade Integration* (Cambridge, Mass.: MIT Press. 1996, edition ii, pg. 26)

As regards the first test, the Panel noted that India did not dispute the likeness of the relevant automotive parts and components of domestic or foreign origin for the purposes of Article III:4. With respect to the second test, the Panel enquired and found the indigenization condition, constitutes a condition to the granting of an advantage, namely, in this instance, the right to import the restricted kits and components. It therefore constitutes a requirement within the meaning of Article III:4. The Panel next examined whether the Indian measure affected the internal sale, offering for sale, purchase or use of the imported products within the meaning of Article III:4. The Panel found: To meet the indigenization requirement, car manufacturers must purchase Indian parts and components rather than imported goods. This provides an incentive to purchase local products. Such a requirement "modifies the conditions of competition between the domestic and imported products" and therefore affects the internal sale, offering for sale, purchase and use of imported parts and components in the Indian market within the meaning of Article III:4 of the GATT 1994. And, finally, to determine whether imported products were treated less favourably than domestic products, the Panel examined whether the Indian measure modified the conditions of competition in the Indian market to the detriment of imported products. According to the Panel, the very nature of the indigenization requirement generated an incentive to purchase and use domestic products and hence created a disincentive to use like imported products. Such a requirement clearly modified the conditions of competition of domestic and imported parts and components in the Indian market in favour of domestic products. The Panel therefore found that the indigenization condition, as contained in Public Notice No. 60 and in the MOUs, was a violation of Article III:4.

The EC and the US also claimed that the trade balancing condition required MOU signatories, who purchased restricted kits and components on the Indian market, to count the value of those purchases towards their trade balancing obligations. In other words, if an MOU signatory purchased a component that was subject to import restrictions in India from either a trading company or another MOU signatory that had imported such a component on the basis of an import license, the value of such

components would be taken into account for purposes of the neutralization requirement. Applying the same criteria, the Panel found that kits and certain listed components of domestic and foreign origins were like products, that the requirements affected the competitive conditions of the imported product on the Indian market, and that the trade balancing condition accorded a less favourable treatment to the imported products than to like products of domestic origin, within the meaning of Article III:4.

3. *Quantitative Restrictions and Agriculture*

QRs are those control measures which limit the quantities of goods that may be exported or imported. QRs are to be administered non-discrirninately. The purpose of the Agreement on Agriculture (AoA). is to open up trade in agriculture. The commitments under the AoA can be divided into market access, export competition, and domestic support. All Members were required to make commitments in each of these areas, although the extent of their commitments varies.

Market access - Here, developed and developing countries were to convert all Non tariff barriers (NTBs) into tariffs and bound them. The AoA also enjoins Members from maintaining or reverting to NTBs, which have been converted into customs duties. This however excludes measures, such as QRs maintained under the BOP provisions. It is this provision of the AoA, which underlay *India – QRs*.

In this case, the US claimed that since processed food, fresh fruits and vegetables and other agricultural products were "consumption goods, which could directly satisfy human needs without further processing", India's QRs on imports of consumer goods also served as a form of "agricultural protectionism".[79] Quoting the IMF, that there was no BOP necessity for the QRs, the US concluded that India violated its obligations under Article 4.2 of the AoA. India, on the other hand, argued that footnote 1 to Article 4.2 clarified that it did not extend to measures maintained under the BOP provisions. According to India, the question of the consistency of India's import restrictions with Article 4:2 depended on their consistency with GATT Article XVIII:B,

and the legal status of India's import restrictions under the AoA was consequently identical to that under GATT. India wanted the Panel to understand that its claim that its import restrictions were consistent with Article XVIII:B included the claim that they were consistent with the AoA.

Having found that India's QRs violated GATT Article XI:1, not justified under Article XVIII:B and also violated GATT Article XVIII:11, the Panel concluded that India's restrictions were "not" measures maintained under balance-of-payments provisions, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture." The issue was not raised in the appellate proceedings. It was mainly due to the "peace clause", the issue of agriculture has so far figured only obliquely in India's experience with the DSS. But the issue remains most contentious. The anticipated gains from the agricultural trade liberalization have thus far escaped developing countries. A number of developed countries have continued to provide high domestic support and export subsidies to their agricultural sectors. Market Access in the developed countries is also hampered by their maintaining high tariffs on products of interest to developing countries.

4. Textiles and Clothing

A key area of export interest to India, international trade in textiles and clothing has for long been subject to a most restrictive regime. Before the coming into existence of the WTO, international trade in textiles and clothing was regulated through the MFA. The ATC oversee a ten-year phase out of the MFA and it was proposed that from 1 January 2005, trade in textiles and clothing to be governed by regular GATT disciplines.

The first issue of interest to India in *US – Underwear* case was the applicability of a transitional safeguard action. India submitted that the US did not have the option of claiming a situation of actual threat of serious damage in July 1995, after having

determined in March 1995 that there was a situation of serious damage and having requested consultations from Costa Rica on that basis. India argued that all the data necessary to be provided to Costa Rica in terms of the provisions of Article 6 of the ATC had not been provided by the US. The data available did not indicate that there had been either a situation of serious damage or actual threat of serious damage to the US domestic industry, attributable to imports. India recalled that imports from Costa Rica, which had been almost entirely from US components supplied by the US industry producing underwear and mostly produced in Costa Rica by units established by US underwear manufacturers, could not have contributed to serious damage or actual threat thereof to the same US industry which engaged voluntarily in such co-production activities. The US action, India concluded, actually sought to protect the US industry producing fabrics for underwear and not the industry producing underwear and this was inconsistent with Article 6.

(i) the fact that restrictions under Article 6 of the ATC are to be applied only sparingly, (ii) the fact that the United States has the burden of proving that it has complied with the requirements of Article 6 of the ATC, (iii) the deficiencies in respect of the evidence on the existence of serious damage(iv) the fact that the United States failed to demonstrate adequately that the cause of serious damage was imports, and (v) the fact that the United States voluntarily agreed to accept import limits from other countries exporting underwear to the United States that permitted increases over their current export levels that were far in excess of Costa Rica's export levels to the United States.

The Panel therefore concluded that the US "failed to demonstrate adequately in the March Statement that its domestic industry suffered serious damage that could be attributed to Costa Rican imports and thus, by imposing import restrictions on imports of Costa Rican underwear, the United States failed to comply with its obligations under Article 6.2 and 6.4 of the ATC." The Panel clarified that a finding on "serious damage" required the party taking action to demonstrate that damage had already occurred, whereas a finding on actual threat of serious damage" required it to

demonstrate that, unless action was taken, damage would most likely occur in the near future. The Panel found that the March Statement contained no elements of such a prospective analysis.

In US - Blouses, India argued that the ATC required demonstration that the increase in imports was causing serious damage or actual threat thereof. India claimed that the US had failed, and did not even attempt, to demonstrate any causal link between the rising imports and declining production. India submitted, "to impose burdens on particular exporters not because they engaged in dumping or benefited from subsidies but merely because they were more efficient than others was contrary to the basic purpose of the multilateral trading order."

The US, on the other hand, argued that the ATC did not prescribe any specific methodology for collecting data and that its demonstration was reasonable with respect to causation and serious damage or actual threat thereof. The Panel said that the importing Member remained free to choose the method of assessing whether the state of its domestic industry was caused by such other factors as technological changes or changes in consumer preferences, but it must demonstrate that it had addressed the issue. The Panel therefore concluded that the US determination did not respect the requirements of Article 6 of the ATC.

5. *Patent Protection*

The scope for protection of Intellectual property rights in the WTO and its implications for developing countries have not only been variedly viewed, but continue to invite attention. What constitutes a "means" for the filing of patent applications and entails the grant of exclusive marketing rights were the main issues in *India - Patents (US),* the first occasion for the DSS to interpret and apply the TRIPS Agreement.

The US claimed that India had failed to implement its obligation under Article 70.8 of the TRIPS Agreement to establish a "means" to preserve the novelty of applications for pharmaceutical and agricultural chemical products during the transition period available

to developing countries under the TRIPS Agreement. Such a means, according to the US, must ensure that persons, who filed or would have filed applications, had a 'means" been in place on time and maintained, could file such applications and received the filing date they would have received.

At the time of establishment of the Panel, the Indian Patents Act, 1970, did not provide patent protection for pharmaceutical and agricultural chemical products. The Act also stated that if it appeared to the Controller General of Patents, Designs and Trademarks that the invention was not patentable under the Act the application should be refused. The Patents (Amendment) Bill, 1995, was still being debated. India informed the Panel that, between 1 January 1995 and 15 February 1997, while a total of 1339 applications had been received and registered, no request for the grant of exclusive marketing rights had been submitted to the Indian authorities. India also apprised the Panel that, pending passage of the Bill required to permanently give effect to its instruct the patent offices in India to continue to receive a tent applications for such products and to keep them for Processing as and when the change in the Indian law to make such products patentable would take effect. India therefore submitted that it had provided a means for the filing of patent applications for pharmaceutical and agricultural chemical products consistently with Article 70.8.

The Panel noted that the fact that patent applications had been filed in respect of pharmaceutical and agricultural chemical products did not alter the situation, as it was "unknowable how many applications would have been filed if an appropriate system had been in place." The Panel was of the view that potential patent applicants were influenced by the legal insecurity created by the continued existence of the Act which required rejection of product patent applications. The Panel therefore found India in violation of Article 70.8, for it was not clear to it that a court would uphold the validity of administrative actions which apparently contradicted mandatory legislation.

5. *The Environment*

The emergence of trade-relatedness has not only brought the environment from the periphery of GATT to the mainstream of the WTO, but has also given rise to some of the most contentious disputes ever since. Two important environment protection issues faced by India were of sanitary and phytosanitary protection and conservation of exhaustible natural resources.

(a) Sanitary and phytosanitary protection. In *Australia -Salmon,* India emphasized that Members must ensure that these measures were applied in an equitable manner and did not constitute a disguised restriction on international trade. India pointed out that the sanitary measure had to be applied *"only to the extent necessary* to protect human, animal or plant health or life, and had to be based on scientific principles and not maintained without sufficient scientific evidence." India noted that the intention and objective of Article 5.5 of the SPS Agreement was very clear: "Members shall avoid distinctions in the levels of protection they consider appropriate in different situations, if these result in discrimination or disguised restriction on international trade."[234] India therefore identified the requirement of risk assessment and the prohibition of discimination or disguised restriction on international trade in the application of sanitary and phytosanitaty measures. ". The Panel noted that if a sanitary measure was not based on a risk assessment, as required in paragraphs 1 and 2 of Article 5, the measure could be presumed not to be based on scientific principles or to be maintained without sufficient scientific evidence and concluded that Australia acted inconsistently not only with Article 5.1 but also with Article 2.2 of the SPS Agreement.

(b) Conservation of exhaustible natural resources.

The WTO allows Members to adopt measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with

restrictions on domestic production or consumption." However, these measures may not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

As one of the four complainants in *US - Shrimp,* India did not accept the US assertion that the use of TEDs (a technique) was the only way to keep sea turtles species found in India's territorial waters from becoming extinct. While India shared the US concern over the plight of sea turtles and considered it important to ensure their survival, the importance of this goal did not justify the US taking unilateral actions that infringed upon India's sovereign right to formulate its own environmental and conservation policies. The US argued that, since sea turtles were a shared global resource, efforts by one nation to protect sea turtles would not succeed unless other nations in whose waters these species also occurred took comparable measures. Since none of the evidence cited by the US demonstrated that sea turtles found in the US areas subject to the TED requirement migrated to Indian territorial seas or beaches, India concluded that significant numbers of sea turtles would appear to migrate regionally but not globally. The US submitted that the very attempt by the complainants to characterize certain sea turtles as "under their jurisdiction" was inaccurate both as a matter of fact and of international law. India termed this approach as incorrect. India, along with Pakistan and Thailand, maintained that the purpose of the US shrimp embargo was to dictate an environmental policy that was to be followed by other Members with respect to all shrimp caught within their jurisdiction if they wished to export any shrimp to the US India claimed that the discriminatory effects of the embargo imposed by the US had led to a dramatic decline in India's shrimp exports to the US. India pointed out that the socio-economic condition of the coastal community in India was closely linked with fishing and the embargo had adversely affected their livelihood. The Panel held that "the environmental issues at stake in this case should be evaluated to a large degree in light of local and regional conditions" and that "conservation measures should be adapted, *inter alia,* to the environmental, social and

economic conditions prevailing where they are to be applied. The Panel further told that it did not impose on members specific methods of conservation such as TEDs.

But the US afterwards appealed the Panel ruling, and rejecting the Panel's approach, the AB held that "A requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels, in areas where there is a likelihood of intercepting sea turtles is directly connected with the policy of conservation of sea turtles."

There is neither evidence nor projection that emerging environmental policies and requirements would not adversely affect developing countries' market access. While India's merchandise trade continues to suffer from ever-newer forms of protectionism, proposals have been made on environmental services, an area where developed countries are the major suppliers. The initiation of the ongoing anti-dumping case in the US against select shrimp exporters, including India, soon after the enforcement of the US Public Health Security and Bio-terrorism Preparedness Act, 2002, has made the matters worse for the beleaguered industry.

6. *Trade-Related Investment Measures*

The TRIMs Agreement applies to investment measures taken by Members relating to trade in goods. It identifies five investment measures as inconsistent with GATT Articles III and XI.

India raised its concerns in *Indonesia – Auto* and the DSS applied the TRIMs Agreement. It was alleged that measures taken by Indonesia violated Article 2 of the TRIMs Agreement.[324] In India's view, since the emphasis was on the application by Members of a measure which could be said to be a trade-related investment measure, it was "evident that we need to ab initio be clear whether the said measures taken by Indonesia come

within the ambit of being trade related investment measures or not." Referring to the drafting of the TRIMs Agreement, India pointed out that the TRIMs Agreement was basically designed to provide a level playing field for foreign investment in third countries. It was evident, India added, that any measure taken by a country relating to its internal taxes or subsidies, as Indonesia had done, could not be construed to be trade-related investment measure. India submitted that the TRIMs Agreement did not add any new obligations to Members, since it merely stated that a measure which was a trade-related investment measure should not violate Article III or XI.

India argued that, since the measures taken by Indonesia were in the form of subsidies, the measures should be governed solely by the SCM Agreement. To India, "just as investment measures cannot be presumed to be a form of subsidization, subsidies too cannot be presumed to be trade-related investment measures."

The Panel set for itself a two-fold task: the determination of whether the measures at issue were "investment measures", whether they were "trade-related", and found that the measures applied by Indonesia were investment measures, and they were also "trade-related".

Indian position

India has been an active participant in the system, and the following details are well indication of this fact[6] -

1. **India as Complainant**

India has been a complainant in 17 cases. It has brought four GATT cases - one against Poland alleging discriminatory treatment of Indian autos (settled); one against Turkey in respect of textile quotas (won in important panel/AB report on GATT Article XXIV);

[6] (Visited on September 12, 2006) <http://www.wto.org/english/thewto_e/countries_e/india_e.htm>

one against the US restrictions on shrimp (won in important AB report on Article XX) and one against the EC's GSP program (won in an important AB report).

