

ICTSD Project on Dispute Settlement



# Compliance and Remedies Against Non-Compliance Under the WTO System



Towards A More Balanced Regime for All Members

By **Virachai Plasai**

Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand



International Centre for Trade  
and Sustainable Development



Issue Paper No. 3

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## ABBREVIATIONS AND ACRONYMS

ASEAN	Association of South East Asian Nations
CDSOA	Continued Dumping and Subsidies Offset Act
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
LDC	Least Developed Countries
MFN	Multilateral Trade Negotiations
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TRIMs	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on Law of the Sea
WTO	World Trade Organization



## FOREWORD

The creation of the WTO dispute settlement system has been called a major achievement by observers and its importance has been echoed from all sides of the multilateral trading system. The Dispute Settlement Understanding (DSU), the agreement that governs the WTO dispute settlement mechanism, seeks to ensure an improved prospect of compliance, given its provisions on compensation and retaliation, and thus constitutes a central element in providing security and predictability to the multilateral trade system.

With more constraining procedures, and a fast-growing jurisprudence, the dispute settlement system has, however, become significantly more legalised and consequently more complex. This, in turn, has raised the demands on the capacity of Member countries interested in engaging the system to protect or advance their trade rights and objectives. While developing countries' participation in trade disputes has increased tremendously since the time of the GATT, most disputes are still confined to a small number of 'usual suspects' - the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina. So far, 76% of all WTO disputes have been launched among this group of Members. This begs the question of engagement of other Members, and in particular of developing countries which may be facing undue trade restrictions.

Various reasons have been propounded for this lack of active engagement by the majority of the Membership. These include: a lack of awareness of WTO rights and obligations; inadequate coordination between government and private sector; capacity constraints in monitoring export trends; identifying existence of undue trade barriers and feasibility of legal challenge; financial and human resources constraints in lodging disputes; and often a lack of political will - the 'fear factor' - i.e., that trade preferences or other forms of assistance will be withdrawn, or some form of retaliatory action will be taken, if developing countries pursue cases against certain major trading partners. While many of these constraints need to be addressed at the national level, the current review process of the DSU also offers a potential avenue to improve the functioning of the DSU. A major area of controversy in this process has been the issue of compliance and remedies.

With the establishment of the WTO, enforcement of dispute settlement rulings has indeed been strengthened. In fact, the overall compliance rate rises above 80%. Even so, available options for retaliation arguably seem to be geared more towards re-balancing the level of concessions rather than inducing compliance with Member obligations. Moreover, the smaller the economy and the narrower the trade basket, the slimmer the opportunity to find a sector to retaliate against without adversely affecting the domestic market. In this context, the present study argues that as long as retaliation is the only remedy, and that the system does not provide adequate opportunity or incentives for disputing parties to agree on meaningful compensation, only larger economies will be in a position to impose 'effective' retaliation. This creates particular problems and challenges for smaller and poorer economies wanting to impress remedies to force compliance by a stronger trading partner.

Analysing the relationship between compliance and remedies against non-compliance, the study raises the dilemma: should sanctions against non-compliance aim merely at repairing the damage caused or should they go beyond to achieve a punitive effect? Could an alternative solution be found in-between? The study questions the fact that the level of nullification or impairment, as determined by WTO adjudicative bodies, which is a key factor in determining the retaliation amount, in many cases appears to be lower than the damage actually incurred. It argues that this could lead to a situation in which the challenged Member prefers to be retaliated against rather than comply with WTO recommendations and rulings. The study further suggests that rectifying actions do not always



comply with the recommendations and may only be of 'cosmetic' nature, protracted or partial. Arguably, the practice of Members in the WTO's first ten years of operation confirms such trends.

The study explores ways in which to make Panel and Appellate Body reports more conducive to compliance to advance the position of developing countries by enabling them to retaliate efficiently against a stronger trading partner. In doing so, the study offers a series reflections and suggestions on how the DSU could be improved to achieve equilibrium. These include options for ensuring better compliance, i.e. by making WTO rulings binding and not merely recommendatory, as well as a critique of the DSU for not containing provisions on retroactive retaliation which would thus allow for 'compensation' from the time of imposition of the harmful measure. Currently, a Member can implement a measure that may potentially be WTO-incompatible, maintain it until all legal options are exhausted (on average three years), and only discharge it at the end of the 'reasonable period of time' granted to implement rulings without being liable to retaliatory action. Another 'glitch' of particular concern to weaker Members in a system established to ensure equality among Members. The study also reflects on the necessity to clarify the so-called 'sequencing' problem and the relationship between compliance panels and retaliation (Articles 21.5 and 22.2/6). It argues that in spite of Members' attempts to resolve this problem bilaterally it is preferable to amend the DSU to reduce legal uncertainty in the system. Finally, the study suggests that to strengthen remedies under the DSU, the option to provide monetary compensation should be considered - a proposal which has received support from several developing countries.

This paper is produced under ICTSD's research and dialogue programme on Dispute Settlement and Legal Aspects of International Trade which aims to explore realistic strategies to maximise developing countries' capability to engage international dispute settlement systems to defend their trade interest and sustainable development objectives. The author is Virachai Plasai, Director General at the Ministry of Foreign Affairs in Thailand. We hope that you will find this study a useful contribution to the debate on whether adequate options for developing countries to enforce compliance and invoke effective retaliation under the WTO is in fact provided in DSU or whether certain changes should be made to truly balance the legal playing field of the WTO.



Ricardo Meléndez-Ortiz  
Chief Executive, ICTSD

## INTRODUCTION

When the World Trade Organization (WTO) was created in 1995, there was expectation that the enforcement regime under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) would be better than the old one under the 1947 General Agreement on Tariffs and Trade (GATT 1947). The relevant GATT provisions lacked clarity and GATT practice was inconsistent in trade litigation, particularly with regard to compliance and remedy against non-compliance.<sup>1</sup> In addition, no particular attention was given to possible difficulties of developing countries on matters regarding to compliance and remedy. WTO Members therefore expected that the DSU would bring about a more effective regime with adequate special and differential treatment for developing country Members.

This study attempts to evaluate to what extent the DSU enforcement system has been functioning as intended a decade earlier. As we shall see, out of all the disputes brought to the WTO, only sixteen cases are subject to the compliance and remedy regime under Article 22.6 of the DSU.<sup>2</sup> On the one hand, with the majority of cases resolved satisfactorily, the dispute settlement system has been quite effective. On the other, these non-compliance cases seem to remain in the status of non-compliance on a permanent basis; the responding parties in all these cases have yet to bring their WTO-inconsistent measures into full compliance. This could signify a system weakness that might ultimately lead the Members to asking whether the DSU compliance and remedy regime has added anything to the WTO dispute settlement mechanism and whether its underlying concepts need to be re-examined.

Compliance and remedy, under the DSU, are two inter-related components of a whole system of enforcement. In order to successfully encourage compliance, remedies against non-compliance must be adequate. During the course of our analysis, emphasis will be placed, *inter alia*, on a core philosophical dilemma: should sanction against non-compliance aim strictly at repairing

the damage caused or should it go beyond and achieve a punitive effect? Are there any alternative solutions in-between? We believe that this is a key issue, upon which, to a large extent, the much sought after stability and predictability of the multilateral trading system depends.

This study also seeks to assess how well the compliance and remedy system has served developing countries. Large-economy Members are culprits in all the non-compliance cases. Does this suggest that Article 22.6 proceedings have been disproportionately exploited by large-economy Members? What are the conclusions to be drawn when the two largest economies are most often found not to be in compliance and when, so far in practice, only larger economies could have resort to an effective “retaliation”? Are Article 22.6 proceedings a privilege under the DSU that is only available to the economically powerful? What are the implications for developing countries?

We propose that these crucial questions, and related matters thereto, be addressed through an analysis framework that deals with each component in details, with an emphasis on “retaliation” as the last resort remedy under the DSU. In the last section, we will discuss how aspects of compliance and remedies may be improved so as to provide meaningful special and differential treatment to developing countries. As we go along, we will be providing suggestions and recommendations, taking into account WTO jurisprudence and the Members’ views and proposals on these important questions.

It should be noted that this study relates to cases involving “violation” complaints. Discussion focuses only on cases of violation of a covered agreement, where nullification or impairment of rights and obligations is presumed.<sup>3</sup> Cases of non-violation and situation complaints, where there is no violation of a covered agreement but nullification or impairment may be established, are not included in our analysis.

## 1. OVERVIEW OF A WORKABLE SYSTEM

The drafters of the DSU used as basis the relevant GATT provisions, in particular Article XXIII:2 of the GATT 1947, and built on them by adding new steps and procedural details. The result is

a strengthened compliance regime, with remedy options available to WTO Members who suffer nullification or impairment of benefits.

### 1.1 The compliance regime

Under the DSU, once a Member is found to be in violation of its obligations under the WTO Agreement, the DSB normally adopts a recommendation or ruling requiring the Member concerned to “bring its measure at issue into conformity with its obligations”.<sup>4</sup> The principle is that the Member concerned must promptly comply. This is to ensure effective dispute settlement to the benefit of all Members.<sup>5</sup> The DSU, however, provides for a possibility for the Member concerned to have “a reasonable period of time” to comply, if it is impractical for the Member concerned to comply immediately. The *recommended* period of the reasonable period of time under the DSU is *up to 15 months*. The reasonable period of time may be approved by the DSB on the basis of a proposal by the Member concerned, or, in the absence of such approval, mutually agreed by the parties within 45 days after the date of adoption of the recommendations or rulings, or in the absence of such agreement, determined by binding arbitration to be completed within 90 days after the date of adoption of the recommendations or rulings.<sup>6</sup>

Body member. Up to February 2007, twenty-four arbitrations have been established and the longest reasonable period of time so far has been 15 months and one week.<sup>7</sup>

A system of surveillance of the implementation of the DSB recommendations or rulings is also provided for. Six months after the establishment of the reasonable period of time, the issue of implementation of recommendations or rulings is placed on the agenda of the regular DSB meeting, at which, as well as at subsequent regular DSB meetings, the Member concerned must provide the DSB with a written status report of its progress in the implementation.<sup>8</sup>

After the end of the reasonable period of time, if the parties to the dispute cannot agree as to whether the measures taken to comply with the DSB recommendations or rulings exist or are consistent with the covered agreement, the matter is to be decided through “recourse to this dispute settlement procedure, including where possible resort to the original panel.”<sup>9</sup> The panel must complete its work within 90 days after the date of referral.<sup>10</sup>

A well-established practice is now in place to have this arbitration conducted by one Appellate

### 1.2 The remedy options

Two main features of the GATT system have been retained: the prospective nature of compliance and remedies,<sup>11</sup> and the types of remedy available. In case of non-compliance, a remedy is usually authorised by the Dispute Settlement Body (DSB), covering the period *from the expiry of the period of time for compliance*. Compliance and remedies therefore do not cover the period from the adoption of measure at issue to the time at which the offending Member must comply.

As for the types of remedy, compensation and “suspension of concessions or other obligations” are available as under the GATT system. The DSU makes it clear, however, that these remedies are only of temporary nature. The preferred remedy is always full implementation by the Member concerned of a recommendation to bring its measure into conformity with its WTO obligations.<sup>12</sup>

### 1.2.1 Compensation

If the Member concerned fails to comply with the recommendations or rulings within the reasonable period of time, it must, upon request, enter into negotiations with the complaining party with a view to agreeing on a mutually acceptable compensation.<sup>13</sup> Compensation must be on a most-favoured nation basis, if the covered agreement contains an MFN obligation, since Article 22.1 provides that if granted, “compensation shall be consistent with the covered agreements”. Compensation is normally “paid” through further concessions such as reduction of tariffs on designated goods or removal of limitations on market access or national treatment for designated services, but there is no provision in the DSU that would prevent a Member concerned from paying monetary compensation to the complaining Member.

### 1.2.2 Suspension of concessions or other obligations

Article 22.2 establishes a link between both types of remedy by prescribing that if no agreement is reached on compensation after 20 days from the date of expiry of the reasonable period of time, the complaining party may request authorization from the DSB to suspend concessions or other obligations against the Member concerned.

For trade in goods, suspension of concessions or other obligations usually consists of imposing higher tariff than the bound rate or other trade barriers on goods from the Member concerned on a non-MFN basis. It may also take other forms, such as suspending benefits under the GATS or any other covered agreement including the TRIPS.

Suspension across sectors or across agreements is allowed under Article 22.3. As a matter of principle, suspension must take place in the same sector as that in which a violation or other nullification or impairment is found.<sup>14</sup> Only when a complaining party considers that this is not practicable or effective, it may retaliate with respect to another sector under the same agreement.<sup>15</sup> If the complaining party considers

that it is not practical or effective to retaliate with respect to another sector under the same covered agreement and the circumstances are serious enough, it may seek to retaliate under another covered agreement.<sup>16</sup> In applying this principle, the complaining party must take into account the trade in the sector or the agreement under which a violation or other nullification or impairment is found, and the broader economic elements related to the nullification or impairment and the broader economic consequences of the retaliation.<sup>17</sup>

Article 22.4 sets forth the principle of “equivalence” between the level of the nullification or impairment and that of suspension, while Article 22.5 prohibits any retaliation where such retaliation is prohibited under a covered agreement.

In practice, by way of “negative consensus”, a request for suspension of concessions or other obligations is normally always approved by the DSB.<sup>18</sup> Under Article 22.6, such approval must be granted within 30 days of the expiry of the reasonable period of time. However, the Member concerned may object to the level of suspension or claim that Article 22.3 on “cross retaliation” has not been observed.<sup>19</sup> In this case, the matter would be referred to arbitration to be carried out by the original panel if the members are available or by arbitrator to be appointed by the Director-General.<sup>20</sup> This arbitration must be completed within 60 days from the date of expiry of the reasonable period of time.<sup>21</sup>

The “Article 22.6 arbitration” has a precise mandate to determine whether the level of suspension is equivalent to the level of the nullification or impairment.<sup>22</sup> It may also determine if the suspension is allowed under the covered agreement concerned and, where applicable, whether the principles and procedures set forth in Article 22.3 have been followed.<sup>23</sup> The arbitrator’s decision is final and the DSB shall grant authorisation to suspend concessions or other obligations by “negative consensus” where the request is consistent with the decision of the arbitrator.<sup>24</sup>

Article 22.8 provides that suspension of concessions or other obligations must be temporary and the surveillance of the DSB under Article 21.6 would continue to cover those cases where compensation has been provided or retaliation has been authorised until there is compliance.

After ten years, there seems to be a consensus among the WTO Members that the DSU is, from a general point of view, a reliable instrument. Any reference to its ongoing reform tends to underline that Members should aim for an improvement, and not a major overhaul of the system. One area in which Members feel the need for such improvement is indeed the compliance and remedy regime.

The first DSU Review was a built-in mandate. As a result of the Uruguay Round negotiations, WTO Members were invited to complete a full review of the DSU within four years after the entry into force of the Marrakesh Agreement Establishing

the WTO.<sup>25</sup> Such review ended without result, however, and in 2001, the Doha Ministerial Conference decided on a new mandate for the review of the DSU. Here, WTO Members clearly state that they are looking for improvements and clarifications of the DSU.<sup>26</sup> The intention is not to change the rules nor depart from the general principles already contained in the instrument. Proposals subsequently tabled by Members have confirmed this intention. On the question of compliance and remedies, most of the proposals on the table are those that had been submitted prior to the Doha Ministerial Declaration but some of them have been refined and new elements have been added.<sup>27</sup>

In broad terms, we find the Members' approach sensible and realistic. We will indeed take their views and comments into account as we go along examining below how, in our view, the WTO compliance and remedy system may be further improved and strengthened.

## 2. ENSURING BETTER COMPLIANCE

As we have seen under I.A above, the DSU compliance regime contains a number of important improvements from the GATT regime. It is however far from perfect. The regime still operates under systemic shortcomings, several of which are substantive, making complying with the DSB recommendations or rulings problematic in many cases.

In this section, we will be making a number of concrete suggestions for ensuring better compliance under the DSU, addressing in the process the problems, which have emerged over the years as the Members apply the DSU in “live” cases.

### 2.1 Possibility for the panel and the Appellate Body to issue binding implementation orders

#### 2.1.1 The situation

Article 19 of the DSU provides that in case a violation is found, the panel or the Appellate Body “shall *recommend* that the Member concerned brings the measure into conformity with [the covered] agreement”.<sup>28</sup> In addition, they may “*suggest* ways in which the Member concerned could implement the recommendations”.<sup>29</sup>

This results in the panel or Appellate Body being *vague* with regard to action to be taken by the Member concerned to implement their decision. The standard formulation is to recommend that the Member concerned bring the WTO-inconsistent measure “into conformity with its obligations under the covered agreement”, without any precision as to how this may be carried out. This kind of language indeed leaves room for interpretation and Members have more or less considered themselves free to adopt any measure that they deem appropriate within the broad universe of such recommendations. In some cases, the implementing measure only touches upon one or some of the aspects of the measure at issue.<sup>30</sup> In others, implementation may simply be of “cosmetic” nature<sup>31</sup> or is late, protracted and only partial<sup>32</sup>.

#### 2.1.2 Our suggestion

The prime purpose of the DSU is to ensure security and predictability of the multilateral trading system.<sup>33</sup> In this context, it would be desirable to allow the panel and Appellate Body

to order specific implementing measure to be carried out by the Member concerned pursuant to a ruling of violation.

This possibility exists in proceedings of other third-party adjudication. Judgments of the International Court of Justice (ICJ), for instance, have binding force between the parties to the dispute.<sup>34</sup> Under Article 94 of the Charter of the United Nations, each Member State undertakes to comply with the decision of the Court in any case to which it is a party and if this does not occur, the other party may have recourse to the Security Council, which may make recommendations or take binding decisions.<sup>35</sup> Past practice showed that, where there is a need, operative provisions of an ICJ judgment<sup>36</sup> can be a specific measure to be implemented by the party concerned.<sup>37</sup> It should be noted, however, that many of the ICJ decisions have not been complied with.<sup>38</sup> This is mostly due to political dimensions of those cases, which are normally absent in a context of the WTO. However, and perhaps paradoxically, the *political* impact of those ICJ decisions seems to be even more significant than their effect on the legal plane.<sup>39</sup> It is in this sense that their effectiveness is to be appreciated. In trade matters, in any case, we remain convinced that specificity in panel and Appellate Body recommendations or rulings will be conducive to a more effective compliance by the party concerned.

