

5 Enforcement of WTO Obligations: Remedies and Compliance

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(p. 111) 5 Enforcement of WTO Obligations

Remedies and Compliance

1. Overview: implementing the DSB's 'recommendations and rulings' 111
2. Remedies in cases of successful non-violation and situation complaints 113
3. The starting point: rulings and recommendations based on recommendations and suggestions pursuant to DSU Article 19 114
 - 3.1 Recommendations by Panels or the Appellate Body pursuant to DSU Article 19 115
 - 3.2 Suggestions 116
4. *Lex specialis* remedies 119
5. Prompt compliance and the reasonable period of time (RPT) 120
 - 5.1 Bilateral determination of the RPT 121
 - 5.2 Multilateral determination of the RPT 121
 - 5.3 Surveillance of implementation by the DSB after the establishment of RPT 127
6. Compliance review pursuant to DSU Article 21.5 127
 - 6.1 The mechanics 127
 - 6.2 The rationale for compliance Panels: the exclusion of unilateralism 128
 - 6.3 The mandate of compliance Panels 129
 - 6.4 Appeals of compliance Panel decisions 131
 - 6.5 The sequencing issue 131
7. Enforcement measures pursuant to DSU Article 22 132
 - 7.1 The remedies available under DSU Article 22.1 132
 - 7.2 The different functions of compensation and suspension of concessions 132
 - 7.3 Mutually acceptable compensation pursuant to DSU Article 22.2 134
 - 7.4 Countermeasures: suspension of concessions or other obligations under Article 22 134
 - 7.5 Prospective or retroactive remedies 140
 - 7.6 Compulsory submission to arbitration (Article 22.6) 141
8. Compliance following the adoption of countermeasures 147
9. The sequencing issue: DSU Article 21.5 vs. 22.2 148
10. Conclusions 152

1. Overview: Implementing the DSB's 'Recommendations and Rulings'

An adopted Panel or Appellate Body report is a binding decision ('recommendation or ruling') by the General Council of the WTO convened as a Dispute Settlement Body, DSU Article 21.1, and shall be unconditionally accepted by the parties to the dispute, DSU Article 17.14. Pursuant to DSU Article 21.3, 'losing' members have to inform the DSB of their 'intentions in respect of implementation of the recommendations and rulings of the DSB'.¹ Pursuant to DSU Articles 21.1 and 3.7, a 'losing party' must (p. 112) promptly (immediately) bring its measures into compliance with its WTO obligations—not less, not more.² In contrast to the general law of state responsibility, no compensation is due, that is, WTO law does not establish the obligation to undo the economic consequences of the internationally wrongful act that is the breach of the WTO Agreement. These efforts have to be completed within a *reasonable period of time* (RPT), defined either bilaterally, through an agreement between the parties, or multilaterally by resorting to arbitration (see section 5 of this chapter). If the parties disagree as to whether compliance has been achieved, the parties to the original dispute will submit their new dispute to a *compliance Panel* (see section 6 of this chapter) whose decision may be appealed to the Appellate Body.

In practice, WTO members fulfil these obligations remarkably well: compliance with adopted WTO Panel and Appellate Body reports is high.³

If, however, a WTO member fails to comply with the 'recommendations and rulings' of the Dispute Settlement Body (DSB),⁴ DSU Article 22 offers temporary (DSU Article 22.1) 'second-best' options: mutually agreed compensation or the suspension of concessions or other obligations by the successful complaining party vis-à-vis the defending party.

Whereas the former is a voluntary and transitional buy-out—possibly in the form of a temporary re-balancing of reciprocal rights and obligations—the latter are temporary⁵ enforcement measures, inflicted unilaterally, but pursuant to multilateral standards and supervision; they are supposed to bring about the *specific performance due*.

Such measures—often also labelled as *retaliation* (retaliatory) *measures*—typically raise the (bound) duties for certain goods originating in the member whose WTO-incompatible behaviour had given rise to the dispute settlement procedure. As will be shown later, however, the DSU does not exclude the suspension of other obligations, and members have availed themselves (with the authorization of the DSB) of that (p. 113) possibility.⁶ If the *concerned party* objects, the dispute will be submitted to an Arbitrator (usually the members of the original Panel) who will then decide on the appropriate level of countermeasures to be imposed (see section 7 of this chapter).

However, WTO members have not often had recourse to enforcement measures explicitly provided for in Article 22.⁷

2. Remedies in Cases of Successful Non-violation and Situation Complaints

Whereas the remainder of this chapter focuses on the implementation of successful *violation complaints*, this section addresses the implementation of successful *non-violation*⁸ or *situation complaints*,⁹ albeit in a most cursory fashion.¹⁰ Both of these complaints are characterized by the fact that they do not undertake to challenge the WTO-compatibility of measures taken by a fellow member, but rather, despite the absence of active wrongdoing, claim nullification and impairment of WTO Agreement-based benefits.

In light of this constellation, the negotiators refrained from extending the hard-and-fast rules of the regular DSU decision-making and enforcement mechanism to these special types of complaints, no doubt taking into account that both the non-violation and the situation complaint have played a limited role in GATT/WTO practice.¹¹

(p. 114) • If a *non-violation complaint* convinces a Panel and/or the Appellate Body, the respective adjudicative body will recommend a *mutually satisfactory adjustment*.

¹² To facilitate the resolution of the dispute, an Arbitrator may, upon request, determine the level of benefits which have been impaired. Very much in contrast to the regular procedure, such a determination is *not binding* on the parties to the dispute. ¹³ Recourse to *compensation* (itself, a voluntary option) can be part of a mutually satisfactory adjustment. ¹⁴

• A successful *situation complaint* benefits even less from the elaborate enforcement mechanisms provided by the DSU. Its Article 26.2 makes it clear that these 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'. Considering the GATT's positive consensus rule, the adoption of the Panel report and certainly any subsequent implementation depends on the consent of the state that, according to the evaluation of the adjudicating body, would have to change the status quo.

3. The Starting Point: Rulings and Recommendations Based on Recommendations and Suggestions Pursuant to DSU Article 19

DSU Article 19.1 reads as follows:

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.

The *recommendation* made by the WTO Panel or the Appellate Body pursuant to DSU Article 19.1 turns into a ruling by the DSB (cf. DSU Article 21.3 and 21.5 which speak of *recommendation and ruling*) upon being adopted (DSU Articles 16.4, 17.14).¹⁵ The DSB will (upon the pertinent recommendation of the adjudicative body) 'request' the losing party to bring its measure into conformity with WTO law. Therefore, the DSU provision that lays down what Panels and the Appellate Body recommend *to the DSB*, Article 19, also defines the remedies provided for by the DSU for breach of WTO Agreement obligations. DSU Article 19 is one of the central legal foundations for the legitimation of the continuation of the GATT 1947 practice to provide as a remedy against treaty violations only the obligation to discontinue the illegal act and to 'bring the measure into conformity' with GATT (and now WTO) law.

(p. 115) 3.1 Recommendations by Panels or the Appellate Body pursuant to DSU Article 19

DSU Article 19 prescribes a three-pronged 'deliverable' of a Panel or Appellate Body report that finds a complaint at least partially well-founded: First, the pertinent dispute settlement organ will conclude that a measure is inconsistent with a covered agreement; as a consequence, it *shall*, secondly, 'recommend that the Member concerned bring the measure into conformity with that agreement'. Thirdly, it *may* suggest *how* to implement that recommendation.¹⁶ The ruling and recommendations of the DSB will—inevitably, pursuant to DSU Articles 16.4 and 17.14—mirror this structure: The DSB *will* conclude that a

violation has occurred, *will* request that the member concerned bring the measure into conformity, and, finally, *may* recommend how to implement this.¹⁷

The first element, i.e. the determination that a breach has occurred, is the conclusion drawn from the 'objective assessment of the matter before' the Panel pursuant to DSU Article 11, both with regards to the facts and the applicable WTO law. The second and third elements are the DSU-specific consequences of the wrongful act (established previously), and are the (only) remedies available to a WTO member, in light of the exclusion (in DSU Article 23) of other avenues to enforce the right of the aggrieved party.

As the purpose of dispute settlement is limited to helping resolve ongoing disputes, a *recommendation* (pursuant to DSU Article 19) to withdraw a measure that is no longer in existence is of no assistance to the resolution of the dispute.¹⁸ Thus, whereas the finding of illegality of a measure that has ceased to exist remains possible, provided 'such finding is necessary to secure a positive solution to the dispute',¹⁹ a recommendation to remedy an illegal measure that has already ended would be both nonsensical and an unjustified intrusion into the right of the concerned state to remain free from unwarranted requests by the DSB.²⁰

DSU Article 19.1 leaves no discretion as to the substantive content of the *recommendation*: it will include the holding that the author of the illegal act must change (or abolish altogether) the pertinent measure in order to terminate the violation of WTO law. This obligation does not put into question the member's substantial discretion regarding the specific implementation.²¹ The combination of, on the one hand, binding (p. 116) determination of a breach, coupled with the ensuing obligation to stop such illegal activity and, on the other hand, a considerable discretion as to *how* to implement a DSB ruling or recommendation may seem counter-intuitive, but represents an important aspect of the WTO's dispute settlement mechanism's calibration:

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.²²

3.2 Suggestions

DSU Article 19.1 permits Panels and the Appellate Body to go beyond recommending to the DSB that a member stop the internationally wrongful act. Rather, they may also suggest *how* a member can implement its pertinent obligations. Once the pertinent report is adopted, such *suggestions* by the adjudicative bodies will change in status: they will become the (still non-binding) recommendation of the DSB. As such, they serve as (authoritative) guidance as to what should be done.²³ Irrespective of its legal force, a WTO member complying with the DSB recommendation (based on such a *suggestion* pursuant to DSU Article 19), should have achieved compliance with its WTO obligations.²⁴

3.2.1 Treatment of requests for suggestions in WTO case law

Whereas the wording of DSU Article 19 suggests that Panels and the Appellate Body are at liberty to make a suggestion if they deem it appropriate in the circumstances,²⁵ they have exercised that competence very cautiously. This would seem to be motivated by the desire to impede as little as possible members' sovereignty, in order to preserve for them 'the

maximum autonomy in ensuring...conformity and, if there is more than one lawful way to achieve this,...the freedom to choose that way which suits it best.'²⁶

Panels and the Appellate Body have—in line with the clear wording of DSU Article 19—adhered to the view that the DSU does not oblige them to suggest a preferred resolution of the dispute, even when requested to do so.²⁷ In the case *US—Continued (p. 117) Zeroing*, the Appellate Body, after recalling that DSU Article 19.1 *requires* recommendations ('...shall recommend...'), but merely authorizes suggestions ('...*may* suggest ways in which a Member *could* implement the recommendations...') stated:

Therefore, as the right to make a suggestion is discretionary, a panel declining a request for such a suggestion does not act contrary to Article 19 of the DSU.²⁸

The discretion on whether making a suggestion is, however, not limitless: In *US—Oil Country Tubular Goods Sunset Reviews (Article 21.5—Argentina)*, the Appellate Body clarified that Panels must give reasons for declining such authority when a party has requested it to do so:

The discretionary nature of the authority to make a suggestion under Article 19.1 must be kept in mind when examining the sufficiency of a panel's decision not to exercise such authority. However, *it should not relieve a panel from engaging with the arguments put forward by a party in support of such a request.* (Emphasis added.)²⁹

At this point, the legal basis for the obligation to engage with a member's request for a suggestion remains unclear; due process considerations and the very purpose of the DSU's mechanism would, however, appear to support that approach.

DSU Article 19 does not require a request by a party as a necessary condition for issuing a *suggestion*.³⁰ But Panels will discount non-specific requests for suggestions such as the one presented by the European Communities (EC) in *US—Lead and Bismuth II* which suggested 'that the United States amend its countervailing duty laws to recognize the principle that a privatization at market prices extinguishes subsidies.'³¹ The Panel declined to make such a broad suggestion and stated instead:

We would suggest that the United States takes all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned violation of Article 10 of the SCM Agreement from arising in the future.³²

In *US—Stainless Steel*, the Panel was requested by Korea to suggest that the United States revoke the contested antidumping order. The United States opposed this suggestion and instead asked the Panel to confine itself to a general recommendation.³³ The Panel agreed with the US argument, stating that DSU Article 19.1 'allows but does not require a panel to make a suggestion where it deems it appropriate to do so.'³⁴ The Panel added that revocation of the antidumping order would be one—but not the only—way for the United States to bring its measures into compliance.³⁵

(p. 118) 3.2.2 Situations that warrant the issuing of suggestions

Panels will utilize the authorization to suggest pursuant to DSU Article 19 when the discretionary margin of a member as to how to bring its measures in line with WTO law is (exceptionally) reduced to only one option. Thus, 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'.³⁶ The Panel declined to make this recommendation, noting that DSU Article 19:1 *obliges* Panels and the Appellate Body to recommend that the member concerned bring measures found to be in violation of WTO obligations into conformity,³⁷ while it *allows* them to suggest ways in which the member

concerned could bring its measure into conformity. But as the Panel had concluded that the entire investigation had been flawed and should never have been initiated, it *suggested* 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.³⁸

Similarly in *Guatemala—Cement II*, Mexico again requested revocation of duties and reimbursement of the collected duties. After repeating the position that a Panel has discretion to issue suggestions, even where a specific request by a party has been made to this effect,³⁹ the Panel again noted that the antidumping investigation in question should never have been initiated on the basis of the information submitted by the applicants, that illegalities had been committed during the investigation, and the finding that dumping had occurred (and caused injury) had not been supported by the available evidence. In light of this information, the Panel stated that it could

not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute.⁴⁰

With respect to Mexico's request for *reimbursement* of illegally collected antidumping duties, however, the Panel's analysis was more cautious. It examined the request but ultimately declined to take it up because of 'important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1. of the DSU'.⁴¹ (p. 119) *US—1916 Act (Japan)* is an exceptional case in which the Panel made a suggestion despite its explicit recognition that several possible corrective actions by the United States were possible. The Panel acceded to a request by Japan to suggest that the United States repeal their WTO-incompatible law. The Panel noted, however, that while it was suggesting repeal, amendment of the offending law may also suffice to correct the violation and that its suggestion should be understood as one of the ways in which the United States could conceivably bring its measures into conformity with its WTO obligations.⁴²

3.2.3 Unrequested suggestions

In *EC—Export Subsidies on Sugar*, the Panel made a suggestion without being requested to do so by the complaining party:

Pursuant to Article 19.1 of the DSU, the Panel suggests that in bringing its exports of sugar into conformity with its obligations..., the European Communities consider measures to bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.⁴³

Clearly, the Panel did push the envelope in this case: apparently motivated by the particular concerns and interests of developing countries affected by the EC's measures, it issued a suggestion without request; the suggestion to take certain (probably quite appropriate) policy actions was clearly not mandated by international law. Whereas such an approach might be welcomed and appropriate in a diplomatic dispute settlement environment, it seems questionable whether it is an appropriate course of action in the highly judicialized inter-state dispute settlement mechanism established by the DSU.