It has brought eight cases against various trade remedies - under the ATC: US Coats and US Shirts & Blouses (in both of which, the measure was not extended); and under the antidumping agreement: EC Cotton Fabrics (no measure imposed); EC Bed Linen (won in panel/AB proceeding; limited use of "zeroing"); South Africa Pharmaceuticals (not pursued); US Steel Plate (won in panel); US Byrd Amendment (won in panel/AB report); and Brazil Jute (not pursued).

The other three cases involved EC Rice Duties (not pursued); US Textile Origin Rules (lost in panel) and Argentina Pharmaceutical Products (not pursued).

2. India as Respondent

India has also been a respondent in 17 cases. The cases have involved its failure to enact a mail-box mechanism under the TRIPS Agreement (lost in panel/AB reports); its unjustified reliance on the balance-of-payments exception (lost in panel/AB reports); its automotive regime (lost in panel report). The US and the EC were the complainants in these three matters.

Of the remaining cases, five involve EC challenges to various Indian export and import restrictions and its antidumping duties on certain products. Except for the last, which is recent, the others were partially resolved. The remaining case is a recent challenge by Bangladesh to Indian antidumping duties on batteries, which was brought in 2004.

3. India as third party

As a third party, India has been acting in 46 cases

4. Overall Assessment

India has been involved in a number of major cases - with mixed results. The loss in the Patents case was difficult to implement, although the loss in the balance-of-payments case was not particularly serious since India had and continued to have through the Asian financial crisis quite strong reserves. It has won some significant cases, as well - Turkey Textiles; US Shrimp; EC Bed Linen.

It is interesting that the EC is the main complainant against India, followed by the US. Indeed, except for the BOP case, no one else requested consultations with India except the US and the EC, until the 2004 request by Bangladesh. On the other side, India has brought cases against a number of countries, but again, mainly against the US and the EC.

Chapter 5

Enforcement of WTO obligations: remedies and compliance

1 Enforcing the WTO obligations

In theory one can distinguish between exogenously and self-enforced contracts, depending on the identity of the enforcer. The WTO is a self-enforcing contract: assuming non compliance with the rulings by a WTO adjudicating body, the injured WTO Member can request and impose countermeasures, that is raise the level of its bound duties *vis-à-vis* the author of the illegal act. WTO countermeasures are by law (Art. 22.1 DSU) transitional: the DSU explicitly reveals a preference for *specific performance* of the obligations assumed. Hence, from a systemic perspective, countermeasures are a means aimed at inducing compliance. Viewed from the injured WTO Member's perspective, the situation can be different: suspending concessions is tantamount to imposing a cost on the society adopting countermeasures, in the sense that the price of imports will, as a result of countermeasures, become higher than before (with the ensuing welfare losses for domestic consumers). Adoption of countermeasures will thus largely depend on a cost-benefit analysis, whereby on the one side of the equation the self-imposed loss will be calculated, whereas, on the other, the likelihood that the author of the illegal act might change behaviour and the resulting benefits from such change will be computed.

WTO Members have not often had recourse to countermeasures.[7] Increasingly however, there is a growing concern with respect to the effectiveness of the system to take care of deviations from what has been agreed. It is certainly not a coincidence that developing

[7] We are of course aware of the fact that it is difficult to establish a benchmark to measure 'often' in this respect. Bagwell *et al.* (2005) have counted fewer than 10 cases where countermeasures have been imposed (adding cases where a request has been tabled). The same authors count a much larger number of persisting violations, which suggests that quite a few ongoing violations of the WTO remain unpunished.

countries especially have for the first time during the ongoing *Doha round* massively tabled proposals aiming at re-shaping the existing regime. We will be discussing some of them at the end of this Chapter, as well as some proposals discussed in the doctrine. We first however, privilege a look at the mechanics of enforcement.

In a nutshell, enforcement depends on the type of the complaint (Section 2). We first briefly discuss enforcement in a-typical cases (non violation and situation complaints), and then move to discuss in detail enforcement of WTO obligations, assuming a violation has been committed. The starting point has to be the *recommendation* (and, eventually, *suggestion*) by the WTO adjudicating body. In the typical case, a WTO adjudicating body will recommend that the losing party bring its measures into compliance without specifying what precisely it should do (Section 3). Compliance efforts will have to be undertaken within a *reasonable period of time*, defined either bilaterally, through agreement between the parties, or, multilaterally, through recourse to arbitration (Section 4). Assuming disagreement as to the whether compliance has indeed been achieved, the parties to the original dispute will submit their new dispute to *a compliance panel* (and eventually, the Appellate Body, as discussed in Section 5). If the final outcome of this process that compliance has not been achieved, the injured party will have the right to impose countermeasures. It will first have to table a request to this effect and, in its *request for authorization* to impose countermeasures, it should ensure that the level of proposed countermeasures does not go beyond the level of injury suffered (Section 6). Assuming disagreement between the parties as to the level of proposed countermeasures, their dispute will be submitted to an Arbitrator (usually the members of the original panel) who will decide on first and last resort on the level of countermeasures to be imposed (Section 7). Remarkably, the DSU contains no specific provisions as to what procedure should be followed in case, following imposition of countermeasures, the author of the illegal act claims to have brought its measures into compliance (Section 8).

2 The type of the complaint matters

There are three different types of legal complaints that can be raised before WTO adjudicating bodies. As of Section 3, we will be focusing on enforcement in case a

violation complaint has succeeded. In this Section we briefly discuss enforcement in case a *non violation* or a *situation complaint* has succeeded.[8] Both types of complaint share one thing: there is no need to argue that a WTO Member has violated its WTO obligations. However, they are now (with the advent of the DSU) treated differently.

Assume that a WTO has raised a *non violation complaint* and succeeded: the WTO adjudicating body will recommend a *mutually satisfactory adjustment.* In the absence of practice, we can only speculate as to scope of this term. To facilitate the resolution of the dispute, an arbitrator can, upon request determine the level of benefits which have been impaired, but such suggestions are *not binding* on the parties to the dispute (Art. 26.1c DSU). Recourse to *compensation* (itself, a voluntary option) can be part of a mutually satisfactory adjustment (Art. 26.1d DSU).

Assume now that a WTO Member has raised a *situation complaint* and succeeded: Art. 26.2 DSU makes it clear that the rules of the DSU apply

> "only up to and including the point in the proceedings where the panel report has been circulated to the Members."

As of this stage, the GATT positive consensus-rule applies: adoption of the panel report and any eventually following action can be formally decided only if both parties to the dispute agree on the issue.

3 Recommendations and suggestions by WTO adjudicating bodies

In the rest of the paper, we focus on enforcement of WTO obligations assuming that a *violation complaint* has been raised. Of course, a necessary condition to even start

[8] See Petersmann (1991) for an excellent overview of the GATT practice with respect to non violation complaints.

discussing enforcement of WTO obligations is a ruling to the effect that an inconsistency has been established.[9]

Assuming that a *ruling* (that is, a finding of inconsistency) has been pronounced, WTO adjudicating bodies *shall* also *recommend* (Section 3.1) that the WTO Member which is the author of the illegal act bring its measures into compliance with the WTO; WTO adjudicating bodies *may* also *suggest* (Section 3.2) ways to do so.

3.1 Recommendations

Art. 19.1 DSU reads:

> "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."

Art. 19 DSU distinguishes thus between *recommendations* and *suggestions*. As already stated above, a *recommendation* must be issued in case a finding of inconsistency has been pronounced. Case law however, has clarified that a *recommendation* is not necessary in case the measure at dispute is no longer in place. The rationale for this approach has to do with the (consistent by now) understanding of WTO adjudicating bodies that the purpose of dispute settlement is to help resolve ongoing disputes. A *recommendation* to withdraw an already withdrawn measure is of no help to the

[9] This sentence is probably a pleonasm, since, in DSU-parlance, a finding of inconsistency is a *ruling* (Art. 3.2 DSU).

resolution of the dispute.[10] The Appellate Body made this point clear in its report on *US – Certain EC products*. There it dealt with an appeal against a panel *recommendation* to withdraw a measure which had been found to be inconsistent with the WTO, but which, subsequent to the initiation of the proceedings, had ceased to exist. The Appellate Body decided that

> "the Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."

Subsequent panels (see for example, the panel report on India – Autos*) have confirmed this view.*

3.1.1 The substantive content of a recommendation

Art. 19 DSU leaves WTO adjudicating bodies no discretion as to the substantive content of a *recommendation*, which is inflexible across disputes: the author of the illegal act must bring its measures into compliance. Practice confirms that there has been no deviation in this respect.

As a result, a *recommendation* leaves its addressees with substantial discretion as to what needs to be done for compliance to be achieved.[11] The need for discretion when it comes to implementing a report by a WTO adjudicating body, has been best described in the panel report on *US – Section 301 Trade act*:

---

[10] This is not to suggest that a WTO Member cannot challenge a measure which has been withdrawn during the adjudication process. The legal interest to secure a *ruling* (a finding of inconsistency) is thus distinguished from the legal interest to secure a *recommendation* when the challenged measure has been withdrawn. WTO adjudicating bodies have consistently held the position that the legal interest to secure a *ruling* on a withdrawn measure is the interest not to see the withdrawn measure repeated in the future.

[11] Although, as Mavroidis (2000) argues there are some obvious limits: for example, the WTO Member concerned cannot continue/repeat the same behaviour.

"The obligation on Members to bring their laws into conformity with WTO obligations is a fundamental feature of the system and, despite the fact that it affects the internal legal system of a State, has to be applied rigorously. At the same time, enforcement of this obligation must be done in the least intrusive way possible. The Member concerned must be allowed the maximum autonomy in ensuring such conformity and, if there is more than one lawful way to achieve this, should have the freedom to choose that way which suits it best".

3.1.2 The function of a recommendation

Technically, the addressee of a recommendation *is not the WTO Member author of the illegal act. It is the Dispute settlement body (DSB), that is, the organ administering the DSU where representatives of all WTO Members participate. The DSB, upon* recommendation *by a WTO adjudicating body, will* request *from the WTO Member concerned to bring its measures into compliance with its obligations. WTO adjudicating bodies reports are all written in this way. Action by the DSB to this effect is conditioned on a request by the winning (before the WTO adjudicating body) WTO Member. Hence, the* recommendation *is the first step aimed at securing enforcement after a* ruling *(finding of inconsistency) has been issued.*

3.1.3 The legal force of a recommendation

By virtue of the fact that a recommendation *will be part of a DSB decision addressed to the WTO Member concerned (form), and because of the unambiguous wording of Art. 19 DSU (substance), it is binding upon its addressee.*

3.2 Suggestions

3.2.1 The substantive content of a suggestion

The content of a *suggestion*[12] is case-specific, and will depend on a series of variables: the facts of the case, the request of the complaining party, the evaluation by the WTO adjudicating body etc.

3.2.2 The function of a suggestion

Art. 19 DSU states that *suggestions* are meant to facilitate the implementation of recommendations. Contrary to a *recommendation*, which leaves ample discretion to its addressee, as to what needs to be done in terms of implementation, a *suggestion* prejudges the addressee's discretion. This does not mean that *suggestions* are binding on WTO Members.[13] A *suggestion* serves as guidance as to what should be done.

Mavroidis (2000) has taken the view that, irrespective of their legal force, a WTO Member which has complied with a *suggestion* must be deemed to be in compliance with its WTO obligations.[14] It seems plausible to argue that the burden of persuasion needed to establish that following a suggestion has not led to implementation is quite substantial.

Suggestions can of course, be requested. Art. 19 DSU does not state though, that absence request to this effect, no *suggestion* will be issued. The argument however has been made

---

[12] See also the discussion infra on the content of suggestions in case a subsidy scheme has been found to be prohibited by the disciplines in the *SCM agreement.*

[13] See the discussion *infra* under 3.2.5.

[14] Assuming, of course, that a panel's *suggestion* has not been overturned by the Appellate Body: country A loses before a panel which suggests ways to implement its obligations. Country A does not appeal and conforms to the panel's suggestion. If B, the complainant in the original panel is not happy with the implementation, it will institute a compliance panel, and assuming that the compliance and the original panels are in agreement (in light of their composition it looks like a foregone conclusion), it will appeal. The Appellate Body *might* take the view that the *suggestion* was not enough to achieve compliance. Critically, it will have to evaluate the impact of the A's decision not appeal the *suggestion* and to what extent non appeal should be viewed as acquiescence (estoppel).

that suggesting in the absence of a request to do so, amounts *ipso facto* to a violation of the maxim *non ultra petita*. This argument, it is submitted, is misplaced. *Non ultra petita* is relevant when, for example, a complainant claims violation of Art. I GATT and the panel rules on Art. II GATT. Assuming an illegality has been pronounced, the court has inherent powers to determine what needs to be done to repair the damage. This is true not only in domestic but also in international practice.[15]

As we will see, there is practice (exceptionally so, though) in the WTO of panels suggesting in the absence of a request to do so.

3.2.3 Requesting a suggestion

3.2.3.1 Requests for suggestions must be specific

A request for suggestion must be specific, in the sense that there is danger that panels might not be willing to adopt a request which does not specify in precise enough terms the content of the requested *suggestion*. The panel in its report on *US – Lead and bismouth II* faced a request by the EC

> "to suggest that the United States amend its countervailing duty laws to recognize the principle that a privatization at market prices extinguishes subsidies". (§ 8.2).

Since however, the European Community did not identify the specific provision of US law, the panel declined to make a suggestion to the effect requested. One can argue with the well-founded of this opinion. True, panels do not have to entertain vague claims, and the panel at hand could have rejected this request for being vague. It could however, still go ahead and suggest ways for the losing party to bring its measures into compliance, since, as we saw, Art. 19 DSU does not pre-condition the issuance of a *suggestion* on a prior request to this effect.

---

[15] Mavroidis (2000) offers a number of examples from international practice on this score.

3.2.3.2 Discretion to suggest, even when requested to do so

The panel report on *US – Stainless steel* dealt with a request by Korea, in case it accepted its claim, to suggest that the United States revoke the antidumping order in place. The United States requested the panel to decline Korea's requested suggestion and instead confine itself to a general recommendation. The Panel refused to accept Korea's claim. At the heart of its refusal to entertain Korea's claim is the panel's persuasion that:

> "Article 19.1 of the DSU allows but does not require a panel to make a suggestion where it deems it appropriate to do so" (§ 7.8).

The panel however added that, in its view, revocation of the antidumping order would be one way for the United States to bring their measures into compliance but not the only way to do so.

Over the years, panels have adhered to the view that they are under no legal compulsion to suggest even when requested to do so. A recent illustration of this attitude is traced in the panel report on *EC – Pipe fittings* (§ 8.11):

> "By virtue of Article 19.1 of the *DSU*, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Clearly, however, a panel is by no means required to make a suggestion should it not deem it appropriate to do so. Thus, while we are free to suggest ways in which we believe the European Communities could appropriately implement our recommendation, we decide not to do so in this case."