Comparison may also be made to dispute settlement procedures involving a State and a



private party. We are well aware that this type of dispute is of different nature but the fact that they involve a State as a party - and therefore a possible candidate for compliance - should, to a certain extent, render such comparison useful for the purpose of our study. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides that an arbitration award rendered under its rules shall be binding on the parties and that each party shall abide by and comply with the award, subject to its enforcement on the domestic plane.<sup>40</sup> In addition, each Contracting State to the Convention undertakes to recognise an award rendered pursuant to the Convention as binding and enforce the pecuniary obligation imposed by

the award within its territory.<sup>41</sup> The Convention contains no provision forbidding the arbitrators to order specific measure to be implemented, if deemed appropriate, by the responding party. Such measure usually takes the form of a monetary compensation (hence the term “pecuniary obligations”) or restitution of an asset.<sup>42</sup> This indeed has rendered compliance - *by governments* - under the ICSID system quite effective.

Under the WTO system, with a compulsory implementing measure to be ordered by the panel or Appellate Body, full compliance should become more justifiable for the Member concerned vis-à-vis its domestic constituencies. It should thus be easier for the government to comply.

## 2.2 Possibility for a “retroactive” compliance

### 2.2.1 The situation

As we have mentioned in Section I above, one of the features of the GATT system retained in the DSU is the prospective nature of compliance. There is no provision under the DSU that governs compliance and remedies for the period starting from the adoption of a WTO-inconsistent measure by a Member until the moment that compliance is required under Article 21 (usually the expiry of the reasonable of time). This in many cases can seriously affect trade. The WTO litigation usually takes more than a year and during this period, there is no possibility for the affected parties, including the private sectors, to seek compliance or remedies. This is the case even when there is a ruling that the measure adversely affecting trade is a violation of WTO obligations.

A notable exception is Article 4.7 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). When the measure at issue is found to be a prohibited subsidy, the panel must recommend that the subsidizing Member *withdraw* the subsidy without delay. As noted by the Article 21.5 panel

in *Australia - Automotive Leather*, withdrawal of a subsidy implies repayment of the amount of subsidy and is not purely “prospective”. In this case, therefore, compliance can be considered as “retroactive”, since the situation is rectified *as from the date of adoption of the WTO-inconsistent measure*.<sup>43</sup>

### 2.2.2 Our suggestion

It would be desirable to include in the DSU a provision of more general application along the lines of Article 4.7 of the SCM Agreement. “Retroactive compliance” may, for example, be required in cases where the measure at issue is a WTO-inconsistent duty or tax. The Member concerned would, once violation is found, be required to *reimburse* the whole amount of duty or tax collected. In other cases, such as quantitative restrictions, denial of national treatment, or non-tariff barriers, it may not be practical for the Member concerned to comply as from the date of adoption of the measure at issue. For these, a “retroactive remedy” could be a solution. We refer our readers to Section III.D below for details.

## 2.3 Making the reasonable period of time for compliance genuinely “reasonable”

### 2.3.1 The situation

Article 21.3 of the DSU is worded such that the Member concerned can almost always claim that it is “impracticable for it to comply immediately”. It also allows certain flexibility for such Member regarding time frame for implementation, even in case of arbitration under Article 21.3 (c). According to the jurisprudence, it is the prerogative of the implementing party to specify the type of measures required under its domestic law. The arbitrator then determines the length of time required for the enactment of such measures.<sup>44</sup> In many cases, this flexibility in the legal text has resulted in the implementing Member being granted a longer rather than a shorter period of time. This is clearly at variance with the objective of prompt compliance of the DSU.

### 2.3.2 Members’ views

The EC made a proposal to enhance the possibility of mutual agreement of the parties to the dispute by eliminating any deadline for such agreement and by proposing a rule that any recourse to arbitration may be initiated only after 30 days from the date of adoption of the DSB recommendations or rulings. The arbitrators are to be appointed within ten days and must issue an award within 45 days from the date of appointment.<sup>45</sup> This proposal of the EC seems to be in line with the thinking of many Members and other proposals have been made along the same line with some variations regarding the time frame.

Jordan, for example, proposes that a request for arbitration may be made within 60 days from the date of adoption of the recommendations and rulings by the DSB and that the time frame for the completion of arbitration under Article 21.3(c) of the DSU begins on the date of appointment of arbitrators, and not the date of adoption of the DSB recommendations or rulings.<sup>46</sup> Korea also appears to support this idea but stresses that it is the prevailing party that decides, if

it deems that there is no adequate progress in seeking a mutually agreeable solution, to have recourse to arbitration in a DSB meeting to be held within 30 days after the adoption of the DSB recommendations or rulings.<sup>47</sup> Proposals have also been made to ensure that in a dispute concerning subsidies, the reasonable period of time includes the time period specified by a panel for a subsidizing Member to withdraw a prohibited subsidy,<sup>48</sup> and the six-month period during which a party complained against must comply with the DSB recommendations or rulings regarding an actionable subsidy<sup>49</sup>.

Another area of interest regarding the reasonable period of time is how the time should be used by the Member concerned and the prevailing party. Numerous proposals have been made to introduce an obligation for the parties to consult each other with a view to reaching a mutually satisfactory solution regarding implementation of the DSB recommendations or rulings with<sup>50</sup> or without<sup>51</sup> the possibility of third party participation.

Mexico for its part made a proposal that the possibility for a reasonable period of time for implementation be eliminated altogether.<sup>52</sup>

With the exception of Mexico’s, the proposals made by Members clearly indicate that they are not looking for major change in the system of determination of reasonable period of time. Apart from trying to get the timing right and to enhance possibility of mutually satisfactory solution agreed through consultations, another important departure from the present practice is the proposal that the arbitrators be chosen from the name on the indicative list of panellists, not from members of Appellate Body as has been the practice.<sup>53</sup>

### 2.3.3 Our suggestion

We believe that the DSU should strike a balance between two basic necessities. On the one hand, it is generally accepted that States need a period



of time to proceed in accordance with their respective internal procedures in order to amend or withdraw a measure. On the other hand, there is a need to ensure that a measure found to be in violation of WTO obligations is dealt with so as to eliminate any inconsistency as soon as possible. In this context, Article 21.3 (c) as interpreted by WTO jurisprudence is a workable provision that responds well to actual situation.

Proposals by the Members regarding reasonable period of time relate mostly to procedural aspects of referring the matter to arbitration. We are of the view that if adopted, they would clarify the existing system and thus render compliance more effective. We find it difficult, however, for the mechanism to function properly if Members were, as suggested by Mexico, to eliminate altogether the possibility of a reasonable period of time for implementation.<sup>54</sup>

Our suggestion, in the context of our proposal to introduce binding suggestions by the panel

or Appellate Body (see A above), is that the provision on the determination of the reasonable period of time may be fine-tuned to match the new possibility. To ensure effective compliance and a genuinely reasonable period of time for implementation, the DSU should make it mandatory for an Article 21.3 (c) arbitrator to base the reasonable period of time on the type of measures as suggested by the panel or Appellate Body. The reasonable period of time would be the shortest possible length of time as is reasonably possible under the implementing party's domestic legal system in order to enact such suggested measure.

More importantly, we propose that if, in a specific case, it is considered legitimate to allow a certain period of time for the Member concerned to comply, then there should be some kind of *modus vivendi* between the parties to the dispute to allow a certain degree of remedy pending full compliance. This indeed may take the form of an interim measure.<sup>55</sup>

## 2.4 An adequate surveillance of implementation

### 2.4.1 The situation

The DSB has the responsibility to keep under surveillance the implementation of adopted recommendations or rulings. In cases where the Member concerned has a reasonable period of time to comply with the recommendations and rulings, it must provide the DSB with status report in writing of its progress in the implementation after six months following the date of establishment of the reasonable period of time and at each DSB meeting thereafter.<sup>56</sup> Such surveillance continues to be applicable in cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.<sup>57</sup>

On the substantive side, practice has shown that the system of submitting status report under Article 21.6 has become, in many cases, a mere

formality. In fact, this provision contains no requirement concerning the details of such status reports. The Member concerned can submit to the DSB a status report, which simply says that it is in compliance with the recommendations and rulings without any further details. With other Members rarely questioning it, the status report by the concerned Member can be more like a routine submission that is devoid of any meaning.

### 2.4.2 Members' views

The EC and Japan made proposals to strengthen surveillance of implementation by the DSB, linking it to the reasonable period of time. The existing system is maintained with the addition of some new elements. First, the obligation for the Member concerned to report to the DSB begins earlier, i.e. six months after the date of the adoption of the DSB recommendations or rulings, and not from that of the establishment

of the reasonable period of time. An obligation is provided for the Member concerned to notify the DSB upon compliance and, failing that the Member concerned must inform the DSB of steps taken and measures that it expects to have taken. In the latter case, the Member concerned must report status of implementation to the DSB upon the expiry of the reasonable period of time. All of the notifications must include details on the relevant measure of the Member concerned.<sup>58</sup> China tables a proposal along the same line but with less detail.<sup>59</sup>

Proposals have also been made for a specific report in case the Member concerned considers that it has complied with the recommendations or rulings of the DSB.<sup>60</sup> Under these proposals, upon compliance with the recommendations and rulings of the DSB, the Member concerned has to submit to the DSB a written notification on compliance, which would include a detailed description as well as the text of the relevant measures the Member concerned has taken.<sup>61</sup> It has also been proposed that if the Member concerned expects that it cannot comply at the expiry of the reasonable period of time, it has to submit a written notification on compliance including the measures it has taken, or the measures that it expects to have taken by the expiry of the reasonable period of time.<sup>62</sup> Such requirements would allow the Member concerned to provide detailed reason why it cannot comply with the DSB recommendations or rulings at the expiry of the reasonable period of time.

## 2.5 A quick and effective multilateral determination of compliance

### 2.5.1 The situation

The DSU provision on the determination of compliance, Article 21.5, is silent about any possibility for consultation prior to requesting a panel. This is important since practice in the first decade of the WTO has shown that consultation can lead to a mutually acceptable solution. Another issue is the time frame for determining compliance in case of appeal. Article 21.5 aims to resolve the "disagreement between the complaining party and the Member

### 2.4.3 Our suggestion

We are of the view that the current DSU surveillance mechanism based on status report is useful, but improvement is possible to make it stronger and more meaningful. We therefore believe that adopting the above proposals by the Members should bring about more effectiveness to the surveillance process since early monitoring will help encourage compliance. Furthermore, to make the status reports more informative and the mechanism more effective, there should be a requirement in the DSU for a detailed status report on the implementation progress. Mandatory information should include details such as the steps taken under domestic law, the progress in comparison to the last status report (where applicable) and the expected date of completing the implementation.

Where there is no compliance and compensation has been provided or concessions or other obligations have been suspended, a detailed status report would be even more necessary for effective surveillance. Pursuant to Article 22.8, the Member concerned should also give detailed explanation in its status report as to why it has not complied. Since compensation and suspension of concessions are only temporary measures, the Member concerned should be required to regularly provide reasons for their continued existence.

concerned as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB". The panel established under this article has up to 90 days after the date of referral of the matter to it to decide the matter and have its report circulated.<sup>63</sup> Although appeal is not specifically provided for under Article 21.5, it is allowed in practice and the normal appeal proceedings under Article 17 are applicable.<sup>64</sup>

While the time frame of the panel under Article 21.5 is shorter than the normal panel procedure under Article 7, the Appellate Body maintains the same time frame as provided for in the normal appeal procedure under Article 17, which provides up to 60 days from the date a party to the dispute notifies its decision to appeal with a possibility of 30 days extension. Therefore, the determination of compliance under Article 21.5 could last up to 180 days, which is quite lengthy. This might lead WTO Member that does not intend to implement the DSB recommendations or rulings to use the determination of compliance as an opportunity to simply drag out a case.

### 2.5.2 Members' views

It is therefore not surprising that proposals by WTO Members focus on clarifying these issues. For example, the EC has proposed that consultations take place before a request for the compliance panel can be made.<sup>65</sup> Under this proposal, consultation is to be held within 20 days from the date of request and the panel may be established only after the end of such consultation. The EC

and Japan have also proposed that no further time for implementation shall be allowed after the DSB adopts the report of the compliance panel or the Appellate Body in case of appeal.<sup>66</sup>

### 2.5.3 Our suggestion

The Members should avoid situation in which compliance proceeding is used simply as a tactical move to “buy time”. One possible improvement relates to the time frame. The compliance determination process could be further shortened if the appeal proceedings could be expedited in the same spirit as the time frame for compliance panel. In concrete terms, the time frame for appellate proceedings in this case may be limited to 30 days, with a possibility of 30 days extension.

Also, the Members should be encouraged to seek a mutually acceptable solution on compliance. Consultations should therefore be made compulsory before any referral of a matter to a compliance panel.

## 2.6 Getting the issue of “sequencing” right

### 2.6.1 The situation

Article 22.2 allows for a possibility for a complaining party to suspend concessions or other obligations “if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time”. It does not specify when, how and by whom the failure of the Member concerned is to be determined. If the parties to the dispute cannot agree on whether there is such failure, Article 21.5 provides that this disagreement is to be “decided through recourse to this dispute settlement procedure including, wherever possible, resort to the original panel”.

The two provisions, read together, seem to suggest some kind of sequence between a prior determination of compliance under Article 21.5,

and an authorisation to suspend concessions or other obligations under Article 22 (in case of non-compliance). To construe them otherwise would amount to accepting a possibility for a unilateral determination of non-compliance and would be at variance with the object and purpose of the DSU. In addition, Article 23, which provides context for the interpretation of these two provisions, is entitled “strengthening the multilateral system” and thus would lend weight to the view that any retaliation must be preceded by a multilateral determination of non-compliance.

However, there seems to be a possibility of reading the current text of the DSU otherwise. Article 22.2 does not require specifically that failure to comply is to be determined under Article 21.5 prior to a request for suspension. In fact, on its face the time frames provided under Article 22.2 and 22.6 are not even reconcilable

with that provided under Article 21.5: request for suspension can be made after 20 days and authorisation must be granted within 30 days of the date of expiry of the reasonable period of time; while Article 21.5 mandates that work must be completed within 90 days after the date of referral of the matter. Normal practice of the Members is to wait until after expiry of the reasonable period of time before having recourse to Article 21.5. This means that a typical Article 21.5 panel would be completed at the earliest 90 days after the expiry of the reasonable period of time, i.e. 60 days after the deadline for the DSB to grant suspension authorisation has elapsed. In addition, Members with possibility to retaliate would tend to read Article 22 as independent from Article 21.5. It would therefore request retaliation as and when it considers that the other side has failed to comply (indeed after 20 days have passed after expiry of the reasonable period of time). This “unilateral” determination of compliance would not be inconsistent with Article 23 since this Article allows determination to the effect that a violation has occurred to be made in accordance with “the rules and procedures of this Understanding”. Such rules and procedures would indeed include paragraph 6 of Article 22.

The famous issue of “sequencing” came into light for the first time during the *EC - Bananas III* dispute. In that case, after the date of expiry of the reasonable period of time, the EC requested an Article 21.5 panel to examine its own implementing measure.<sup>67</sup> Ecuador requested another Article 21.5 panel on the EC measure.<sup>68</sup> The US, on the other hand, requested an authorisation under Article 22.2 to suspend concessions or other obligations. The crisis could be resolved due to the fact that the Article 21.5 panellists and the Article 22.6 arbitrators are the same individuals. In an effort to “find a logical way forward” that ensures a multilateral decision, in the absence of agreement of WTO Members over the proper interpretation of Articles 21 and 22, the panellists/arbitrators concluded that they first had to reach a view on whether the EC implementing measure is WTO consistent. They examined the revised

EC regime and found it inconsistent with WTO obligations.<sup>69</sup> Only then did they proceed with assessing the equivalence between the level of the nullification or impairment of the US and that of the suspension of concessions or other obligations to be authorised.<sup>72</sup>

Following the *EC - Bananas III* experience, Members have chosen to address this inadequacy of the DSU text by concluding bilateral agreements on the sequencing of Article 21.5 compliance panels and Article 22.6 arbitrations.<sup>73</sup> The first such agreement was concluded between Australia and Canada in *Australia - Salmon*.<sup>74</sup> Since then, the practice has become quite common. In some cases, the agreement provides for possibility of an appeal against the decision of the 21.5 panel.<sup>75</sup> Past arbitration under Article 22.6 has recognised the status of such bilateral agreement and applied its term to the case at hand.<sup>76</sup>

### 2.6.2 Members’ views

With regard to the sequencing issue within the context of DSU Review, the main proposals come from the EC and Japan. They reflect mostly the work of the pre-Doha period but contain differences on some detailed procedures, in particular with regard to suspension of concessions or other obligations. Both proposals advocate a compulsory “compliance panel” as a prerequisite to any suspension of concessions or other obligations.<sup>77</sup>

An Article 21 *bis* is proposed to replace, in substance, the current Article 21.5. The principle now is that compliance determination is to be made solely in accordance with the provision of this new Article, instead of in accordance with the existing procedure of the DSU. Article 21 *bis* is designed to stipulate clear rules with precise time frame that prevents any “loop” in the litigation. Under this new provision, a compliance panel may be established at the request of the complaining party under one of the following scenarios: the Member concerned states that it does not need a reasonable period of time; the Member concerned notifies a compliance to the

DSB; or in any case at the end of the reasonable period of time (30 days under the EC proposal, and 10 days under the Japanese proposal, before the expiry of the reasonable period of time).<sup>78</sup>

The EC proposal also allows for a possibility to have recourse to the new Article 21 bis in case of a dispute concerning compliance with the terms and conditions of the mutually agreed solution notified under Article 3.6.<sup>79</sup>

Under both proposals, the compliance panel must circulate its report within 90 days after the date of establishment and the report is to be adopted by “negative consensus” unless it is appealed. In case of appeal, the Appellate Body proceedings would follow the normal rule under Article 17. In case the panel or the Appellate Body finds that the Member concerned has not complied with the recommendations or rulings, the Member concerned would not be entitled to further

time for implementation.<sup>80</sup> The EC proposal also specifies that the DSB may grant authorization for a suspension of concessions or other obligations only after the adoption of the compliance panel or the Appellate Body’s report.<sup>81</sup>

### 2.6.3 Our suggestion

We are of the view that despite the possibility in practice for the Members to conclude bilateral agreement with regard to the sequencing issue, it is still desirable to amend the DSU to reflect such practice as it could help reduce legal uncertainty in the system. It should be made clear in the DSU, as a matter of principle, that multilateral determination of non-compliance is a prerequisite to any suspension of concessions or other obligations. The proposals of the EC and Japan are certainly a good basis for discussion and should be seriously considered by the Members.