4. *Lex specialis* Remedies

Whereas the DSU provides for the generally available declaratory remedies under WTO law, specific remedies are to be found in certain other WTO agreements as *lex specialis*. For example, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains important provisions on remedies, notably in the case of prohibited subsidies (Article 4) and actionable subsidies (Article 7).⁴⁴ When Article 4.7 of the SCM Agreement specifically defines what a Panel has to do in case of a prohibited (export) subsidy, this, of course, is not a *suggestion* pursuant to the general DSU Article 19.1, but a specific remedy provided for the scenario covered by Article 4.7 of the SCM Agreement.⁴⁵

(p. 120) The Appellate Body has clarified that a Panel requested to pronounce on the consistency of a farm subsidy under the disciplines of the Agreement on Agriculture and those of the SCM Agreement, cannot adjudicate the dispute under the former only. In *EC—Export Subsidies on Sugar*, the Appellate Body held this to be a wrong exercise of judicial economy, depriving the complainant of the specific benefit that is the binding request by the DSB to immediately withdraw the subsidies concerned pursuant to Article 4.7 of the SCM Agreement.⁴⁶

5. Prompt Compliance and the Reasonable Period of Time (RPT)

As it may be ‘impracticable to comply immediately’ with a DSB ruling or recommendation, DSU Article 21.3 allows as a second-best solution compliance within ‘a reasonable period’ of time.⁴⁷ According to the Appellate Body,

[T]he requirement is immediate compliance. However, Article 21.3 recognizes that immediate compliance may not always be practicable, in which case it foresees the possibility of the implementing Member being given a reasonable period of time to comply. An important consideration is that the reasonable period of time is not determined by the implementing Member itself. Instead, the reasonable period of time may be proposed by the implementing Member and approved by the DSB, mutually agreed by the parties, or determined through binding arbitration. This confirms that the reasonable period of time is a limited exemption from the obligation to comply immediately.⁴⁸

A ‘reasonable period of time’ (RPT) has been described as ‘the shortest period possible within the legal system of the (implementing) Member’.⁴⁹ When a reasonable period of time has been granted or agreed upon, compliance with the recommendations and rulings of the DSB must be achieved by the end of the reasonable period of time at the latest.⁵⁰ This happens in the vast majority of cases; the important exceptions are more a confirmation of the rule than a negation.⁵¹

(p. 121) 5.1 Bilateral determination of the RPT

In the overwhelming majority of cases,⁵² the parties to the dispute reach an agreement as to the length of the RPT:⁵³ pursuant to DSU Article 21.3(b), parties have forty-five days to come to that agreement. However, state practice has not paid much attention to that time frame.⁵⁴ While this seems difficult to reconcile with the wording of Article 21.3(b), the purpose of the DSU (and Article 21 in particular) as well as the member-centric character of the WTO would support a rather generous interpretation to avoid a systemically undesirable obligation to resort to arbitration according to Article 21.3(c) once the forty-five-day timeline of subparagraph (b) has expired.

5.2 Multilateral determination of the RPT

5.2.1 The regulatory framework

DSU Article 21.3(a) and (c) allows the determination of an RPT without *prior* agreement between the parties.

Under subparagraph (a) the implementing member concerned ('Member concerned') may propose to the DSB a suitable period of time. The DSB decision is not subject to 'reverse' consensus, and thus has to be taken by 'positive' consensus (DSU Article 2.4); hence, any member, including the successful complainant, may veto the adoption of the proposal by the DSB. This is a strong incentive to either find an agreed solution or to propose only a solution that seems acceptable for the (successful) complaining member.⁵⁵ Not surprisingly, DSU Article 21.3(a) has not been used much.⁵⁶

As a measure of last resort, i.e. if the RPT is not determined pursuant to Article 21.3(a) and (b), DSU Article 21.3(c) allows—within ninety days after the date of adoption of the recommendations and rulings—binding arbitration to determine what the RPT should be:

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 (p. 122) 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.⁵⁷

In most cases submitted to arbitration so far, the Arbitrator has been a member of the Appellate Body. Nevertheless, the time limit of ninety days, of which up to twenty days are reserved for the appointment process, has proven to be an insurmountable hurdle. To exclude the argument that the Arbitrator's mandate had lapsed under those circumstances, parties accept that the award 'would be deemed to be an award under Article 21.3(c) of the DSU',⁵⁸ in order to avoid any disputes concerning the validity of the award. Note, that the obligation to implement a DSB ruling starts with the decision to adopt the Panel or Appellate Body report in question; it is then that the RPT (possibly determined later by the Arbitrator) starts, and not at the time of the Article 21.3(c) award.

5.2.2 Determining the RPT through arbitration pursuant to DSB Article 21.3(c)

The task of the Arbitrator—which needs no adoption by the DSB to have legally binding effect, pursuant to DSU Article 21.3(c)—is to determine the 'reasonable period of time' that lies by definition somewhere between (only exceptionally practicable) *immediate compliance* and the desirable (note that the DSU uses the word 'should', rather than 'shall') maximum period of fifteen months from the date of adoption of the Panel or Appellate Body report.⁵⁹ In *US—Offset Act (Byrd amendment) (Article 21.3(c))*,⁶⁰ the Arbitrator explained that his mandate did not encompass any suggestion as to the manner in which the concerned party had to implement the decision of the DSB, stating that his task was not 'to look at *how* implementation will be carried out, but to determine *when* it is to be done.'⁶¹

5.2.2.1 The function of the fifteen-month guideline

In one of the earliest pertinent awards, the Arbitrator in *EC—Hormones* viewed the fifteen-month period pursuant to Article 21.3(c) as 'a guideline for the arbitrator, and not a rule'; in other words, fifteen months is 'the outer limit in the usual case'.⁶² This idea has been further refined in later jurisprudence:⁶³ in *Chile—Price Band System (Article 21.3(c))*,⁶⁴ the Arbitrator stated:

(p. 123) Notwithstanding this “guideline” [of a desirable maximum of 15 months from the date of adoption of the panel and Appellate Body reports], 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.⁶⁵

5.2.2.2 The ‘particular circumstances’

The reasonableness of the implementation period is to be determined by the particularities of the case. Despite certain criteria having been fleshed out in the pertinent jurisprudence, the strong emphasis on the circumstances of the case entails significant discretion on the part of the Arbitrators:

[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.⁶⁶

Despite the recognition that the Arbitrator’s task is ‘not to look at how implementation will be carried out, but to determine when it is to be done’,⁶⁷ the jurisprudence now recognizes that the Arbitrator will need to take into account the modalities of possible implementation in determining a reasonable period of time.⁶⁸

It is generally accepted that an Arbitrator’s mandate in these Article 21.3(c) proceedings is limited to determining the ‘reasonable period of time’ for implementation in the underlying WTO dispute. In fulfilling this limited mandate, the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate. Like previous arbitrators before me, I consider that my mandate relates to the *time* by when the implementing Member must achieve compliance, not to the *manner* in which that Member achieves compliance. Yet, *when* a Member must comply cannot be determined in isolation from the chosen means of implementation. In order ‘to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so.’ Thus, in making my determination under Article 21.3(c), the means of implementation available to the Member concerned is a relevant consideration.

While an implementing Member has discretion in selecting the means of implementation, this discretion is not ‘an unfettered right to choose any method of implementation’. In my view, implementation of the recommendations and rulings of the DSB in this case is an ‘obligation of result’, and therefore the means of implementation (p. 124) chosen must be apt in form, nature, and content to effect compliance, and should otherwise be consistent with the covered agreements. Thus, although I am mindful that it falls within the scope of Article 21.5 proceedings to assess whether the measures eventually taken to comply are WTO-consistent, in making my determination under Article 21.3(c) I must consider ‘whether the implementing action falls within the range of permissible actions that can be taken in order to implement the DSB’s recommendations and rulings.’

As other arbitrators in the past, I also consider that the implementing Member is expected to use whatever flexibility is available within its legal system to promptly implement the recommendations and rulings of the DSB. This is justified by the importance of fulfilling the obligation to comply immediately with the recommendations and rulings of the DSB, which have established that certain

measures are inconsistent with a Member's WTO obligations. However, this does not necessarily include recourse to 'extraordinary' procedures.⁶⁹

In line with this discussion, the Arbitrator considered carefully the means proposed by Colombia—the implementing member—and rejected certain proposals which he considered irrelevant to implementation and as unnecessarily prolonging the RPT.⁷⁰

5.2.2.3 Factors considered in WTO arbitral awards

Arbitral Awards consider regularly a number of factors to determine the RPT:⁷¹

First, the Arbitrator will consider whether compliance requires *legislative* rather than *administrative* means, as the latter requires normally less time.⁷² When recourse to legislative activity is required, the possible timeline may be relevant.⁷³ In the same vein, the legally binding—as opposed to the discretionary—*nature of the implementing procedures* will also weigh in the Arbitrator's mind.⁷⁴

Second, the Arbitrator will consider the *complexity* of the implementation process, such as whether a series of new statutes is required, or whether a simple repeal of the statute suffices.⁷⁵ By way of example, in *US—Stainless Steel (Article 21.3(c))*, a case arising under the Anti-Dumping Agreement, the Arbitrator considered the 'technical complexity of eliminating the simple zeroing methodology in periodic reviews due to (p. 125) the import-specific assessment of final anti-dumping liability under the United States' retrospective system'⁷⁶ in the following terms:

Accordingly, the technical complexities of allocation of duties among importers cannot casually be disregarded but, to the contrary, may legitimately be considered a particular circumstance affecting the determination of a reasonable time for abolition of the methodology of simple zeroing in periodic reviews. At the same time, however, this particular circumstance cannot justify a long delay in the implementation of elimination of simple zeroing in periodic reviews. Provisional administrative allocation rules might, perhaps, be devised and put into effect while the long-term administrative or legislative allocation standards are in process of establishment.⁷⁷

Third (and related to the second category), 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 *Chile—Price Band System* described this as follows:

The [measure in question] 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.⁷⁸

Lastly, if the WTO member concerned has *developing country* status, the Arbitrator will, in light of DSU Article 21.2, usually determine a longer RPT.⁷⁹ The issue, however, can be more complicated when both defendant and complainant are developing countries. Facing such a dispute, the Arbitrator on *Chile—Price Band System (Article 21.3(c))* decided not to

account for this factor in the calculation of the RPT.⁸⁰ In *Colombia—Ports of Entry (Article 21.3(c))*, the Arbitrator followed a similar approach:

[I]n a situation where both the implementing and the complaining Members are developing countries, the requirement provided in Article 21.2 is of little relevance, except if one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party.⁸¹

(p. 126) All the concerns discussed here show that despite the appropriate emphasis on a swift implementation of the ruling, the notion of reasonableness has been used to inject elements of proportionality into the determination of the RPT.

5.2.2.4 Factors not considered in WTO arbitral awards

Factors unrelated to the assessment of the shortest period possible required for implementation do not fall within the ambit of the terms ‘particular circumstances’ pursuant to Article 21.3.⁸² In *US—Offset Act (Byrd amendment) (Article 21.3(c))* the Arbitrator did not consider that the state had to implement an *international* obligation which created additional complexity to the implementation process.⁸³ Other factors considered irrelevant were, for example, whether or not the executive branch could rely on stable support by the majority of Parliament,⁸⁴ the economic and financial consequences resulting from the implementation,⁸⁵ and the existence of sufficient further economic harm if implementation was not effected immediately.⁸⁶

5.2.2.5 The burden of proof

Reflecting prior case law,⁸⁷ the Arbitrator in *US—Offset Act (Byrd amendment) (Article 21.3(c))* held:

that it is for the implementing Member to establish that the duration of the implementation period it proposes constitutes the ‘shortest period possible’ within its legal system to implement the recommendations and rulings of the DSB. Where the implementing Member fails to establish that the period of time requested by it is indeed the shortest period possible within its legal system, the arbitrator must determine the ‘shortest period possible’ for implementation, which will be shorter than that proposed by the implementing Member, on the basis of the evidence presented by all parties in their submissions, and taking into account the 15-month guideline provided by Article 21.3(c).⁸⁸

Recent jurisprudence has followed this approach with the caveat that the initial burden on the implementing member ‘does not absolve the other Member from producing (p. 127) evidence in support of its contention that the period of time requested by the implementing Member is not “reasonable”, and a shorter period of time for implementation is warranted.’⁸⁹

5.3 Surveillance of implementation by the DSB after the establishment of RPT

Under DSU Article 21.6, surveillance of the implementation of adopted recommendations and rulings is the primary responsibility of the DSB; each dispute (‘matter’) remains on the DSB agenda until the matter is resolved.⁹⁰ In addition, the issue of implementation of any adopted ruling may be raised by any member at any time.