This interpretation of Art. 19 DSU in this respect by WTO adjudicating bodies is questionable. Panels seem to pay attention to the term *may*, appearing in Art. 19 DSU. A different rationale could be advanced though, for the inclusion of the term *may* in Art. 19 DSU: it could be that this term is there to denote that absent a request for a suggestion, panels are not obliged to suggest. In presence of a request though, they have to at least entertain the request. Consequently, the term *may*, in this reading is there to subject the task of a panel to the specificities of a particular litigation. In other words, panels may or may not suggest absent a request to this effect; they will have to however, entertain the request for a *suggestion* every time such a request has been submitted to them. The only rationale for not doing so would be judicial economy. As standing case law has made it clear, judicial economy-type of considerations should not be advanced when the interest of dispute resolution is at stake: a panel should rule as much as necessary to resolve the dispute. A suggestion is a necessary ingredient for dispute resolution: for even if not followed, it provides a benchmark to evaluate the adequacy of the implementation method eventually preferred by the WTO Member concerned. Moreover, from a pure policy-perspective, the ongoing saga of compliance panels and re-runs of previously half-litigated cases should have provided panels with enough incentive to start at least entertaining all requests to suggest.

3.2.3.3 The dominant case for suggestions (when requested): no other way to implement

A survey of WTO practice reveals that panels have suggested when they were of the view that there was no conceivable way beyond their suggestion available to the WTO Member concerned to implement its obligations. This is the dominant case in practice. There is however, some practice whereby panels have suggested although they took the view that there were potentially means at the disposal of the WTO Member requested to bring its measures into compliance other than their *suggestion*.

In *Guatemala – Cement I*, the complainant, Mexico, requested the panel to *recommend* that Guatemala revoke the measure and also "refund those anti-dumping duties already collected."

The panel declined, noting that Article 19.1 of the DSU confines panels to recommending that the Member concerned bring the measure into conformity. However, the panel did note that Article 19.1 authorized it to *suggest* ways in which the Member concerned could bring its measure into conformity. With regard to Mexico's request concerning revocation, the panel stated that, since it had concluded that the entire investigation rested on an insufficient basis and therefore never should have been initiated,

> "we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."

The same issue came up again during the proceedings of *Guatemala – Cement II*. Mexico again requested revocation of duties and reimbursement of illegally perceived duties. The panel first repeated its position that it had discretion to provide for suggestions even in presence of a specific request by the complaining party to this effect. It then went on to briefly remind the particular circumstances of the case at hand: the investigation should have never been initiated on the basis of the available information; illegalities were committed during the investigation; no finding that dumping occurred which caused injury was supported by the available evidence. In light of this information, the panel could

> "not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute."

The attitude of the panel was different however with respect to Mexico's request for reimbursement of illegally perceived antidumping duties. However, it still went ahead and examined the request ultimately declining to adhere to it because of the very serious

systemic issues raised. The panel did not explain why revocation of the antidumping order does not raise systemic issues whereas reimbursement does.

The panel report on *Argentina – Poultry antidumping duties* faced the same issue, that is, a request from Brazil to suggest revocation of the Argentine order imposing antidumping duties. The panel had previously found that Argentina had violated its obligations by determining that there was sufficient evidence to initiate an investigation when this was not the case; by having recourse to best information available in violation of Art. 6.8 AD; by making an improper comparison between normal value and export price; by failing to make an objective examination of the injury factors and by de-respecting the causality-requirement. In the panel's view, in light of the extent of Argentina's violations, a revocation of duties imposed was well in order. On reading of this panel report seems to suggest that the cumulative nature of violations is the rationale for the suggestion; the factual similarity between this case and the *Guatemala – Cement I & II* cases on the other hand, lends support to the argument that in such cases revocation is the only remedy, at least in the eyes of WTO panels.

In its report on *US – 1916 act (Japan)* however, the panel, although it recognized that the remedy that Japan requested it to suggest (that the United States repeal their law found to be inconsistent with the WTO) was not the only way that the United States could bring its measures into compliance (since, the panel itself accepts that an amendment of the law could probably suffice), it still went on to make the *suggestion* as requested by Japan, noting however that its *suggestion* should be understood as one of the ways in which the United States could conceivably bring their measures into conformity with their WTO obligations. This is the only reported case so far where, upon request, a panel suggested although it did not adhere to the view that the *suggestion* at hand was the only remedy at the disposal of the WTO Member concerned.

3.2.4 Un-requested suggestions

3.2.4.1 Legislative "suggestion": the case of export subsidies

Note however, that with respect to export subsidies, there is an explicit requirement in the *SCM Agreement* that they must be withdrawn without delay. In such cases, the recommendation to bring the measures into compliance will be accompanied by a request that the export subsidy be withdrawn *without delay*. Nowhere does the WTO Agreement specify that the Art. 4.7 SCM should be understood as a *suggestion*, although its function is very comparable to that of a suggestion. In such cases, a *suggestion* will hence always be issued but the period of time during which implementation should be carried out might vary. Although panels have accorded different implementation periods, the Appellate Body, in its report on *US – FSC (Article 21.5 – EC)* made it clear that a defence to the effect that citizens have a right for an orderly transition cannot validly be raised against the obligation to withdraw immediately an illegal subsidy.

Recently, the Appellate Body clarified that a panel requested to pronounce on the consistency of a farm subsidy under the disciplines of the *Agriculture agreement* (AG) and those of the *SCM agreement*, cannot adjudicate the dispute under the former only, invoking to this effect judicial economy. In *EC – Export subsidies on sugar*, the Appellate Body held that this is wrong exercise of judicial economy, because it deprives the complainant of the possibility to benefit from Art. 4.7 SCM, and thus secure a request for immediate withdrawal of the subsidies concerned.

3.2.4.2 Other cases

The panel report on *EC-Export subsidies on sugar* is the only case so far where a panel suggested, although it was not requested to do so by the complaining parties. It justified its decision to suggest in light of the interests of the many developing countries

participating in the process. It is tenuous to draw any results from this case, and we mention it only for the sake of completeness.

3.2.5 Suggestions Are Not Binding

All reports so far have consistently held that *suggestions* are not binding. As we discussed above though, such admission is only relevant when it comes to deciding on the burden of persuasion associated with cases where *suggestions* have and, conversely, have not been followed.

4 Reasonable period of time (RPT)

Following a *recommendation* and/or *suggestion* by a WTO adjudicating body, the WTO Member author of the illegal act will have to bring its measures into compliance with the WTO within a *reasonable period of time* (RPT). The RPT can be defined either by agreement between the parties to the dispute (bilateral definition), or, in case an agreement is not possible, through recourse to arbitration (multilateral definition).

4.1 Bilateral definition of the RPT

Art. 21.3 DSU defines two cases of bilateral definition of the RPT:

(a) *tacit* agreement between the parties in dispute, where the proposal by the party requested to implement is not objected to by the other party or parties (Art. 21.3a DSU);
(b) *explicit* agreement between the parties in dispute (Art. 21.3b DSU).

4.2 Multilateral definition of the RPT

4.2.1 The regulatory framework

Art. 21.3c DSU deals with the situation where parties to the dispute cannot agree on the extent of the RPT. In this case, recourse can be made to arbitration and the RPT will be:

> "a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator 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."

In all cases submitted to arbitration so far, the Arbitrator has been a Member of the Appellate Body.

4.2.2 The task of the Arbitrator

The Arbitrator in *US – Offset act (Byrd amendment) (Article 21.3c)* provided his understanding of his mandate under Art. 21.3 (c) DSU in the following terms:

> "it is *not* part of my mandate to determine or even to suggest the manner in which the United States is to implement the recommendations and rulings of the DSB."
>
> ...
>
> "... my task is not to look at *how* implementation will be carried out, but to determine *when* it is to be done."

The Arbitrator does not start from a clean slate though. The DSU contains some guidance helpful to determine when implementation should occur:

(a) the Arbitrator is requested to define an RPT because *immediate compliance,* which is the over-riding objective, is impracticable (art. 21.3 DSU);

(b) the RPT should not exceed fifteen months, but it can be longer or shorter depending on *particular* (often referred to as *attendant*) *circumstances* (Art. 21.3c DSU).

The Arbitrator knows as a result, that the legislative wish is to define as short as possible RPTs and that, by default a 15 month period is indicated which is supposed to serve as guideline for measuring RPTs each time a request to this effect has been tabled.

4.2.3 Measuring the RPT under Art. 21.3c DSU

4.2.3.1 The function of the 15 month-guideline

Up until the report by the Arbitrator in *Chile – Price band system (Article 21.3c)*, case-law was hardly consistent on this score. In this Arbitrator clarified that the 15 month period is but a guideline and that what matters in order to measure the RPT each time is the existence of attendant circumstances:

> "Article 21.3(c) provides for an arbitrator a "guideline" of a maximum of 15 months from the date of adoption of the panel and Appellate Body reports when establishing a "reasonable period of time" for implementation. Notwithstanding this "guideline", I must ultimately be informed, as Article 21.3(c) instructs, by the "particular circumstances" of a given case, which may counsel in favour of shorter or longer periods. As previous arbitrators have observed, the controlling principle is that the "reasonable period of time" should be "the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB", in the light of the "particular circumstances" of the dispute."

In this vein, the Arbitrator in *US – Offset act (Byrd amendment) (Article 21.3c)* held the view that the 15 month period does not represent an "average or a usual period". In his view, it is the particular (attendant) circumstances that will ultimately define the extent of the RPT.

4.2.3.2 Attendant Circumstances

(a) The role of attendant circumstances

The Arbitrator in *US – Hot-rolled steel (Article 21.3c)* explained that *attendant circumstances* have a function similar to *reasonableness*:

> 1. "In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case."

It stems that Arbitrators enjoy large discretion on this score where the original provision (Art. 21.3c DSU) is largely incomplete and, for all practical purposes, the contract will be completed through *judge-made law*. Before however, we move to discuss the emerging trends in the interpretation of Art. 21.3c DSU, a small detour to the issue of burden of proof is appropriate.

(b) The burden of proof

Reflecting prior case law on this score, the Arbitrator in *US – Offset act (Byrd amendment) (Article 21.3c)* held that it is for the implementing party to establish first that the proposed RPT is the shortest period possible. Absent such demonstration, the Arbitrator will judge based on evidence submitted by the parties to the dispute.

(c) Attendant circumstances in WTO case law

Case-law[16] has so far developed a number of attendant circumstances which are relevant in calculating the RPT:

first, the question whether implementation will take place through *administrative* or through *legislative* means, the case normally being that the former can take place in a shorter time [of the report of the Arbitrator in *Canada – Pharmaceutical patents (Article 21.3c);* see also of the Arbitrator's report on *Chile – Price band system (Article 21.3c)*]. The latter report accepted to take into account for the computation of the RPT pre-legislative activity although such activity was not legally required. The Arbitrator in *US – Offset act (Byrd amendment) (Article 21.3c),* clarified that when recourse to legislative activity is required for implementation to occur, the calendar of the legislative body at hand could be relevant;

second, the *complexity* of the implementation process (that is whether a series of new statutes is required, or whether a simple repeal of the statute suffices) is relevant. The Arbitrator on *Chile – Price band system (Article 21.3c)* added here that information about the measure aimed to ensure implementation is hence, necessary although the legal issue regarding consistency of such measure with the WTO rules is beyond the Arbitrator's mandate. On the other hand, the Arbitrator in *US – Offset act (Byrd amendment) (Article 21.3c)* made it plain that the fact that the WTO Member at hand is required to implement international obligations is not a complexity-factor. In his view, if this were the case, then all requests for arbitration under Art. 21.3c DSU would have to account for this factor;

third, the legally binding –as opposed to the discretionary—*nature of the implementing procedures* will also weigh in his mind [of the report on *Canada – Pharmaceutical patents (Article 21.3c)*]. The former will weigh heavier in light of the inflexibility associated with such steps;

---

[16] See on this score Hughes (2004) and Pauwelyn (2004).

fourth, if the WTO Member concerned has *developing country* status, then the Arbitrator will usually define a longer RPT [of the report on *Chile – Alcoholic beverages (Article 21.3c)*]. The issue however can be more complicated if both defendant and complainant are developing countries. Facing such a dispute, the Arbitrator on *Chile – Price band system (Article 21.3c)* decided not to account for this factor in the calculation of the RPT:

> "Accordingly, I recognize that Chile may indeed face obstacles as a developing country in its implementation of the recommendations and rulings of the DSB, and that Argentina, likewise, faces continuing hardship as a developing country so long as the WTO-inconsistent is maintained. In the unusual circumstances of this case, therefore, I am not swayed towards either a longer or shorter period of time by the "[p]articular attention" I pay to the interests of developing countries."

fifth, the *role* of the measure found to be inconsistent with WTO rules in a particular society might also influence the definition of RPT. The Arbitrator in its report on *Chile – Price band system* described this attendant circumstance in the following manner :

> "I am of the view that the PBS is so fundamentally integrated into the policies of Chile, that domestic opposition to repeal or modification of those measures reflects, not simply opposition by interest groups to the loss of protection, but also reflects serious debate, within and outside the legislature of Chile, over the means of devising an implementation measure when confronted with a DSB ruling against the original law. In the light of the longstanding nature of the PBS, its fundamental integration into the central agricultural policies of Chile, its price-determinative regulatory position in Chile's agricultural policy, and its intricacy, I find its

unique role and impact on Chilean society is a relevant factor in my determination of the "reasonable period of time" for implementation."

It seems thus, that this fifth factor deserves to be treated as an attendant circumstance on its own, since it is dissociated from the developing country-status that Chile might enjoy in the WTO.

5 Compliance panels

5.1 The mechanics

If during the RPT, however defined, no implementing activities *at all* take place, then the complaining party can request authorization to suspend concessions. If, on the other hand, implementing activities do take place, one can distinguish between two situations:

(a) the complaining party agrees that the author of the illegal act has adequately implemented its WTO obligations; or
(b) the complaining party does not agree that this has indeed been the case.[17]

In the first case, and assuming that the no third WTO Member objects to the implementation, marks the end of the matter. In the second case, the original complainant (the party that now disagrees with the adequacy of the implementation efforts) can request the establishment of a compliance panel as *per* Art. 21.5 DSU.

The panel will be composed by the members of the original panel, if possible. If not, the parties to the dispute and, ultimately in case of disagreement the Director-General of the WTO, will compose the panel. Art. 21.5 DSU requests from the panel to issue its reports

[17] There is a third (rather unlikely) situation where the parties to the dispute agree that implementing activities that took place were inadequate. In this case as well, the injured party can request authorization to suspend concessions.

within 90 days. In practice, slight deviations from this statutory deadline are being observed.

5.2 The rationale for compliance panels and the *sequencing* issue

The rationale for a compliance panel has to do with the resolve of WTO Members to ensure that no unilateral definitions of illegality will take place after the advent of the WTO. Art. 23.2 DSU, the over-arching discipline in the DSU-system cautions that findings of illegality will be the exclusive privilege of WTO adjudicating bodies. As a result, absent a finding by a (compliance) panel that the illegality persists as a result of inadequate implementation, the complainant cannot request authorization to impose countermeasures, the *ultima ratio* in the context of enforcement of WTO obligations.

We should note however, that this is not necessarily the manner in which business has always been conducted within the WTO. WTO practice, at least in the first years, has been quite ambivalent: there are reported cases where a request for authorization to suspend concessions was submitted along with a request to establish a compliance panel. The most notable case is the *EC – Bananas III* dispute. The United States had requested authorization to suspend concessions *vis-à-vis* the European Community since, in its view, the latter had not brought its measures into compliance during the reasonable period of time. The European Community objected. In its view, compliance had indeed occurred during the RPT. In any even, in the EC view, in case of disagreement between the parties, unless a compliance panel has first pronounced on the absence of compliance, the complainant cannot legitimately request suspension of concessions; the latter presupposes a finding that no compliance occurred. Such finding, in the EC view, was, by virtue of Art. 23.2 DSU, the exclusive privilege of the WTO adjudicating bodies. This is what is often termed the *sequencing* issue, that is, that a request to suspend concessions must always follow and cannot precede a compliance panel.