### 3. MAKING REMEDIES “JUST” AND EFFECTIVE

The compliance and remedy aspects are related. In order to successfully encourage compliance, remedies against non-compliance under the DSU must be adequate.

As noted earlier, the types of remedy under the DSU are similar to those under the GATT system.<sup>82</sup> Yet, the relevant GATT provisions contain no specific procedure for remedy authorization.<sup>83</sup> Article 22 of the DSU, on the other hand, specifies steps and procedural details for such authorization and, in this sense, constitutes a

new and significant development from the GATT system. It should also be noted that only once in GATT history was a contracting party authorised by the CONTRACTING PARTIES to suspend GATT obligations vis-à-vis another contracting party.<sup>84</sup> Under the DSU, the number of authorisations of suspension has already been much more significant.<sup>85</sup> This is certainly a sign that the mechanism is usable. We believe, however, that its effectiveness may be enhanced along the following lines.

#### 3.1 Compensation as a meaningful alternative to “revelation”

##### 3.1.1 The situation

The current text of the DSU does not provide for a real possibility for the parties to the dispute to meaningfully engage in the negotiations in view of any compensation. Article 22.2 allows only 20 days from the date of expiry of the reasonable period of time for the parties to do so before the complaining party can request authorisation to suspend concessions or other obligations. This, together with Article 22.6 which provides that the DSB shall grant authorisation for a suspension within 30 days after the expiry of the reasonable period of time, means that any complaining party with material possibility to retaliate would normally request a suspension without trying to reach agreement with the Member concerned on compensation. In addition, if the relevant covered agreement provided for an MFN obligation, compensation would be even less attractive as an option since it would have to benefit all other Members in accordance with Article 22.1 of the DSU. The current text of the DSU therefore results in denying this possibility to the Members in practice.

A Member might find it more acceptable, as a pragmatic solution, particularly from the viewpoint of its domestic constituencies, to offer compensation as a temporary solution pending compliance. This could be the case in particular where compliance involves long internal process

of amending legislation of domestically sensitive nature. In other cases, the Member might find comfort in the fact that they can engage in negotiations to determine the level of the sanction against it, rather than having a sanction imposed by a third-party adjudication. From a systemic point of view, allowing meaningful negotiations on compensation should be more in keeping with the object and purpose of the DSU, which attaches importance, *inter alia*, to consultations in view of mutually acceptable solutions.

##### 3.1.2 Members’ view

In the process of DSU reform, the EC and Ecuador have introduced a compulsory step of negotiated compensation. Under their proposals, if the complaining party so requests, the Member concerned must submit a proposal for trade compensation in accordance with the award, if any, of the arbitrator to determine the level of nullification or impairment (under Article 22.1 as proposed by the EC, and under Article 21.3 *bis* as proposed by Ecuador).<sup>86</sup> If there is no proposal for compensation or no agreement, the complaining party may request authorisation to suspend concessions or other obligations. The total time frame for negotiated compensation is 60 days after the request, but the proposal does not specify any time limit for the complaining party to make such request.



Ecuador also proposes that if a Member concerned is a developing country and the complaining party is a developed country, any compensation agreement shall take into account the special and differential treatment provision of Article 21.8.<sup>87</sup> If no agreement on compensation is reached, any authorisation to suspend concessions or other obligations would take into account the level of nullification and impairment indicated by the complaining party or established by arbitration under Article 21.3 bis proposed by Ecuador.

Other proposals have been made on compensation. Australia proposes that negotiations on compensation begin within 10 days after request, which can be made any time including before the expiry of the reasonable period of time.<sup>88</sup> In case of a compensation agreement, the right of a third party to compensation may be determined through an expedited arbitration under Article 25.

Mexico proposes that compensation negotiations be possible if the Member concerned fails to comply immediately, i.e. the Member concerned would not be entitled to any reasonable period of time.<sup>89</sup>

### 3.1.3 Our suggestion

To enhance the remedy aspect of the DSU, we believe that trade compensation must be made a viable option, in particular where the responding party finds it impracticable to comply immediately or within a reasonable period of time with the DSB recommendations or rulings. The general approach should be that compensation is a voluntary measure to re-balance the level of benefits between the parties, as opposed to suspension of concessions or other obligations which is a sanction imposed by multilateral decision.

### 3.1.4 Meaningful compensation negotiations

First and foremost, the parties to the dispute, should they desire so, must be provided

with sufficient time to conduct meaningful negotiations with a view to compensation. Such negotiations should begin after the responding party either has failed to inform the DSB pursuant to Article 21.3 that it intends to implement the recommendations or rulings of the DSB, or has been found by a compliance panel<sup>90</sup> to have failed to bring the WTO-inconsistent measure into conformity with its obligations. In such situation, either party should be permitted to request consultations with a view to reaching agreement on compensation. In our view, the party should be allowed at least 60 days to reach a mutually satisfactory solution. It is therefore necessary to ensure that during negotiations for compensation, the complaining party may not submit a request to the DSB for a suspension of concessions or other obligations. Only when such negotiations fail, or at the date of expiry of the period of time allocated for negotiations, may the complaining party request authorisation to suspend concessions or other obligations. Once a request is made, the DSB may be convened<sup>91</sup> to decide on such request by “negative consensus”. This indeed supposes amendments to the “20 days” rule in Article 22.2 and the “30 days” rule<sup>92</sup> in Article 22.6 of the DSU to allow more time for compensation negotiations.

A new regime of compensation along the above lines should encourage Members to consider this option in a more serious manner. It should allow a non-complying party to find itself, vis-à-vis its domestic constituencies, in a position to accept compromise by offering compensation after an adverse substantive ruling by the panel or Appellate Body, or a ruling of non-compliance by a compliance panel. Under certain circumstances, compensation might present itself as the most sensible temporary solution for the responding party. This idea also finds support in the EC proposal to amend Article 22.2 and 22.6.<sup>93</sup>

### 3.1.5 Possible monetary compensation

Compensation in the context of the WTO is generally understood as further trade concessions accorded by the responding party

in addition to its WTO bound concessions. To allow flexibility, however, the DSU should make it clear that monetary compensation is also possible. WTO disputes relate to trade benefits. According to normal practice and relevant WTO jurisprudence, these benefits are of quantifiable nature.<sup>94</sup> At least from the technical point of view, it is thus feasible that nullified or impaired benefits be compensated in monetary terms. In this context, we do not see any justification in preventing a responding party to pay monetary compensation to the complaining party, if both sides so agree. Proposals have been tabled to amend the DSU in this sense in cases brought by a least developed country,<sup>95</sup> or a developing country, against a developed country.<sup>96</sup>

### 3.1.6 Compensation based on a multilateral determination of the level of nullification or impairment

As a remedy option, compensation may be combined with the procedure for determining the level of the nullification or impairment, which under the current DSU is available only for suspension of concessions or other obligations. The idea is to allow the level of nullification or impairment to be determined prior to or during the period of compensation negotiations between the parties. This would obviously facilitate the parties in their consultations since the *amount* of monetary compensation can be based on third-party determination. Proposals have been made for a separate determination of the level of the nullification or impairment.<sup>97</sup> Such determination may come in handy as a basis for negotiating the level or amount of compensation between the parties. The EC, it should be noted, seems to see the merit of using third-party determination as reference. Under the EC proposal, the parties to the dispute may agree at any time before the submission of a request for suspension, to request an arbitration to determine the level of the nullification or impairment caused by the WTO-inconsistent measure. The arbitration must complete its work within 45 days of the request. Subsequent negotiations on compensation, if requested, must be conducted on the basis of a proposal made consistent with the level of the

nullification or impairment determined by the arbitrator.<sup>98</sup> A separate determination of the level of the nullification or impairment along this line is also useful in streamlining the compliance and remedy procedures, as the level of the nullification or impairment determined can also be used as basis for a subsequent determination of the level of suspension of concessions or other obligations.

### 3.1.7 The MFN issue

To render compensation more meaningful as an option, Members may need to re-think the MFN requirement under Article 22.1. In the absence of such MFN requirement, any Member that suffers nullification or impairment of benefits as a result of a measure by another Member can bring a case against the latter and, if successful, can request compensation on its own right. This should render compensation a more attractive remedy both for the responding party - for whom the "price" of compensation is lower - and the complaining party - who does not have to share the benefits with non-disputing party. This would also eliminate potential problem of giving the same amount of compensation to the complaining party and other Members not suffering from nullification or impairment of benefits, or having suffered nullification or impairment of benefits to a lesser extent than the complaining party.

Even if the MFN requirement is retained, compensation may still be useful if the parties can agree to select - for compensation - a benefit in a sector of particular export interest to the complaining party and in which other Members have little export interest. Another solution for preventing "free riders" would be to incorporate into the DSU the existing jurisprudence in case of multiple complainants.<sup>99</sup> In the context of compensation, any claimant must therefore have suffered nullification or impairment and may only request compensation with respect to the trade effect caused by the WTO-inconsistent measure relating to its export. This supposes indeed that it must have been party to the original dispute, and therefore amendment to Article 22.1 is required.



Monetary compensation is arguably not subject to MFN requirement as MFN obligations under WTO covered agreements relate only to treatment of products or services of other Members and not to monetary reparation between Members. Australia seems to be of this view. It has proposed an amendment to Article 22.2 so that in case where mutually acceptable compensation is not available to third parties to the dispute, the responding party agrees to an expedited arbitration under Article 25 to determine the right of a third party to compensation. This suggests that not all WTO Members would necessarily receive compensation or receive the same level of compensation as the parties in the dispute.<sup>100</sup> Under this thinking, monetary

## 3.2 Possibility for interim relief

### 3.2.1 The situation

Under the current DSU, there is no possibility for a complaining party to request that interim measure be ordered by the panel to, inter alia, suspend the measure at issue during the proceedings.

The concept of interim relief is well established in the major legal cultures and, under domestic court proceedings, is perceived as a common temporary relief pending a final ruling on the merits of the case. In international trade, where a government measure is alleged to be inconsistent with international law, it would be desirable to provide for a mechanism to alleviate the impact of such measure on private parties during dispute settlement proceedings.

Among the arguments put forward to counter this view figure prominently the questions of possible abuse and State sovereignty. In fact, it has been argued that if States were to be provided with the possibility of obtaining interim relief for trade measures they would be encouraged to bring frivolous cases and hope for a possible window during which their private operators can evade a legitimate trade measure by another State regardless of whether such measure is consistent with international law. Also, any interim measure will have to be enforced by the State concerned

compensation would become more attractive as an option.

### 3.1.8 Termination of compensation

Lastly, in order to ensure that compensation is genuinely temporary, the DSU should contain provisions that allow speedy multilateral decision to terminate any compensation agreement once the responding party has complied with the original DSB recommendations or rulings. We believe that such a common provision for compensation and suspension of concessions or other obligations should be possible and refer our readers to Sub-section C below.

and it might be difficult for the State and its stakeholder to accept such enforcement without having been found to be in violation of international law or, in the WTO context, to be nullifying or impairing benefits of other Members.

On the other hand, the opposite is also true. In absence of the rule allowing interim relief, States would be more inclined to take measure that is or can be inconsistent with its international obligation, knowing that it will be able to apply such measure with impunity until it is found by a third-party adjudication to be in violation of its international obligations. In addition, where available remedy is only of prospective nature such as under the DSU, the State is even more encouraged to do so because there is no possibility of sanction for the period starting from the adoption of the measure to the moment when implementation of an inconsistency ruling is due. During that period, the measure may have caused injury to private parties. In international trade context, this could possibly result in commercial loss as well as worker lay-off.

### 3.2.2 Members' views

Mexico makes a proposal that places the burden of proof on the complaining party regarding any damage or threat thereof that might result from

the measure at issue and introduce a possibility of interim relief measure to be authorised by the original panel through new Article 12.6 bis and therefore suggests that these interim measures may continue during the course of an Article 22.6 arbitration.<sup>101</sup> Mexico's proposal is also interesting in that it suggests actions to be taken either by the responding party or the complaining party "to stop or counteract the damage or threat thereof".<sup>102</sup>

### 3.2.3 Our suggestion

We believe that in the context of the WTO, the lack of interim relief during panel and Appellate Body proceedings, to a large extent, renders the WTO dispute settlement system less secure and predictable than it should have been.<sup>103</sup> Once a case is brought to the DSB, there should be a possibility for the panel, pending decision on the merits of the case, to issue a decision of preliminary nature to prevent the Member concerned from taking steps or doing something which would change factual situations and thus affect future decision of the panel on the merits of the case. The purpose would be to protect the rights of the parties as of the time of commencement of proceedings, without allowing the panel to pass an interim judgment on the substance.

### 3.2.4 The ICJ model

The Statute of the International Court of Justice (ICJ), for instance, allows such possibility, which is often referred to as "interim measures of protection".<sup>104</sup> Article 41 of the Statute of the ICJ provides that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". In past cases, the Court when considering a request for provisional measures usually exercised discretion by examining whether the requested measures are necessary to preserve the rights of the parties.<sup>105</sup> In many cases, the Court was satisfied that it should order interim measures.<sup>106</sup> The rights sought to be protected by interim measures must be those

that are the subject matter of the proceedings before the Court and not merely those which would be affected by the possible outcome of those proceedings.<sup>107</sup> For the Court, interim measures are ordered in particular to preserve the rights that may subsequently be adjudged by it to belong to a party, without ruling on those rights.<sup>108</sup> This is justified if there is urgency and if irreparable prejudice would be caused without the interim measures.<sup>109</sup>

The terms of Article 41 leave room for interpretation as regard the nature of the Court's decision to grant interim measures. On the one hand, since Article 41 contains words such as "indicate", "ought to" and "suggested", it has been understood that the parties are not bound by the measures indicated. On the other hand, Articles 73-78 of the Rules of the Court use the term "decision" in the context of interim measures. This has led some doctrinal writings to argue that ICJ interim measures are binding on the parties.<sup>110</sup> In 2001, the Court finally ruled that provisional measures under Article 41 are binding on the parties, for to believe otherwise would be contrary to the object and purpose of this Article.<sup>111</sup> To justify the ruling, the Court also refers to "the principle universally accepted by international tribunal and likewise laid down in many conventions [...] to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".<sup>112</sup>

### 3.2.5 Other possible models

Another example is provided by the dispute settlement procedures under the 1982 United Nations Convention on Law of the Sea (UNCLOS). For disputes brought under its Part XI (5) or XV, interim (provisional) measures may be prescribed by the adjudicating Court or Tribunal. The purpose of such measures is to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision".<sup>113</sup>

The Convention makes it clear that in case the dispute is brought to the Tribunal for the Law of the Sea, the Tribunal has the “power” to prescribe provisional measures. In all cases, the provisional measures are binding on the parties, which must comply promptly with such measures.<sup>114</sup>

Similar to the above discussion on possibility for the panel and the Appellate Body to issue binding implementation order, reference to the ICSID Convention<sup>115</sup> can, to a certain extent, be useful in the context of WTO. On this particular aspect of the proceedings, the Convention allows, unless the parties otherwise agree, an arbitral tribunal to “recommend” any provisional measure to preserve the respective rights of either party.<sup>116</sup> It should be noted here that interim measures in a State-investor dispute would primarily concern the State party to the dispute. In most cases, an order by a municipal court or other judicial authority would be required. A stronger language, providing for a power to issue orders, would be less acceptable for States that might consider it as an infringement upon their judicial sovereignty regarding enforcement of international arbitration decisions.

The above models should prove to be useful as reference should the Members decide to incorporate interim relief into the DSU. The UNCLOS model is perhaps the most desirable, since it is undeniable that in trade matters, there are rights of the party that may be affected by

the panel or Appellate Body decision on the merits and thus should be preserved during the panel or Appellate Body proceedings. The ICJ model is also worth considering for possible adaptation.<sup>117</sup> As the current DSU does not even mention a possibility of interim relief, a provision based on Article 41 of the ICJ Statute would already constitute an important step in the direction of ensuring certainty and predictability of the WTO system in a more effective manner. Despite its term, this Article as interpreted by the ICJ has more than a simple recommendation value. In any case, the language of Article 41 of the ICJ Statute constitutes, in our view, a minimum on interim relief possibility that is missing in the DSU. After all, what we are suggesting here is for the DSU to incorporate a long-established general principle of law that the parties to dispute which is *sub judice* are obliged to abstain from an act which would nullify a subsequent judgment.

A DSU provision on interim relief should also state clearly that the issue is separate from any rulings to be made on the merits of the case. It should also confine interim relief to cases where there is urgency, and where absence of an interim measure would cause irreparable damage to the rights concerned.<sup>118</sup> It should accord discretion to the panel or Appellate Body in considering whether there should be an interim measure so as not to jeopardise the presumption that Member States implement their WTO obligations in good faith.