6. Compliance Review Pursuant to DSU Article 21.5

6.1 The mechanics

Once the DSB accepts the Panel or Appellate Body finding that a member's measure is not compatible with its obligations under WTO law, it also adopts the recommendations and/or suggestions made pursuant to DSU Article 19.1. This may require the member concerned to modify existing or enact completely new legislation, or, rather, less demanding, to change a particular administrative practice. If these modifications are carried out to the satisfaction of the complaining party, the dispute will have been resolved.

However, in the event that the modifications made do not fully satisfy the complaining party, DSU Article 21.5 provides for ongoing multilateral control of the dispute and excludes unilateral determination of whether the party concerned conformed with the DSB's ruling:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel...

The Panel (in the context of Article 21.5 procedures often called a *compliance Panel*) must issue its reports within ninety days; in practice, considerable deviations from this deadline have been common.⁹¹

(p. 128) In *US—FSC (Article 21.5—EC II)* the Appellate Body dealt with the specific requirements of a request for the establishment of an Article 21.5 Panel, finding that DSU Article 6.2⁹² was 'applicable to panel requests under Article 21.5':

It is important to note that the text of Article 21.5 expressly links the "measures taken to comply" with the recommendations and rulings of the DSB. Therefore, the "specific measures at issue" to be identified in Article 21.5 proceedings are measures that have a bearing on compliance with the recommendations and rulings of the DSB. This, in our view, indicates that the requirements of Article 6.2 of the DSU, as they apply to an Article 21.5 panel request, must be assessed in the light of the recommendations and rulings of the DSB in the original panel proceedings that dealt with the same dispute.

Hence, in order to identify the "specific measures at issue" and to provide "a brief summary of the legal basis of the complaint" in a panel request under Article 21.5, the complaining party must identify, at a *minimum*, the following elements in its panel request. First, the complaining party must cite the recommendations and rulings the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which according to the complaining party have not yet been complied with. Secondly, the complaining party must either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that *no* such measures have been taken by the implementing Member. Thirdly, the complaining party must provide a legal basis of its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies.⁹³ (Emphasis in the original.)

6.2 The rationale for compliance Panels: the exclusion of unilateralism

The rationale for the existence of the compliance mechanism is laid out in DSU Article 23: the drafters of the DSU wanted to mitigate trade disputes by subjecting all decisive steps to multilaterally legitimized and controlled procedures. In the context of compliance it would have been counter-intuitive to subject the dispute as such to strict (multilateral) dispute settlement rules, whereas the determination whether a member had complied with the recommendation and ruling of the DSB would have been left to the parties' (unilateral) determination. It follows that there is no limit to initiating Article 21.5 proceedings. Especially in complex disputes, the parties involved may disagree several times on whether the original wrong has been undone: when this cannot be settled through consultations, either party can bring the matter, as often as deemed necessary, before a compliance Panel.⁹⁴

(p. 129) 6.3 The mandate of compliance Panels

The mandate of compliance Panels⁹⁵ has been clarified by the Appellate Body in its report on *Canada—Aircraft (Article 21.5—Brazil)*⁹⁶ which dealt in substance with the question whether the revision of Canada's state aid scheme constituted 'compliance' pursuant to DSU Article 21.1. On appeal, the Appellate Body stated:

[T]he 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*.⁹⁷ (Italics in the original.)

According to the Appellate Body, this meant more than the examination of whether the modification measures represented an implementation of the DSB's recommendation of what to do: Rather, it was the duty of the compliance Panel to determine whether the new status quo was compatible with the WTO obligations of the respondent:

We have already noted that these proceedings, under Article 21.5 of the DSU, concern the "consistency" of the revised TPC programme with Article 3.1(a) of the *SCM Agreement*.⁹⁸ Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to "the issue of whether or not Canada *has implemented the DSB recommendation*". The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified—that is, by 18 November 1999. That recommendation to "withdraw" the prohibited export subsidy did not, of course, cover the new measure—because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure—the revised TPC programme—is consistent with Article 3.1(a) of the *SCM Agreement*.

Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure

taken to comply” will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU (p. 130) would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the “consistency with a covered agreement of the measures taken to comply”, as required by Article 21.5 of the DSU.⁹⁹

However, the question of whether the measure was one which was taken to comply with the rulings of the DSB and therefore relevant to the Article 21.5 compliance procedure may be disputed and the Appellate Body has favoured a broad interpretation of the phrase ‘measures taken to comply.’

A Member’s designation of a measure as one taken “to comply”, or not, is relevant to this inquiry, but it cannot be conclusive. Conversely, nor is it up to the complaining Member alone to determine what constitutes the measure taken to comply. It is rather for the Panel itself to determine the ambit of its jurisdiction....

Some measures with a particularly close relationship to the declared “measure taken to comply”, and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and defects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared “measure taken to comply” is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one “taken to comply” and consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.¹⁰⁰

This issue also arose in an interesting fashion in *US—Zeroing (EC) (Article 21.5—EC)* where the United States had taken certain measures in the antidumping context (administrative reviews) *before* the DSB’s recommendations and rulings in the case. The Panel reasoned that ‘as a matter of logic,...a measure taken before the adoption of the DSB’s recommendations and rulings could rarely, if ever, be found to be a measure taken “to comply” with such recommendations and rulings.’¹⁰¹ The Panel, therefore, did not consider these measures to be subject to DSU Article 21.5 proceedings. The Appellate Body disagreed.¹⁰²

In our view, the Panel’s formalistic reliance on the date of issuance of the subsequent review in ascertaining whether these reviews had a close nexus with the recommendations and rulings of the DSB was in error. The relevant inquiry was not whether the subsequent reviews were taken with the intention to comply with the recommendations and rulings of the DSB; rather, in our view, the relevant inquiry was whether the (p. 131) subsequent reviews, despite the fact that they were issued before the adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature, effects, and timing*, with those recommendations and rulings, and with the declared measures “taken to comply”, so as to fall within the scope of Article 21.5 proceedings. (Emphasis in the original).¹⁰³

The Appellate Body has even found that the *measure taken to comply* examined by the compliance Panel may incorporate unaltered elements of the original measure (in this case an arithmetical error) which were not challenged in the original proceedings.

While claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings, the unconditional acceptance of the recommendations and rulings of the DSB by the parties to a dispute does not preclude raising new claims against measure taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings. We do not see how allowing such claims in Article 21.5 proceedings would “jeopardize the principles of fundamental fairness and due process”, or how it would unfairly provide a “second chance” to the complaining Member, provided these new claims relate to a measure “taken to comply” and do not re-argue claims that were decided in the original proceedings.¹⁰⁴

Whereas it is thus a well-established principle that a complainant can neither use a compliance Panel to renew or expand its challenge to the original measure, the last example shows that Article 21.5 proceedings are indeed new, and comprehensive procedures.¹⁰⁵

6.4 Appeals of compliance Panel decisions

Although DSU Article 21.5 does not specify that compliance Panel reports may be appealed, multiple cases attest the established practice at the WTO to appeal the report of the compliance Panel to the Appellate Body. According to DSU Article 21.5, disputes over compliance with recommendations and rulings ‘shall be decided through recourse to these dispute settlement procedures’, which of course are characterized, inter alia, by the option to lodge on appeal.

6.5 The sequencing issue

One of the most discussed topics in the context of the implementation phase is the potential clash between the procedures pursuant to Article 21.5 (examination of compliance), on the one hand, and Article 22.2 (examination whether a request for (p. 132) enforcement measures is WTO compatible), on the other hand. We discuss this issue after having introduced the reader to the enforcement phase in the next section.

7. Enforcement Measures Pursuant to DSU Article 22

7.1 The remedies available under DSU Article 22.1

Most treaty-based dispute settlement mechanisms do not contain provisions for *enforcing* authoritative dispute settlement decisions. Even when such procedures exist—as was the case in GATT 1947—the decision as to whether enforcement should be activated in a particular case might depend on a political decision by the organs of the pertinent treaty regime. The lack of enforcement was one of the main reasons for the United States to use or threaten to use a unilateral instrument (‘Section 301’¹⁰⁶) to enforce GATT dispute settlement decisions before the establishment of the WTO: While the GATT Contracting Parties did have the competence to take enforcement measures pursuant to GATT Article XXIII, actual enforcement was extremely rare.¹⁰⁷ In the Uruguay Round negotiations, DSU Article 22 was conceived as a form of *multilateralized* ‘Section 301’ enforcement mechanism: effective enforcement had to be an integral part of the dispute settlement mechanism (hence satisfying the US demands for effectiveness), but only according to multilaterally defined standards and, in the case of disagreement over the legality of enforcement measures, subject to the control by adjudicative bodies set up by the DSU (thus alleviating the fears of American unilateralism). DSU Article 22 thus determines the procedures that apply if the respondent (pursuant to DSU Article 22.2, the ‘Member

concerned') fails to comply with the DSB's recommendations and rulings. The membership has taken advantage of these possibilities in thirty-six cases.¹⁰⁸

7.2 The different functions of compensation and suspension of concessions

As a first option, the successful complainant may opt for a buy-out solution: it may request the member concerned (the losing member) to enter into negotiations 'with a view to developing mutually acceptable compensation' (Article 22.2, first sentence). Only if that route is not taken, or, if taken, does not lead to results, the complainant(s) 'may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements' (Article 22.2, second sentence). Therefore, compensation pursuant to DSU Article 22.2 is best understood as a (temporary) re-balancing of the pre-existing balance of rights and (p. 133) obligations. It makes enforcement (temporarily) obsolete, as the complainant, while not receiving its due, gets a (temporary) substitute. Note, that compensation pursuant to DSU Article 22 must not be confused with the notion of compensation in the general law of state responsibility. In general international law, compensation encompasses the undoing of the economic consequences of an internationally wrongful act.¹⁰⁹ In WTO law, it means a (temporary) rebalancing of obligations among certain participants in the multilateral trading system.

In contrast to compensation, the suspension of concessions is inflicted unilaterally upon the member concerned. Despite the difference between compensation, on the one hand, and suspension of concessions or other obligations, on the other, these concepts are conflated in the wording of DSU Article 22.1:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

DSU Article 22.1 determines *one* important commonality between the two concepts: both remedies are less than what the complaining member had bargained for, which is specific performance of the commitments undertaken in the WTO Agreement. However, apart from this common trait, the two measures are very different: compensation, while temporary as a matter of principle, may be made permanent if the parties so wish, as no member is obliged to enforce a favourable DSB decision. If the compensation negotiated is a trade concession, nothing in the WTO Agreement prevents such an arrangement, provided that GATT Article I (most-favoured nation treatment) is observed. If the compensation is, rather, a (monthly) payment, say for the development of certain technologies, the latter would arguably not have to be extended to other members pursuant to GATT Article I. Indeed, such a compensation may be a way for the illegally acting member to settle the dispute by re-balancing prospectively (*pro futuro*) the level of reciprocally granted advantages, provided that this rebalancing is compatible with the multilateral trade agreement concerned.¹¹⁰

In contrast, *suspension of trade concessions* is an enforcement measure that must be, pursuant to Article 22.8, stopped as soon as the member concerned returns to legality or otherwise terminates the dispute.¹¹¹

(p. 134) 7.3 Mutually acceptable compensation pursuant to DSU Article 22.2

Recourse to *compensation* has not been frequent; some of the better known examples are listed in the following: In *US—Section 110(5) Copyright Act*,¹¹² complainant and respondent reached a temporary agreement, running for three years until 20 December 2004, pursuant to which the respondent paid US\$ 3.3 million to the complaining member.¹¹³ At the time of writing, the parties are still working in order to reach a mutually satisfactory resolution of this matter.¹¹⁴ In *US—Upland Cotton*,¹¹⁵ the United States agreed to fund a \$147.3 million per year programme for technical assistance and capacity-building for Brazil's cotton sector.¹¹⁶ This agreement can be viewed as a temporary financial compensation pending the final resolution of the dispute. In *Japan—Alcoholic Beverages II*,¹¹⁷ Japan agreed to concede additional market access on certain items, pending the full implementation of the Appellant Body Report.¹¹⁸

7.4 Countermeasures: suspension of concessions or other obligations under Article 22

If an agreement on compensation has not been possible, the injured party may ask the DSB for authorization to suspend tariff concessions or other (non-tariff) obligations (DSU Article 22.2). The purpose of this unilateral (but multilaterally legitimized) suspension of obligations from the perspective of the successful complainant is to 'induce compliance'.¹¹⁹ This request for what are termed 'countermeasures'—made under Article 22.2—calls forth the principles and procedures of Article 22.3.