In the US view, if the deadline of 20 days mentioned in Art. 22.2 DSU after the expiry of the RPT had lapsed, it would have lost its right to request authorization to suspend

concessions. The United States thus went ahead and requested authorization of suspension of concessions to which the European Community objected. The United States then, requested the establishment of arbitration under Art. 22.6 DSU to determine the level of concessions to be suspended. Four days later, Ecuador (the other complainant in the *EC – Bananas III* dispute) requested the establishment of a compliance panel to rule on whether the EC had indeed complied during the reasonable period of time.

The European Community requested from the Arbitrators to suspend their proceedings until the compliance Panel had first ruled whether compliance had indeed occurred or not. The Arbitrators on *EC – Bananas III (Article 22.6 – US)* rejected the point of view of the EC in the following terms:

> "In a letter dated 22 February 1999, the European Communities requested that we suspend this arbitration proceeding until 23 April 1999, i.e. until 10 days or so after the date set for the completion of the pending proceedings brought by Ecuador and the European Communities pursuant to Article 21.5 of the DSU in respect of the revised EC banana import regime. However, in light of Article 22.6 of the DSU, which requires that an arbitration there under "shall be completed within 60 days after the date of expiry of the reasonable period of time", or 2 March 1999, we decided that we were obligated to complete our work in as timely a fashion as possible and that a suspension of our work would accordingly be inappropriate."

As a result, the report by the Arbitrators determining the level of concessions to be suspended was circulated on 9 April 1999 whereas three days later, that is on 12 April 1999 the compliance panel established at the request of Ecuador circulated its report where it found that the EC had not complied with its obligations during the reasonable period of time [*(EC – Bananas III (Article 21.5 – Ecuador)*].

A different approach was followed by the Panel in its report on *US – Certain EC products*: when confronted with the same issue, the Panel made it clear that a request for suspension of concessions can only be authorized if a compliance panel has first ruled that no compliance occurred during the reasonable period of time. However, in the Panel's view, an Arbitrator requested to determine the level of concessions to be suspended could also determine whether compliance occurred.

Both interpretations are wrong: wrong on *textual* grounds, since they bypass the explicit wording of Art. 23.2 DSU (both) and of Art. 22.7 DSU which circumscribes the mandate of an Arbitrator acting under the auspices of Art. 22.6 DSU (the latter); wrong on *contextual* grounds, since the period mentioned in Art. 22.2 DSU continues to be workable assuming no implementing activity at all occurred, or even, assuming that there is agreement that no implementation occurred: one can start counting the 20 day period from the day on which the compliance panel and/or the Appellate Body has definitively pronounced that implementation did not occur during the RPT; wrong in light of the *object and purpose* of the DSU which is there (as indeed, Art. 23.2 DSU has in so many words stated) to guarantee that there will be no more unilateral definitions of illegality.

There is by now substantial evidence in practice suggesting that sequencing belongs to the past: WTO Members have, ever since, either through agreement or informally so, always sought recourse to compliance panels before they tabled a request for authorization to impose counter-measures. During the DSU-review,[18] a number of proposals have been made to ensure that sequencing will in the future be explicitly reflected in the DSU.

[18] Ongoing, at the time of writing. See Mavroidis (2004) on WTO practice in this context, who also reflects some of the proposals on *sequencing* tabled during the DSU review. On his account, practice reveals a number of bilateral agreements between interested parties aiming at sequencing 22.6 to 21.5 DSU, and thus, avoid *EC – Bananas III*-type of issues.

5.3 The mandate of compliance panels

The mandate of compliance panels[19] has been clarified in the Appellate Body jurisprudence in its report on *Canada – Aircraft (Article 21.5 – Brazil).* Following condemnation by a panel and the Appellate Body, Canada revised its original TPC programme (the measure which had been found to be inconsistent with the WTO) so that it does not amount to an export subsidy anymore (and thus, be consistent with Art. 3.1(a) of the SCM Agreement). The complainant however, was not in agreement with Canada as to the adequacy of its implementing efforts. The dispute was submitted to a compliance panel the report of which was appealed. On appeal, the Appellate Body had, *inter alia*, the opportunity to provide its understanding of the mandate of a compliance panel:

> "... 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.* 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.*"

The Appellate Body confirmed its understanding of this issue in its report on *US – Shrimp (Article 21.5 – Malaysia).* It seems clear henceforth that a compliance panel's mandate is limited to the *new measure* (the measure taken to comply with the WTO adjudicating body's findings). However, it is important to note that a compliance panel will examine the consistency of the new measure, not only with those provisions of the WTO treaties that have been invoked by the complainant in the original action, but also

[19] See on this score, but also, in general on the role of panels, Davey (2004).

with any other provision that the complainant chooses to raise before the compliance panel in its request. At the same time, as is explained below, a complainant cannot use a compliance panel to renew or *expand* its challenge to the original measure).

To avoid any misunderstandings on this score, the Appellate Body, in its report on *EC – Bed linen (Article 21.5 – India)* held that a claim which challenges a measure which is not taken to comply with the original panel's recommendation is not properly before a compliance panel.

5.4 Compliance panels reports can be appealed

A report by a compliance panel can be appealed. There is by now ample practice in this respect.

5.5 More than one compliance panel on the same dispute?

Practice reveals that a second compliance panel can be effectively established in the context of the same original dispute. *Brazil – Aircraft (Article 21.5 – Canada, Second recourse)* is an appropriate illustration.

However, practice on this score has probably developed *contra legem*. The purpose of compliance panels is to evaluate whether compliance occurred during the RPT. There is however one RPT only. Assuming recourse to 21.5 DSU is made at the end of the RPT,[20] the panel will check all implementing efforts within the RPT and pronounce on their consistency. There is however, only one RPT at the disposal of WTO Members and

[20] It is highly unlikely that a compliance panel will be established before the end of the RPT: for reasons having to do with the length of procedures, even if this has been the case, normally the RPT will be long finished before the end of the panel procedures. On the other hand, the defendant can always request from the panel to suspend its proceedings until the RPT has lapsed.

hence, there can be only one compliance panel to evaluate implementation in the context of a particular dispute.

6 Requesting countermeasures

6.1 The right to request countermeasures[21]

If at the end of the RPT, the author of the illegal act has failed to bring its measures into compliance (either because no implementing activities at all took place, or because the undertaken implementing activities were not adequate for the Member concerned to have brought its measures into compliance with its WTO obligations) Art. 22.2 DSU kicks in:

> "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."

[21] We use this term as a generic term covering all WTO-permissible forms of countermeasures. We will of course be more specific in Section 6.3, where we discuss the form of countermeasures.

6.2 The function of *compensation, suspension of concessions or other obligations*

Art. 22.1 DSU makes it plain that there is no institutional equivalence between *suspension of concessions or other obligations* and the obligation to perform the WTO contract (*pacta sunt servanda*). The former is simply a temporary means until compliance has occurred.

Art. 22.8 DSU underscores this point:

> "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."

WTO Members can agree, in accordance with Art. 22.1 DSU, instead of having recourse to *suspension of concessions or other obligations*, on a *compensation* to be paid on a temporary basis until full compliance with the WTO obligations has occurred. Art. 22.1 DSU pertinently reads in this respect:

> "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."

Consequently, *compensation* and *suspension of concessions or other obligations* are temporary means that can be used alternatively until specific performance has been secured. Recourse to *compensation* however, has been very infrequent: in fact, compensation has been agreed only once; following the condemnation of US copyright practices in *US – Section 110(5) Copyright act*, the European Community (complainant) and the United States (defendant) agreed to submit to an Art. 25 DSU arbitration, since they could not agree on the compensation to be paid.[22]

The Arbitrators in *EC – Bananas III (Article 22.6 – US)* understand the purpose of countermeasures, as stated in Art. 22.1 DSU, to be to *induce* compliance by the recalcitrant WTO Member:

> "Accordingly, the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this temporary nature indicates that it is the purpose of countermeasures to *induce compliance.*"

Since *compensation* and *suspension of concessions* can be alternatively used, this observation is good law for *compensation* as well. However, as we will see *infra*, when quantifying countermeasures, the purpose of countermeasures (inducing compliance) should play second fiddle to the legal constraint enshrined in Art. 22.4 DSU.

---

[22] See the discussion of the case in Grossman and Mavroidis (2003). The authors note, *inter alia*, that it is questionable whether Art. 25 DSU was meant to serve this purpose. It seems that the Arbitrator here assumed a role normally entrusted to an Art. 22.6 DSU arbitration.

There is of course no doubt as to the subject of the compensation: it is the WTO Member the practices of which have been found to be WTO-inconsistent. In theory, doubt can only exist as to the target of *suspension of concessions or other obligations*: both the letter (Art. 22.6 DSU 'the Member concerned'), and the spirit of Art. 22 DSU, make it clear that the *suspension of concessions or other obligations* will take place not on an MFN- but on a bilateral basis, that is, it will be directed only against the recalcitrant WTO Member.

6.3 The form of countermeasures

Assuming compensation has not been agreed, the injured party will request the right to suspend concessions or other obligations (Art. 22.2 DSU). The letter of the law establishes thus the possibility to suspend

(a) either concessions, that is tariff concessions; or
(b) other (than tariff concessions) obligations.

Hence, other (than tariff concessions) un-identified obligations can, in principle, also be suspended. This question arose during the proceedings in *US – AD act 1916 (EC).* Having secured a ruling that the US act at hand was WTO-inconsistent, and faced with no compliance by the United States during the RPT, the European Community submitted to the United States its proposal to adopt *mirror legislation.* The European Community requested, in other words, permission to adopt its own version of the *US AD act 1916,* to be applied only vis-à-vis the United States. In the absence of agreement with the United States, the European Community tabled the same request before the Arbitrators (under Art. 22.6 DSU) who were asked to pronounce on whether *mirror legislation* satisfies the requirements of Art. 22.4 DSU.

The Arbitrators responded in the negative. In their view, the European Community should be permitted to suspend concessions equivalent to the amount of nullification and impairment suffered each time the *US AD act 1916* was applied against EC economic

operators. They were prohibited however from adopting *mirror legislation* since, in their view, such a measure is not WTO-consistent in light of the fact that it does respect the requirements of Art. 22.4 DSU. We quote of their report on *US – AD act 1916 (Article 22.6 – US)*:

> *"First, under Article 22.7 of the DSU, the arbitrators cannot examine the "nature" of the proposed suspension. We do not have the jurisdiction to determine equivalence between the measure proposed to implement the suspension and the measure causing the nullification or impairment. Article 22 of the DSU provides for the suspension of concessions or obligations. The arbitrators cannot approve the adoption of measures by the requesting party."*

This passage is awkwardly drafted, to put it mildly. It seems as if the Arbitrators exclude altogether the possibility to have recourse to measures other than the *suspension of concession*. The least quote sentence where the report mentions *measures* and not *the measures* lends support to this argument. If this is indeed the case, then this report is *contra legem*, since it reads out the terms *or other obligations* enshrined in Art. 22.1 DSU.

6.4 The procedure to follow

The WTO Member wishing to impose countermeasures will first have to draw a list of concessions to be suspended.[23] The WTO Member at hand will have to follow the procedure laid down in Art. 22.3 DSU, whereby it will have first to seek suspension in the same sector(s) in which the violation of WTO has been found and, assuming it believes that such action is not *practicable* or *effective*, in a different sector covered by

[23] In practice, except for the *US AD act 1916*, there has never been another case where the suspension of obligations other than tariff concessions has been requested. Following *US AD act 1916*, and absent a *revirement de jurisprudence*, it is highly unlikely that we will see in the future requests to suspend obligations other than tariff concessions.

the same agreement or, eventually, in a different sector covered by another agreement (cross-retaliation). Assuming the WTO Member decides to take action under a different sector (than that in which violation has been found), it will have to justify its decision to do so (Art. 22.3 DSU). A sector is defined in the following terms in Art. 22.3 DSU:

> "with respect to goods, all goods;
>
> with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;
>
> 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."

An *agreement* is, for the purposes of Art. 22.3 DSU, the GATT with respect to goods, the GATS with respect to services and the TRIPs with respect to intellectual property rights.

The question has arisen in practice whether the decision by a WTO Member to cross-retaliate should be *justiciable*. This issue arose in *EC – Bananas III*, when Ecuador requested authorization to suspend concessions under TRIPs, in light of the fact that the European Community refused to comply with its obligations under the GATT. In the case at hand, Ecuador had clearly stated in its request that it wanted to suspend concessions only in the fields of GATS and TRIPs, justifying, as it had to, is choice to proceed in this way:

> "The economic cost of withdrawal of concessions in the goods sector alone would have a greater impact on Ecuador than on the EC, and in proceeding in that way Ecuador would only succeed in further accentuating the imbalance in their trade relations, already seriously injured by the nullification and impairment of benefits for which the European Communities alone are responsible. This nullification or

impairment of benefits amounts to over 50 per cent of all exports of goods by the EC to Ecuador. The great majority of these exports consist of capital goods and raw materials that are essential for the Ecuadorian economy.

Since the withdrawal of concessions in the goods sector is at present not practicable or effective, and the circumstances are sufficiently serious to justify fully Ecuador exercising its rights under Article 22, Ecuador requests authorization to suspend concessions and other obligations under the GATS and TRIPS Agreements.

For the reasons given above, Ecuador proposes to suspend concessions or obligations stemming from the trade-related intellectual property rights in the following categories set out in Part II of the TRIPS Agreement:

Section 1: Copyright and related rights, *Article 14: Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations*

Section 3: Geographical indications

Section 4: Industrial designs

Ecuador also proposes to suspend concessions and obligations in the following subsector in its Schedule of specific commitments:

4. Distribution services

B. Wholesale trade services (CPC 622)

In addition, Ecuador reserves the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner.

The suspension of concessions or other obligations will apply to the following EC member States: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the United Kingdom." (italics in the original).

The Arbitrators' report on *EC –Bananas III (Article 22.6 – EC)* did not accept the list presented by Ecuador as such. In their view, Ecuador's proposal does not bind the Arbitrators, who retain the discretion to review it and amend it (as it did, in the particular case).

"It follows from the choice of the words "if that party considers" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words "in considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.

...

In the light of the foregoing considerations, it is our view that the degree of practicability and effectiveness of suspension of concessions under the GATT may

vary between different categories of products imported from the European Communities to Ecuador. We conclude that the European Communities has not established that suspension of concessions with respect to primary goods and investment goods is both practicable and effective for Ecuador in this case. However, with respect to consumer goods, we conclude that Ecuador has not followed the principles and procedures of Article 22.3 in considering that suspension of concessions on consumer goods is not practicable or effective for it in this case.

...

Ecuador submitted the statistics that display the inequality between Ecuador and the European Communities in support of its argumentation that circumstances are serious enough to justify suspension across agreements: 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.