### 3.3 Ensuring that compensation and “retaliation” are “temporary”

#### 3.3.1 The situation

Even though Article 22.1 states clearly that neither compensation nor suspension of concessions or other obligations is preferred to full compliance, the DSU currently provides no clear procedure that would allow for an action to terminate remedy measure once the Member concerned has complied. With regard to compensation, the DSU is completely silent and seems to be leaving the issue to negotiations between the parties concerned. With regard to

suspension of concessions or other obligations, Article 22.8 simply states the principle that it must be temporary and can be applied only until the removal of the violation, or such time when the Member concerned provides a solution for the nullification or impairment, or a mutually satisfactory solution is reached.

The second possibility mentioned under Article 22.8 seems to suggest that retaliation can be replaced by some other solution but the text remains vague and does not provide for any

recourse in case of disagreement as to whether retaliation should be terminated in a given situation. In the real world, one can expect circumstances in which a Member concerned considers itself in full compliance and therefore believes that any retaliation against it should be terminated. In such circumstances, if the retaliating Member does not agree, there is no possibility for a quick resolution of the difference and, in this case, retaliation - which is an exception to the rule - will continue. Such a situation would be at variance with the principle set forth under Article 22.1 and 22.8 and also with the object and purpose of the DSU.

### 3.3.2 Members' views

In the context of DSU Review, the EC and Japan address the issue of termination of suspension by proposing a possibility for the DSB to withdraw the authorisation to suspend concessions or other obligations, upon request by the Member concerned, on the ground that it has eliminated the inconsistencies or the nullification or impairment. If the complaining party does not agree that the Member concerned has complied with the recommendations or rulings of the DSB in the dispute, an expedited panel procedure is available under the new Article 21 *bis*, as proposed by the EC and Japan, to decide on compliance and, if necessary, to re-compute the level of nullification and impairment.<sup>119</sup> If the Article 21 *bis* panel finds that the Member concerned has complied with the DSB recommendations or rulings, the DSB would, upon request, withdraw the authorisation by "negative consensus". If the Article 21 *bis* panel finds that the Member concerned has not complied, a party to the dispute can request an arbitration to determine

the level of the nullification or impairment. The arbitration must be completed within 45 days after the date of the request. If the arbitrator decides on a different level of the nullification or impairment, the DSB would, upon request by the Member concerned, modify the authorization accordingly by "negative consensus".<sup>120</sup>

### 3.3.3 Our suggestion

We believe that Article 22.8 of the DSU provides a good basis for addressing this inadequacy. It entrusts the DSB with the task of keeping under surveillance those cases where concessions or other obligations have been suspended but there has been no compliance. The objective of this provision is arguably to ensure, *inter alia*, that retaliation is genuinely a temporary measure applicable until such time as the WTO-inconsistent measure has been removed: retaliation must end as soon as there is compliance. To enhance this aspect of the DSB surveillance, a specific termination procedure must be provided for in case the responding party implements the recommendations and rulings of the DSB after a suspension of concessions or other obligations has been authorised against it. The procedure must allow a Member that has complied to seek a formal termination of the suspension. Any disagreement between the parties should be referred to a compliance panel, the decision of which should be final. In case the panel finds that there is compliance, the suspension should be withdrawn. In this context, the ideas contained in the EC and Japan's proposals above are, in our view, constructive and constitute an excellent basis for the Members to discuss this important issue.

## 3.4 Possibility for "retroactive" remedies

### 3.4.1 The situation

The DSU does not expressly address the issue of possible "retroactive remedies". Under the DSU, the earliest moment a complaining party may expect compliance is upon the adoption of recommendations or rulings of the DSB. Article

21.1 sets the principle that "prompt compliance" of such recommendations or rulings is "essential to ensure effective resolution of dispute to the benefit of all Members". This provision in itself, it may be argued, does not preclude possible recommendations or rulings that provide for a retroactive remedy that could help address

the nullification or impairment possibly caused during the reasonable period of time and before. In fact, pursuant to Article 19.1, the panel and Appellate Body may even “suggest” a “retroactive” ways in which the Member concerned could implement recommendations or rulings. So far in practice, they have indeed abstained from doing so. In any case, it is clear that under Article 19.1, a panel or Appellate Body has no authority to order measures to be taken to implement its recommendations. Even if the panel or Appellate Body in a case decides to “suggest” a remedy that has a retroactive effect, the Member concerned would not be bound to follow such suggestion.

### 3.4.2 Members’ views

The idea of “retroactive” remedies seems to find support among the Least-Developed Countries (LDCs) and African Group for cases in which the responding party is a developing country. These Members propose that Article 21.8 be amended so that “the quantification of injury and compensation [...] be computed as from the date of adoption of the measure found to be inconsistent with a covered agreement to the date of the withdrawal of the measure”.<sup>121</sup> Also, Mexico proposes that the level of the nullification or impairment be calculated, not from the date of expiry of the reasonable period of time but from the date of *imposition* of the measure, or request for consultation, or establishment of the panel.<sup>122</sup>

### 3.4.3 Our suggestion

We believe that the issue of retroactivity is closely linked to that of interim relief. To a certain extent, an interim measure, if confirmed by a decision on the merits of the case, would provide a de facto retroactive remedy as from the date of the interim measure. Questions still remain, however, in cases where the final decision on the merits does not confirm the interim measure or in cases where a just remedy would require retroactive effect from the date of imposition of the measure at issue subsequently found to be WTO-inconsistent.

In case of an interim measure prescribing that the responding party suspends the application of the measure at issue during the DSU proceedings, if the panel or Appellate Body subsequently finds that the measure is WTO-consistent, questions may arise as to the rights of the responding party. The panel or Appellate Body should therefore be empowered to decide on a possibility for its recommendations or rulings to be implemented in a “retroactive” way. For example, if the interim measure is for the responding party to suspend imposition of a duty that is subsequently found to be WTO-consistent, a retroactive remedy - in favour of the responding party - would be to allow retroactive collection of the duty during the time of the DSU proceedings as from the date of the interim measure. This may only be feasible in cases where domestic laws and regulations of the responding party do not prevent it from doing so.<sup>123</sup> Another solution would be, in such cases, for the panel or Appellate Body to “order” a reimbursement of duty collected pursuant to a WTO-inconsistent measure once a ruling of inconsistency on the merits has been made, instead of ordering suspension of the measure at issue.

With or without possibility of an interim relief, the issue of retroactivity is of relevance in the context of preserving the rights of a complaining party *as from the date of imposition* of the measure at issue that is subsequently found to be WTO-inconsistent. We believe that panel and Appellate Body should be empowered to use discretion so as to restore the level of mutual benefits between the parties that exists before the violation by the responding party. This can be achieved either through a measure to be taken by the responding party or through an action to be taken by the complaining party in case of non-compliance.

In many cases, it is true, remedy with retroactive effect is materially not practicable. For example, where the WTO-inconsistent measure is a violation of market access or national treatment under the GATS, or of an obligation under the TRIPs or the Agreement on Trade-Related Investment Measures (TRIMs), it would be unrealistic to attempt to “go back in

time” and restore the benefits of the parties as existed prior to the measure. A practical solution should be to re-balance the benefits under the covered agreement between the parties through compensation (an action by the responding party) or suspension of concessions or other obligations (an action by the complaining party), based on a level of nullification or impairment calculated *as from the date of imposition of the WTO-inconsistent measure*.<sup>124</sup>

This should allow the DSU to address the issue of damage caused during the period from the imposition of the measure to the ruling of inconsistency.<sup>125</sup> It should be noted that Article

22.4 on its face does not prevent an arbitrator from calculating the level of nullification and impairment from the date of adoption of the measure. Past practice shows, however, that calculations are made as from the date of expiry of the reasonable period of time,<sup>126</sup> and to allow future arbitration to apply “retroactive” remedy may require amending the DSU to expressly provide for the possibility.

In the next section, we will take a close look at suspension of concessions or other obligations as the last resort, “ultimate” remedy against non-compliance under the DSU.



## 4. TOWARD A MORE BALANCED “RETALIATION” REGIME

Under the current DSU, suspension of concessions or other obligations appears to be the only meaningful remedy against non-compliance available to Members.

Reading of Article 22.2 and 22.6 leads to one obvious conclusion: compensation is not a viable option. This is largely because the parties to the dispute have only 20 days to negotiate compensation before the complaining party can request a suspension of concessions or other obligations. It is a well-known fact that compensation negotiation is usually of extreme complexity involving various parties including domestic stakeholders of both sides. It is highly unlikely that such negotiation can be initiated and concluded within 20 days. In addition, Article 22.6 states that suspension of concessions or other obligations must be authorised within 30 days after the reasonable period of time. This is normally interpreted as prohibiting any authorisation after that deadline, unless otherwise agreed between the

parties. In practice, Members are therefore not encouraged to try to agree on compensation, and a complaining party in a position to do retaliate will almost always seek to do so.<sup>127</sup>

In this context, it is well worth taking a closer look at the mechanism and how it has been applied in actual dispute cases. After a decade, a body of WTO jurisprudence has emerged on suspension of concessions or other obligations through Article 22.6 arbitrations.<sup>128</sup> One arbitration set up under Article 25.3 also deals with the question of the determination of nullification or impairment.<sup>129</sup> We will first attempt to analyse the WTO jurisprudence on this particular aspect of remedy. We will then offer our comments on whether and how this mechanism can be improved. As stated earlier, emphasis will be placed on a core philosophical dilemma: should sanction against non-compliance aim strictly at repairing the damage caused or should it go beyond and achieve a punitive effect?

### 4.1 Jurisprudence on DSU article 22.6

#### 4.1.1 Preliminary Issues

A clear line of jurisprudence has been developed on preliminary proceedings for the Article 22.6 arbitration. The main points are:

##### *Specificity standard for the request*

Requests for suspension of concessions or other obligations under Article 22.2, as well as requests for referral to arbitration under Article 22.6, serve similar due process objective as requests for an establishment of a panel under Article 6.2 of the DSU. The specificity standard under Article 6.2 is therefore relevant for both Article 22.2 and 22.6 requests.<sup>130</sup> In concrete terms, an Article 22.2 request must at least set out a specific level of suspension and must specify the agreement and sector under which concessions or other obligations would be suspended.<sup>131</sup> In fact, the more precise a request for suspension is in terms of product coverage, type and degree of suspension, the better.

Belated supplementary requests and arguments concerning additional amount of alleged nullification or impairment have been found not to be compatible with the minimum specificity requirement for an Article 22.2 request, because they are not part of the original DSB referral of the matter to arbitration.<sup>132</sup> This however does not preclude the parties from, subsequently during the proceedings, providing documents on methodology for calculation.<sup>133</sup> Also, it is not sufficient for a requesting party to state that it “reserves the right” to suspend concessions under a covered agreement without any other precision.<sup>134</sup>

A party seeking to suspend concessions under Article 22.2 is not required to indicate precisely which obligations it seeks authorisation to suspend. It is sufficient for the requesting party to only identify the covered agreement under which authorisation is sought.<sup>135</sup> It is also not necessary for a complaining party to specify a request in numerical or monetary terms. In *U.S.*

- 1916 Act, the EC sought authorisation to adopt a "mirror regulation" or "mirror legislation", i.e. to adopt an equivalent regulation or legislation to the 1916 Act against imports from the U.S.<sup>136</sup> In *US - Byrd Amendment*, the EC requested authorisation to suspend the application vis-à-vis the US of tariff concessions and related obligations under GATT 1994 in an amount to be determined every year by reference to the amount of the offset payment made to the affected domestic producers in the latest annual distribution under the Byrd Amendment.<sup>137</sup> In both cases, the requests were considered specific enough to satisfy the minimum standard under Article 22.2.<sup>138</sup> In both cases, however, the level of suspension authorised was ultimately based on a quantified level.<sup>139</sup>

#### *Mandate of arbitrator under the Agreement on Subsidies and Countervailing Measures*

Article 4.11 of the SCM Agreement provides that in the event of an Article 22.6 arbitration in a dispute relating to prohibited subsidies, "the arbitrator shall determine whether the countermeasures are appropriate". In such case, the arbitrators have jurisdiction to determine not only the appropriateness of the requesting party's proposed countermeasures but also the level or the amount of countermeasures considered to be appropriate.<sup>140</sup> If the proposed level of countermeasure is considered not to be appropriate, the arbitrator, as necessary, may apply their own methodology for calculating an appropriate level.<sup>141</sup>

#### *Preliminary rulings*

It has been noted that neither paragraph 6 or 7 of Article 22 provides for a possibility of a preliminary ruling and that there is no practice of a preliminary ruling in Article 22.6 arbitration.<sup>142</sup> The arbitrator in *US - Byrd Amendment* therefore decided not to issue a preliminary ruling as requested by the US. This however did not preclude the arbitrator from ruling on procedural issues when examining the substantive matters in the decision.<sup>143</sup>

#### *Burden of proof*

Since *EC - Hormones*,<sup>144</sup> subsequent Article 22.6 arbitrators have all confirmed the principle that it is for the responding party to prove that the requesting party's request for suspension exceeds the level of the nullification or impairment.<sup>145</sup> On the other hand, the requesting party must also supply evidence to sufficiently support its view that the level of suspension proposed is equivalent to the level of the nullification or impairment.<sup>146</sup> This is important since some evidence may be in the sole possession of the party suffering nullification or impairment (i.e. the requesting party).<sup>147</sup> The submission of such evidence is therefore necessary and would be in the interest of both sides of the dispute.<sup>148</sup> The arbitrators in *Brazil - Aircraft* went as far as affirming that the issue of burden of proof is to be distinguished from the issue of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the arbitrator.<sup>149</sup> In addition, it is generally for each party asserting a fact, whether requesting or responding party, to provide proof thereof.<sup>150</sup>

#### *Third party rights*

Article 22 does not provide for third party status under Article 22.6 arbitration proceedings to determine the equivalence between the level of suspension and the level of the nullification or impairment. The arbitrator for *EC - Hormones*, however, allowed both complaining parties (the US and Canada) to attend each other's Article 22.6 hearing since the arbitrator considered it necessary to adopt the same or very similar methodology for the determination of "equivalence" in both cases.<sup>151</sup> This decision seems to be motivated by a specific circumstance in the case: both the US and Canada are requesting authorisation to suspend concessions or other obligations against the same EC measures.

Subsequent arbitrations have shown that *EC - Hormones* is rather an exception to the rule. In *EC - Banana III*, the arbitrator did not allow Ecuador to participate as third party in the



proceeding since they did not believe that Ecuador's right would be affected.<sup>152</sup> In *Brazil - Aircraft*, the arbitrator does not allow Australia to participate in the proceedings as third party since it considers that Australia's rights are not affected by the arbitration.<sup>153</sup> In *US - Byrd Amendment*, however, the same specific circumstance in *EC - Hormones* seems to exist. In this case, all requesting parties participated in a single joint substantive hearing and upon request, if deemed necessary by the arbitrator, were entitled to special session on specific issues on a bilateral basis.<sup>154</sup>

#### 4.1.2 Substantive issues

The mandate of the arbitrator as set out by Article 22.7 is to determine whether the level of suspension sought by the complaining party is equivalent to the level of the nullification or impairment sustained by it as a result of the failure of the Member concerned to bring its WTO-inconsistent measure into compliance. In doing so, the arbitrator must not examine "the nature of the concessions or other obligations to be suspended".<sup>155</sup> If the arbitrator rejects the proposed level of suspension, they must proceed to determine such level in a manner consistent with the relevant covered agreement.<sup>156</sup>

The purpose of the suspension of concessions or other obligations (and of the countermeasure under Article 4.11 of the SCM Agreement), according to past arbitration, is to *induce compliance* and not to authorise a punitive action against the responding party. This stems from the obligation to ensure equivalence between the level of the nullification or impairment and the level of suspension of concessions or other obligations.<sup>157</sup>

##### *Level of the nullification or impairment*

It has been made clear that determining the level of nullification or impairment under Article 22 is a separate legal process from the establishment of the existence of nullification or impairment under Article 3.8.<sup>158</sup> No assimilation can be made between on the one hand, a violation or a

breach of right under the WTO Agreement and on the other hand, the benefit nullified or impaired as a result of the violation or the breach.<sup>159</sup> A violation generates a presumption of nullification or impairment pursuant to Article 3.8, but it is not a form of nullification or impairment.<sup>160</sup>

To determine an equivalent level of suspension of concessions or other obligations, arbitrators traditionally proceed, as a starting point, to determine the level of the nullification or impairment suffered by the requesting party as of the date of expiry of the reasonable period of time.<sup>161</sup> This determination is normally based on the relevant measure or the market condition as of such date. In the *EC - Bananas III* cases, the arbitrators consider the level of the nullification or impairment arising from the revised EC measures, while in the *EC - Hormones* cases, the arbitrators consider the market for beef product existing on the implementation date which has shrunk as a result of various health concerns as compared to the market existing at the outset of the case.<sup>162</sup>

Normally the arbitrator uses a "counter-factual"<sup>163</sup> approach, which compares the existing situation with that which would have occurred had implementation been taking place as of the date of expiry of the reasonable period of time. In *EC - Hormones*, for example, the arbitrator estimates the total value of US beef or beef products that would enter the EC annually if the ban had been withdrawn on the date of expiry of the reasonable period of time. The arbitrator deducts from that total value, the value of US export of high quality beef and edible beef offal for human consumption, i.e. those that have not been treated with hormones, of the period from 1996 - 1998.<sup>164</sup> The end result provides the estimated value of hormone-treated export that would enter the EC but for the ban's continuing existence beyond the reasonable period of time.<sup>165</sup>

The level of the nullification or impairment is a key element in the arbitrator's mandate since Article 22 has been construed to mean that any suspension that exceeds the level of nullification or impairment would constitute

a punitive remedy,<sup>166</sup> and therefore is inconsistent with Article 22.4. In calculating the level of nullification or impairment, the arbitrator must rely on credible, factual and verifiable information, not on speculation.<sup>167</sup> To put it differently, any claim of nullification or impairment must be “meaningfully quantified”.<sup>168</sup> Thus, it would be too speculative or too remote to claim nullification or impairment for a deterrent or “chilling effect” on exports of the complaining party to the responding party.<sup>169</sup> Likewise, litigation costs incurred by the complaining party cannot be included in a “meaningfully quantified” claim of nullification or impairment.<sup>170</sup> On the other hand, past arbitrations have taken into account future nullification or impairment resulting from future application of the measure at issue. In *US - 1916 Act*, the EC is entitled to adjust the quantified level of suspension to account for this additional level of nullification or impairment.<sup>171</sup> Likewise, in the *US - Byrd Amendment*, the arbitrator includes for the purpose of assessing nullification or impairment, instances of the application of the measure at issue.<sup>172</sup>