7.4.1 Countermeasures: cross-retaliation and its limits

The successful complaining party seeking to impose countermeasures must present to the DSB a list of concessions or obligations to be suspended. Pursuant to DSU Article (p. 135) 22.3(a), the first option for countermeasures is to seek suspension in the same sector(s) in which the violation of WTO has been found, i.e.:

- (i) with respect to goods, all goods;
- (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;¹²⁰
- (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section [1-7] of Part II or the obligations under Part III, or Part IV of the Agreement on TRIPS.¹²¹

However, if such action is not *practicable* or *effective*, the suspension may be applied to a different sector covered by the same agreement¹²² (Article 22.3(b)). If this additional escalation is not *practicable* or *effective*, the complaining party 'may seek to suspend concessions or other obligations under another covered agreement' (Article 22.3(c)). The latter action is known as *cross-retaliation*.¹²³

Pursuant to DSU Article 22.3(e), a WTO member wishing to suspend concessions under subsection (b) or (c) of Article 22.3 will have to justify its decision to do so. This obligation became for the first time relevant in *EC—Bananas III*;¹²⁴ Ecuador requested authorization to suspend concessions under GATS and TRIPs in order to induce compliance by the EC.¹²⁵ As the EC objected to Ecuador's proposal, the matter went to arbitration pursuant to Article 22.6. The ensuing award modified Ecuador's proposal so that *some* of its intended countermeasures (\$60.8 million) had to be directed towards goods; the remainder of the

trade volume was allowed to affect (up to \$201.6 million) services or TRIPs. The Arbitrator in that case set out the standards for applying Article 22.3(b) and (c) as follows:

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 (p. 136) 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....(Emphasis supplied.)*¹²⁶

This standard of review of the complaining party’s proposal has been confirmed in subsequent jurisprudence.¹²⁷ In *US—Upland Cotton (Article 22.6—US)* the Arbitrators reflected in detail on their understanding of the procedures to be followed by complainants seeking to cross-retaliate and in particular on the meaning of the terms ‘practical and effective’ of Article 22.3:

[T]he wording of the provision implies that the complaining party may consider either that it is “not practicable” or that it is “not effective” to seek suspension under the same agreement, and that it need not conclude that same-agreement suspension is both “not practicable” and “not effective”, in order to reach the conclusion that it is “not practicable or effective”.

“practicable”

... “[P]racticability” refers to whether suspension in the same sector or agreement is *available for application in practice*, as well as *suited for being used in a particular case*. If it is not a real option or it is not suited to be used in the circumstances, it will be not

practicable....

In our view, the essence of a consideration of “practicability” of suspension is that it relates to its actual availability and feasibility. The impracticability could be either a legal one, as postulated in the example given in *EC - Bananas III (Ecuador)(Article 22.6 - EC)*, or a factual one, such as might arise if the countermeasure exceeds the total amount of the trade available to be countered.

“effective”

...The arbitrator on *EC - Bananas III (Ecuador) (Article 22.6 - EC)*...conclude[d] that “the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance with DSB rulings within a reasonable period of time”....

We do not share the view...that a consideration by the complaining party of the sector or agreement in which suspension would be “least harmful” to itself would necessarily be pertinent. As we read the terms of subparagraphs (b) and (c), a consideration of the “effectiveness” criterion under these provisions involves an assessment of the effectiveness—or lack thereof—of suspension *in the same sector or under the same agreement*, rather than an assessment of the relative effectiveness of such suspension, as compared to suspension in another sector or agreement. In other words, the procedures and principles under Article 22.3 do not entitle a complaining party to freely choose *the most* effective sector or agreement under which to seek suspension. Rather, it entitles the complaining party to move out of the same sector or same agreement, where it considers that suspension *in that sector or agreement* is not “practicable or effective”.

(p. 137) ...[T]he question of whether “the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party” would be pertinent to a consideration of the “effectiveness” of the said suspension. Indeed, as the arbitrator on *EC - Bananas III (Ecuador) (Article 22.6 - EC)* notes, there may be situations in which, for example, the complaining party is heavily dependent on imports from the other party, to such an extent that it may cause more harm to itself than it would to the other party, if it were to suspend concessions or other obligations in relation to these imports. In such a situation, where the complaining party would cause itself disproportionate harm, such that it would in fact be unable to use the authorization, there would be a basis for concluding that such suspension would not be “effective”....

This is consistent with the objective of inducing compliance, in that this provision seeks to ensure that the complaining party will be in a position to actually have recourse to the authorized remedy, and thus enable it to contribute to inducing compliance, as is its legitimate purpose. At the same time, we agree...that the “likelihood of compliance”, as such, is not at issue in this determination. Rather, what is at issue is the ability of the complaining party to make effective use of the awarded countermeasures in order to induce such compliance.¹²⁸

Even when same-agreement suspension is both ‘not practicable’ and ‘not effective’, a party cannot just escalate its choice of countermeasures. Rather, the ‘circumstances’ need to be serious enough for cross-retaliation. Especially relevant are the two factors stated in Article 22.3(d): the importance of the trade in the sector or under the agreement under which nullification or impairment has occurred and the broader economic consequences involved. However, these considerations may not be the only relevant considerations in such an assessment. The statement by the arbitrator on *US—Gambling (Article 22.6—US)* still represents the state of play.

The determination, which relates to “circumstances”, is of necessity an assessment to be made on a case-by-case basis, and that the circumstances that are relevant may vary from case to case. We note however, that these circumstances should be serious “enough”, which suggests that it is only when the circumstances reach a certain degree or level of importance, that they can be considered to be serious enough.^{128a}

In particular, the ‘economic consequences arising from the suspension’¹²⁹ need to be taken into account. The twin elements of Article 22.3(d) were also applied by the Arbitrators in *US—Upland Cotton (Article 22.6—US)*, who stated as follows:

In the circumstances of this case, [Article 22.3(d)(i)] means that what is to be taken into account is “the trade” in all goods under the trade in goods agreement, that is, trade in goods generally, and its importance to Brazil.

The second consideration [Article 22.3(d)(ii)] required to be taken into account is the “broader economic elements related to the nullification or impairment” and the “broader economic consequences of the suspension.”

(p. 138) [T]he fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that “broader economic consequences” relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial.¹³⁰

7.4.2 Equivalence: the level of permissible countermeasures, DSU Article 22.4

Pursuant to DSU Article 22.4, ‘the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.’ This standard is not dissimilar from the general law on state responsibility, pursuant to which ‘countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’.¹³¹

According to the Arbitrators in *EC—Banana III (US)* equivalence means:

“equal in value, significance or meaning”, “having the same effect”, “having the same relative position or function”, “corresponding to”, “something equal in value or worth”, also “something tantamount or virtually identical”. Obviously, this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other.¹³²

At first, this language contrasts somewhat with the more generous notion of ‘appropriateness’ that is the benchmark for suspensions of concessions under GATT Article XXIII:2. However,

in light of the explicit reference in paragraphs 4 and 7 of Article 22 of the DSU to the need to ensure the *equivalence* between the level of proposed suspension and the level of the nullification or impairment suffered, the standard of *appropriateness* ...has lost its significance as a benchmark for the authorization of the suspension of concessions under the DSU...[T]he 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 (p. 139) degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment.¹³³

This convincing reading of DSU Article 22.4 excludes a priori any punitive consideration: that notion, it will be recalled, is alien to the concept of both general countermeasures and enforcement measures under the DSU.¹³⁴

Nevertheless, the decision in *Canada—Aircraft Credits and Guarantees (Article 22.6—Canada)* is noteworthy.¹³⁵ Without referring to any punitive function, the Arbitrators increased the countermeasures by adding a 20 per cent mark-up simply because Canada had officially stated that it would maintain its subsidy programme irrespective of the Arbitrators' decision:

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...¹³⁶

In *US—1916 Act (EC)*,¹³⁷ a US statute had been ruled to be WTO-inconsistent; but the United States failed to comply pursuant to DSU Article 21.1. However, the European Community—in the absence of an agreement with the United States—submitted a proposal to adopt *mirror legislation*,¹³⁸ aiming at making its trading partner swallow some of the medicine it dispenses to others.

While the Arbitrators allowed the suspension of concessions equivalent to the amount of nullification and impairment caused by the WTO-incompatible US measure, they viewed the proposed enforcement measures as incompatible with the equivalence requirement in DSU Article 22.4:

Thus, we are of the view that the European Communities' proposal to adopt a "mirror" regulation relates to the nature of the obligations to be suspended. We agree with the United States that we do not have the jurisdiction to determine equivalence between the *measure* proposed to implement the suspension and the *measure* that resulted in the nullification or impairment. DSU Article 22.6 and 22.7 authorize the suspension of *concessions or other obligations*. The arbitrators do not have the jurisdiction to approve the adoption of *measures* by the complaining party.¹³⁹

(p. 140) 7.5 Prospective or retroactive remedies

Equivalence between countermeasure and original treaty violation must be demonstrated when a request for authorization to suspend concessions is being submitted. As WTO law stands, the calculation must not include past damages to the complainant's trade interests, but rather must be limited to the (unfavourable) difference between the trade benefits resulting from abiding by the WTO obligations and the status quo which is shaped by the continuing breach of WTO law. In their report on *EC—Hormones (US) (Article 22.6—EC)*, the Arbitrators therefore decided that the pertinent countermeasures should be calculated from the end of the RPT.¹⁴⁰ Similar conclusions are to be found, for example, in *EC—Bananas III (Ecuador) (Article 22.6—EC)*,¹⁴¹ as well as the report on *Brazil—Aircraft (Article 22.6—Brazil)*.¹⁴²

However, the Panel in *Australia—Automotive Leather II* reached a different conclusion with regard to the *lex specialis* of SCM Article 4.7:

[W]e 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.¹⁴³

Retroactive remedies are not unheard of in the AD/CVD practice of the GATT/WTO regime: in the GATT era, there were 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.¹⁴⁴ However, the general view remains that WTO remedies cannot be applied retroactively.¹⁴⁵ Furthermore, the *Australia—Automotive Leather II* case concerned prohibited export subsidies and should be distinguished *de lege lata*; this is not to say, however, that it would not be worth exploring how to create a stronger incentive to comply with recommendations and rulings which would still be acceptable to WTO members. For instance, it would be imaginable to allow a right to compensate calculated on the basis of the nullification and impairment from the date of the establishment of the first Panel in the original proceedings or the decision of the DBS or some other well-defined point in time, thus avoiding unacceptable compensation claims.

(p. 141) Prospective remedies mean, as a practical matter, that less trade is affected by countermeasures. This is both an advantage and a weakness: since the consequences are not as harsh, such remedies might be less efficient in inducing compliance. For example, the member violating the Antidumping Agreement knows that in the worst case scenario, it may be ordered to end, after years of effective protectionist trade impeding measures, its WTO-inconsistent duties. However, the goal of the WTO is to facilitate trade, not impede it: countermeasures multiply the amount of trade that is subjected to treatment that is not desirable from the perspective of WTO law. Stronger defences therefore do have the downside of further destabilizing international trade. On the other hand, initiatives aiming at clarifying this issue amongst WTO members have not been translated into treaty modifications. As things stand, 'retroactive remedies are alien to the long established GATT/WTO practice where remedies have traditionally been prospective',¹⁴⁶ save some exceptions particularly in the field of AD and CVD laws.¹⁴⁷

7.6 Compulsory submission to arbitration (Article 22.6)

The request by a WTO member to cross-retaliate is fully *justiciable*: If the member concerned objects to the proposed countermeasures as not conforming with DSU Article 22.3, 22.4, or 22.5, or on other grounds, the matter will be referred to arbitration under DSU Article 22.6., 22.7. If possible, the members of the original Panel will serve as Arbitrators; otherwise, the Director-General of the WTO will appoint substitute arbitrators. So far, nineteen arbitral awards under DSU Article 22.6 have been rendered.¹⁴⁸

7.6.1 The mandate of the Arbitrators

DSU Article 22.7 requests the Arbitrators to ensure that the level of proposed countermeasures does not surpass the prospective nullification and impairment suffered by the party requesting authorization to adopt countermeasures.¹⁴⁹ Summarizing past practice in this respect, the Arbitrators in *US—Gambling (Article 22.6—US)*¹⁵⁰ defined their task in the context of DSU Article 22.6 as an obligation to determine, in the light of DSU Article 22.3 and 22.4, the correct volume of allowable countermeasures.

7.6.2 The burden of proof

The burden of proof in Article 22.6 arbitrations, as in regular WTO dispute settlement, is well established:

(p. 142) WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency. The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established WTO jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a *prima facie* case or presumption that the level of suspension proposed by the US is *not* equivalent to the level of nullification and impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose.

The same rules apply where the existence of a specific *fact* is alleged...

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.)¹⁵¹

The Arbitrators reiterated this allocation of the burden of proof in arbitration proceedings under DSU Article 22.6 in the *US—Gambling*¹⁵² and in the *US—Upland Cotton* arbitrations.¹⁵³ Hence, there is a presumption in favour of the proposed suspension unless it is challenged effectively by the other party.