In our view, these figures illustrate the considerable economic differences between a developing WTO Member and the world's largest trader. We believe that these differences confirm our considerations above that it may not be practicable or effective for Ecuador to suspend concessions or other obligations under the GATS or with respect to all product categories under the GATT. However, to some extent, the same rationale could hold true also for suspension of obligations under the TRIPS Agreement by a developing country Member in a situation involving a substantial degree of economic inequality between the parties concerned.

...

The counterfactual we have chosen is a global tariff quota equal to 2.553 million tonnes (subject to a 75 Euro per tonne tariff) and unlimited access for ACP bananas at a zero tariff (assuming the ACP tariff preference would be covered by a waiver). Since the current quota on tariff-free imports of traditional ACP bananas is in practice non-restraining, this counterfactual regime would have a similar impact on prices and quantities as the current EC regime. However, import licences would be allocated differently in order to remedy the GATS violations.

We calculated the effect on relevant Ecuadorian imports of the revised EC banana regime, compared with the counterfactual described in the previous paragraph, based on the assumption that the aggregate volume of EC banana imports is the same in the two scenarios. This implies that EC banana production and consumption, and the f.o.b., c.i.f., wholesale and retail prices of bananas, also are the same in the two scenarios. This in turn implies that the aggregate value of wholesale banana trade services after the f.o.b. point, and the aggregate value of banana import quota rents, are the same in the two scenarios. Both of those values are readily calculated from the price and quantity data made available to us. The only difference between the scenarios is in the shares of those aggregates that are enjoyed by Ecuador and other goods and service suppliers.

We assume the volume of Ecuador's banana exports to the EC would increase (at the expense of other suppliers) to the level of its best-ever exports during the past decade, that the share of those bananas distributed in the EC by Ecuadorian service suppliers would rise to 60 per cent, and that the proportion of those distributed bananas for which Ecuadorian service suppliers are given import licences would rise to 92 per cent (assuming that the remaining 8 per cent of the available import licences are those reserved for newcomers, consistent with the assumption used in the US/EC Bananas III arbitration).

Using the various data provided and our knowledge of the current quota allocation and what it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of Ecuador's nullification and impairment is US$201.6 million per year."

In of their report, the Arbitrators indicated the sectors where suspension of concessions should take place:

"Consequently, and consistent with past practice in arbitration proceedings under Article 22, we suggest to Ecuador to submit another request to the DSB for authorization of suspension of concessions or other obligations consistent with our conclusions set out in the following paragraphs:

Ecuador may request, pursuant to paragraph 7 of Article 22, and obtain authorization by the DSB to suspend concessions or other obligations of a level not exceeding US$201.6 million per year which we have estimated to be equivalent within the meaning of Article 22.4 to the level of nullification and impairment suffered by Ecuador as a result of the WTO-inconsistent aspects of the EC import regime for bananas.

Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend concessions or other obligations under the GATT concerning certain categories of goods in respect of which we have been persuaded that suspension of concessions is effective and practicable. Notwithstanding the requirement set forth in Article 22.7 that arbitrators "shall not examine the nature of the concessions or other obligations to be suspended", we note that in our view these categories of goods do not include investment goods or primary goods used as inputs in Ecuadorian manufacturing and processing industries, whereas these categories of goods do include goods destined

for final consumption by end-consumers in Ecuador. In making its request for suspension of concessions with respect to certain product categories, we note that, consistent with past practice in arbitration proceedings under Article 22, Ecuador should submit to the DSB a list identifying the products with respect to which it intends to implement such suspension once it is authorized.

Ecuador may request, pursuant to subparagraph (a) of Article 22.3, and obtain authorization by the DSB to suspend commitments under the GATS with respect to "wholesale trade services" in the principal sector of distribution services.

To the extent that suspension requested under the GATT and the GATS, in accordance with subparagraphs (b) and (c) above, is insufficient to reach the level of nullification and impairment indicated in subparagraph (a) of this paragraph, Ecuador may request, pursuant to subparagraph (c) of Article 22.3, and obtain authorization by the DSB to suspend its obligations under the TRIPS Agreement with respect to the following sectors of that Agreement:

(i) Section 1: Copyright and related rights, Article 14 on "Protection of performers, producers of phonograms (sound recordings) and broadcasting organisations";

(ii)Section 2: Geographical indications;

(iii) Section 3: Industrial designs."

Hence Ecuador, contrary to its wish, had to impose countermeasures worth $60.8 million in the field of goods and was free to choose between countermeasures in the area of services or TRIPs for the remaining part leading up to $201.6 million.

The standard of review that the Arbitrators applied in *EC – Bananas III* (Article 22.6 – EC) was couched in the following terms:

> "the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector."

In a nutshell, the Arbitrators in this case held the view that their understanding of what is practicable and effective prevails. Would they be prepared to take the blame in case their prediction was to be proved wrong? We doubt it. We submit that this is the wrong view. It is not the task of the Arbitrators to second guess evaluations of efficiency and practicability. Wisely, the text of Art. 22.3 DSU prefaces every sentence to this effect with the words *if that party considers* (that action is impracticable or ineffective). This suggests that the legislator's intent was to leave WTO Members with the maximum of discretion as to the sectors where action should be taken, disciplining only the amount of permissible action (by virtue of Art. 22.4 DSU).

Luckily, this view has not been followed down in subsequent practice. It seems fair to argue that nowadays, the discretion of Arbitrators is limited to a review of whether the requesting party has provided an explanation why it was not practicable or effective to suspend concessions within the same sector and does not extend beyond this point. In subsequent practice, as discussed in *US AD act 1916* above, the Arbitrators have explicitly refrained from reviewing the nature of the concessions to be suspended, limiting their review on the amount of proposed suspension of concessions.[24] Since practice so far however, is quite limited, it is probably too early in the day to draw any definitive conclusions as to the content WTO practice on this score.

---

[24] Irrespective of our disagreement with the decision of this report to set aside the possibility to suspend obligations other than tariff concessions, it does take the view that respecting Art. 22.4 DSU is the overarching discipline.

6.5 The legal constraint of Art. 22.4 DSU

Any time suspension of concessions is sought, WTO Members have to respect the discipline provided for in Art. 22.4 DSU which calls for equivalence between the proposed level of suspension of concessions and the level of nullification and impairment suffered by the injured party:

> "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."

Crucially, equivalence is established at the moment when a request for authorization to adopt countermeasures is being submitted. It is highly unlikely that, say $200 million dollars/year which are authorized in September 2005 because they correspond to the damage suffered, will correspond to the damage suffered each subsequent year that the illegality persists. A number of variables might influence the outcome, and their substantial uncertainty as to their eventual shaping. The DSU, as it stands, does not contain any institutional guarantees to ensure fast relief in case of deviation from the discipline of Art. 22.4 DSU: all an adversely affected WTO Member can do is request a new panel. This provides interested (and willing to go ahead with this option) parties with yet another incentive to overshoot the quantification of countermeasures.

So, the interested party will submit its list of proposed countermeasures. The ball is then in the other party's, the one against which countermeasures will be imposed, camp. It might agree with the proposed list, or it might disagree. We take each option in turn in what immediately follows.

6.6 Agreement between the parties

Art. 22.6 DSU deals with the case where the parties to the dispute agree on the level of concessions to be suspended. A request for suspension of concessions has to be submitted in a *timely manner* (as provided by Art. 22.6 DSU) before the DSB, and will be approved unless there is a consensus (the formation of which requires the consent of the requesting party) against it. It is not clear where exactly one should draw the line with respect to the term *timely manner*; this provision is aimed to disqualify abusive requests to impose countermeasures. For example, requesting authorization to impose countermeasures twenty years after the final finding that a violation has been committed should be judged untimely: a number of factors (ranging from the substantive content of the agreement invoked to the factual existence of the once outlawed behaviour) might simply not warrant adherence to such a request.

6.7 Disagreement between the parties

6.7.1 Compulsory submission to the Arbitrators

In case of disagreement between the parties with respect to the proposed list, recourse will be made to Arbitrators who will determine the level of concessions to be suspended (Art. 22.6 DSU). The Arbitrators are, if possible, the members of the original panel.[25] If this solution is impossible, it is the Director-General of the WTO who will appoint the missing Arbitrator(s).

[25] In practice, this solution might raise some issues: how would, for example, the Arbitrators react in a case where the findings of the original panel have subsequently been reversed by the Appellate Body?

6.7.2 The task of the Arbitrators

Art. 22.7 DSU requests from the Arbitrators to ensure that the level of proposed countermeasures corresponds to the damage suffered by the party requesting authorization to adopt countermeasures. Assuming that, a complaint regarding the procedures reflected in Art. 22.3 DSU has been submitted, the Arbitrators have the power to review it as well. To observe their task, the Arbitrators will adopt their working procedures. The report on *US – Offset Act (Byrd Amendment) (EC)* in an Annex reflects the procedures followed by the Arbitrator in the case at hand.[26] We quote (pp. 50-51):

> "The Arbitrator will follow the normal working procedures of the DSU where relevant and as adapted to the circumstances of the present proceedings, in accordance with the timetable it has adopted. In this regard,
>
> (a) the Arbitrator will meet in closed session;
>
> (b) the deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. However, this is without prejudice to the parties' disclosure of statements of their own positions to the public, in accordance with Article 18.2 of the DSU;
>
> (c) at any substantive meeting with the parties, the Arbitrator will ask the United States to present orally its views first, followed by the party(ies) having requested authorization to suspend concessions or other obligations;
>
> (d) each party shall submit all factual evidence to the Arbitrator no later than in its written submission to the Arbitrator, except with respect to evidence necessary during the hearing or for answers to questions. Derogations to this procedure will be granted upon a showing of good cause, in which

[26] Similar procedures have been followed in all other Art. 22.6 DSU cases.

case the other party(ies) shall be accorded a period of time for comments, as appropriate;

(e) the parties shall provide an electronic copy (on a computer format compatible with the Secretariat's programmes) together with the printed version (6 copies) of their submissions, including the methodology paper, on the due date. All these copies must be filed with the Dispute Settlement Registrar, [...]. Electronic copies may be sent by e-mail to [...]. Parties shall provide 6 copies and an electronic version of their oral statements during any meeting with the Arbitrator or no later than noon on the day following any such meeting.

(f) except as otherwise indicated in the timetable, submissions should be provided at the latest by 5.00 p.m. on the due date so that there is a possibility to send them to the Arbitrator on that date. As is customary, distribution of submissions to the other party(ies) shall be made by the parties themselves;

(g) if necessary, and at any time during the proceedings, the Arbitrator may put questions to any party to clarify any point that is unclear. Whenever appropriate, a right to comment on the responses will be granted to the other party(ies);

(h) any material submitted shall be concise and limited to questions of relevance in this particular procedure.

(i) Parties have the right to determine the composition of their own delegations. Delegations may include, as representatives of the government concerned, private counsel and advisers. Parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and these Working Procedures, particularly in regard to confidentiality of

the proceedings. Parties shall provide a list of the participants of their delegation prior to, or at the beginning of, any meeting with the Arbitrator.

(j) to facilitate the maintenance of the record of the arbitration, and to maximize the clarity of submissions and other documents, in particular the references to exhibits submitted by parties, parties shall sequentially number their exhibits throughout the course of the arbitration. "

2. Summarizing past practice in this respect, the Arbitrators in this report understand that their task in the context of Art. 22.6 DSU is to come up with a number: they do not have to accept the number reflected in the proposed list. The Arbitrators have understood that their task under Art. 22.7 DSU does not oblige them to reject a proposed list, without any further ado. Such behaviour, if practiced, could only delay the procedure. In case of disagreement with the proposed list, the Arbitrators will reduce the requested amount of concessions to be suspended.

In EC – Bananas III (Ecuador) (Article 22.6 – EC), *the arbitrators stated:*

> 3. "[W]e note that, if we were to find the proposed amount...not to be equivalent, we would have to estimate the level of suspension we consider to be equivalent to the nullification or impairment suffered by Ecuador. This approach is consistent with Article 22.7 of the DSU which emphasizes the finality of the arbitrators' decision....
>
> 4. We recall that this approach was followed in the US/EC arbitration proceeding in EC – Bananas III and the arbitration proceedings in EC – Hormones, where the arbitrators did not consider the proposed amount of suspension as equivalent to the nullification or impairment suffered and recalculated that amount in order to be able to render a final decision."[27]

[27] See also *Canada – Aircraft Credits and Guarantees (Article 22.6 –Canada)*

5. As already mentioned supra, the approach of the Arbitrators in the same report with Ecuador's proposed cross-retaliation has not been followed in any other Arbitrators' decision. Consequently, it seems fair to conclude that the task of the Arbitrators is to ensure that the *procedures* reflected in Art. 22.3 DSU have been observed, and to decide on a number which will reflect the level of permissible countermeasures.[28]

6.7.3 The burden of proof

Summarizing past practice, the Arbitrators in their report on *US – 1916 act (EC) (Article 22.6 – US)* reflected in detailed terms the allocation of burden of proof in the context of Art. 22.6 DSU proceedings in the following manner :

> *"The burden of proof in Article 22.6 arbitrations, as in regular WTO dispute settlement, is by now well established. As stated by the arbitrators in* EC – Hormones (US) (Article 22.6 – EC):
>
> > 6. "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

---

[28] Practice often defies imagination. The United States are probably the inventors of the so called *carousel* procedures whereby the identity of the items the concessions of which are being suspended changes post-authorization (to ensure that more than the original lobbies will have their share of the pie, but also because there is a genuine belief that 'we might not get it right the first time'). The issue of the consistency of *carousel* procedures has been discussed time and again in various WTO *fora*, without however ever being discussed before a panel. Mavroidis (2004) takes the view that there is nothing wrong with this procedure, assuming that various lists have been submitted for approval to the Arbitrators. In the opposite case, WTO Member should stick to the proposed list. During the DSU review a number of proposals have been submitted to clarify the status of *carousel* procedures under WTO-law. At the moment of writing the DSU review is still in progress.

> US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that 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.
>
> 7. 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..." (emphasis and italics in the original).

Hence, there is a presumption that the proposed list has respected Art. 22.4 DSU which will hold true unless effectively challenged.[29]

---

[29] See also § 2.8 in *Canada – Aircraft Credits and Guarantees (Article 22.6 –Canada)*

6.7.4 The Arbitrators' decision: first and last resort

Art. 22.7 DSU pertinently provides that:

> "The parties shall accept the arbitrator's decision as final."

The Arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* confirmed in their report (§ 2.12) that Art. 22.7 DSU precludes the possibility to appeal the Arbitrators' award.

6.7.5 Calculating the level of suspension of concessions

6.7.5.1 Economics matter

We should start by stating that this is one of the very rare areas where the WTO adjudicating bodies have had recourse to institutional (WTO) economics expertise: whereas it is normally the legal affairs divisions that act as secretaries and legal officers to panels, members of the Economics division have assisted Arbitrators in coming up with a number in the context of an Art. 22.6 DSU review.[30]

A good example is provide in the Arbitrators' report on *US Offset act (Byrd amendment) (EC) (Article 22-6 – US)*. Duties under the *US Offset act* can be imposed against any WTO Member, and not necessarily against EC-originating products. The Arbitrators were requested however to define the level of countermeasures that the European Community only could legitimately take. To complicate matters even more, any time duties were imposed say, against Japanese computers, one could legitimately expect diversion towards EC-computers (so there could be in-built compensation for EC-exporters any time duties are being imposed against competing producers).