To determine the level of the nullification or impairment, the arbitrator usually considers the methodology proposed by the requesting party. If such methodology is found to be consistent with the DSU, the arbitrator will proceed with the level of nullification or impairment on that basis.<sup>173</sup> Otherwise, the arbitrator will normally determine such level by applying the methodology that they find appropriate for the case at hand.<sup>174</sup>

With the exception of arbitrators under Article 4.11, past arbitrations normally based the level of the nullification or impairment on the *trade or economic effects* of the measure at issue on the complaining party expressed in numerical or monetary terms.<sup>175</sup> In most cases, the use of direct trade effect is found to be justified since it is generally more directly identifiable and quantifiable.<sup>176</sup> In *US - Section 110(5) Copyright Act and US - 1916 Act*, however, the arbitrator relied on the broader concept of *economic impact*.<sup>177</sup> This was no doubt dictated by the

nature and possible implications of the measure at issue - respectively, measures affecting economic benefits to the holder of intellectual property rights under Section 110 (5) of the Copyright Act, and possible civil or criminal judicial decisions or settlements under the 1916 Act.<sup>178</sup> In *US - Byrd Amendment*, the arbitrator further refined the approach, basing the level of nullification or impairment on a determination of the trade effects on the requesting party of the violation by the US of its WTO obligations through *each application* of the measure at issue,<sup>179</sup> using an *economic model* methodology.<sup>180</sup>

Arbitrators under Article 4.11 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), however, consider that they are not required to confine their determination to assessing trade or economic effects of the WTO-inconsistent measure. Their mandate to determine “appropriate countermeasure” seems to leave more discretion to them in assessing the amount of countermeasure than to Article 22.6 arbitrators. It has been considered that “appropriateness” of countermeasure cannot be “reduced to a requirement that constrains countermeasures to trade effects”.<sup>181</sup>

The presumption of nullification or impairment, as provided in Article 3.8, does not provide evidence of a particular level of the nullification or impairment sustained by the complaining party.<sup>182</sup> The arbitrator in *US - 1916 Act* stresses however that this does not mean that the level of the nullification can simply be “zero”.<sup>183</sup> If the original panel determines that there is nullification or impairment of benefits accruing to the complaining party, that level must necessarily be something greater than a zero.<sup>184</sup>

#### *Level of suspension of concessions or other obligations*

The level of suspension of concessions or other obligations must be of quantifiable nature. In *EC - Bananas III (US)*, the arbitrator decided the amount of suspension (191.4 million USD per year) by reference to the average import value of EC export to the US over a certain

period.<sup>185</sup> Other arbitrations that followed also give precise amount of the value of concessions or other obligations to be suspended.<sup>186</sup> Even in a case where the complaining party does not specify a monetary amount for the suspension in its request, past arbitrations always decide for a level of suspension in quantifiable terms.

In *US - 1916 Act*, the EC requested for a “qualitative suspension” by adopting a “mirror” regulation or an equivalent regulation to the 1916 Act against imports from the US.<sup>187</sup> The request was found by the arbitrator to relate to the *nature* of the obligations to be suspended and thus was rejected on the ground that Article 22.7 prohibits the arbitrator from examining “the nature of the concessions or other obligations to be suspended”.<sup>188</sup> The arbitrator, proceeding with the determination of the level of the nullification or impairment, concluded then that since the 1916 Act was found to be WTO inconsistent “as such”, each application of the Act entitles the EC to increase concomitantly the level of its suspension.<sup>189</sup> The EC therefore is allowed to suspend concessions or other obligations against imports from the US in a quantified manner so that the amount of the suspension does not exceed “the quantified level of [the] nullification or impairment it has sustained as a result of 1916 Act”.<sup>190</sup> In quantifying the level of nullification or impairment, the EC may include the cumulative monetary value of any amounts payable by EC entities pursuant to final court judgments for, or the settlements of, claims under the 1916 Act.”<sup>191</sup>

In *US - Byrd Amendment*, the requesting parties sought suspension in an amount to be determined every year by reference to the amount of the offset payments made to affected domestic producers in the latest annual distribution under the Continued Dumping and Subsidies Offset Act of 2000 (CDSOA). The arbitrator first determined the level of the nullification or impairment by reference to an *economic model*<sup>192</sup> designed to identify a co-efficient that would allow it to obtain the value of the trade effect of the CDSOA on exports of the requesting parties, corresponding to the level of nullification or

impairment.<sup>193</sup> The level of suspension was then determined as the total value of trade not exceeding the amount of offset payment made by the US under CDSOA for the most recent year for which data are available on imports from the requesting parties *multiplied by the co-efficient identified (0.72)*.<sup>194</sup>

An arbitrator cannot recommend the suspension of specific obligations or the adoption of a specific measure by the suspending party. This would amount to specifying the nature of the suspension and fall outside the arbitrator’s mandate under Article 22.7.<sup>195</sup>

In case of multiple requesting parties, each of them may only request suspension of concessions or other obligations with respect to the trade effect caused by the WTO inconsistent measure relating to its own exports.<sup>196</sup>

#### *Assessment of “equivalence” between the level of the nullification or impairment and the level of suspension*

Equivalence must be determined through a quantitative - not qualitative - assessment of the proposed suspension.<sup>197</sup> The arbitrator in *EC - Bananas III (US)*, having found that “it is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined”, concluded that a prerequisite for ensuring equivalence between the two levels at issue is to determine the level of nullification or impairment.<sup>198</sup> The arbitrator in *US - FSC* underlined that Article 22.4 “explicitly sets a quantitative benchmark to the level of suspension of concessions or other obligations that might be authorised” and that “this is similarly reflected in Article 22.7, which defines the arbitrators’ mandate in such proceedings”.<sup>199</sup> By contrast, it was also stressed that “there is no such indication of an explicit quantitative benchmark” in Article 4.10 of the SCM Agreement.<sup>200</sup>

In cases not involving the SCM Agreement, where the complaining party expresses a request of suspension in quantitative terms, the arbitrator has found that it has to assess whether there is

“quantitative equivalence between the level of impairment and the level of suspension.<sup>201</sup> The fact that a request for suspension has not been stated in quantitative terms, however, does not in and of itself render the request inconsistent with Article 22. In such cases, the arbitrator has developed a methodology to assess equivalence in quantitative terms.<sup>202</sup> The arbitrator in *US - 1916 Act* went as far as demonstrating that to assess equivalence in qualitative terms could result in a level of suspension that is disproportionately different from the level of the nullification or impairment.<sup>203</sup>

As general approach, the arbitrator in *EC - Hormones* first assessed whether the responding party has established a *prima facie* case that the level of suspension proposed by the complaining party is not equivalent to the level of the nullification or impairment. In the affirmative, that is if the complaining party fails to rebut this presumption, the arbitrator has “an essential task and responsibility” to make its own estimate on the basis of all arguments and evidence submitted by the parties to the dispute. As we have seen above, the arbitrators normally begin their task by determining the level of nullification or impairment sustained by the requesting party.<sup>204</sup>

The arbitrators then proceed to assess equivalence by deciding on the level of suspension to be authorised. It has been stressed in *EC - Bananas III* that “equivalence” connotes “a correspondence, identity or balance between two related levels, i.e. between the level of concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other.”<sup>205</sup> The benchmark of equivalence under Article 22.7 reflects a stricter standard of review for the arbitrator than the degree of scrutiny that the standard of appropriateness of action taken under Article XXIII (2) to suspend obligations, as applied under the GATT of 1947, would have suggested.<sup>206</sup> Therefore, suspension of concessions or other obligations is not to be granted “beyond” what is equivalent to the level of nullification or impairment. Any suspension of concessions or other obligations in excess of the level of the nullification or impairment would

be of a punitive nature.<sup>207</sup> To put it differently, “the effect of suspending concessions should not exceed that of the [responding party] bringing the [WTO-inconsistent] measure into conformity with” the covered agreement concerned.<sup>208</sup>

In *US - Byrd Amendment*, the arbitrator broke “new grounds” by relying on an *economic model* to assess the level of the nullification or impairment.<sup>209</sup> This approach allows determination of an equivalent level of future, undetermined nullification or impairment resulting from future application of a WTO-inconsistent measure (in case non-compliance continues after the reasonable period of time). The suspending Member, however, must ensure that the level of suspension does not exceed the total value of trade constituting the level of the nullification or impairment, and must not apply the suspension so that it has effect on trade exceeding the identified level of nullification or impairment.<sup>210</sup>

The “new grounds” - i.e. relying on an economic model for assessing the level of the nullification or impairment -, according to the arbitrator, suggest that the value of an industry distribution of the trade impact from the CDSOA could vary from one year to another. This justifies authorisation of a *variable* level of suspension of concessions or other obligations, as opposed to the traditional one single level of the nullification or impairment established at the level that existed at the end of the reasonable period of time favoured by previous arbitrators. Under this approach, if the level of nullification changes, the level of suspension may be adjusted from time to time, provided that the adjustments are justified and unpredictability is not increased as a result.<sup>211</sup> The arbitrator believed that this solution is consistent with Article 22 of the DSU, does not increase unpredictability and would be more suitable for inducing compliance since “the cost of the violation” to the Member concerned would not decrease as time passes.<sup>212</sup> In fact, the responding party (who is in violation of its WTO obligations) would control the levers to make the actual level of suspension go up or down.<sup>213</sup>

*“Appropriateness” of countermeasures under the SCM Agreement*

In cases where the measure found to be WTO-inconsistent is a prohibited subsidy, the mandate of the arbitrator under Article 4.11 of the SCM Agreement is to determine “whether the countermeasures are appropriate”. Footnote 9 of the SCM Agreement also provides that countermeasures must not be “disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited”.

Past arbitrations stressed that, based on the text of the SCM Agreement and the DSU, countermeasures should be adapted to the particular case at hand. The arbitrator must take into account the specific context of a given case and to that extent is given more flexibility than in cases not involving prohibited subsidies.<sup>214</sup>

Despite the above, there are elements that are common to the mandate of Article 22.6 arbitration in cases involving prohibited subsidies and in other cases. Both Article 4.11 of the SCM Agreement and Article 22.7 of the DSU give jurisdiction to the arbitrator to determine the *amount* or *level* of the countermeasures or the suspension, as the case may be, to be authorised.<sup>215</sup> It has also been noted that the term “countermeasures”, as used in Article 4 of the SCM Agreement, may include suspension of concessions or other obligations.<sup>216</sup>

Past arbitrators also agreed, however, that Article 4.11 of the SCM Agreement seems to leave more discretion to arbitrators in assessing the appropriateness, or the amount, of countermeasures.<sup>217</sup> According to the arbitrator in *Canada - Aircraft Credits and Guarantees*, the traditional “counter-factual approach” used by Article 22.6 arbitrators to assess equivalence - focusing on what would have happened if compliance had occurred compared to the non-compliance situation - “may in some cases result in a lack of effectiveness of countermeasures in achieving compliance”.<sup>218</sup> It was therefore concluded that countermeasures based on trade effects or competitive harm methodology are

not “appropriate” in the sense of Article 4.11 of the SCM Agreement.<sup>219</sup>

Another major difference between the two proceedings is that the concept of countermeasures seems to be “directed either at countering the measure at issue (in this case, at effectively neutralizing the export subsidy) or at counteracting its effect on the affected parties, or both”.<sup>220</sup> In this sense, the concept would not preclude the possibility of countermeasures *at a level exceeding the level of the nullification or impairment*.

Guidance may indeed be sought from footnote 9 of the SCM Agreement, which provides that countermeasures must not be “disproportionate”. This provision has been construed to introduce some kind of proportionality in the process of assessing the appropriateness of countermeasures. The arbitrator in *Brazil - Aircraft* referred to the work of the International Law Commission (ILC) on state responsibility<sup>221</sup>, stressing that it “would be contrary to the principle of effectiveness in the interpretation of treaty” to limit the meaning of the notion of appropriate countermeasures to that of equivalence.<sup>222</sup> Noting that according to the ILC<sup>223</sup> and the Article 22.6 arbitrator in *EC - Bananas III (US)*<sup>224</sup>, countermeasures are meant to induce compliance, the arbitrator concluded that with respect to prohibited subsidies, “a countermeasure is ‘appropriate’ *inter alia* if it *effectively* induces compliance”, i.e. if it induces “the withdrawal of the prohibited subsidies”.<sup>225</sup> The arbitrator then used the amount of the subsidies as the basis for calculating appropriate countermeasures in this case, and concluded that “an amount of countermeasures which corresponds to the total amount of the subsidy is ‘appropriate’”.<sup>226</sup>

The arbitrators in *US - FSC* and *Canada - Aircraft Credits and Guarantees* followed the same approach of basing the amount of countermeasures on the amount of subsidies.<sup>227</sup> Both cases underlined the importance of proportionality.<sup>229</sup> This is not “meant to entail a mathematically exact equation but soundly



enough to respect the relative proportions at issue so that there is no manifest imbalance or incongruity".<sup>229</sup> A "congruent relationship" must be maintained "in countering the measure at issue so that the reaction is not excessive in light of the situation to which there is to be a response".<sup>230</sup> Therefore, "the relationship to be respected is precisely that of 'proportion' rather than 'equivalence'".<sup>231</sup>

"Proportionality"<sup>232</sup> under footnote 9 of the SCM Agreement is to be construed in light of the fact that subsidies at issue are *prohibited*. Therefore, appropriateness cannot be confined to the elements of countering the injurious effects on the requesting party, but must be assessed taking into account "the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of rights and obligations as between Members".<sup>233</sup> In assessing the appropriateness of the countermeasures, the gravity or the severity of the breach must therefore be taken into account.<sup>234</sup> This approach was also adopted by the arbitrator in *Canada - Aircraft Credits and Guarantees*.<sup>235</sup>

As appropriateness of countermeasures must be assessed on a case-by-case basis,<sup>236</sup> factors that are specific to the case may be taken into account, as well as other relevant factors that are of a more general application. In *Canada - Aircraft Credits and Guarantees*, for example, the arbitrators took into account the level of the countermeasures authorised in the related *Brazil - Aircraft* case, the value of import of goods from the responding party to the requesting party, the gravity of the breach, the need to induce compliance and the issue of whether the countermeasures are not manifestly excessive.<sup>237</sup> In fact, the arbitrator found that it was authorised to consider "relevant factors constituting the totality of the circumstances at hand".<sup>238</sup> Having determined the value of the total amount of the subsidy, the arbitrator then examined other relevant factors put forward by the parties and decided to adjust the result of its calculation based on the amount of subsidy to take into account the stated intention of

Canada to maintain the subsidy at issue in breach of its WTO obligations. For the arbitrator, this was necessary in order to "reach the level of countermeasures which can reasonably contribute to induce compliance".<sup>239</sup>

### *Cross-retaliation*

Article 22.3 allows a complaining party to suspend concessions or other obligations across the sectors or across the covered agreements.<sup>240</sup>

Suspension across sectors or across agreements is "the exception and does not become the rule".<sup>241</sup> The terms "if the party considers" in Article 22.3 (b) and (c) seem to leave a margin of appreciation to the requesting party, but the chapeau of the same article also contains the wording "the complaining party shall apply the following principles and procedures". Such margin of appreciation by the requesting party is therefore subject to review by the arbitrator.<sup>242</sup> In addition, subparagraph (e) provides that a requesting party seeking suspension across sectors or across agreements must state the reason therefor. This has been construed to give authority to the arbitrator to scrutinise the request in light of the conditions and factors listed under Article 22.3.

In *EC - Bananas III (Ecuador)*, the EC had been found in violation of its obligations under the GATT 1994 and the GATS,<sup>243</sup> Ecuador however requested suspension of its commitments under the GATS and its obligations under the TRIPS Agreement. It also reserved the right to suspend concessions or other obligations under the GATT 1994 "in the event that this may be applied in a practicable and effective manner".<sup>244</sup>

The arbitrator found Ecuador's request with regard to the GATT 1994 not specific enough.<sup>245</sup> In addition, it found "a certain degree of inconsistency" between making a request to suspend concessions or other obligations across agreements and simultaneously making a request to suspend concessions or other obligations in the same sector as that in which the violation has been found. For the arbitrator, this implied,

in the first place, that suspension is practicable and effective under the same sector.<sup>246</sup>

The task of the arbitrator in this respect is to determine whether the principles and procedures set forth in Article 22.3 have been followed. In case of a negative determination, the requesting party would be required to submit another request that is consistent with the arbitrator's decision for authorization by the DSB.