7.6.3 The Arbitrators' decision: first and last resort

DSU Article 22.7 pertinently provides that the parties to the dispute shall accept the Arbitrators' decision as final, hence precluding the possibility to appeal the Arbitrators' award.¹⁵⁴ DSU Article 22.7 also provides for adoption of the Arbitrators' report by the DSB. The DSB must be informed of the report 'promptly' and will, upon request, grant the authorization for the prescribed remedies in the Arbitrators' report, 'unless the DSB decides by consensus to reject the request'.

7.6.4 Calculating the level of suspension of concessions

Calculating the level of suspension of concessions has been one of the rare constellations where WTO adjudicating bodies have had recourse to institutional (WTO) economics expertise: whereas it is normally the Legal Affairs Division and the Rules (p. 143) Division of the WTO Secretariat that assists Panels, Arbitrators draw on the expertise provided by the Economics Division to determine a figure in the context of a DSU Article 22.6 review.¹⁵⁵ Typically, the Arbitrator will determine the appropriate level of countermeasures at a significantly lower level than requested by the party wishing to enforce its rights.¹⁵⁶ A good example is the decision on *US Offset Act (Byrd Amendment) (EC) (Article 22.6—US)*.¹⁵⁷ This statute allowed the US administration to impose duties on products from all and any trading partners. The Arbitrators' task, however, was to define the level of countermeasures that the European Community could impose. To complicate matters further, some subsequent duty modifications by the US Act could be expected to have beneficial consequences for the

EC: imposition of duties on Japanese and Korean computers would have rendered like EC products more competitive in the US market.

The Arbitrators decided that the European Community could impose countermeasures not exceeding 72 per cent of all 'anti-dumping or countervailing duties paid on imports from the European Communities at that time, as published by the United States' authorities duties imposed by the United States on imports originating in the European Community'.¹⁵⁸ To reach this conclusion, the Arbitrators had to consider divergent econometric models submitted by the two parties. Whereas the decision follows a modified version of the model proposed by the requesting parties,¹⁵⁹ the Arbitrators emphasized that the task of evaluating the trade effects of the scheme could not be accomplished with mathematical precision.¹⁶⁰

7.6.5 Indirect benefits: what counts as a nullified or impaired benefit?

What counts as a nullified or impaired benefit? In *EC—Bananas III (Ecuador) (Article 22.6—EC)*,¹⁶¹ the United States claimed that the calculation of the countermeasure should take into consideration the lost profits that were the consequence of the EC's WTO-incompatible banana regime. In their view, the European Community, by blocking banana imports from Mexico, was influencing adversely exports of US fertilizers to Mexico. The Arbitrators refused to follow that argumentation:

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 (p. 144) 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.

...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....[T]here 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.¹⁶² (Emphasis in the original.)

Trade is so intertwined across countries that opening the door to *indirect benefits* amounts to a quasi-impossibility to drawing a predictable line. Legal predictability and security, it

will be recalled, is one of the most important benefits of the GATT/WTO system, and clearly would be endangered by such an approach.

The above discussion on indirect benefits informs the calculation of the level of nullification and impairment: the Arbitrators only include the value added in a given member state to determine this member's nullification and impairment. To give an example: an item produced in member M has a value of €10. For the production of that item, the producer MP uses imported materials worth €4. Whereas MP will lose €10/unit in the case where an illegal trade barrier has been erected against products from M, it will stop importing the input worth €4. As a result, M's actual nullification and impairment will not be 10, but €6/unit. To proceed otherwise would lead to a double-counting that would not be compatible

with the standard of "equivalence" as embodied in paragraphs 4 and 7 of Article 22 of the DSU [...]. 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.

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 (p. 145) 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.¹⁶³

7.6.6 Litigation costs are not recoverable

Because only the nullification and impairment of (future) trade benefits and not the compensation for (past) damages or other disadvantageous consequences of WTO-incompatible measures determine the extent of possible countermeasures, the legal fees paid may not be included in the calculation of nullification and impairment, as there is no 'basis in the WTO Agreements to support the view...that legal fees can be claimed as a loss of a benefit accruing to a WTO Member.'¹⁶⁴

7.6.7 The special cases of prohibited and actionable subsidies

Arbitrations involving prohibited or actionable subsidies under the SCM Agreement involve special considerations that are somewhat different from other Article 22.6 arbitrations.

This is exemplified by the *US—Upland Cotton* Article 22.6 arbitration decisions which were handed down after the United States had been found to be maintaining prohibited and actionable agricultural subsidies by both the Panel and the Appellate Body¹⁶⁵ (and after both of these bodies sitting as Article 21.5 compliance Panels¹⁶⁶ found that the United States had not sufficiently corrected the WTO violations involved). Two separate arbitrations (before the same Arbitrators) were undertaken—one under Article 22.6 as well as SCM Article 4.11 to determine the appropriate amount for suspensions in response to (maintaining) a prohibited subsidy; and the second under Article 22.6 and SCM Article 7.10

to determine the remedy for maintaining an actionable subsidy. In both proceedings, the Arbitrators ruled that both the provisions of the DSU as well as the SCM Agreement applied and that the SCM Agreement as *lex specialis* ought to play a dominant role.¹⁶⁷

The Arbitrators first determined the meaning of ‘appropriate’ countermeasures, the remedy for prohibited subsidies, drawing guidance from footnote 9 to the SCM Agreement, which states that the term ‘appropriate’ means essentially not ‘disproportionate’. (p. 146) The Arbitrators also noted that in prior prohibited subsidy remedy arbitrations, most notably in *Brazil—Aircraft (Article 22.6—Brazil)*,¹⁶⁸ the level of the subsidy paid by Brazil to its aircraft producers was used as the benchmark for countermeasures. This approach was followed in two other Article 22.6 arbitrations, which equally calculated the permissible amount of countermeasures based on the amount of the subsidy.¹⁶⁹ While not discounting this approach applied by prior Panels, the Arbitrators ruled that the remedial focus should be on the injury rather than the subsidy:

The use of the “amount of the subsidy” in prior cases does not imply, however, that the arbitrators in these earlier cases necessarily considered that the “amount of the subsidy” was the only basis on which “appropriate countermeasures” might have been calculated. In fact, as we understand it, the arbitrators in these cases took into account the fact that the legal standard embodied in Article 4.10 of the SCM Agreement allows greater flexibility than those under Article 22.4 of the DSU or Article 7.9 of the SCM Agreement to tailor the countermeasures to the specific circumstances of the case at hand...In fact, in these decisions, some form of consideration was given to the trade effects of the measure on the complaining Member...

As we have determined above, a consideration of the “appropriateness” of countermeasures, and in particular the requirement for the countermeasures not to be “disproportionate”, suggests that there should be a degree of relationship between the level of countermeasures and the trade-distorting impact of the measure on the complaining Member.

In most cases, the trade-distorting impact of the subsidy on one or several other Members would not necessarily bear any particular relationship to the amount of the subsidy...[T]he amount of the subsidy may in fact be lower than its trade effects, and apportioning it would ordinarily exacerbate that likelihood. This amount therefore does not seem to us to be *a priori* appropriate, nor is it necessarily proportionate to the extent to which the trade of the Member concerned is adversely affected. In these circumstances, it cannot be assumed that the total amount of the subsidy is an appropriate measure of its trade effects, or even that it is necessarily a relevant “proxy” for those effects.¹⁷⁰

The Arbitrators determined that consideration of the trade-distorting impact of the US subsidies to be the appropriate criteria for calculation of countermeasures despite both parties’ arguments that the appropriate countermeasure should be based on the amount of the subsidy. Interestingly, in spite of the divergent approaches adopted by the parties on the one hand and the Arbitrators on the other, the decision nonetheless used the figures proposed by the parties:

(I)t seems to us that, while purporting to apply an approach based primarily on the “amount of the subsidy”, both parties have in fact incorporated in their analysis elements that aim to capture the trade effects of the measure, rather than its “amount”....

(p. 147) ...This confirms us in our view that there is no particular basis for assuming, *a priori*, that the amount of the subsidy alone adequately reflects the relevant circumstances, for the purposes of calculating “appropriate” countermeasures.¹⁷¹

An additional argument in favour of this more holistic approach are the difficulties that may arise, when another WTO member successfully challenges the original measure of a respondent member and requests authorization to adopt countermeasures against that very member.¹⁷²

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....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.¹⁷³

Thus, the new standard for an ‘appropriate’ remedy for prohibited subsidies announced by the *US—Upland Cotton* Arbitrators appears welcome.

As to the remedy for actionable subsidies under SCM Article 7.10, the Arbitrators interpreted ‘commensurate’ to mean a correspondence between the countermeasures and the ‘degree and nature of the adverse effects determined to exist.’¹⁷⁴ To apply this standard the Arbitrators used economic modelling to calculate the worldwide impact of the US subsidies and the amount of adverse effects that should be apportioned to Brazil.¹⁷⁵

8. Compliance Following the Adoption of Countermeasures

The DSU contains no specific provisions concerning the case where countermeasures have been authorized and, after the imposition of countermeasures, the member on the receiving end takes corrective action to come into compliance with its WTO obligations. Such a situation poses no difficulty, if the member(s) imposing the countermeasures agrees that the once prodigal member is now in compliance. But what happens when there is disagreement on this point—when the member subjected to countermeasures claims to be in compliance, whereas the member(s) imposing the countermeasures has the opposite view?

This precise question came up in the *Canada—Continued Suspension (Hormones)* case, which was decided by the Appellate Body in 2008. In this dispute, the Appellate Body had ruled (in 1998!) that the EC’s trade restrictions on hormone-treated meat violated several WTO rules; as a consequence, both Canada and the United States had obtained (p. 148) authorization to impose countermeasures in 1999. In 2003, the EC amended its Directive on hormone-treated meat and notified the DSB that it had complied with the ‘recommendations and rulings’ of the DSB in the original case. Canada and the United States, however, refused to end their countermeasures, as they viewed the EC’s action as insufficient. The EC then initiated proceedings against both Canada and the United States in 2004, claiming that both countries violated WTO rules by continuing the suspension of concessions without further authorization by the DSB.

In the *Canada—Continued Suspension (Hormones)* case, the substance of which we treat in Chapter 20 on environmental protection and trade, the Appellate Body set out guidance for

how members should handle the case in which countermeasures are in effect, but the member on the receiving end has taken corrective, albeit possibly insufficient, action:

Where, as in this dispute, an implementing measure is taken and Members disagree as to whether this measure achieves substantive compliance, both Members have a duty to engage in WTO dispute settlement in order to establish whether the conditions in Article 22.8 have been met and whether, as a consequence, the suspension of concessions must be terminated...

Article 21.5 does not indicate which party may initiate proceedings under this provision. Rather, the language of the provision is neutral on this matter, and it is open to either party to refer the matter to an Article 21.5 panel.... Thus... the text of Article 21.5 does not preclude an original respondent from initiating proceedings under that provision to obtain confirmation of the consistency with the WTO agreements of its implementing measure.¹⁷⁶

The *Canada—Suspension* decision, therefore, laid this issue to rest, which had been the consequence of the DSU's drafters oversight.

9. The Sequencing Issue: DSU Article 21.5 vs. 22.2

The relationship between the procedures established by DSU Articles 21.5 and 22.2 has given rise to a significant amount of scholarly writing and adjudicative practice. Which of the two procedures has priority, if at all? Must compliance be asserted via Article 21.5 before a party can move to request authorization for the enforcement of its rights (as confirmed by the successful violation complaint)? Whereas DSU Article 21.5 provides that:

[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel [,]

DSU Article 22.2 determines that:

[i]f the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the (p. 149) 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.

Despite the lack of any language in DSU Article 22.2 requiring a previous 'certificate of non-compliance' (pursuant to DSU Article 21.5), one would, at first sight, be inclined to request that a member seeking enforcement would achieve clarity as to whether non-compliance exists. Such a view would seem to fit best with the structure of the provisions regulating the enforcement phase—first clarify whether there is compliance, DSU Article 21, (only) if so, move on to enforcement, DSU Article 22.2. It would also seem to advance

the leitmotiv of the WTO dispute settlement mechanism, restated, inter alia, in DSU Article 23, that:

members should, in the case of a dispute, not unilaterally determine the prerequisites for trade restricting measures; rather, the authorisation of the DSB is requested, as is, the possibility for having the legality of the measures examined by a panel or the Appellate Body.¹⁷⁷

However, there are timing issues that reveal that the drafters have not sufficiently coordinated those two procedures: The compliance Panel 'shall circulate its report within 90 days after the date of referral of the matter to it', whereas, pursuant to DSU Article 22.6, the DSB has to grant authorization within thirty days after the RPT has expired. Arbitration must be concluded within sixty days after expiry of the RPT. Hence, the 'Article 21.5 cavalry' would arrive thirty days too late, if all deadlines were to be applicable. Also, even if one moves directly to the enforcement phase, the drafters have made sure that there is *control of legality*, thus rendering the argument somewhat moot that moving mandatorily via DSU Article 21.5 would be the preferred avenue from a perspective of avoiding unilateral and unchecked use of economic might.

The question of whether a complainant may successfully request an authorization to impose countermeasures, absent a finding by a (compliance) Panel that the illegality persists as a result of inadequate implementation, arose for the first time in the *EC—Bananas III*¹⁷⁸ dispute. The United States had requested authorization to suspend concessions vis-à-vis the European Community pursuant to DSU Article 22, since, in its view, the latter had not brought its measures into compliance during the RPT. The EC objected, claiming that the measures it had undertaken after the DSB decision had (p. 150) brought it into compliance as requested by the DSU. According to the EC, the United States was therefore not entitled to request the suspension of concessions *before* a compliance Panel had determined that indeed the EC measures taken after the DSB decision had failed to bring it into compliance with that ruling. To hold otherwise, the EC opined, would constitute a presumption of a finding of non-compliance.