---

[30] See Keck (2004). See also the World Trade Report (2005) pp. 171 – 209. This observation is no guarantee that all economists will agree with the outcome.

The Arbitrators decided that the European Community could impose countermeasures not exceeding 72% of all duties imposed by the United States on imports originating in the European Community. To reach this conclusion, the Arbitrators developed a model which led them to believe that a .72% coefficient was warranted in the case at hand. The Arbitrators had to first address the models presented by the two parties to the dispute and explain themselves as to their preference for a model based on the approach advocated by the European Community. Both models multiplied an assumed level of disbursements by a factor, or coefficient, to arrive at the total trade effect: in the model of the requesting parties, this factor was 1.54; in the case of the United States, this factor would appear to be on a product and importer basis for each year, the range of coefficients as estimated by the United States (for the products for which they presented data) being between 0.27 and 1.41. The differences in modelling had more to do with differences in the assumptions about the values of the elasticities and the pass-through values used rather than with the model itself, or the level of aggregation.

Presented with such conflicting evidence, the Arbitrators rejected the US model and adopted a modified version of the model proposed by the requesting parties. They expressed the basic relationship of the trade effect as follows:

> Trade effect = (value of disbursements)*[(pass-through)* (import penetration)*(elasticity of substitution)]

The term in the square brackets, they went on to state, can be defined as a trade effect coefficient. The Arbitrators were in agreement with prior Arbitrators regarding the reliability of economic modelling (they were 'mindful that the task of evaluating the trade effects of the scheme cannot be accomplished with mathematical precision').

Mindful of the limits in modelling, the Arbitrators went ahead and applied their model to the facts of this particular case.[31]

---

[31] The *Byrd* arbitration report is not the best publicity for the use of economics in WTO. In the *US – FSC* case, when faced with the same issue (calculation of countermeasures), the report

6.7.5.2 Standard of review

Although Arbitrators are formally not a panel, it would be odd to accept that they are not bound by the generic standard of review embedded in Art. 11 DSU, or, by a more or less, similar standard. Practice has revealed some more specific features, which are evidence of a tendency to practice a relatively speaking more discretionary *standard of review.*

Drawing inferences *is not unheard of the in panel's practice. It is not unheard of in Arbitrators' practice under Art. 22.6 DSU either. The Arbitrators' report on* US Offset act (Byrd amendment) (EC) (Article 22-6 – US) *provides a good illustration to this effect. The elasticity of substitution and the pass through were essential elements of its trade effect coefficient (used in the model described* supra *under 6.7.5.1). To perform its task it required, and requested to this effect, factual information from the parties in dispute. The requesting states (that is, the WTO Members requesting authorization to impose countermeasures) and the United States (the eventual target of countermeasures) did not demonstrate equally cooperative behaviour.*

With respect to elasticity of substitution, the Arbitrators drew inferences from the fact that the United States did not submit the requested elasticities, and failed to convincingly contest the validity of the values submitted by the requesting parties. As a result, the Arbitrators used in their model the values submitted by the requesting parties. In recognition of the fact that different aggregation methodologies exist, they decided to vary the elasticity values submitted by the requesting parties by 20 per cent. Therefore, three different sets of simulations were performed: one using the submitted elasticities and one each for values that are 20 per cent lower and 20 per cent higher than these elasticities.

(probably thanks to the help provided by the economists employed) stated that it was impossible to come up with *one* number, but only with a *range* of numbers. This approach has solid foundations in economic theory since the calculation of the counterfactual (the situation absent the illegality committed) is far from being an *exact science*. However, in *Byrd*, we see at the end of the day one number. One would expect that for the same reasons that it was impossible to come up with a number in *US – FSC*, the arbitrators would have come up with a range number in *Byrd* as well. At the end of the day however, irrespective of the occasional sloppiness in calculating the amount of compensation, calculation of countermeasures will always be closer to reality when recourse to economic analysis is made, than in the opposite case.

Beyond drawing inferences, *there is evidence of* guess work *in Arbitrators' practice. With respect to pass-through, the Arbitrators in the same dispute noted that this concept is generally referred to in the economic literature as the extent to which exchange rate changes affect domestic prices, and, in this case, used this concept in a similar fashion to that used in previous cases [*US – FSC (Article 22.6 – US)*]:*

> 8. "[P]ass through relates to the degree to which a company uses a subsidy it receives to lower the price of the product that it exports. At one extreme the company may choose to apply the full amount of the subsidy to the price of its products, thereby lowering its price. At the other, it may choose not to lower the price of the product."

In their view, a 100% pass-through assumption implies an application of the total amount, whereas a zero assumption implies that none will be so employed. They acknowledged that 100% pass-through is, in practice, not realistic. However, in the absence of any better information allowing them to apply another percentage as the upper end of the range, they were intuitively of the view that, if the upper end of the range is not 100 per cent, it is probably very close to that percentage.

It is questionable whether intuitions are in conformity with the standard of review reflected in Art. 11 DSU. As Arbitrators' reports are the ultima ratio *however, we will never know whether a particular Arbitrators' report was or was not in conformity with Art. 11 DSU.*

6.7.5.3 No room for punitive damages

We have already alluded to the fact that the Arbitrators in *EC – Bananas III (Ecuador) (Article 22.6 – EC)* held that countermeasures should induce compliance by the recalcitrant WTO Member. However, in their view, the quest for compliance-inducing

mechanisms cannot lead them to calculations of the amount of countermeasures that would neglect the Art. 22.4 DSU imperative. Punitive damages, for example, could induce compliance. In the Arbitrators' view, recourse to punitive damages is, by virtue of Art. 22.4 DSU, excluded. Hence, compliance must be induced without disrespecting the discipline of Art. 22.4 DSU.

Check however, the Arbitrators' report on *Canada – Aircraft credits and guarantees (Article 22.6 – Canada)*. Without stating that they were suggesting punitive damages they revised their authorized countermeasures upwards by adding a 20% mark-up simply because Canada had officially stated that it would maintain its subsidy programme irrespective of the Arbitrators' decision. We quote:

> "Recalling Canada's current position to maintain the subsidy at issue and having regard to the role of countermeasures in inducing compliance, we have decided to adjust the level of countermeasures calculated on the basis of the total amount of the subsidy by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations. We consequently adjust the level of countermeasures by an amount corresponding to 20 per cent of the amount of the subsidy as calculated in Section III.E above, i.e.:
>
> US$206,497,305 x 20% (US$41,299,461) = US$247,796,766."

The question of course is whether the 20% mark-up fits in the definition of punitive damages. *Prima facie*, good arguments could be made to support such a claim. For example, the Arbitrators even invoke the overarching objective to induce compliance to substantiate their choice to establish countermeasures which definitely rise above the level of injury. Before one is drawn into fast conclusions however, we should point out

that this report was issued in the context of a dispute involving prohibited subsidies. As we will see *infra* in Section 6.7.5.9, the discipline reflected in Art. 22.4 DSU is not relevant in the case of prohibited subsidies: Arbitrators can suggest *appropriate* as opposed to *equivalent* countermeasures. If at all hence, there is room for punitive damages only in the context of prohibited subsidies. On the other hand, this is the only pronouncement in this direction so far and any conclusions to the effect that, even in the narrow context of prohibited subsidies punitive damages are in order, might suffer from selection bias.

It is of course questionable whether this is a recipe to guarantee compliance since, it could very well be the case that a violator wins more[32] from the violation than the commercial damage suffered.

It follows that what matters at the end of the day, from the perspective of positive law, is the quantification of the damage. Whether such quantification will induce compliance depends on a number of variables: conceivably, it could very well do just that and there is empirical evidence suggesting that this might have occasionally been the case.[33] There is however, evidence to the opposite direction, as well.

With this in mind, we now turn to the specific of the quantification, as reflected in case law.

6.7.5.4 Retroactive or prospective remedies?

There is divergence in WTO practice with respect to the remedies recommended: in the overwhelming majority of cases, Arbitrators have recommended prospective (*ex nunc*)

---

[32] Moreover, victory in this case does not have to be constrained in purely quantifiable terms. It is a difficult exercise even for the most talented econometrician to come up with a number demonstrating how much a politician wins by keeping in place an illegal trade barrier. For his/her gains can extend much beyond a good salary guaranteed through re-election.

[33] See Bagwell et al. (2005).

remedies, stating that the obligation to compensate kicks in from the point in time when the RPT expired. There is however, practice which goes the other way and suggests that nothing in the WTO contract precludes retroactive (*ex tunc*) remedies.

The Arbitrators, in their report on *EC – Hormones (US) (Article 22.6 – EC)* held the view that countermeasures should be calculated from the end of the RPT (§ 38). Similar conclusions are to be found, for example, in *EC – Bananas III (Ecuador) (Article 22.6 – EC),* as well as the report on *Brazil – Aircraft (Article 22.6 – Brazil).*

A panel report however, the report on *Australia – Automotive leather II* reached the opposite conclusion:

> "... 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."

Retroactive remedies are not unheard of practice in the GATT/WTO regime: in the GATT-era, there are five reported cases where GATT contracting parties recommended that GATT parties which illegally imposed antidumping or countervailing duties should *reimburse* all duties illegally perceived from the date of the first perception of such duties.[34] As already mentioned however, this is the only case in the WTO-era where a pronouncement in favour of retroactive remedies has been made.

It is difficult to evaluate from a legal perspective the attitude of Arbitrators so far. True, Art. 19 DSU does not prejudge this issue. In principle, panels are free to suggest retroactive remedies. As we saw supra, several panels have recommended revocation of antidumping orders, without specifying whether their suggestion was to be understood as

[34] All GATT cases are reported in Petersmann (1993) and Mavroidis (2000).

a prospective (in which case they should have used a different noun) or a retroactive action. The better arguments, the choice of the term notwithstanding, are probably that panels have suggested prospective action since they have consistently refrained from suggesting reimbursement: had they done so, there would be no doubt that they indeed suggested retroactive action.

Customary international law[35] certainly sides with retroactive remedies. However, customs and treaty are of equal value and nothing precludes parties from adopting contractual terms at variance with customary international law. In light of the GATT past practice, it is doubtful whether the founding fathers of the WTO, by enacting Art. 19 DSU, did indeed intend to deviate from customary international law. Practice seems to go this way however.

Prospective remedies represent by definition, a 'lighter' arithmetic amount than retroactive remedies in the same case. From this perspective, they might prove to be a less efficient instrument inducing compliance. For what is the incentive for a WTO Member to respect, for example, the antidumping disciplines if it knows that at worst, it risks seeing itself obliged to stop some four years down the road imposing illegally (in the first place) imposed duties? It will have provided itself with a safeguard for its producers in the meantime, without having to comply with the safeguards (or the antidumping) provisions.[36]

On the other hand, legislative initiatives aiming at clarifying this issue have not been translated into law so far.[37] As things stand, one can only conclude that the prospective calculation of countermeasures (as of the end of the RPT) represents the typical case.

---

[35] See Pauwelyn (2003), Mavroidis (2000).

[36] But see also some counter-arguments advanced by Lawrence (2003).

[37] See Bagwell *et al.* (2005).

6.7.5.5 Indirect benefits

The Arbitrators in their report on EC –Bananas III (Ecuador) (Article 22.6 – EC) *dealt,* inter alia*, with the following issue: the United States claimed that they should be compensated for lost profits resulting from the EC bananas import regime. In their view, the European Community, by blocking imports into its market of bananas originating in Mexico, was* ipso facto *blocking exports to the Mexican market of fertilizers originating in the United States. In other words, in the US view, Mexico would have little need for US-fertilizers in light of the reduced export opportunities of bananas to the EC market. The Arbitrators decided against the US claim in this respect. In their view, the European Community could be held liable for trade in bananas lost by Mexican exporters, but not for trade in fertilizers lost by US exporters as a result of Mexico's decision to reduce imports of the said commodity. Art. 22 DSU, consequently, must be construed so as to disallow the inclusion of indirect benefits, when calculating the amount of countermeasures. We quote from;*

> *"We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services between the US and third countries do not constitute nullification or impairment of even* indirect *benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes lost US exports defined as US content incorporated in Latin American bananas (e.g. US fertilizer, pesticides and machinery shipped to* Latin America and US capital or management services *used in banana cultivation), we do not consider such lost US exports for calculating*

nullification or impairment in the present arbitration proceeding between the European Communities and the United States.

As for goods used as inputs, this conclusion is also consistent with the rules of origin for goods. The WTO Agreement on Rules of Origin contains some disciplines, but otherwise leaves discretion to WTO Members to devise rules for the determination of the country of origin of goods during a transitional period until the work programme for the harmonization of non-preferential rules of origin is completed. WTO Members typically determine the origin of agricultural products based on the place of production. In principle, every banana has the origin of the country where it was grown. For purposes of WTO rules it is irrelevant whether goods or services (e.g. fertilizer, machinery, pesticides, capital and management services) used as intermediate inputs in the cultivation of bananas and their delivery up to the f.o.b. stage are of US origin even if US content should amount to a significant part of the end-product's value. Also under US rules of origin bananas grown in Puerto Rico or Hawaii are US products regardless of the percentage of foreign input incorporated in them or used for their cultivation. Our conclusion also reflects the fact that the requirements of Articles I and XIII of GATT are tied to the origin of goods.

It would be wrong to assume that there is no further recourse within the framework of the WTO dispute settlement system to claim compensation or to request authorization to suspend concessions equivalent to the level of the nullification or impairment caused with respect to bananas of Latin American origin, including incorporated inputs of whatever kind or origin. A right to seek redress for that amount of nullification or impairment does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States. In fact, a number of these WTO Members have been in the recent past, or are currently, in the process of exercising their rights under the DSU. Moreover, our concern with the protection of rights of other WTO

Members is in conformity with public international law principles of sovereign equality of states and the non-interference with the rights of other states. Consequently, there is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing the latter's origin or service suppliers owned or controlled by it." (emphasis in the original).

This attitude is probably meritorious. Trade is so inter-wined across countries that opening the door to indirect benefits *amounts to a quasi-impossibility to draw somewhere the line. What if, for example, fertilizers have some added value originating in Japan, which, in turn has added value originating in India and so on and so forth. On the other hand, this approach could probably be harmful to some.*[38]

6.7.5.6 Only value added matters

A direct outcome of the discussion on indirect benefits discussed supra, *is the decision by the Arbitrators in the same case to compute only value added when calculating the level of nullification and impairment. In other words, assuming that a good costs 10€ and 4€ of the total value are imported goods. Sure the exporter of the said good will lose 10€/unit in case an illegal trade barrier has been erected against its exports. However, as a result of the trade measure it is now by facing, it will probably stop importing the input costing 4€. As a result, the actual nullification and impairment will not be 10, but 4€/unit. The Arbitrators in their report on* EC –Bananas III (Ecuador) (Article 22.6 – EC) *captured this point in:*

[38] Assume for example, that country A exports all of its production to B which in turn uses it as input for a final product exported to C. Assume further that C closes down its market to exports from B.