The term "same sector(s)" in Article 22.3 was found in *EC - Bananas III (US)* to mean the sector(s) in which inconsistencies with the responding party's WTO obligations found in the original dispute have not been removed fully.<sup>247</sup> In cases where there is a request for suspension across sectors or across agreements, it is for the requesting party to submit information giving reasons and explanations for its initial consideration justifying such request. Once it has done so, it is ultimately for the responding party to establish that suspension within the same sectors or the same agreements is effective and practicable.<sup>248</sup> In *EC - Bananas III (Ecuador)*, the arbitrator found that the degree of practicability and the effectiveness of suspension of concessions under the GATT may vary between different categories of products. In this case, suspension was found to be practicable and effective with regard to goods destined for consumers in Ecuador, but not for investment goods or primary goods used as input in Ecuadorian industry.<sup>249</sup>

Suspension of concessions across agreements must satisfy another condition under Article 22.3 (c) that "circumstances are serious enough."<sup>250</sup> Inequality between the parties, in favour of the responding party, which can be displayed through trade and economic statistics, may be used to support an argumentation that circumstances are serious enough in this respect.<sup>251</sup> Applying subparagraph (d) of Article 22.3, the arbitrator attributed particular significance to proportion of the trade affected by the WTO-inconsistent measure and the importance of such trade to the requesting party. It must be noted that in this case, the requesting party is a developing country and that the proportion of such trade is more important for the requesting party than for the responding Member.<sup>252</sup>

It has also been stressed that the terms "broader economic elements" under Article 22.3(d)(ii) relates primarily to the party suffering nullification or impairment.<sup>253</sup> However, "broader economic consequences" of the suspension under the same sub-paragraph was found to relate to both the requesting and the responding parties. This is because a suspension may also entail, at least to some extent, adverse effects for the suspending party, in particular where a great imbalance in term of trade volumes and economic power exists between the two parties.<sup>254</sup> To satisfy the requirement of subparagraph (i) of Article 22.3 (d), it is sufficient for the requesting party to demonstrate that its economy is highly dependent upon the trade in question and is highly sensitive to any changes in international trade flow and conditions of competition abroad. As for the requirement of subparagraph (ii), it is sufficient for the requesting party to show that there is a relation between the "broader economic elements" considered by it and the nullification or impairment caused by the measure at issue.<sup>256</sup>

Application of the factors listed in subparagraph (d) of Article 22.3 gains another dimension where the case is brought by a developing country. In this case, such application is "collaborated by the provision of Article 21.8," which requires the DSB to take into account not only the trade coverage of measure complained of, but also their impact on the economy of the developing country Member concerned.<sup>257</sup>

A case may arise in which suspension of concessions or other obligations is practicable and effective under the same sectors or agreements (where a violation has been found) only for part of the level of nullification or impairment. In this case, suspension for the residual amount of nullification or impairment may be found by the arbitrator to be practicable or effective in another sector under the same agreement or under another agreement.<sup>258</sup>

#### *Product coverage of the suspension*

Article 22 of the DSU does not require that the requesting party specify the products

that will be subject of the suspension.<sup>259</sup> In practice, however, a requesting party usually submits to the DSB, together with its request for suspension, a list of products to be covered by the suspension, which for trade in goods normally takes the form of an additional import duty above bound customs duties. In some cases the initial list would cover trade in an amount significantly higher than the proposed level of suspension.<sup>260</sup> Once authorisation is granted by the DSB, there is no requirement for the requesting party to draw up a list of products covered by the suspension that is equivalent to the amount of suspension authorised. The initial list therefore may end up covering trade in an amount substantially higher than the authorised level of suspension, in particular where the arbitrator has reduced the level of suspension proposed by the requesting party.

In *EC - Hormones*, the EC asked the arbitrator, once the level of nullification or impairment has been determined, to request that the US and Canada submit a new list that covers trade in an amount equivalent to the level of nullification or impairment determined by the arbitrator. The arbitrator however found no support for this request in the DSU.<sup>261</sup> For the arbitrator, apart from the rules provided under Article 22, the determination of other aspects related to the suspension, including the issue of

product coverage, “remain[s] the prerogative of the Member requesting the suspension”.<sup>262</sup> Product coverage relates to qualitative aspects of the suspension, touching upon the nature “of concessions to be suspended, and therefore ‘fall[s] outside the arbitrator’s jurisdiction”.<sup>263</sup> Once the level of suspension has been determined, the requesting party “is free to pick” products from the initial product list put before the DSB equalling a total trade value not exceeding the amount of suspension determined by the arbitrator.<sup>264</sup>

This would indeed mean that the requesting party may resort to a “carousel” type of suspension where the concessions or other obligations to be suspended may periodically change in terms of product coverage. In *EC - Hormones*, the US, stressing that the DSU does not prevent future changes to the list of products, stated that the US “has no current intent to make such changes”.<sup>265</sup> The arbitrator seems to be implicitly admitting that a “carousel” type of suspension could require an adjustment in the way in which the effect of the authorised suspension is calculated. However, it did not see the need to consider the issue since it was assumed that “the US - in good faith and based upon [the US’s] unilateral promise - will not implement the suspension of concessions in a ‘carousel’ manner”.<sup>266</sup>

## 4.2 Possible improvements

We believe that the enforcement mechanism under the current DSU - as workable as it may be - should be improved in many respects, so that the instrument may contribute in a more effective manner to ensuring predictability and security of the multilateral trading system.

### 4.2.1 A Clearer procedure for the Request of Suspension and referral to Article 22.6 Arbitration

#### *Members’ views*

The EC, Ecuador and Japan propose that Article 22.2 be amended to allow for a request to

suspend concessions or other obligations only under the following scenarios: the Member concerned does not inform the DSB pursuant to Article 21.3 (or Article 21.3 *bis* as proposed by Ecuador) that it intends to implement the recommendations or rulings of the DSB; the Member concerned does not notify the DSB that it has complied in accordance with the EC and Japan’s proposal under Article 21.6; or when the compliance panel or Appellate Body pursuant to Article 21 *bis* finds that the Member concerned has not complied.<sup>267</sup> The EC also proposes a fourth possibility that is when the Member concerned has been determined through Article 21 *bis* not to have complied with a mutually



agreed solution under Article 3.6 of the DSU.<sup>268</sup> The EC and Japan propose to modify the rule of referral to an Article 22.6 arbitration (to determine the level of suspension of concessions or other obligations) by deleting any deadline for the authorisation to suspend concessions or other obligations. They also introduce a possibility for the parties to the dispute to reach an agreement on replacement of the panel members if the original panel members are not available. Only in the absence of an agreement that the Director-General may appoint a replacement arbitrator and this is to be done within five days after referral to arbitration and after consultation with the parties. A new time frame of 45 days after referral is proposed instead of the current rule, which results in practice in allowing only 30 days for the arbitrators to complete their work, unless there has been an arbitration to determine the level of the nullification or impairment under the new Article 22.1 as proposed by the EC and Japan.<sup>269</sup>

Mexico proposes that the arbitration under Article 22.6 can be set up only when the Member concerned objects to such level and no determination of the level of nullification and impairment has been made pursuant to Mexico's proposal to amend Articles 15 and 17 (see 2) below.

#### *Our suggestion*

These proposals are constructive as they aim at introducing more clarity and effectiveness in the procedure for obtaining authorisation to retaliate against a non-complying Member. The proposal by the EC and Japan on Article 22.2, in particular is a logical complement to their proposed mechanism of compliance determination.<sup>270</sup> It appears to be useful since it would provide clearly for instances in which suspension may be sought by a complaining Member. The scenarios provided are quite adequate as they would cover all possible cases of non-compliance that have been confirmed, either through an act or omission of the Member concerned itself or through a multilateral determination.

### 4.2.2 Possibility for a Separate determination of the level of nullification or impairment

#### *Members' views*

A new idea has been introduced on procedural aspects to allow for a separate determination of the level of nullification or impairment caused by the measure found to be inconsistent with a covered agreement in the original case. The EC and Japan proposed to amend Article 22.1 by adding a possibility for the Member concerned to request an arbitration for this purpose, to be carried out by the original panel if members are available. The arbitrator must finish its work within 45 days after the date of request and the award of the arbitrator shall be final and binding upon the parties in any subsequent proceedings under Article 22.6<sup>271</sup> to determine the equivalence of the level of suspension of concessions or other obligations and that of the nullification or impairment.

Ecuador proposes that the determination of the level of nullification or impairment be made through arbitration under a new Article 21.3 *bis*. A request for such determination may be made any time before a request under Article 22.2 is made, including during the reasonable period of time. The arbitrator may combine this task with a mandate to determine a reasonable period of time under Article 22.3. It must take into account the impact of the WTO-inconsistent measure on the economy of a complaining party that is a developing country, if the Member concerned is a developed country. In addition, the level of nullification or impairment thus determined may be revised by an Article 21 *bis* compliance panel.<sup>272</sup>

Mexico proposes that the determination of the level of nullification and impairment be made by the original panel during the stage of interim review (Article 15), which determination may be subject of an appeal under Article 17.<sup>273</sup>

The LDC Group proposes that, in a case brought by a least-developed country against a developed

country, the level of the nullification or impairment be determined by an arbitration that is separate from the Article 22.6 arbitration that determines the level of suspension of concessions or other obligations. A request for the latter arbitration cannot be made until after the former arbitration has completed its work. In the arbitration to determine the level of the nullification or impairment, account will be taken of legitimate expectation of the least-developed countries and the development objectives of the WTO Agreement as well as possible adverse effects on the least-developed countries.<sup>274</sup>

The African Group proposes the same idea having a prior determination of the level of the nullification or impairment in case of “collective” suspension of concessions or other obligations by developing or least developed countries.<sup>275</sup>

Two Members of the Association of Southeast Asian Nations (ASEAN), the Philippines and Thailand, also see the need for a separate determination of the level of the nullification and impairment. They, however, preferred to have this task accomplished by Article 22.6 arbitration but, in line with prevailing jurisprudence, propose that the arbitrators proceed with and complete this task prior to determining the level of suspension of concessions or other obligations.<sup>276</sup>

#### *Our suggestion*

We support in principle these ideas, since they allow, inter alia, a more systematic approach to determining the level of suspension to be authorised. This should allow such level to better reflect the damage suffered by the complaining Member. A separate, prior determination of the level of nullification or impairment will also allow compensation to be carried out on the basis of a third party determination of the level of nullification or impairment, and will render the option more meaningful.

### 4.2.3 A “just” retaliation should re-balance benefits and at the same time effectively induce compliance

#### *The situation and past arbitrators’ views*

As noted in Section IV.A.1.b, in cases not involving prohibited subsidies, the level of suspension of concessions or other obligations cannot exceed the level of the nullification or impairment. The key factor is the value of lost sales or trade effects of the WTO inconsistent measure. Calculation of the level of suspension is based on a “counter-factual” established by reference to current trade statistics. Although past arbitration has presented this approach as a way of inducing compliance, it seems to be geared more toward re-balancing benefits between the parties.<sup>277</sup> This could lead to a situation in which the Member concerned prefers to find itself at the receiving end of a DSB-authorized retaliation than to comply with the DSB recommendations and rulings. Such Member may be motivated by the need to address the concerns of its domestic constituencies, and there is a risk that retaliation may become some kind of long-term or permanent compensation, allowing the Member to indefinitely postpone its compliance. Practice of Members in the first decade of the WTO has confirmed that such a trend is possible.<sup>278</sup> This type of situation is clearly at variance with the letter and spirit of Article 22.1. In this context, it would be safe to conclude that “equivalence” between the level of the nullification or impairment and that of suspension does not necessarily induce compliance in an *effective* manner.

In cases involving prohibited subsidies, on the other hand, the level of appropriate countermeasure is based on the amount of subsidy that has been disbursed and not on the level of nullification or impairment. In some cases, the level or amount of countermeasure may even be higher than the level of nullification or impairment.<sup>279</sup> This involves case-by-case assessment, taking into account factors found to be relevant by the arbitrator. Trade effect may be taken into account along the same

line as in the cases not involving prohibited subsidies, but it is not a decisive factor.<sup>280</sup> The rationale is indeed to effectively induce compliance. This approach is possible because the mandate of arbitrator under Article 4.11 of the SCM Agreement is to determine whether the proposed countermeasures are “appropriate” and not whether the level of the proposed countermeasures are “equivalent” to the level of the nullification or impairment.

Retaliation that aims primarily at re-balancing benefits between the parties, under certain circumstances, may not be a “just” solution. This type of retaliation can result in a lack of effectiveness in achieving compliance. This has been noted in past arbitration.<sup>281</sup> The lack of effectiveness, should it occur, has been taken into account in cases involving prohibited subsidies where the level of countermeasures is adjusted accordingly. In some cases, countermeasures equal to the amount of subsidies (therefore already higher than the level of nullification or impairment) might be insufficient to induce compliance. In such cases, a higher level of countermeasures has been adopted “in light of the need to induce compliance”.<sup>282</sup>

This nonetheless remains a potential problem in cases not involving prohibited subsidies. The arbitrator in *US - Byrd Amendment*, noting that previous arbitrators had acknowledged the need to induce compliance, concluded however that “exactly what may induce compliance is likely to vary in each case, in the light of a number of factors including, but not limited to, the level of suspension of obligations authorised”.<sup>283</sup> The arbitrator went on to conclude that the “classical” approach based on an assessment of the trade effect of a WTO-inconsistent measure may not always contribute to the identification of the actual level of nullification or impairment. In the arbitrator’s view, the very meaning of the concept of nullification or impairment is still disputed and needs to be addressed by the Members.<sup>284</sup> The arbitrator also concluded that to require equivalence between the level of suspension and the level of the nullification or impairment seems to imply that suspension “is

only a means of obtaining some form of temporary compensation even when the negotiations of compensation has failed.”<sup>285</sup> According to the arbitrator, it is therefore unclear what role is to be played by the suspension of concessions or other obligations in the DSU because a clear object and purpose of the suspension is lacking.<sup>286</sup>

#### *Our suggestion*

In this context, we believe that in cases not involving prohibited subsidies, there is a need to fine-tune the regime of suspension to enable it to *effectively* induce compliance. The approach is to start with a “classical” determination of the level of the nullification or impairment through assessment of trade or economic effects of the measure at issue on the requesting party, using the “counter-factual” method. The result should then be adjusted<sup>289</sup>, taking into account “relevant factors constituting the totality of the circumstances at hand”<sup>290</sup>, or “factors potentially influencing the eventual trade effect” of the measure at issue<sup>291</sup>. The end result should be an “equivalent” level of suspension that allows flexibility and a solution that is well -adapted to each case at hand.

Intentional non-compliance should be considered an aggravating factor.<sup>292</sup> The same should be adopted in cases where there is a prolonged non-compliance or where there is a possibility of subsequent and repeated violation.<sup>293</sup>

GATT “purists” might argue that the WTO remedy system is based on the concept of nullification or impairment. The purpose of the remedy is therefore to restore the benefits that have been impaired or nullified, and to allow a remedy that exceeds the level of nullification or impairment would be at variance with this very concept. Taking into account this argument, it would be perhaps appropriate to distinguish between, on the one hand, a case of violation of a WTO obligation (in which nullification or impairment is presumed) and, on the other hand, cases of non-violation and situation complaints (there is no violation but nullification or impairment

may be established).<sup>294</sup> For the latter cases, the “purist” argument might stand, but for the former cases, it is worth considering whether the fact that there is a breach of treaty obligations should justify a remedy that goes beyond simply restoring the impaired or nullified benefits.

From the doctrinal point of view, a breach of treaty by a party entitles the injured State to, *inter alia*, some kind of compensation or countermeasures.<sup>295</sup> This is because a breach of treaty obligation is an “internationally wrongful act” that involves state responsibility. A countermeasure becomes legitimate against the perpetrator of such act.<sup>296</sup> This should justify a distinction between cases of violation of the WTO Agreement from other cases of nullification or impairment of WTO benefits. For those cases of violation of a WTO obligation, the DSU should incorporate elements of “general” international law relating to countermeasures. Indeed, apart from restoring benefits, the purpose of countermeasures under international law is also to ensure *proportionality* between the remedy and the injury suffered.<sup>297</sup>

We would therefore submit that from both theory and practice point of views, a case of violation should be treated, for the purpose of suspension of concessions or other obligations, along the same line as cases involving a prohibited subsidy. The arbitrator should be allowed to grant a level of suspension that exceeds the level of nullification or impairment so that suspension may constitute a legitimate and proportionate measure in response to an internationally wrongful act. This requires a case-by-case assessment of the circumstances at hand. The methodologies adopted respectively in *Canada - Aircraft Credits and Guarantees* and *US - Byrd Amendment* might prove useful as reference in this context, although they might be of limited value for cases in which the wrongful act cannot be quantified.<sup>298</sup>

We are by no means suggesting that a suspension of concessions or other obligations should be “punitive”.<sup>299</sup> Although the term “punitive” is not contained in the text of the DSU, we do not

believe that suspension should aim at punishing an offending Member. We are simply trying to render the mechanism of suspension more efficient and effective through application of the well-established general principles of legitimate and proportionate response to an internationally wrongful act.

This may involve amendment of Article 22.4 to allow the concept of equivalence to be construed in a broader manner, perhaps with possible special and differential treatment where a developing country is involved. This solution should achieve both purposes of re-balancing benefits and *effectively* induce compliance while at the same time does not result in a “punitive” measure against the responding party.

#### 4.2.4 Enchancing the possibility of cross-retaliation

##### *Members' views*

It seems that WTO Members do not really share similar views with regard to cross-retaliation. On the one hand, Mexico has proposed to eliminate cross-retaliation.<sup>300</sup> On the other, India has proposed to make it easier to use cross-retaliation if the complaining party is a developing country and the Member concerned is a developed country.<sup>301</sup>

##### *Our suggestion*

We believe that cross-retaliation is a useful tool for ensuring effective remedies against non-compliance, and thus should be maintained. *EC - Bananas III (Ecuador)* has more than proven this point. WTO Members have different patterns of trade for both goods and services. Therefore, it is not always possible for a Member to retaliate within the same sector or under the same agreement.<sup>302</sup>

The arbitrator in *EC - Bananas III (Ecuador)*, however, applied Article 22.3 in a way that perhaps makes cross-retaliation even more difficult to use.<sup>303</sup> For example, by reserving its

right to suspend concessions or other obligations under the GATT 1994, Ecuador was found to have created “a certain degree of inconsistency” with its request to retaliate across agreements.<sup>304</sup> The arbitrator found that the reservation by Ecuador, if permissible, would imply in the first place that suspension is practicable and effective within the same sector under the same agreement.<sup>305</sup> In our view, moreover, it is questionable whether it is necessary to interpret “circumstances are serious enough” in subparagraph (c) by linking it to “the importance of such trade” and “the broader economic consequences” in subparagraph (d).<sup>306</sup> The latter two are factors to be taken into account not only in case of suspension across agreements under subparagraph (c) but also in case of suspension in the same sector or across sectors under the same agreement as provided for under subparagraphs (a) and (b), while the condition that “circumstances are serious enough” is unique to subparagraph (c).