In the US view,¹⁷⁹ the deadline set by DSU Article 22.2 (twenty days after the expiry of the RPT had lapsed) defined the window of opportunity to request authorization to suspend concessions; from that perspective, once that window had closed—that is, after twenty days—the right to authorized suspensions would have vanished like the picture of Dorian Gray.¹⁸⁰ Therefore, the United States proceeded with its request for an authorization to suspend concessions pursuant to DSU Article 22 and requested the DSB to refer the matter to arbitration under DSU Article 22.6 to determine the level of concessions to be suspended.¹⁸¹ 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.¹⁸²

The Arbitrators in *EC—Bananas III (Article 22.6—US)* rejected the EC's request to suspend their proceedings until the compliance Panel had ruled whether compliance had indeed occurred or not:

[T]he European Communities requested that we suspend this arbitration proceeding...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 thereunder "shall be completed within 60 days after the date of expiry of the reasonable period of time",...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.¹⁸³

As a result, the report by the Arbitrators pursuant to DSU Article 22.6 determining the level of concessions to be suspended was circulated three days before the compliance Panel, in discharging its functions under DSU Article 21.5 (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.¹⁸⁴

(p. 151) The unregulated but nevertheless existing interconnection between DSU Articles 21.5 and 22 is unsatisfactory. The view that an Article 21.5 compliance proceeding precedes a request for an authorization for suspension can use the argument that non-compliance is a prerequisite for legally applying suspensions: how then, the reasoning would go, can an Arbitrator decide on the appropriate level of suspensions without knowing whether or not a member has brought its measures into compliance with its WTO obligations?¹⁸⁵ However, this line of argumentation does not fully address timing issues: pursuant to DSU Article 22.6 a request for an authorization to suspend concessions shall be granted by the DSB 'within 30 days' of the expiry of the reasonable period of time, while in accordance with Article 21.5, a compliance Panel has ninety days from the expiry of the reasonable period of time to circulate its report. Thus, if the term 'within 30 days' is indeed to be interpreted as establishing a one-shot window of opportunity (as was claimed by the United States) the situation becomes untenable for the law-abiding complainant: once the compliance Panel has issued its report, the time to grant an authorization to retaliate would likely have elapsed.

Initially, it was the Arbitrators and Panellists in that first 'sequencing procedure' that found 'the logical way forward'¹⁸⁶ to overcome the DSU's sub-optimal drafting: Two adjoining provisions dealing with interrelated issues fail to take notice of each other. The Article 21.5 Panellists found that the EC had not properly implemented the ruling and recommendation of the DSB, three days after the same individuals, discharging their functions as Arbitrators in the Article 22.6 arbitration had found the requested US countermeasures to be 'equivalent' pursuant to DSU Article 22.6 (see earlier). Following that example, parties in all subsequent implementation disputes agreed explicitly that the requests for suspension of concessions and the referral to an Article 21.5 compliance Panel would be made concurrently, providing however, that retaliation procedures are suspended until after the compliance Panel circulates its report.¹⁸⁷

In the alternative, the parties may agree to preserve the right to request for an authorization to suspend concessions until a certain time after the compliance Panel has circulated its report, notwithstanding the time limit set by Article 22.6.¹⁸⁸ It seems obvious that amending the DSU in order to eliminate this procedural malfunction (p. 152) would be welcomed. This amendment may well be achieved as part of the Doha Round, should the latter be successful.¹⁸⁹

10. Conclusions

The WTO dispute settlement mechanism is a remarkable success: In the last twenty years, it has established itself as the premier international dispute settlement mechanism. Panels and in particular the Appellate Body (and the less visible heads behind them) are recognized as producing high-quality work, taking arguments by parties seriously and creating legal certainty and predictability.

This does not mean, however, that the status quo is perfect. With regard to the questions discussed in this chapter, the possibly most irritating aspect is the lack of a right of the aggrieved party to claim compensation for the economic consequences of the violation of its rights under the covered agreements. Rather, the wrongdoer knows that the system established by the DSU virtually guarantees that WTO violations will only have any *legal*

consequences for the wrongdoer, once the RPT has ended. Very often that means up to three years of illegal behaviour that can be exercised before the aggrieved party has a right to counteract, pursuant to DSU Articles 22 and 23. For a small or medium economic power, who has few other possibilities to influence its trade partners, this status quo is sub-optimal. Having said this, small and medium-sized economic powers will also think twice before suspending any concessions or obligations.

There is little doubt that this weakness of the law on remedies is also one of the reasons why all trade powers—including all permanent members of the UN Security Council, all important regional powers (with the exception of Iran), indeed the whole world—have accepted the WTO mandatory dispute settlement mechanism. States who are normally extremely reluctant to accept judicial control—the Security Council’s reaction to modest attempts to protect fundamental due process rights of individuals caught by the dragnet of UN sanctions may be recalled—accept that they are fully accountable to the WTO DSB and their fellow members for the compatibility of their state measures with WTO law. It would not have been thought, perhaps, that the world’s superpowers would be prepared to accept a system that, in addition to these remarkable traits, would oblige them to ‘wipe out all the consequences’¹⁹⁰ of their WTO-incompatible measures. In addition, if one recalls that very few states are in a position (p. 153) to take enforcement measures without doing themselves more harm than good,¹⁹¹ clearly we are looking at a scenario where the law is highly unlikely to change. The only potential for substantive change imaginable would seem to lie in creating a legal right to claim compensation once the RPT has expired, but even this looks like an ambitious plan for the future.

These fundamental issues should, of course not stand in the way of incremental progress. The sequencing issue is the consequence of an oversight, and could easily be fixed, if the membership is prepared to address this in the Doha Round, or as a matter of secondary institutional law. Other shortcomings that have become visible and relevant over the last twenty years¹⁹² should, of course, also be addressed.(p. 154)

Footnotes:

¹ DSU Art. 21.3; see Alan Yanovich and Werner Zdouc, ‘Procedural and Evidentiary Issues’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle Van Damme, eds., *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 371 *et seq.*

² DSU Art. 3.7 reads in pertinent parts: ‘In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.’

³ cf. the statistical data in Kara Leitner and Simon Lester, ‘WTO Dispute Settlement 1995–2014—A Statistical Analysis’ (2015) *Journal of International Economic Law* 18, 203–14.

⁴ DSU Art. 21.1 demands prompt compliance; Art. 21.4 states that eighteen months is the maximum period of delay, unless otherwise agreed or decided.

⁵ Art. 22.1 states that: ‘compensation and the suspension of concessions or other obligations are temporary measures...’. Furthermore, Art. 22.8 reads in part: ‘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...’. The notion that the suspension of concessions or other obligation is temporary was reiterated in the often cited *EC—Banana III (US)* in which the Appellate Body at para. 6.3 further indicated that the purpose of a countermeasure is to *induce compliance*. This principle has become settled law and as indicated by the Arbitrator in *US—Upland Cotton*, para. 4.112: “‘Inducing compliance’ appears rather to be the common purpose of retaliation measures in the WTO dispute.’

⁶ Cross-retaliation, as this is called, has been (at the time of writing) authorized in three cases: *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitration), *US—Gambling (Article 22.6—US)* (Arbitration), and *US—Upland Cotton (Article 22.6—US)* (Arbitration); see also Werner Zdouc, ‘Cross-retaliation and Suspension under the GATS and TRIPS Agreements’ in Chad P. Bown and Joost Pauwelyn, eds., *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2010) 515–35 and Lucas Eduardo F. A. Spadano, ‘Cross-agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?’ (2008) *World Trade Review* 7, 511–45.

⁷ To date, requests for authorization to retaliate pursuant to DSU Art. 22.2 have been filed in twenty-two cases, while the total number of requests is thirty-six (in certain disputes with multiple complainants, there were multiple requests, see <<http://www.worldtradelaw.net/databases/retaliationrequests.php>>). Authorization to retaliate by the DSB pursuant to DSU Art. 22.6 was granted in nine cases: *EC—Bananas III*; *EC—Hormones*; *Brazil—Aircraft*; *US—FSC*; *US—1916 Act*; *Canada—Aircraft Credits and Guarantees*; *US—Offset Act*; *US—Upland Cotton*; and *US—Gambling*; see the very helpful statistical data at <<http://www.worldtradelaw.net/databases/suspensionawards.php>> and the WTO website <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

⁸ DSU Arts. 3.1 and 26.1 and GATT Art. XXIII:1(b). For a critical analysis of WTO non-violation complaints see Christophe Larouer, ‘WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System’ (2006) *Netherlands International Law Review* 53, 97–126.

⁹ DSU Art. 26.2; see also Ernst-Ulrich Petersmann, ‘Violation and Non-Violation Complaints in Public International Trade Law’ (1991) *German Yearbook of International Law* 34, 175–231 for an excellent overview of the GATT 1947 practice with respect to non-violation complaints.

¹⁰ For more detailed information see Dae-Won Kim, *Non-Violation Complaints in WTO Law, Theory and Practise*, Studies in Global Economic Law, Vol. 9 (Bern et al.: Peter Lang, 2006); Robert W. Staiger and Alan O. Sykes, ‘Non-Violations’ (2013) *Journal of International Economic Law* 16, 741–75; Susy Frankel, ‘Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes’ (2009) *Journal of International Economic Law* 12, 1023–65.

¹¹ cf. the WTO Analytical Index (2012) (<https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_09_e.htm#1355>); non-violation complaints were unsuccessfully filed in *US—Gasoline*, *EC—Hormones*, *Japan—Film*, *EC—Asbestos*, *Korea—Procurement*, *US—Offset Act (Byrd Amendment)*, *China—Auto Parts*, *US—COOL*, *EC—Seal Products*; no situation complaint has been used since 1994.

¹² No provision requires members to withdraw a measure that is compatible with WTO law.

13 DSU Art. 26.1 lit. c).

14 DSU Art. 26.1 lit. d).

15 Therefore, the DSU clearly attributes to the Panels and the Appellate Body a role exceeding the typical *assisting* function, despite DSU Art. 11 stating that Panels ‘assist the DSB in discharging its responsibilities under this Understanding and the covered agreements.’

16 Article 19 also reflects the obligation of the losing party to comply with its WTO obligations; see Petros C. Mavroidis, ‘Article 19 DSU’ in Rüdiger Wolfrum, Peter-Tobias Stoll, and Karen Kaiser, eds., *Max Planck Commentaries on World Trade Law: Institutions and Dispute Settlement*, Vol. 2 (Leiden: Martinus Nijhoff Publishers, 2006).

17 See, for example, *US—Certain EC Products* (Appellate Body), para. 81.

18 This is not to suggest that a WTO member cannot challenge a measure that has been withdrawn during the adjudication process. WTO adjudicating bodies have consistently held that a legal interest to secure a *ruling* on a withdrawn measure exists to prevent that it may be implemented again in the future. To that effect, see *Chile—Price Band System* (Panel); cf. also *US—Certain EC Products* (Appellate Body), para. 81: ‘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.’

19 *Chile—Price Band System* (Panel), para. 7.112.

20 See *Dominican Republic—Import and Sale of Cigarettes* (Appellate Body), para. 129.

21 cf. Petros C. Mavroidis, ‘Remedies in the WTO: Between a Rock and a Hard Place’ (2000) *European Journal of International Law* 11, 763–813, which emphasizes outer limits to that discretion: for example, the WTO member concerned may not continue or repeat the same behaviour.

22 *US—Section 301 Trade Act* (Panel), para. 7.102.

23 See, for example, the Appellate Body reports on *EC—Bananas III (Article 21.5—Ecuador)* (Appellate Body), and *EC—Bananas III (Article 21.5—US)*, para. 321.

24 cf. Mavroidis, ‘Remedies in the WTO’, n 21 at 781.

25 In any case, Panels and the Appellate Body are not obliged to issue a suggestion on how to end the stated WTO incompatibility. *US—Steel Plate* (Panel), para. 8.8 and *US—Softwood Lumber V* (Panel), para. 8.6.

26 *US—Section 301 Trade Act* (Panel), para. 7.102.

27 A recent illustration of this attitude is traced in the Panel report *EC—Pipe Fittings* (Panel), where the Panel stated at para. 8.11 that: ‘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.’

28 *US—Continued Zeroing* (Appellate Body), para. 389.

29 *US—Oil Country Tubular Goods Sunset Reviews (Article 21.5—Argentina)* (Appellate Body), para. 183; the Appellate Body left open whether ‘Articles 11 and 12.7 were applicable to a request for suggestion’.