*"If we were to allow for such "*double-counting*" of the same nullification or impairment in arbitration proceedings under Article 22.6 of the DSU with different WTO Members, incompatibilities with the standard of "equivalence" as embodied in paragraphs 4 and 7 of Article 22 of the DSU could arise. Given that the same amount of nullification or impairment inflicted on one Member cannot simultaneously be inflicted on another, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment caused by the Member that has failed to bring a WTO-inconsistent measure into compliance with WTO law. Moreover, such cumulative compensation or cumulative suspension of concessions by different WTO Members for the same amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures.*

In view of the fact that initially five WTO Members participated in the original Bananas III *dispute, the problem of "*double-counting*" nullification or impairment is more than a theoretical possibility. Despite the ambiguity in the wording of Article 22.6 of the DSU, we as Arbitrators in this arbitration proceeding involving only the United States do not exclude the possibility that other original complainants may request authorization from the DSB to suspend concessions towards the European Communities at a later point in time (assuming that the revised regime should prove to be WTO-inconsistent). Therefore, in addition to the need to preserve the rights of other WTO Members under Article 22.6 of the DSU, we also believe that the calculation of the level of nullification or impairment suffered by other original complainants in the* Bananas III *dispute is not within our terms of reference in this arbitration proceeding between the European Communities and the United States only.*

We consider that not only goods or service inputs in banana cultivation but also services that add value to bananas after harvesting up to the f.o.b. stage should be excluded from the calculation of nullification or impairment that the United States is entitled to claim in the present arbitration proceeding. We realize that the use

of this f.o.b. cut-off point as well as of origin rules is somewhat arbitrary. The globalization of the world economy means that products increasingly "incorporate" as intermediate inputs many goods and services of different origins. While it may be necessary to develop more sophisticated rules in this regard in the future, we believe that the line we have drawn is appropriate in this particular case, which involves the suspension of concessions. We imply no limitations on the extent of WTO obligations for this or other cases by this decision.

In response to the foregoing section B, which was contained in our Initial Decision, the United States argues that the export of packaging materials should be treated differently because such materials are not an input to banana production per se. However, in our view, to the extent that the packaging is part of the value of the exported bananas as of the f.o.b. stage, the reasoning set out above clearly applies." (italics and emphasis in the original).

6.7.5.7 Litigation costs are not recoverable

The Arbitrators in their report on *US – 1916 act (EC) (Article 22.6 – US)* made it clear that legal fees paid cannot form part of the calculation of nullification and impairment since:

"We are not aware of any basis in the WTO Agreements to support the view advanced by the European Communities that legal fees can be claimed as a loss of a benefit accruing to a WTO Member. Moreover, we are not aware of any prior case in which such a claim has been permitted. It is also not clear which fees, and under what circumstances, could be included in such a claim."

6.7.5.8 Calculating countermeasures following a GATS-violation

Conceptually, for the calculation of countermeasures, it should not matter whether a violation has occurred in GATT or in GATS. Practically however, it is probably more difficult to calculate equivalence, when the violation occurred in GATS. This issue has been discussed in case-law, however, the Arbitrators in their report on EC –Bananas III (Ecuador) (Article 22.6 – EC) *did not provide any meaningful clarifications as to the practicality of calculating countermeasures aimed against GATS-violations. In the case at hand, the EC had been found in violation of its obligations under the GATS, with respect to foreign distributors of bananas. The Arbitrators clarified only one aspect of the calculation: the origin of the goods does not matter; what matters is the amount of* trade lost *by foreign distributors. We quote from:*

> *"In our view, what matters for purposes of the calculation of nullification or impairment under the GATS, in light of the EC's commitments on "wholesale trade services", is that, according to the UN CPC descriptions quoted above, the* principal *services rendered by wholesalers relate to reselling merchandise, accompanied by a variety of related,* subordinated *services, such as, maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services. We consider that this rather broad variety of* principal *and* subordinated *services should constitute the benchmark against which the United States could possibly claim nullification or impairment for losses in its actual or potential trade with the European Communities.*
>
> *We would also emphasize that, according to Article XXVIII(b) of the GATS, the "supply of a service" (e.g. wholesaling) includes "the production, distribution, marketing, sale and delivery of a service". We also recall that, pursuant to*

Articles XXVIII(d,f,g,l,m,n) of the GATS, the origin of a service supplier is defined on the basis of its ownership and control. Therefore, for the calculation of nullification or impairment by reference to losses of actual or potential service supply, it does not matter whether the lost services relate to trade in bananas from the United States, or from third countries, to the European Communities, or to bananas wholesaled within the European Communities, provided that the service suppliers harmed are commercially present in the European Communities and US-owned or US-controlled. These considerations are subject to our conclusion above that it is the right of those WTO Members which are the countries of origin of bananas to claim nullification or impairment for actual or potential losses in the supply of service transactions that add value to bananas up to the f.o.b. stage, and that such claims cannot be made by the United States under Article 22.6 of the DSU."

6.7.5.9 The special case of prohibited subsidies

Art. 4.10 SCM, dealing with the specific case of prohibited subsidies, stipulates that:

> "In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request."

Note that Art. 4.10 SCM, contrary to Art. 22.4 DSU, does not use the term *equivalent* when it describes the extent of permissible countermeasures but instead the term *appropriate* as defined in the cited footnote 9. Practice has added some important clarifications on this score.

First, the Arbitrators in *EC –Bananas III (Ecuador) (Article 22.6 – EC)* first noted that the term *equivalent* invites an interpretation to the effect that there is a high degree of relation between the level of concessions to be suspended and the level of nullification and impairment. We quote from:

> *"However, we note that the ordinary meaning of* "appropriate", *connoting "specially suitable, proper, fitting, attached or belonging to", suggests a certain degree of relation between the level of the proposed suspension and the level of nullification or impairment, where as we stated above, the ordinary meaning of* "equivalent" *implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment. Therefore, we conclude that the benchmark of equivalence reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the WTO's DSU than the degree of scrutiny that the standard of* appropriateness, *as applied under the GATT of 1947 would have suggested." (italics in the original).*

The Arbitrators report on *Brazil – Aircraft (Article 22.6 – Brazil)* repeated this idea in their report adding that in the case of a prohibited subsidy, an appropriate countermeasure should be calculated using the amount of subsidy paid as benchmark. In this case, the Arbitrators held the view that it was appropriate to authorize Canada to take countermeasure up to the level of the subsidy paid by Brazil to its aircraft producers and not only up to the amount of injury suffered by Canadian producers participating in the same (with the Brazilian) relevant product market. In the Arbitrators' view such countermeasures should not be considered punitive. We quote the hart of their discussion from:

> "Our interpretation of the scope of the term "appropriate countermeasures" in Article 4 of the SCM Agreement above shows that this would not be the

case. Indeed, the level of countermeasures simply corresponds to the amount of subsidy which has to be withdrawn. Actually, given that export subsidies usually operate with a multiplying effect (a given amount allows a company to make a number of sales, thus gaining a foothold in a given market with the possibility to expand and gain market shares), we are of the view that a calculation based on the level of nullification or impairment would, as suggested by the calculation of Canada based on the harm caused to its industry, produce higher figures than one based exclusively on the amount of the subsidy. On the other hand, if the actual level of nullification or impairment is substantially lower than the subsidy, a countermeasure based on the actual level of nullification or impairment will have less or no inducement effect and the subsidizing country may not withdraw the measure at issue.

Brazil also claimed that countermeasures based on the full amount of the subsidy would be highly punitive. We understand the term "punitive" within the meaning given to it in the Draft Articles. A countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of that State. Since we do not find a calculation of the appropriate countermeasures based on the amount of the subsidy granted to be disproportionate, we conclude that, a fortiori, it cannot be punitive.

We note that Brazil also claimed that Canada could not request the right to take countermeasures in the amount of the subsidy because it chose to take countermeasures in the form of suspension of concessions or other obligations and, pursuant to Article 22.4 of the DSU, such measures must be equivalent to the level of nullification or impairment.

We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate

Body in Guatemala – Cement, we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 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.

On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case, other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.

We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The "inducing" effect would most probably be very similar.

> For the reasons set out above, we conclude that, when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is "appropriate"."

The same approach was followed in the Arbitrators' report on *US – FSC (Article 22.6 – US)*. In this case however, the Arbitrators opined that, has they followed an injury-test and linked the level of appropriate countermeasures to the level of injury suffered by the European Community, they would have ended up with the same result.

This case is interesting for yet another reason: it deals with an issue that was left un-answered in the Arbitrators report on *Brazil – Aircraft (Article 22.6 – Brazil)*: *quid* in case where, subsequent to the authorization, another WTO Member introduces a new complaint and requests authorization to adopt countermeasures against the same (subsidizing) state? This is an issue since the first complainant has already been authorized to adopt countermeasures up to the level of the subsidy. Assuming sequential enforcement, for the second complainant to be satisfied, the Arbitrators would have to accept that Art. 4.10 SCM allows for punishment beyond the level of the subsidy paid. Is such punishment an appropriate countermeasure. The Arbitrators respond in the negative arguing that, in such a case, the original complainant should be asked to somehow 'share the spoils' with the second complainant:

> *"In the circumstances of this case, the European Communities is the sole complainant seeking to take countermeasures in relation to this particular violating measure. That is also, in our view, a relevant consideration in our analysis. Had there been multiple complainants each seeking to take countermeasures in an amount equal to the value of the subsidy, this would certainly have been a consideration to take into account in evaluating whether such countermeasures might be considered to be not "appropriate" in the circumstances. That is not, however, the situation before us.*

The reasoning we have followed above could be construed – in a purely abstract manner – to be as inherently applicable to any other Member as to the complainant in this case viz. the European Communities. We would simply underline, in this regard, that in this case, we were not presented with a multiple complaint but a complaint by one Member. Thus we have not been obliged to consider whether or how the entitlement to countermeasures based on our reasoning above should be allocated across more than one complainant. Thus to the extent that there would be an issue of allocation, as it were, it need not – and did not – enter into consideration as an element to otherwise "discount" the European Communities' entitlement to countermeasures in this particular case.

Understandably, it would be our expectation that this determination will have the practical effect of facilitating prompt compliance by the United States. On any hypothesis that there would be a future complainant, we can only observe that this would give rise inevitably to a different situation for assessment. To the extent that the basis sought for countermeasures was purely and simply that of countering the initial measure (as opposed to, e.g., the trade effects on the Member concerned) it is conceivable that the allocation issue would arise (although due regard should be given to the point made in footnote 84 above). We take note, on this point, of the statement by the European Communities:

"...it may well be that the European Communities would be happy to share the task of applying countermeasures against the United States with another member and voluntarily agree to remove some of its countermeasures so as to provide more scope for another WTO Member to be authorized to do the same. This will be another fact that future arbitrators could take into consideration.""

The Arbitrators' report on *Canada – Aircraft credits and guarantees (Article 22.6 – Canada)* clarified that the gravity of the violation cannot be taken into account in addition to the legislative imperative laid down in Art. 4 SCM. It is precisely because prohibited subsidies are pronounced illegal, as per Art. 4 SCM, that subsidizing in this manner constitutes a grave violation of the *WTO agreement,* and are punished through

appropriate and not merely equivalent countermeasures. This report hence, argues against double dipping.

7 Compliance following the adoption of countermeasures

Remarkably the DSU does not contain any specific provisions dealing with the situation where, post-adoption of countermeasures, the WTO Member concerned has implemented its WTO obligations. All Arts. 21.6 and 22.8 DSU do is to state that the DSB will keep under surveillance all issues regarding implementation. Assuming that abusive recourse to Art. 21.5 DSU is not allowed, all an interested WTO Member can do is request the establishment of a panel which will examine the legality of the countermeasures imposed against it, when it has already complied with its obligations. This of course entails lengthy procedures. This is one area where a legislative addition would be quite welcome: an additional (*a la* 21.5 DSU) fast track procedure would definitely find its place in this context.

Chapter 6

Conclusion and Suggestions

In sum, it can be said that the goal of developing countries in the evolution of the dispute settlement is no different from that of the developed nations: a better level of compliance with obligations. It highlights the specific challenges developing countries have faced, in particular sectors, and with particular GATT rules. It also examines the confidence played by developing countries in the new dispute settlement procedures provided in the DSL). And, it highlights recent developments and initiatives to provide developing countries with better access to the dispute settlement system.

The analysis of the experiences of developing nations throughout the evolution of the dispute settlement procedure demonstrates the particular challenges developing nations have faced under the GATT procedure and then under the WTO DSM. Since the large increase in their GATT membership in the 1960s, developing nations have supported a strong dispute settlement procedure to ensure a better level of compliance by all nations.

Their participation in the dispute settlement process has gradually changed from fairly insurmountable difficulties in bringing claims and enforcing rulings (through lack of economic and political influence) to a situation where confidence in the renovated system is apparent through increased use and reliance on a structure of legal and procedural disciplines ensuring a degree of certainty.

Still there remains much to be done. Perhaps the greatest challenge now facing the WTO is the further integration of developing countries into the multilateral trading system. With the erosion of tariffs and the greater use of non-tariff barriers to trade—product standards, investment requirements, environmental and social standards, and competition policies—there will be a need to ensure that countries' interests can be pursued and protected.

US experience demonstrates how vital the dispute settlement system is for opening up markets and warding off protectionist measures. Developing countries will need to be

prepared to face the coming challenges, from an institutional and substantive standpoint. Several of them are already well placed to improve their ability to meet these challenges directly.

For many others, there remains the possibility that they may become further marginalized. To avoid this, the WTO may need to work closely with other agencies in the international community to provide the necessary support to those who cannot by themselves acquire specialist legal or other technical services. Useful initiatives and proposals in this regard are already underway. All WTO members should lend their support to such endeavors.

Potential Reforms which could further be made

The operation of the system suggests a pressing need for following reforms:

- **Tighter time limits**, so as provide relief faster
- More effective remedies, so as to improve **prompt implementation**

There are also some other worthwhile reforms - **a permanent panel body** (which could allow significant time savings), **increased transparency, expanded third party rights and remand power for the Appellate Body**.

Time limits

What can be done to reduce time frames? A serious consideration of this issue requires a step-by-step examination of how savings might be achieved at each step of the panel, appellate and implementation process.

1. Panel Composition

Once a panel has been established, the first major source of delay is in the composition of panel. Although this is foreseen to take 20-30 days in the DSU,[39] it typically takes much longer. For example, the average time for composition of the nine panels working in mid-January 2004 was 68 days, and all but one of them had been composed by the Director-General (i.e., not by agreement of the parties). A permanent panel system would save one and one-half to two months, on average, since panelists could be assigned immediately after establishment.

2. Panel Briefing

At the moment the DSU Appendix 3 guidelines provide for up to six weeks for the filing of the complainant's first written submission and up to three weeks thereafter for the respondent's submission. Although, experience says that most complainants have insisted on the six-week period, there is no justification for it. They should know what their case is about and they largely control the timing of the proceeding through establishment and composition. Allowing them six weeks to prepare their initial submission is totally unnecessary. Beyond that, it is unfair to the respondent, which should have relatively more time to prepare a response since it does not know exactly what the arguments will be. Complainants should be required to file their briefs within, at most, two weeks of panel composition and respondents should be given three or four weeks to respond. This would save several weeks compared to the current practice. The opposition to this proposal seems to be based on a desire by complainants not to forego the strategic advantage they now have. But since that advantage is unfair, this change is clearly a very easy and fair way to save several weeks.