We are of the view that cross-retaliation should be made easier to use, given that it may allow small-sized economy Members to overcome the credibility problem in implementing suspension authorised by the DSB. As the arbitrator notes in *EC - Bananas III (Ecuador)*, some Members could face difficulties in the context of suspensions of concessions or other obligations if it is not realistic or possible for them to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment within the same sector or under the same covered agreement.<sup>307</sup> In such a situation, it would be useful to allow suspension in the same sector to cover only part of the nullification and impairment while the residual amount of nullification or impairment would be the subject of suspension in another sector or under another covered agreement.<sup>308</sup> This solution was mentioned by the arbitrator in *EC - Bananas III (Ecuador)*, but they seemed to be of the view that the current text of the DSU does not allow for such solution.<sup>309</sup> Thus, the DSU text may need to be amended in this sense to enhance the possibility for cross-retaliation.

#### 4.2.5 There must be adequate mechanism to monitor retaliation and maintain “equivalence” between its level and that of nullification or impairment

##### *The situation*

Article 22.4 provides that the level of suspension of concessions or other obligations must be equivalent to the level of the nullification or impairment. Article 22.6 provides for an arbitration to ensure such equivalence. There is, however, no mechanism under the current DSU to ensure that the value of products actually subject to suspension will not exceed the level of nullification or impairment. In fact, it is the Member requesting suspension who decides which products from its list of goods and services submitted under Article 22.2 would be subject to suspension.<sup>310</sup> It is also up to the Member requesting suspension to make sure for itself that the total trade value of the products subject to suspension does not exceed the amount of nullification or impairment found by the arbitrator. There is arguably a risk that the actual level of suspension exceeds the level of nullification or impairment found by the arbitrator, since the complaining party is not required to propose a list of products with value equal to the level of suspension requested during the Article 22.6 arbitration proceedings, nor to submit a new list of products that matches the level of suspension authorised by the DSB. Moreover, the current DSU does not provide for recourse if the Member concerned does not agree that the value of products subject to suspension does not exceed such amount.

In practice, the complaining party normally submits together with its request under Article 22.2 a list of goods or services to be subject to the suspension. There is no rule on this and if a list is submitted, its value can even be higher than the value of *proposed* suspension of concessions or other obligations.

In this context, in particular if the arbitrator decides to reduce the level of the suspension,<sup>311</sup>



there will almost always be a discrepancy between the value of the authorised suspension and the value of the initial list. The current text of the DSU does not provide a mechanism to resolve this discrepancy and ensure exact equivalence between the level of the nullification or impairment and that of the actual suspension. The arbitrator in *EC - Hormones* even stated that there is no requirement under the DSU for the complaining party to be bound by any closed list of goods or services to be subject to the suspension.<sup>312</sup> The party requesting suspension is required only to identify the level of suspension it proposes and the products that may be subject to suspension.<sup>313</sup> Once the arbitrator has determined the level of suspension, which must be equivalent to the level of the nullification or impairment, the Member requesting suspension is free to pick products from its initial list equalling a total trade value that does not exceed the amount of the nullification or impairment found by the arbitrator.<sup>314</sup>

In practice, this allows resort to the so-called “carousel” type of suspension where the concessions or other obligations subject to suspension can change every now and then in term of product or service coverage. The arbitrators in *EC - Hormones* are well aware of this practice but “assumed that the US - in good faith and based upon [this] unilateral promise - will not implement the suspension of concessions in a ‘carousel’ manner”.<sup>315</sup> The arbitrators therefore found that they were not required to adjust the ways in which the effect of the authorised suspension is calculated, and concluded that it was for the suspending Member to draw up the final list “within the bounds of the product list put before the DSB”.<sup>316</sup>

The current text of the DSU as interpreted in *EC - Hormones* results in a virtual authorisation for Members to practice “carousel” type of suspension once the authorisation is granted. A suspending Member may rotate at will products or services subject to suspension as long as it observes the level of suspension authorised. In practice, this may result in a much higher level of retaliation since there can be uncertainty and

unpredictability as to what goods or services are to be subject to the suspension. For many, this is a real concern, taking into account the fact that some Members could take advantage of this possibility, in particular if so required by domestic legislation.<sup>317</sup>

Once a DSB authorisation is granted, there is under the current DSU no specific mechanism or procedure to monitor suspension of concessions or other obligations. According to Article 22.8, surveillance under Article 21.6 will be maintained in cases where concessions or other obligations are suspended. The purpose of such surveillance, however, is to monitor action or measures taken by the Member concerned, and not that taken by the suspending Member. It focuses on whether the Member concerned has complied, and not whether the complaining party suspends its concessions or other obligations in accordance with the DSB authorisation.

#### *Members’ views*

In the DSU Review, several proposals attempt to address this issue. In accordance with its proposal to delete any possibility of cross-sector retaliation, Mexico proposes to delete any mandate in this regard for the Article 22.6 arbitration and introduces an idea that allows new arbitration in case of change in the level of the nullification or impairment.<sup>318</sup> Japan for its part proposes that the determination of the level of nullification and impairment take into account subsequent implementation or administration of the measures found to be inconsistent with a covered agreement.<sup>319</sup>

Australia also proposes the same idea of allowing the second arbitration in case of “variation” of the concessions or other obligations suspended. Such variation can be only to correct technical error or when required by subsequent developments. Furthermore, Australia proposes that Article 22.6 be amended by specifying that an authorisation by the DSB is possible only when permitted under Article 22.2, and by deleting any deadline for such authorisation.<sup>320</sup>



Similarly, the Philippines and Thailand propose that, after the level of the nullification or impairment has been determined by the Article 22.6 arbitrator, the complaining party submit a list of concessions or other obligations it intends to suspend. The arbitrator then determines whether the level of suspension resulting from the list is equal to the level of the nullification or impairment it has determined. An authorisation will not be granted by the DSB unless it is consistent with the determination made by the arbitrator. Once an authorisation is granted, the list of concessions or other obligations to be suspended cannot be modified except by mutual agreement of the parties to the dispute, or by a decision of the arbitrator upon request by the complaining party and solely for technical purposes.<sup>321</sup>

However, the proposal of the Philippines and Thailand seems to go a step further by trying to address the problem of “chilling effects” on trade prior to and during the suspension of concessions or other obligations that result from the authorised list and any subsequent modification thereof. For this purpose, the arbitrator must take account of the time period for trade in the affected sector to adjust itself and to regain its normal course after the suspension. The problem of “chilling effects” is addressed to a certain extent by the EC and Japan who propose that products en route on or before the date of application of suspension shall be exempted from measures to implement such suspension.<sup>322</sup>

#### *Our suggestion*

When the Member requesting suspension is free to choose any products from its list submitted under Article 22.2, uncertainty is created, which could make it more costly for violating the obligations under the WTO Agreement and thus increase such Member’s enforcement power. *This in itself is not necessarily bad*, especially for small-sized economy Members that usually are not economically powerful enough to make their retaliation effective. In this context, uncertainty might help small-sized

economy Members improve their situation as the suspending Members. However, it is also important that the uncertainty thus created does not cause the actual level of suspension to exceed the level determined by the arbitrator under Article 22. 6.

More uncertainty can be created by the carousel-type suspension. A periodic rotation of the products subject to suspension has been introduced by the US in its Carousel Retaliation Act of 1999.<sup>323</sup> Perhaps instead of deciding if the carousel-type suspension should be prohibited, WTO Members should find a way to regulate its use. One concern which may need to be addressed is how to avoid the situation where rotating products creates additional cumulative harm. Such effect, if accounted for, could add to the value of products subject to suspension, unduly making the level of suspension exceed the determined level of the nullification or impairment.<sup>324</sup> In this light, the proposal by the Philippines and Thailand can be a basis for the Members to discuss the issue.<sup>325</sup> It could, however, be improved by including as a mandate for the Article 22.6 arbitrator to also quantify such an accumulative harm caused to the Member concerned if the suspending Member plans to rotate the products subject to suspension. In this way, the costs of unpredictability thus created could be properly taken into account, in quantifiable terms, in the determination of the level of suspension. Past Article 22.6 arbitrators have shown that such computation, based on trade statistics, is feasible.<sup>326</sup>

Therefore, it is desirable to have a specific multilateral procedure of surveillance of the suspension to ensure equivalence between the level of the nullification or impairment and that of suspension, possibly as well as to ensure that upon compliance, the Member concerned is not subject to further retaliation. This may consist of a possibility to refer the matter back to the original Article 22.6 arbitration for continued monitoring and a requirement for the suspending Member to regularly report to the DSB on suspension measures taken.<sup>327</sup> In concrete terms, surveillance would focus on whether the goods

and services subject to suspension are those included in the original list on the basis of which the DSB authorisation has been granted. Also, the value of the overall suspension should be regularly monitored, especially when the level of suspension has been decided to be adjustable on a periodic basis.<sup>328</sup>

To ensure “equivalence” one must also ensure that retaliation ends once there is compliance. Article 22 of the current DSU entrusts the DSB with the task of keeping under surveillance those cases where concessions or other obligations have been suspended but there has been no compliance.<sup>329</sup> The purpose is apparently to ensure that retaliation is genuinely a temporary measure applicable until such time as the WTO-inconsistent measure has been removed. We believe that to achieve this goal, it is necessary to have retaliation terminated as soon as there is compliance. A specific termination procedure must be provided for in case the responding party implements the recommendations and rulings of the DSB after a suspension of concessions or other obligations has been authorised against it for non-compliance<sup>330</sup>. In this regard, the proposals by the EC and Japan<sup>331</sup> appear to be quite constructive as they include a procedure that would enable the Member concerned to request for termination of the retaliation against it once it has complied.

#### 4.2.6 A clear provision on third party rights

##### *The Situation*

The absence of provisions for third-party status under Article 22 of the DSU has led different arbitrators to treat third party rights differently in arbitration proceedings. As mentioned in Section IV.A.1.e, the arbitrator in *EC - Bananas III (US)* denied Ecuador, a co-complainant of the US, third party status in the Article 22.6 arbitration proceeding in which the US was requesting a suspension of concessions or other obligations. The arbitrator only stated that it did not believe Ecuador’s right would be affected by this proceeding.<sup>332</sup>

A few months later, the arbitrator in *EC - Hormones* allowed Canada and the US to attend each other’s arbitration proceedings as third party, reasoning that US and Canadian rights may be affected in both proceedings.<sup>333</sup> The arbitrator in this case explained that the product scope and relevant trade barriers were the same in both proceedings, thus it might be necessary for the arbitrator to adopt the same or very similar methodologies and all parties should therefore receive the opportunity to comment on each other’s proposed methodologies.<sup>334</sup>

Then, more than a year later, the arbitrator in *Brazil - Aircraft* declined Australia’s request to participate in the Article 22.6 arbitration proceedings as a third party.<sup>335</sup> The arbitrator did not believe that Australia’s rights would be affected by this proceeding as Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue and did not demonstrate that countermeasures proposed by Canada might affect its rights or benefits under the WTO Agreement.<sup>336</sup>

These cases seem to suggest that in order to be granted third party status, the requesting party must show that its rights may be affected. The decision in *EC - Bananas III (US)* implies that being a co-complainant does not make prima facie that a party’s rights may be affected. However, there is still no way of knowing how and according to what criteria the subsequent arbitrators will decide whether a party’s rights would be affected.

##### *Our suggestion*

Given such ambiguity in interpretation, the issue of third party rights under Article 22.6 needs to be clarified. If third party rights are provided for under Article 22.6, there would be an opportunity for the party concerned to comment on principles, legal issues and methodologies for calculating the level of nullification and impairment, especially in a multiple complaint case where Article 22.6 proceeding of each co-complainant would involve a similar factual

situation. Without knowing what goes on in each other's proceedings, the co-complainants might be at a disadvantage, given that the responding party, usually the same party in each case, would have access to most, if not all, necessary information in each of its Article 22.6 proceedings while each complaining party would only know about its own proceeding. The EC in the *Bananas III (Ecuador)* case seemed to base its evaluation of Ecuador's methodology (for calculating the level of nullification and impairment) on that of the US. This seemed unfair to Ecuador, which was not allowed as a third party in EC - Bananas III (US) and did not have access to the methodology paper of the US.<sup>337</sup>

Without a clear provision on the extent of third party rights, the practice under Article 22.6 might vary even further. In *US - Byrd Amendment*, the arbitrator did not even discuss the issue of third party rights in its decision but reported that a single, joint substantive hearing for all the complainants was held and all the parties present were allowed to comment on each other's replies.<sup>338</sup> The arbitrator gave individual decisions to all complainants, the substance of which was essentially the same.

## 5. LEVELLING THE PLAYING FIELD IN COMPLIANCE AND REMEDY PROCEEDINGS

Facing with limited resources, many developing countries found it difficult to effectively represent their interests in WTO dispute settlement procedures. So far, developing countries have participated in the compliance and remedy proceedings as the complaining parties in a handful of cases.<sup>339</sup> *Brazil - Aircraft* is the only case under Article 22.6 in which a developing country is involved as a responding party, and subsequently was found to be in non-compliance. From these cases as well as from the text of Articles 21 and 22, it appears to us that the situation of developing countries in the compliance and remedy proceedings needs to be further improved.

The DSU, it is true, contains some special and differential treatment provisions for developing countries. Article 21.2 provides for a particular attention to be paid to “matters affecting the interest of developing country Members” concerning a measure subject to dispute settlement. Article 21.7 provides that for a matter raised by a developing country Member, the DSB must consider what further action it might take “which would be appropriate to the circumstances”. If the complaining party is a developing country, in considering appropriate action to be taken, the DSB must under Article 21.8 take into account the trade coverage of the measures at issue and their impact on the economy of the complaining party.

These provisions, however, have proven to be inadequate to address concerns and interests of developing country Members. The obligations contained therein are loosely termed and remain vague. Article 21.2 indeed has only a recommendation value and Article 21.7 and 21.8 only set forth the principle without specifying in concrete terms how the DSB can address problems of the disadvantageous position of developing country Members in the litigations.<sup>340</sup>

In addition, the DSU does not provide for a specific special and differential treatment in one area that

is most crucial to developing country Members: compliance and suspension of concessions or other obligations. Whether a developing country is on the complying end or the suspending end of the equation, the DSU puts the parties to the dispute on an equal footing. Paradoxically, this is an area where panel and Appellate Body decisions affect, in real and concrete terms, the economy of a developing country Member that is party to the dispute the most.

For compliance and retaliation matters, the size of the economy concerned and its ability to withstand sanctions and adapt itself will always make a difference. Most developing countries lack the ability to make use of many DSU provisions regarding suspension of concessions or other obligations. They are more likely to find themselves in a situation where it is not realistic or possible to suspend concessions or other obligations against a Member concerned, be it a developed or a developing country. In fact, the smaller the size of the economy and the volume of trade, the slimmer the chance of finding a good or a service sector to be subject of suspension that would not produce some kind of adverse effects for the suspending Member.<sup>341</sup>

WTO jurisprudence seems to acknowledge the disadvantageous situation of developing countries in this matter. According to the Article 22.6 arbitrator in *Canada - Aircraft Guarantees and Credits*, the overall level of trade between the two parties to the dispute is a factor to be taken into account in deciding the level of suspension, since the suspension would hurt a significant proportion of trade between them for a certain period of time.<sup>342</sup> It would seem from this decision that the smaller the volume of trade, the lower the level of suspension would be. Developing countries that depend on a limited number of services or commodities for export, and having limited capacity to import, are obviously in a position where retaliation would be less realistic than for developed countries with larger economies. Also, where a

developing country is suspending concessions or other obligations against a developed country, the suspending side might find whatever trade existing between the two countries is much more important to it than to the other side, and that any suspension would probably be more disruptive to its own economy. This situation of

economic inequality has also been noted in *EC - Bananas III (Ecuador)*.<sup>343</sup>

Taking note of the above, we suggest that the situation of developing countries in compliance and remedy matters be improved along the following lines:

## 5.1 Capacity building through extended third party rights

Most developing countries lack the knowledge and expertise regarding Article 22.6 arbitration because they rarely get involved in this proceeding, where DSU compliance and remedy provisions are interpreted and jurisprudence developed. One way for capacity building with regard to Article 22.6 arbitration is to provide these countries with opportunity to acquire information and first-hand experience in this proceeding by participating as third parties.

the parties to the dispute. It should be able to attend substantive meetings and also have an opportunity to express its views.

Third party status may be particularly useful when a developing country is a prevailing co-complainant in a multiple-complaint case.<sup>344</sup> As a third party, the developing country concerned would at least be informed of what goes on in its co-complainant's Article 22.6 arbitration proceeding. It could comment and exchange views on what it considers might affect its interests. This may help the developing country concerned to better manage and become a more active participant in its own Article 22.6 proceedings.

Third party status could be made contingent on the condition that the party concerned must also participate as an original third party from the beginning, or as a co-complainant. A third party should have access to the submissions of

## 5.2 Creating better “incentives” for developing countries to comply

### 5.2.1 Possible special regime for the determination of the reasonable period of time

Although Article 21.2 of the current DSU provides that particular attention should be paid to matters affecting the interests of developing country Members concerning measures subject to dispute settlement, it does not seem to result in adequate flexibility for developing countries. Whether the Member on the complying end is a developing country or a developed country, Article 21.3 places them on an equal footing with regard to the determination of the reasonable period of time. As a result, some Members have proposed that as a special and differential treatment, when the implementing member is a developing country, the reasonable period of time determined through arbitration should be no less than 15 months.<sup>345</sup> In cases that require

change of statutory provisions or change of long-held practice or policy, the reasonable period of time for developing countries has been proposed to be at least two years.<sup>346</sup> In determining the reasonable period of time, it has also been proposed that the arbitrator should give consideration to the particular situation of developing countries.<sup>347</sup>

Understandably, a special regime may be necessary to provide some flexibility to developing countries with regard to the period of time given to comply with the DSB recommendations and rulings. However, we are of the view that the reasonable period of time should not be pre-determined for developing countries in the DSU text, either as a minimum or maximum period of time, as this could affect the philosophy of the WTO dispute settlement system that prompt compliance is the ultimate goal.<sup>348</sup>

What we are suggesting, rather, is a special regime that provides flexibility to developing countries, taking into account circumstances related to its level of development, by allowing a period of time in addition to the reasonable period of time determined under the current Article 21.3. In determining whether extra time should be allowed, the arbitrator may consider factors other than legal procedures under the domestic law of the developing country concerned. The arbitrator may be required to take into account, for example, circumstances related to development objectives and policy of the developing country concerned. Several Members already seem to be supportive of the idea of strengthening special considerations for developing countries in their proposals to amend Article 21.2.