- ³⁰ See *US—Lead and Bismuth II* (Panel), para. 8.8 and also *US—Softwood Lumber V* (Panel), para. 8.6.
- ³¹ *US—Lead and Bismuth II* (Panel), para. 8.2.
- ³² *Ibid.* para. 8.1.
- ³³ *US—Stainless Steel (Korea)* (Panel), paras. 3.3 and 3.5.
- ³⁴ *Ibid.* para. 7.8.
- ³⁵ *Ibid.* para. 7.10.
- ³⁶ *Guatemala—Cement I* (Panel), para. 8.1.
- ³⁷ *Ibid.* para. 8.2.
- ³⁸ *Ibid.* para. 8.6.
- ³⁹ *Guatemala—Cement II* (Panel), para. 9.5 *et seq.*
- ⁴⁰ *Ibid.* para. 9.6; in *Argentina—Poultry Anti-dumping Duties* (Panel), the Panel found, *inter alia*, that Argentina’s decision to initiate a full antidumping investigation was based on insufficient evidence and, therefore, violated its WTO obligations (para. 8.1(a)(i)). The Panel further found Argentina’s WTO violations in that respect ‘to be of a fundamental nature and pervasive’ (para. 8.6). It concluded in para. 8.7 that ‘[i]n light of the nature and extent of the violations in this case, we do not perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Argentina repeal Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil.’ It seems that in the eyes of the Panel, the cumulative and grave nature of the violations suggested that the *only* appropriate remedy was the revocation of the WTO-incompatible Resolution.
- ⁴¹ *Guatemala—Cement II* (Panel), para. 9.7.
- ⁴² *US—1916 Act (Japan)* (Panel), para. 6.292.
- ⁴³ *EC—Export Subsidies on Sugar* (Panel), para. 8.7.
- ⁴⁴ See the discussion in *US—Upland Cotton (Article 22.6—US)* (Arbitration).
- ⁴⁵ SCM Art. 4.7: ‘If a measure is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn.’
- ⁴⁶ *EC—Export Subsidies on Sugar* (Appellate Body), paras. 334 and 335.
- ⁴⁷ Alberto Alvarez Jimenez, ‘A Reasonable Period of Time for Dispute Settlement Implementation: An Operative Interpretation for Developing Country Complainants’ (2007) *World Trade Review* 6, 451–76.
- ⁴⁸ *US—Zeroing (Japan) (Article 21.5—Japan)* (Appellate Body), para. 157.
- ⁴⁹ *EC—Hormones (Article 21.3(c))* (Arbitrator), para. 26. But see also the more nuanced Award of the Arbitrator in *United States—Gambling (Article 21.3(c))* (Arbitration), para. 44: ‘[I]t is useful to recall that the DSU does not refer to the “shortest period possible for implementation within the legal system” of the implementing Member. Rather, this is a convenient phrase that has been used by previous arbitrators to describe their task. I do not, however, view this standard as one that stands in isolation from the text of the DSU. In my view, the determination of the “shortest period possible for implementation” can, and must, also take due account of the two principles that are expressly mentioned in Article 21 of the DSU, namely reasonableness and the need for prompt compliance. Moreover,...each

arbitrator must take account of “particular circumstances” relevant to the case at hand... that are determinative of “reasonableness” in each individual case.’

50 *US—Zeroing (EC)(Article 21.5—EC)* (Appellate Body), para. 299.

51 cf. <https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm>.

52 cf. <<http://www.worldtradelaw.net/databases/rptawards.php>>, where at the time of writing only thirty-one Art. 21.3 (c) awards were reported; to date there have been approximately 200 adopted Panel reports and 117 Appellate Body reports.

53 The agreed upon periods range from four months and fourteen days to twenty-four months; cf. Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edn. (Cambridge University Press, 2013) 195.

54 In *US—Tuna II (Mexico)*, for example, parties needed 96 days to reach an agreement, in *EC—Seal Products* 79 days, and in *China—Rare Earths* 100 days. See also *US—Line Pipe* (Arbitration); *de lege ferenda* see WTO Doc. TN/DS/W/38 (23 January 2003), Dispute Settlement Body—Special Session, Contribution of the European Communities and its Member States to the improvement and clarification of the WTO Dispute Settlement Understanding, where a removal of the deadline is suggested (para. 45).

55 DSU Art. 2.4, fn. 1. To see this in practice, see *US—Hot-Rolled Steel (Article 21.3)* (Arbitrator) and Dispute Settlement Body, Minutes of the Meeting (WT/DS/M/175), paras. 25–8.

56 See Werner Zdouc, ‘The Reasonable Period of Time for Compliance with Rulings and Recommendations Adopted by the WTO Dispute Settlement Body’ in Rufus Yerxa and Bruce Wilson, eds., *Key Issues in WTO Dispute Settlement—The First 10 Years* (Cambridge University Press, 2005) 88, 89.

57 DSU Art. 21.3(c).

58 cf. Statement by the parties in *Chile—Price Band System (Article 21.3)* (Arbitration), para. 2; for a more recent case, see also *Colombia—Ports of Entry (Article 21.3(c))* (Arbitration), para. 6.

59 DSU Art. 21.3 lit. (c).

60 *US—Offset Act (Byrd amendment) (Article 21.3(c))* (Arbitration).

61 *Ibid.* para. 53, emphasis in the original.

62 *EC—Hormones (Article 21.3)* (Arbitrator), para. 25; see also, Peter Tobias-Stoll and Arthur Steinmann, ‘WTO Dispute Settlement: The Implementation Stage’ in Jochen A. Frowein and Rüdiger Wolfrum, eds., *Max Planck Yearbook of United Nations Law*, Vol. 3 (Leiden: Martinus Nijhoff Publishers, 1999) 414; as for the average implementation time period, cf. <<http://www.worldtradelaw.net/databases/implementaverage.php>>.

63 See also *US—Offset Act (Byrd amendment) (Article 21.3(c))* (Arbitration), para. 25.

64 *Chile—Price Band System (Article 21.3(c))* (Arbitration).

65 *Ibid.* para. 34.

66 *US—Hot-Rolled Steel (Article 21.3(c))* (Arbitration).

67 *Ibid.* para. 53, emphasis in the original; see also *US—COOL (Article 21.3(c))* (Arbitrator), para. 68 *et seq.*

68 This proposition was stated quite openly by the Arbitrator in *Brazil—Retreaded Tyres (Article 21.3(c))* (Arbitration), para. 48: ‘In my determination, I am also guided by the

statements of the arbitrator in *EC—Export Subsidies on Sugar* that “the implementing Member does not have an unfettered right to choose any method of implementation.”.’

69 *Colombia—Ports of Entry (Article 21.3(c)) (Arbitration)*, paras. 63–5. See also *US—Stainless Steel (Mexico) (Article 21.3(c)) (Arbitration)*, paras. 40–3.

70 The Arbitrator stated, *inter alia*: ‘I am not convinced that a broad reform of numerous provisions of Colombia’s Commercial Code concerning customs securities is relevant for my determination, as suggested by Colombia. It may well be the case that Colombia considers it desirable to reform its customs securities statutes in order to ensure that guarantees are effectively available in the context of its revised customs control system. However, the relevant recommendations and rulings of the DSB concern the use of indicative prices for customs valuation purposes and certain restrictions on ports of entry.’ *Colombia—Ports of Entry (Article 21.3(c)) (Arbitrator)*, para. 85.

71 See Valerie Hughes, ‘Arbitration within the WTO’ in Federico Ortino and Ernst-Ulrich Petersmann, eds., *The WTO Dispute Settlement System 1995–2003* (The Hague: Kluwer, 2004) 75–86, and Joost Pauwelyn, ‘Proposals for Reform of Article 21 of the DSU’ in *ibid.* 51–60.

72 *Canada—Pharmaceutical Patents (Article 21.3(c)) (Arbitrator)*, para. 49. See also *Chile—Price Band System (Article 21.3(c)) (Arbitrator)*, para. 38 (considering pre-legislative activity).

73 *US—Offset Act (Byrd amendment) (Article 21.3(c)) (Arbitrator)*, para. 70.

74 *Canada—Pharmaceutical Patents (Article 21.3(c)) (Arbitrator)*, para. 51.

75 *Ibid.* para. 50.

76 *US—Stainless Steel (Article 21.3(c)) (Arbitrator)*, para. 59.

77 *Ibid.* para. 61.

78 *Chile—Price Band System (Article 21.3(c)) (Arbitrator)*, para. 48.

79 *Chile—Alcoholic Beverages (Article 21.3(c)) (Arbitrator)*, para. 45; *Indonesia—Autos (Article 21.3(c)) (Arbitrator)*, para. 24.

80 ‘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 PBS 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.’ *Chile—Price Band System (Article 21.3(c)) (Arbitrator)*, para. 56.

81 *Colombia—Ports of Entry (Article 21.3(c)) (Arbitrator)*, para. 106.

82 *Canada—Pharmaceutical Patents (Article 21.3) (Arbitrator)*, para. 52.

83 *US—Offset Act (Byrd amendment) (Article 21.3(c)) (Arbitrator)*, para. 70. Won-Mog Choi, ‘To Comply or Not to Comply?—Non-implementation Problems in the WTO Dispute Settlement System’ (2007) *Journal of World Trade* 41, 1043–71; Ngangjoh H. Yenkong, ‘World Trade Organization Dispute Settlement Retaliatory Regime at the Tenth Anniversary of the Organization: Reshaping the “Last Resort” Against Non-compliance’ (2006) *Journal of World Trade* 40, 365–84; Yuka Fukunaga, ‘Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations’ (2006) *Journal of International Economic Law* 9, 383–426; Bruce Wilson, ‘Compliance by WTO Members with

Adverse WTO Dispute Settlement Rulings: The Record to Date' (2007) *Journal of International Economic Law* 10, 397–403.

84 *Japan—Alcoholic Beverages II (Article 21.3 (c))* (Arbitrator), para. 18; *Canada—Patent Term (Article 21.3(c))* (Arbitrator), para. 60.

85 *Argentina—Hide and Leather (Article 21.3(c))* (Arbitrator), para. 49.

86 *US—Offset Act (Byrd amendment) (Article 21.3(c))* (Arbitrator), para. 78 *et seq.*; *Canada—Patent Term (Article 21.3(c))* (Arbitrator), para. 48.

87 *Canada—Pharmaceutical Patents (Article 21.3(c))* (Arbitrator) para. 47; *US—1916 Act, (Article 21.3(c))* (Arbitrator), para. 32.

88 *US—Offset Act (Byrd amendment) (Article 21.3(c))* (Arbitrator), para. 44.

89 *Colombia—Ports of Entry (Article 21.3(c))* (Arbitrator), para. 67.

90 It is placed on the agenda six months after the date of establishment of RPT (unless the DSB decides otherwise).

91 *cf.*, for example, the Panel reports in *US—Zeroing (EC) (Article 21.5.—EC)* (Panel), which took a record 449 days from referral of the matter to the Panel; similar long delays may be observed, for example, in *EC—Bananas III (Article 21.5—Ecuador II)* (Panel), and *US—Upland Cotton (Article 21.5—Brazil)* (Panel): the average duration, according to the calculations by <<http://www.worldtradelaw.net/databases/suspensionawards.php>>, is 257,90 days, thus coming close to 300% of the DSU-allocated time span.

92 DSU Art. 6.2 reads: 'The request for the establishment of a panel shall...indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.'

93 *Ibid.* paras. 61 and 62.

94 An example would be *Brazil—Aircraft (Article 21.5—Canada, Second Recourse)* (Panel).

95 See on this matter, but also, in general on the role of Panels, William J. Davey, 'Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels' in Federico Ortino and Ernst-Ulrich Petersmann, eds., *The WTO Dispute Settlement System 1995-2003* (The Hague: Kluwer, 2004) 19-30.

96 *Canada—Aircraft (Article 21.5—Brazil)* (Appellate Body).

97 *Ibid.* para. 37.

98 *Ibid.*

99 *Ibid.* paras. 40-1; similar position in *US—Shrimp (Article 21.5—Malaysia)* (Appellate Body), paras. 85-8. See also *EC—Bed Linen (Article 21.5—India)* (Appellate Body), para. 78 ('If a *claim* challenges a *measure* which is not a "measure taken to comply", that *claim* cannot properly be raised in Article 21.5 proceedings').

100 *US—Softwood Lumber IV (Article 21.5—Canada)* (Appellate Body), paras. 73, 77.

101 *US—Zeroing (EC) (Article 21.5—EC)* (Panel), para. 8.115.

102 *US—Zeroing (EC) (Article 21.5—EC)* (Appellate Body), para. 224.

103 *Ibid.* para. 226.

104 *Ibid.* para. 427 (footnotes omitted).