---

[39] The 20-30 day target is not explicitly stated in the DSU, but after 20 days of unsuccessful attempts at panel composition, a party may ask the Director-General to compose the panel within 10 days. (DSU Article 8.7)

3. Panel Meetings

As currently structured and understood, there would seem to be little time to be saved in the panel meetings. To do so, would essentially require the adoption of a one-meeting-only structure. This would save a month or so, but it would fundamentally alter the way disputes unfold. For the moment, the active role of the panel in defining and clarifying issues over the course of two meetings seems indispensable.

4. Panel Report Preparation

There are four aspects of report preparation that should be mentioned – preparation of the descriptive part, preparation of the substantive report, the interim review stage and translation. The preparation of the descriptive part and the substantive part of the report occur simultaneously, so that saving time with respect to the descriptive part will not necessarily result in the earlier issuance of the final report. However, the Secretariat's resources for panel support are generally overtaxed. Thus, reducing input on the descriptive part will free resources that in some instances can be used to support the earlier completion of the substantive report. The current efforts to have parties supply executive summaries of their arguments, which then effectively become the descriptive part of the report, should be made obligatory.

As to the drafting of the substantive report, there are two changes that could save time. The first is the adoption of the permanent panel system. Now, the ad hoc panels must reassemble to discuss the drafting of the report. The difficulty of scheduling such meetings (most panelists have other jobs) inevitably adds to the time it takes to produce a report. Permanent panelists would be expected to spend more time in Geneva and be available on short notice. They would also be used to working with one another and with report preparation in general. Second, a serious attempt should be made to reduce the length of the reports. Not infrequently it seems that they could be pruned significantly and usefully in a serious edit. That takes time, of course, and ad hoc panelists are unlikely to be in a position to do that - it is more important for them to make sure they all agree on

what has been written than to figure out how to make reports shorter. Somehow, the drafting ethos needs to change.

The interim report requirement adds five weeks to the process. Although, some useful features might exist, but its elimination would be an easy way to save five weeks. It may be necessary to forego the limited benefits of interim reports if all of the changes prolonging the process are made.

6. Panel Report Adoption

Perhaps the best example of unnecessary time in the DSU process is the 60 days provided for adoption of the panel report or appeal in lieu thereof. That time could easily be reduced to 30 days. While governments that have lost a case claim that they need all of the time to decide whether to appeal because of the need to consult with interested parties and deal with complex inter-agency decision-making, the reality is that they know the result of the case when they receive the interim report and could start any necessary decision-making at that time. Even if the interim report phase is eliminated, the 60-day period should be reduced by at least two to three weeks.

7. Reasonable Period for Implementation

It was always unfortunate that the major players in the early WTO cases insisted on 15 months for implementation (US - Gasoline; Japan - Alcohol Taxes, Canada -Periodicals and EC - Bananas). While the average has fallen to nine months or so, and it is now clearly accepted that the 15 months referred to as a guide for arbitration is not to be viewed as a minimum or standard time,[40] these periods are still too long. Under the standard approach to setting the period, the focus is on the length of the legislative

[40] EC measures concerning Meat andMeat Products (Hormones), Article 21.3(c) Arbitration Report, WT/DS26/15 & WT/DS48/13,29 May 1998.

process, which rewards complex systems. It seems that having a complex legislative system is fine and perhaps even admirable, but should not give a violator a reward by lengthening the penalty-free period during which it is able to inflict damage on others. The reasonable period of time should be capped at a level lower than 15 months, if necessary with some flexibility for developing countries in special circumstances. A period of six or nine months should be sufficient. That means that some Members will have great difficulty complying on time, but the fact that they will become subject to suspension of concessions or other remedy should have a salutary effect in focusing their efforts on implementation.

Next, in considering how to **improve WTO remedies**, it would be necessary to consider whether there are other forms of remedies beyond compensation and retaliation that might be more effective. One obvious possibility would be the payment of fines or damages. One obvious problem would be the disparity in fine-paying ability among WTO Members. The system would have to be designed to avoid the possibility that rich Members could effectively buy their way out of obligations in a way not available to the poor Members. One alternative would be to tie the amount of fines to the size of the Member's economy, or otherwise provide for a sliding scale that would minimize "discrimination" against poor Members. To avoid the perception that the payment of fines is simply an alternative to compliance, the fines could be assessed annually (or on some other periodic basis) and could be increased over time. Such a system could serve as a method of rebalancing if the fines are paid to the Member owed compliance and could promote prompter compliance if the fines are increased over time.

Annex 1

ARTICLE 22.6 ARBITRATIONS

		Date RPT expired	Date DSB agreed to arbitration	Date of circulation of Arbitration Award	Date DSB authorized countermeasures
DS18 – Canada	*Australia – Salmon*	6 November 1998	28 July 1999	Suspended	
DS26 – US	*EC – Hormones*	13 May 1999	3 June 1999	12 July 1999	26 July 1999
DS27 – Ecuador	*EC – Bananas III*	1 January 1999	19 November 1999	24 March 2000	18 May 2000
DS27 – US	*EC – Bananas III*	1 January 1999	29 January 1999	9 April 1999	19 April 1999
DS46 – Canada	*Brazil – Aircraft*	18 November 1999	22 May 2000	28 August 2000	12 December 2000
DS48 – Canada	*EC – Hormones*	13 May 1999	3 June 1999	12 July 1999	26 July 1999
DS103 – US	*Canada – Dairy*	31 December 2000	1 March 2001	Suspended	
DS108 – EC	*US – FSC*	1 November 2000	28 November 2000	30 August 2002	7 May 2003
DS113 – New Zealand	*Canada – Dairy*	31 December 2000	1 March 2001	Suspended	

DS136 – EC	*US – 1916 Act*	31 December 2001	18 January 2002	24 February 2004	
DS160 – EC	*US – Section 110(5) Copyright Act*	31 December 2001	18 January 2002	Suspended Mutually satisfactory temporary arrangement notified on 23 June 2003	
DS162 – Japan	*US – 1916 Act*	31 December 2001	18 January 2002	Suspended	
DS217, DS234	*US – Offset Act (Byrd Amendment) (8 complainants)*	27 December 2003	26 January 2004	31 August 2004	26 November 2004 (x7) 17 December 2004 (x1)
DS222 – Brazil	*Canada – Aircraft Credits and Guarantees*	20 May 2002	24 June 2002	17 February 2003	18 March 2003
DS245 – US	*Japan – Apples*	30 June 2004	30 July 2004	Suspended	
DS257 – Canada	*US – Softwood Lumber IV*	17 December 2004	14 January 2005	Suspended	
DS264 – Canada	*US – Softwood Lumber V*	2 May 2005	1 June 2005	Suspended	
DS277 – Canada	*US – Softwood Lumber VI*	26 January 2005	25 February 2005	Suspended	

Annex 2

GATT & WTO dispute settlement reports

1. *Decision by the Arbitrators, European Communities – Measures concerning meat and meat products (Hormones), Original complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, (WTO Doc. WT/DS26/ARB, 12 July 1999). Abbreviation: *EC – Hormones (US) (Article 22.6 – EC).*

2. *European Communities - Regime for the importation, sale and distribution of bananas, Recourse to Art. 21.5 of the DSU by Ecuador*, (WTO Doc. DS27/RW of 12 April 1999). Abbreviation: *EC – Bananas III (Article 21.5 – Ecuador).*

3. *Decision by the Arbitrator, European Communities - Regime for the importation, sale and distribution of bananas, Recourse to Art. 22.6 of the DSU by the European Communities*, (WTO Doc. DS27/ARB of 24 March 2000). Abbreviation: *EC – Bananas III (Ecuador) (Article 22.6 – EC).*

4. *Decision by the Arbitrator, European Communities - Regime for the importation, sale and distribution of bananas, Recourse to Art. 22.6 of the DSU by the United States*, (WTO Doc. DS27/ARB of 9 April 1999). Abbreviation: *EC – Bananas III (US) (Article 22.6 – US).*

5. *Brazil – Export financing programme for aircraft, Second recourse by Canada to Article 21.5 of the DSU* (WT/DS46/RW/2 of 26 July 2001). Abbreviation: *Brazil – Aircraft (Article 21.5 – Canada, Second recourse).*

6. *Decision by the Arbitrators, Brazil – Export financing programme for aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, (WTO Doc. WT/DS46/ARB of 28 August 2000). Abbreviation: *Brazil – Aircraft (Article 22.6 – Brazil).*

7. *United States – Import prohibition of certain shrimp and shrimp products, Recourse to Article 21.5 of the DSU by Malaysia* (WTO Doc. WT/DS58/AB/RW). Abbreviation: *US – Shrimp (Article 21.5 – Malaysia).*

8. *Guatemala –Anti-Dumping investigation regarding portland cement from Mexico* (WT/DS60/R of 19 June 1998). Abbreviation: *Guatemala - Cement I.*

9. *Canada – Measures affecting the export of civilian aircraft – Recourse by Brazil to Article 21.5 of the DSU* (WTO Doc. WT/DS70/AB/RW of 21 July 2000). Abbreviation: *Canada – Aircraft (Article 21.5 – Brazil).*

10. *Chile – Taxes on alcoholic beverages, Recourse to Article 21.3c of the DSU* (WTO Doc. WT/DS87/15 and 110/14 of 23 May 2000). Abbreviation: *Chile – Alcoholic beverages (Article 21.3c).*

11. *United States – Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/AB/RW). Abbreviation: *US – FSC (Article 21.5 – EC).*

12. *Decision by the Arbitrator, United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement,* (WTO Doc. WT/DS108/ARB of 30 August 2002). Abbreviation: *US – FSC (Article 22.6 – US).*

13. *Canada – Patent protection of pharmaceutical products, Recourse to Article 21.3 of the DSU* (WTO Doc. WT/DS114/13 of 18 August 2000). Abbreviation: *Canada – Pharmaceutical patents (Article 21.3c).*

14. *Australia – Subsidies provided to producers and exporters of automotive leather* (WTO Doc. WT/DS/126/RW of 21 January 2000). Abbreviation: *Australia – Automotive leather II.*

15. *Decision by the Arbitrator, United States – Anti-dumping act of 1916 (Original complaint by the European Communities), Recourse to arbitration by the United States under Article 22.6 of the DSU* (WTO Doc. WT/DS136/ARB of 24 February 2004). Abbreviation: *US – 1916 act (EC) (Article 22.6 – US).*

16. *United States – Imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom* (WTO Doc. WT/DS138/R of 23 December 1999). Abbreviation: *US – Lead and bismouth II.*

17. *European Communities – Anti-dumping duties on imports of cotton-type bed linen from India, Recourse to Article 21.5 of the DSU by India* (WTO Doc. WT/DS 141/AB/RW of 8 April 2003). Abbreviation: *EC – Bed linen (Article 21.5 – India).*

18. *India – Measures affecting the automotive sector* (WTO Doc. WT/DS146 and 175/R of 21 December 2001). Abbreviation: *India – Autos.*

19. *United States – Sections 301-310 of the Trade act of 1974* (WTO Doc. WT/DS152/R of 22 December 1999). Abbreviation: *US – Section 301 Trade act.*

20. *Guatemala –Definitive antidumping measures on grey portland cement from Mexico* (WTO Doc. WT/DS156/R of 24 October 2000). Abbreviation: *Guatemala – Cement II.*

21. *United States – Anti-dumping act of 1916 – Complaint by Japan* (WTO Doc. WT/DS162/R of 29 May 2000). Abbreviation: *US – 1916 act (Japan).*

22. *United States – Import measures on certain products from the European Communities* (WTO Doc. WT/DS165/AB/R of 11 December 2000). Abbreviation: *US – Certain EC products.*

23. *United States – Anti-dumping measures on stainless steel plate in coils and stainless steel sheet and strip from Korea* (WTO Doc. WT/DS179/R of 22 December 2000). Abbreviation: *US – Stainless steel.*

24. *United States – Antidumping measures on certain hot-rolled steel products from Japan* (WTO Doc. WT/DS184/13 of 19 February 2002). Abbreviation: *US – Hot-rolled steel (Article 21.3c).*

25. *Chile – Price band system and safeguard measures relating to certain agricultural products* (WTO Doc. WT/DS207/13 of 17 March 2003). Abbreviation: *Chile – Price band system (Article 21.3c).*

26. *United States – Continued dumping and subsidy Offset act of 2000, Recourse to Arbitration under Art. 21.3c of the DSU* (WTO Doc. WT/DS 217/14 and 234/22 of 13 June 2003). Abbreviation: US – Offset act (Byrd amendment) (Article 21.3c).

27. *Decision by the Arbitrator, United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU,* (WTO Doc. WT/DS217/ARB/EEC of 31 August 2004). Abbreviation: *US Offset act (Byrd amendment) (EC) (Article 22-6 – US).*

28. *European Communities – Antidumping duties on malleable cast iron tube or pipe fittings from Brazil* (WTO Doc. WT/DS219/R of 7 March 2003). Abbreviation: *EC – Pipe fittings.*

29. *Decision by the Arbitrator, Canada – Export credits and loan guarantees for regional aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, (WTO Doc. WT/DS222/ARB, 17 February 2003). Abbreviation: *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*

30. *Argentina – Definitive antidumping duties on poultry from Brazil* (WTO Doc. WT/DS 241/R of 22 April 2003). Abbreviation: *Argentina – Poultry antidumping duties.*

31. *European Communities – Export subsidies on sugar* (WTO Docs. WT/DS265, 266 and 283/AB/R of 15 October 2004 & WT/DS265, 266 and 283/AB/R of 28 April 2005). Abbreviation: *EC – Export subsidies on sugar.*

Bibliography

Primary sources:

1. Article XXII and XXIII of GATT 1994.

2. Understanding on Rules and Procedures governing the Settlement of Disputes (Annexure 2 of WTO Agreement).

Books:

1. A WTO Secretariat Publication, A Handbook on the WTO Dispute Settlement System (Cambridge university press, United Kingdom, 2004)
2. Ravindra Pratap, India at the WTO Dispute settlement system (Manak Publications Pvt. Ltd, New Delhi, 2004)
3. John H. Jackson, The Jurisprudence of GATT and the WTO (Cambridge university press, United Kingdom, 2000)
4. Peter Gallagher, Guide to the WTO and the Developing countries (Kluwer Law International, Hague, 2000)
5. Autar Krishen Koul, The General Agreements on Tariffs and Trade (GATT) / World Trade Organisation (WTO) – Law, Economics and Politics (Satyam Books, New Delhi, 2005)

Articles:

Ravindra Pratap, Dispute Settlement in the WTO and South Asia,(South Asian Yearbook of Trade and Development, 2005)

Enforcement of WTO obligations: remedies and compliance by
Prof. Mitsuo Matsushita

Ms. Beatrice Chaytor, Dispute Settlement under the GATT/WTO - The Experience of Developing Nations (written for CUTS Centre for International Trade, Economics & Environment, 2004)

Marc L. Busch and Eric Reinhardt, The Evolution of GATT/WTO Dispute Settlement.

Preliminary draft given by William J. Davey, The WTO Dispute Settlement System: The First Decade, May 20, 2004.

Websites:

http://www.wto.org

http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm

http://www.wto.org/english/thewto_e/countries_e/india_e.htm