- 105** *US—Gambling (Article 21.5—Antigua and Barbuda)* (Panel). See for comment on this issue, Fernando Piérola, ‘Rearguing a Defence in Implementation Proceedings: Some Thoughts in the Light of the Article 21.5 Panel Report in *United States—Gambling*’ (2007) *Global Trade and Customs Journal* 2, 419–20.
- 106** Section 301 of the U.S. Trade Act of 1974 (Pub.L. 93-618, 19 U.S.C. § 2411); see *US—Section 301 Trade Act* (Panel).
- 107** See William J. Davey, ‘Dispute Settlement in GATT’ (1987) *Fordham International Law Journal* 11, 51, 99–103.
- 108** cf. <<http://www.worldtradelaw.net/databases/retaliationrequests.php.cross>>.
- 109** cf. Art. 36 of the International Law Commission’s Draft Articles on State Responsibility: ‘1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.’
- 110** See Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edn. (Cambridge University Press, 2013) 200, with further references.
- 111** Alberto Alvarez Jimenez, ‘Mutually Agreed Solutions under the WTO Dispute Settlement Understanding: An Analytical Framework after the Softwood Lumber Arbitration’ (2011) *World Trade Review* 10, 343–73.
- 112** *US—Section 110(5) Copyright Act* (Panel).
- 113** Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/151, 3; *US—Section 110(5) Copyright Act (Article 25 DSU)* (Arbitrator). It should be noted that the amount of compensation had been determined by a DSU Art. 25 arbitration proceeding, which estimated the benefits nullified or impaired to amount to 1.1 million per year. See also the discussion of the case in Gene Grossman and Petros C. Mavroidis, ‘Would’ve or Should’ve? Impaired Benefits Due to Copyright Infringement’ in Henrik Horn and Petros C. Mavroidis, eds., *The WTO Case Law of 2001, The American Law Institute Reporters’ Studies* (Cambridge University Press, 2003) 281–99. The authors note, inter alia, that it is questionable whether DSU Art. 25 was meant to serve this purpose. It seems that the Arbitrator here assumed a role normally entrusted to an Art. 22.6 DSU arbitration.
- 114** *US—Section 110(5) Copyright Act*, Status Report of the United States, WT/DS160/24/Add.123, 9 April 2015.
- 115** *United States—Upland Cotton* (Appellate Body).
- 116** Randy Schnepf, *Brazil’s WTO Case Against the U.S. Cotton Program* (US Congressional Research Service, 7-5700, RL32571, 30 June 2010).
- 117** *Japan—Taxes on Alcoholic Beverages* (Appellate Body).
- 118** Bryan Mercurio, ‘Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding’ (2009) *World Trade Review* 8, 315–38, 324.
- 119** *EC—Bananas III (US) (Article 22.6—US)* (Arbitrator), para. 6.3.
- 120** Document MTN.GNS/W/120 identifies eleven sectors.
- 121** DSU Art. 22.3(f).
- 122** An *agreement* is, for the purposes of DSU Art. 22.3, the GATT with respect to goods, the GATS with respect to services, and the TRIPS with respect to intellectual property rights, DSU Art. 22.3(g).

- 123** Lucas Eduardo and F. A. Spadano, 'Cross-agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?' (2008) *World Trade Review*, Vol. 7, 511–45; Frederick Abbott, 'Cross Retaliation in TRIPS: Options for Developing Countries', ICTSD Program on Dispute Settlement and Legal Aspects of International Trade, Florida State University, Spring 2009, available at <http://www.ssrn.com/so13/papers>.
- 124** *EC—Bananas III* (Panel and Appellate Body).
- 125** *EC—Bananas III*, Recourse by Ecuador to Art. 22.2 of the DSU (WT/DS27/52).
- 126** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator), para. 52.
- 127** *US—Gambling (Article 22.6—US)* (Arbitrator), para. 4.18. *US—Upland Cotton (Article 22.6—US I)* (Arbitrator), paras. 5.51 and 5.67.
- 128** *US—Upland Cotton (Article 22.6—US I)* (Arbitrator), paras. 5.70–5.79, 5.81.
- 128a** *US—Gambling (Article 22.6—US)*, para. 4.108.
- 129** *Ibid.* paras. 5.65–5.66, 5.70–5.71, and 5.73, 5.77–5.90.
- 130** *Ibid.*
- 131** UN Doc. A/RES/56/83, General Assembly, Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/56/589 and Corr.1)] 56/83, Responsibility of States for internationally wrongful acts, Art. 51 of the Draft Articles.
- 132** *EC—Bananas III (US) (Article 22.6—EC)* (Arbitrator), para. 4.1.
- 133** *Ibid.* paras. 6.4–6.5.
- 134** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator), para. 6.3.
- 135** *Canada—Aircraft Credits and Guarantees (Article 22.6—Canada)* (Arbitrator).
- 136** *Ibid.* para. 3.121.
- 137** *US—1916 Act (EC) (Article 22.6 (US))* (Arbitrator), para. 5.42.
- 138** For a critical view of mirror trade measures see Alan W. Wolff, 'Remedy in WTO Dispute Settlement' in Merit E. Janow, Victoria Donaldson, and Alan Yanovich, eds., *The WTO: Governance, Dispute Settlement & Developing Countries* (New York: Juris Publishing Inc., 2008) 797.
- 139** The Arbitrators declined the EC request arguing that it was impossible for them to accept it since there was no way they could ensure equivalence between the nullification suffered by either side (as a result of the original violation for the EC and the countermeasures for the United States), as required by DSU Art. 22.4. They did open the way, however, for the EC to impose countermeasures in the future to recover monetary amounts paid pursuant to final judgments in the United States or pursuant to settlements.
- 140** *EC—Hormones (US) (Article 22.6—EC)* (Arbitrator), para. 38.
- 141** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator).
- 142** *Brazil—Aircraft (Article 22.6—Brazil)* (Arbitrator).
- 143** *Australia—Automotive Leather II (Article 21.5)* (Panel), para. 6.31.
- 144** All GATT cases are reported in Ernst-Ulrich Petersmann, 'International Competition Rules for the GATT/WTO World Trade and Legal System' (1993) *Journal of World Trade* 35, 27–67 and Mavroidis, 'Remedies in the WTO', n. 21 at 763–813.

- 145** The US view, reported in *Guatemala—Cement I* (Panel), para. 5.63, represents the membership's view: '[R]etroactive remedies are inconsistent with the established practice of panels refraining from recommending remedies that attempt somehow to restore the status quo ante or otherwise compensate the prevailing party for WTO-inconsistent actions taken by the defending party'; further examples of state practice reported by Frieder Roessler, 'The Responsibilities of a WTO Member Found to Have Violated WTO Law' in *The WTO in the Twenty-first Century—Dispute Settlement, Negotiations and Regionalism in Asia*, edited by Yasuhei Taniguchi, Alan Yanovich, and Jan Bohanes (Cambridge University Press, 2007) 141, 142.
- 146** *US—Certain EC Products* (Panel), para. 6.106.
- 147** cf. Art. 4.7 of the SCM Agreement.
- 148** cf. <<http://www.worldtradelaw.net/databases/suspensionawards.php>>.
- 149** To perform their task, the Arbitrators will adopt their own working procedures. See, for example, the procedures described in an Annex to the *US Offset Act (Byrd amendment) (EC) (Article 22.6—US)*, Decision by the Arbitrator (WT/DS217/ARB/EEC), 31 August 2004.
- 150** *US—Gambling (Article 22.6—US)* (Arbitrator), paras. 2.5-2.9.
- 151** *EC—Hormones (US) (Article 22.6—EC)* (Arbitrator), paras. 9-11.
- 152** *Ibid.* paras. 2.21-2.23.
- 153** *US—Upland Cotton (Article 22.6—US I)* (Arbitrator), paras. 4.21-4.23; *US—Upland Cotton (Article 22.6—US II)* (Arbitrator), paras. 4 and 12-14. See also *US—1916 Act (EC) (Article 22.6—US)* (Arbitrator).
- 154** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator), para. II.3.
- 155** See Alexander Keck, 'WTO Dispute Settlement: What Role for Economic Analysis?' (2004) *Journal of Industry, Competition and Trade* 4, 365.
- 156** The prototypical example for this statement is *US—Gambling*: there, the Arbitrator authorized 21 Mio. USD per year, whereas suspension worth almost 3.5 billion USD had been requested.
- 157** *US—Offset Act (Byrd Amendment) (EC) (Article 22.6—US)* (Arbitrator).
- 158** *Ibid.* paras. 5.1-5.4.
- 159** *Ibid.* paras. 3.105-3.151.
- 160** *Ibid.* para. 3.148-3.151. For another economic analysis used to calculate countermeasures, compare *US—FSC (Article 22.6—US)* (Arbitrator).
- 161** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator).
- 162** *Ibid.* paras. 6.12 and 6.14.
- 163** *EC—Bananas III (Ecuador) (Article 22.6—EC)* (Arbitrator), paras. 6.16 and 6.18.
- 164** *US—1916 Act (EC) (Article 22.6—US)* (Arbitrator), para. 5.76.
- 165** *US—Upland Cotton* (Panel and Appellate Body).
- 166** *US—Upland Cotton (Article 21.5—Brazil)* (Panel and Appellate Body).
- 167** *US—Upland Cotton (Article 22.6—US)* (Arbitrator) paras. 5.27-5.32; 5.50-5.51.
- 168** *Brazil—Aircraft (Article 22.6—Brazil)* (Arbitrator).
- 169** *Canada—Aircraft Credits and Guarantees (Article 22.6—Canada)* (Arbitrator); *US—FSC (Article 22.6—US)* (Arbitrator).

- 170** *US—Upland Cotton (Article 22.6—US)* (Arbitrator), paras. 4.133, 4.135, 4.136.
- 171** *US—Upland Cotton (Article 22.6—US)* (Arbitrator), paras. 4.170 and 4.171.
- 172** *US—Upland Cotton (Article 22.6—US)* (Arbitrator), paras. 4.170 and 4.171.
- 173** *US—FSC (Article 22.6—US)* (Arbitrator), paras. 4.170 and 4.171.
- 174** *US—Upland Cotton (Article 22.6—US)* (Arbitrator), para. 4.35.
- 175** *US—Upland Cotton (Article 22.6—US)* (Arbitrator), paras. 4.193–4.195.
- 176** *Canada—Continued Suspension* (Appellate Body), paras. 310, 347.
- 177** Alan Yanovich and Werner Zdouc, ‘Procedural and Evidentiary Issues’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle Van Damme, eds., *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 373.
- 178** *EC—Bananas III* (Appellate Body).
- 179** *Ibid.* Recourse to DSU Art. 21.5 by the United States (WT/DS27/RW/USA), para. 4.52.
- 180** This position might be a tenable understanding of the wording of DSU Art. 22.2, but one wonders whether it sufficiently considers its systematic context, its function, and purpose. Art. 22.2 rather sets a minimum time, during which parties shall negotiate without the distraction of potential requests to enforce. It is DSU Art. 22.6 which sets a deadline of thirty days from the RPT, within which time the DSB shall grant an authorization to suspend concessions.
- 181** WTO Doc WT/DS27/43 of 14 January 1999; see also for an overview of the *EC—Bananas II* case and its procedural issues, Mauricio Salas and John H. Jackson, ‘Procedural Overview of the WTO, EC—Banana Dispute’ (2000) *Journal of International Economic Law* 3(1), 145–66.
- 182** *EC—Bananas III (Article 21.5—Ecuador)* Constitution of the Panel, Note by the Secretariat (WT/DS27/44), 18 January 1999.
- 183** *EC—Bananas III (US) (Article 22.6—US)*, para. 2.9.
- 184** *EC—Bananas III (Article 21.5—Ecuador)* (Arbitrator), para. 111; see also *US—Import Measures on certain EC Products* (Appellate Body), paras. 6.92–6.94 and *US—Import Measures on certain EC Products* (Panel), which opined that a request for suspension of concessions could only be authorized if a compliance Panel has first ruled that no compliance had occurred during the reasonable period of time; however, in the Panel’s view, an Arbitrator mandated to determine the level of concessions to be suspended could also determine whether compliance occurred.
- 185** Sherzod Shadikhodjaev, *Retaliation in the WTO Dispute Settlement System* (Kluwer Law International, 2009) 155.
- 186** In the words of the DSB’s chairperson when appointing the Arbitrators in the Art. 22.6 proceedings, noting that they were also Panellists in the Art. 21.5 proceeding.
- 187** Alan Yanovich and Werner Zdouc, ‘Procedural and Evidentiary Issues’ in Daniel Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle Van Damme, eds., *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009) 374; see also with respect to the *sequencing* issue: David Palmeter, ‘The WTO Dispute Settlement System in the Next Ten Years’ in Merit E. Janow, Victoria Donaldson, and Alan Yanovich, eds., *The WTO: Governance, Dispute Settlement & Developing Countries* (New York: Juris Publishing Inc., 2008) 848–9. Such a sequencing agreement was reached between the parties in *Canada—Dairy* (Mutually Agreed Solution) and *Japan—Apples* (Mutually Agreed Solution).

188 See, for example, *Australia—Automotive Leather II* (Mutually Agreed Solution), *Brazil—Aircraft* (Mutually Agreed Solution), and *Canada—Aircraft* (Mutually Agreed Solution).

189 David Palmeter, ‘The WTO Dispute Settlement System in the Next Ten Years’ in Merit E. Janow, Victoria Donaldson, and Alan Yanovich, eds., *The WTO: Governance, Dispute Settlement & Developing Countries* (New York: Juris Publishing Inc., 2008) 849.

190 *Case concerning the Factory at Chorzow* (Chorzow Factory-Fall), Merits, PCIJ, Ser. A, No.13, 47: ‘The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.’

191 Whether the (friendly) trade superpowers US and EU that have used countermeasures pursuant to DSU Art. 22 are indeed benefiting their respective economies is far from certain.

192 For a discussion of the most important proposals, in addition to the contributions in Chad P. Bown and Joost Pauwelyn, eds., *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2010), see Edwini Kessie, ‘The Early Harvest Negotiations in 2003’ in Federico Ortino and Ernst-Ulrich Petersmann, eds., *The WTO Dispute Settlement System 1995–2003* (The Hague: Kluwer, 2004) 115–50; Kyle Bagwell, Petros C. Mavroidis, and Robert W. Staiger, ‘The Case for Tradable Remedies in WTO Dispute Settlement’ in Simon J. Evenett and Bernard Hoekman, eds., *Economic Development & Multilateral Trade Cooperation* (Washington DC: Palgrave MacMillan & The World Bank, 2005) 395–414; Marco Bronckers and Naboth van den Broek, ‘Financial Compensation in the WTO, Improving the Remedies of the WTO Dispute Settlement’ (2002) *Journal of International Economic Law* 8, 101–26.