### 5.2.2 Possible special regime for the DSB retaliation authorisation

It is not our intention to suggest that when the Member concerned is a developing country and does not implement the DSB recommendations or rulings after the expiry of the reasonable period of time, it should not be retaliated against. We simply believe that, as special and differential treatment, the DSU should provide some flexibility to developing countries, upon reasonable justification taking into account their development objectives and policy, in case of a bona fide delay in implementation of DSB recommendations and rulings.<sup>350</sup>

By definition, developing countries may not be well equipped for, or may lack infrastructure to adequately support, the implementation of their WTO obligations. These countries may need time to allow their internal system to evolve in

relation to compliance with their international obligations. Therefore, if the main reason for delay in implementation is due to the level of development, a special regime for retaliation authorisation and compensation should perhaps be provided for.

For example, when authorising the suspension of concessions or other obligations against a developing country Member, the DSB should be empowered to relax the condition that the level of suspension must be equivalent to the level of the nullification or impairment in favour of the developing country subject to retaliation. The arbitrator under Article 22.6 would determine the level of nullification and impairment, as in normal cases, but would recommend that the concessions or other obligations to be actually suspended be of a lower amount, taking into account the objectives and policy of development of the developing country concerned.

Moreover, the DSB should perhaps be allowed to authorise a suspension of concessions or other obligations against a developing country for only a specified period of time, subject to regular review for renewal if compliance is still not possible. The level of suspension could be linked to the developing country's volume of trade with the suspending Member, and the importance of such trade to its economy, instead of relying wholly on the level of the nullification or impairment.

Such a special regime for DSB retaliation authorisation would be an important special and differential treatment for developing countries, and in the long run should allow them to better integrate the multilateral trading system.



## 5.3 Creating better means for “winning” developing countries to ensure compliance

### 5.3.1 Reimbursement of legal fees and expenses as remedy

It is a well-known fact that developing countries with limited resources are facing difficulties with the high litigation costs in the WTO dispute settlement system.<sup>351</sup> As a special and differential treatment measure, a number of WTO Members have proposed that in a dispute between a developed country and a developing country, if the prevailing party is a developing country, it should be able to obtain reimbursement of litigation fees from the losing developed country. Although the main focus in these proposals seems to be on the reimbursement of expenses during the legal proceedings before a panel or Appellate Body, such reimbursement is for the prevailing developing country's legal fees and expenses incurred during the whole litigation process under the DSU, including Article 21.3 (c), 21.5 and 22.6 proceedings.<sup>352</sup>

WTO Members' proposals also seem to aim at cases where a developed country initiates a dispute against a developing country and loses.<sup>353</sup> They certainly form a good basis for discussion. The proposal put forward by India on behalf of a group of developing countries suggests that the panel or Appellate Body award litigation costs to the developing country concerned to the amount of 500,000 USD or actual expenses, whichever is higher. Such litigation costs would include lawyers' fees, charges and all other expenses, preparation of necessary documents for, and participation in, the consultations, panel and appellate proceedings, travel, hotel, per diem and other expenses for a reasonable number of capital-based officials.<sup>354</sup> China, on the other hand, proposes to discuss more detailed definition and calculation of legal costs at the technical level after WTO Members endorse the reimbursement in concept.<sup>355</sup> Jamaica proposes that the costs to be reimbursed would include fees for attorneys and for experts used to assist in the preparation of legal arguments.<sup>356</sup>

Compared to other issues in the DSU review, the reimbursement of litigation expenses is perhaps not such a controversial issue.<sup>357</sup> Some developed countries, including the US, already have in their domestic legal system a fee-shifting rule that allows for reimbursement of legal expenses.<sup>358</sup> However, reimbursement of litigation expenses is only one way to help enhance developing countries' ability to participate in the dispute settlement system. Other alternatives such as the Advisory Centre on WTO Law, a unique intergovernmental organization/law office established in 2001 to provide subsidised legal assistance to developing and least-developed countries, are perhaps another way of trying to alleviate the burden of expensive litigation costs at the WTO.<sup>359</sup>

### 5.3.2 Making cross-retaliation more readily available for developing countries

It is true that Article 22.3 can be perceived as some kind of special and differential treatment provision, as it allows cross-retaliation to sectors in which developing countries might have more potential to do so, such as intellectual property. The Article 22.6 arbitrator in *EC - Bananas III (Ecuador)* recognised that the inequality between Ecuador and the EC is such that it would justify retaliation across agreements under Article 22.3 (c) because in this case, the circumstances would be serious enough and it was not practicable or effective for Ecuador to retaliate under the same agreement.<sup>360</sup> This, however, did not lead to a practicable solution for Ecuador since it still found retaliation under the TRIPS Agreement difficult and unrealistic.

For example, there is the issue of nationality of performers and producers of phonogram, which can complicate the situation where suspension is intended against a particular phonogram, some performers and producers of which might come from other Member countries than the Member concerned. Also, there is the issue of

whether retaliation authorised under Article 22 of the DSU would constitute a violation of the suspending Member's obligations under treaties other than the WTO covered agreements such as the Paris, Berne or Rome Conventions. Finally, an authorisation to suspend concessions granted to a Member does not exempt other WTO Members from their TRIPS obligations. Therefore, a product originating from or a service supplied by a suspending Member that infringes upon intellectual property rights but in a manner consistent with a DSB authorisation under Article 22.6 would not be eligible for export to other WTO Members.<sup>361</sup>

As the last resort remedy, therefore, retaliation does not seem practicable for developing countries.<sup>362</sup> This is because developing countries are unlikely to be able to use market leverage on a Member concerned with a large market, such as the US or the EC, so that the Member concerned amends its measures found to be inconsistent with the WTO Agreement.<sup>363</sup> This is particularly true where there is domestic political pressure on the government to retain such measures. Curtailing access to a developing-country market has relatively little impact on a WTO Member with commercial interests diversifying throughout the world. On the other hand, access to markets of the US or the EC is essential to developing country exporters. These large developed Members, when prevailing, could easily use their economic power to press a smaller developing country to comply with the DSB recommendations and rulings.<sup>364</sup> Such imbalances in the WTO remedy system need to be addressed. Developing countries will not be able to meaningfully participate in a legal system that does not provide for a mechanism to adequately address their unfavourable economic position.

Cross-retaliation could be a tool to increase enforcement power of Members with smaller-sized economies. Developing countries especially need to be able to pose a credible threat when implementing retaliation authorised by the DSB. One way to strengthen the enforcement power of developing countries is to make conditions for authorising cross-retaliation less stringent for

them. For example, where a complaining party that is a developing country prevails, it should be able to acquire authorisation to retaliate across sectors and across agreements without having to satisfy the conditions set forth under Article 22.3. There should be a presumption for the Article 22.6 arbitrator that a developing country has difficulties in the context of suspension of concessions or other obligations, and that it is not practicable or effective for it to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment within the same sector or under the same agreement. Developing countries should also be exempted from the requirement that "circumstances must be serious enough" under Article 22.3(c).<sup>365</sup> A developing country should be allowed, as a general rule and if required by the circumstances, to suspend concessions or other obligations in the same sector or under the same agreement to cover only part of the amount of the nullification or impairment, while the residual amount would be subject of suspension in another sector or under another covered agreement.

It is perhaps true that it may be difficult to translate an authorisation to cross-retaliate into effective pressure to induce the Member concerned to comply.<sup>366</sup> Ecuador in *EC - Bananas III* is a prime example. Until now, it still has not implemented the suspension of obligations under the TRIPS against the EC. Recently, however, there seems to be a renewed interest among developing countries in cross-retaliation through TRIPS. Brazil has announced its intention to request for suspension of concessions in the areas of intellectual property rights and services, as well as raising tariffs on some goods, against the US for failing to remove cotton subsidies found to be inconsistent with the WTO Agreement.<sup>367</sup> In response, the US has reportedly threatened that retaliation might cause Brazil to lose preferential access to its market under the Generalized System of Preferences.<sup>368</sup> Whether or not cross-retaliation by Brazil would constitute an effective leverage against the US remains to be seen.

## CONCLUSION

Within ten years of its creation, the WTO dispute settlement system has already resolved more trade disputes than the GATT regime had during its 48 years of operation.<sup>369</sup> This suggests that WTO Members, including developing countries, have enough faith in the system. Only a handful of the disputes brought to the WTO went as far as Article 22.6 proceedings but they all have remained in the status of non-compliance for quite some time. This seems to suggest that the Article 22.6 proceedings do not really help enhance compliance. In fact, it is not clear if the current system of retaliation can induce compliance at all. The “carousel” debate shows that even the US thought that it did not have adequate enforcement power under the DSU system to make its retaliation effective. For smaller WTO Members, retaliation is simply not practicable.

The situation is aggravated by the fact that the current remedy regime cannot restore the benefits accruing to the injured Member up to the level that existed before the violation. The level of nullification or impairment under the DSU is calculated starting from the expiry of the reasonable period of time, and therefore is lower than that of the benefits lost as a result of a violation of WTO obligations, which starts from the date of imposition of the measures at issue. If retaliation is to re-balance benefits as well as effectively induce compliance, it is rather clear that the current regime has not achieved either objective. This in our view is a signal that re-examination of the underlying concepts of the WTO compliance and remedy regime may be required.

The compliance and remedy regime of the current DSU should be improved. This study has made suggestions and recommendations with a view to making the WTO dispute settlement system a more balanced regime. Among other things, it has suggested that WTO Members reconsider the prospective nature of the remedies. It has also recommended that for a case of violation (as opposed to non-violation or situation complaint), as in a case involving prohibited subsidies, the Article 22.6 arbitrator be allowed, subject *inter alia* to the requirement of proportionality as a general principle of law, to grant a level of suspension that exceeds the level of nullification or impairment so that suspension may constitute a legitimate and meaningful countermeasure to a violation of treaty obligations. In this way, we believe, the dual purposes of re-balancing benefits and effectively inducing compliance can be achieved without resulting in a punitive measure against the Member that is in breach of its WTO obligations.

This study has also made suggestions with a view to improving the situation of developing countries in the compliance and remedy proceedings. It has suggested that imbalances in the retaliation system, which presently favour Members with better market leverage, should be addressed: enforcement power of developing countries should be strengthened and there should be special regimes that provide flexibilities to developing countries. This should ultimately help address developing countries' disadvantageous position in the multilateral trading system as a whole.

## ENDNOTES

- 1 For GATT practice on remedies, see Palmetter, D. and Mavroidis, P.C. (2004). *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd ed.), Cambridge University Press, Cambridge, UK. Pp. 262-264. For the compliance aspect of the GATT dispute settlement cases involving developing countries, see e.g., *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, BISD 415/467, adopted 28 April 1994.
  
- 2 These cases are: Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (“EC – Bananas III (US) (Article 22.6 – EC)”)*, WT/DS48/ARB, 9 April 1999; Decision by the Arbitrators, *European Communities – Measures Concerning Mean and Meat Products (Hormones) – Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (“EC – Hormones (Canada) (Article 22.6 – EC)”)*, WT/DS48/ARB, 12 July 1999; Decision by the Arbitrators, *European Communities – Measures Concerning Mean and Meat Products (Hormones) – Original Complaint by United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (“EC – Hormones (US) (Article 22.6 – EC)”)*, WT/DS26/ARB, 12 July 1999; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU (“EC – Bananas III (Ecuador) (Article 22.6 – EC)”)*, WT/DS27/ARB/ECU, 24 March 2000; Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (“Brazil – Aircraft (Article 22.6 – Brazil)”)*, WT/DS46/ARB, 28 August 2000, paras 3.6-3.10; Decision by the Arbitrator, *United States – Tax Treatment for “Foreign Sales Corporation” – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (“US – FSC (Article 22.6 (US)”)*, WT/DS108/ARB, 30 August 2002; Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (“Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)”)*, WT/DS222/ARB, 17 February 2003; Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities (“US – 1916 Act (EC) (Article 22.6 – US)”)*, WT/DS136/ARB, 24 February 2004; Decision by the Arbitrator, *United States – Continued Dumping And Subsidy Offset Act of 2000, Original Complaint by Brazil, Canada, Chile, the European Communities, India, Japan, Korea and Mexico – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/BRA, WT/DS234/ARB/CAN, WT/DS217/ARB/CHL, WT/DS217/ARB/EEC, WT/DS217/ARB/IND, WT/DS217/ARB/JPN, WT/DS217/ARB/KOR, WT/DS234/ARB/MEX, 31 August 2004. See Summary of the dispute to date at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited on 12 February 2007).
  
- 3 See Article 3, paragraph 1, of the DSU.
  
- 4 See Article 19.1 of the DSU.
  
- 5 See Article 22.1 of the DSU.
  
- 6 See Article 22.3 of the DSU.

- 7 See Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3 (c) of the DSU*, WT/DS27/15, 7 January 1998. It should be noted that the extra week was probably allowed due to the holiday seasons. A reasonable period of time of 15 months would have expired exactly on Christmas Day.
- 8 See Article 21.6 of the DSU.
- 9 See Article 21.5 of the DSU. This provision is an important improvement from the GATT regime. Article XXIII: 2 of the GATT 1947 does not include any specific procedure for compliance determination. It states that “if the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorise a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under the GATT as they determine to be appropriate in the circumstances.” However, when the CONTRACTING PARTIES consider authorising suspension of concessions or other obligations, it is quite logical to assume that they somehow must first determine whether the contracting party in question has complied with their recommendations or rulings.
- 10 See *id.*
- 11 In some instances, GATT panel recommended relief for past damages in the form of reimbursement of antidumping duties under the GATT system. See, for example, Report of the Panel, *New Zealand – Imports of Electrical Transformers from Finland*, BISD 32S/55, adopted 18 July 1985. This must be considered rather as exception to the rule. Key CONTRACTING PARTIES such as the US and the EC opposed reimbursement and as a result, some of the GATT reports that followed this line were not adopted. See for example, Report of the Panel, *United States – Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow products from Sweden*, ADP/47, circulated 20 August 1990, un-adopted; Report of the Panel, *United States – Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, circulated 7 September 1992, un-adopted. See generally, Hudec, R. (1993). *Enforcing International Trade Law: the Evolution of the Modern GATT Legal System*. Butterworth, Salem, NH.
- 12 See Article 22.1 of the DSU.
- 13 See Article 22.2 of the DSU.
- 14 See Article 22.3 (a) of the DSU.
- 15 See Article 22.3 (b) of the DSU.
- 16 See Article 22.3 (c) of the DSU.
- 17 See Article 22.3 (d) of the DSU.
- 18 Under Article 22.6 of the DSU, authorisation is granted unless there is a consensus to reject the request.
- 19 See Article 22.6 of the DSU.
- 20 See *id.*

- 21 See id.
- 22 See Article 22.7 of the DSU.
- 23 See id.
- 24 See id.
- 25 See Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the Trade Negotiations Committee on 15 December 1993.
- 26 See Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para 30.
- 27 See e.g., Communications from the European Communities dated 13 March 2002, *TN/DS/W/1*, p. 1 (citing WT/MIN(99)/8 of 22 November 1999); Communication from Thailand dated 20 March 2002, *TN/DS/W/2*, p. 1 (citing WT/MIN(01)/W/2 and Corr.1); Communication from the Philippines and Thailand dated 21 March 2002, *TN/DS/W/3*, p.1 (citing WT/MIN(01)/W/3 and Corr.1); Proposal by Japan dated 28 October 2002, *TN/DS/W/22*, p. 1 (citing WT/MIN(01)/W/6).
- 28 Article 19.1 of the DSU (emphasis added).
- 29 Id. (emphasis added).
- 30 In cases involving anti-dumping duties, for example, the implementing measure sometimes consists of re-determining an element of the original determination leading to the imposition of a duty. The re-determination would indeed eliminate the inconsistency specified in the rulings, but would lead to the same end result, i.e. maintaining an anti-dumping duty at the same or similar rate. See e.g. *Thailand – Anti-Dumping Duties on Angles, Shapes and Selections of Iron or Non-Alloy Steel and H-Beams from Poland, Status Report by Thailand*, WT/DS122/9, 6 December 2001.
- 31 See Horn, H, and Mavroidis, P.C. (1999). *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, World Bank (WTO 2000 Capacity Building Project Background Papers), Washington DC, USA. P. 16. (Also available at [http://www.itamaraty.gov.br/portugues/ministerio/sitios\\_secretaria/cgc/remedies.pdf](http://www.itamaraty.gov.br/portugues/ministerio/sitios_secretaria/cgc/remedies.pdf), last visited on 12 February 2007).
- 32 Notable cases in which implementation is still pending are: *EC – Bananas*, *EC – Hormones*, *US – FSC*, *US – Byrd Amendment*. Details on the latest development of these cases are discussed in Bridges, Year 10, No. 1, January – February 2006, pp. 15-16 and No. 2, March – April 2006, p. 12 (also available at <http://www.ictsd.org/monthly/archive.htm>, last visited on 12 February 2007).
- 33 See Article 3.1 of the DSU.
- 34 See Article 59 of the Statute of the International Court of Justice.
- 35 A State may contest the jurisdiction of the ICJ in a particular case, but the matter of jurisdiction is nonetheless to be settled by decision of the Court. See Article 36 (6) of the Statute of the International Court of Justice.



- 36 A judgment of the ICJ must contain, *inter alia*, operative provisions. See Article 95 (1) of the International Court of Justice Rules of the Court, adopted on 14 April 1978.
- 37 See e.g., *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, I.C.J. Reports 1962, p. 6 (the Court found that Thailand was under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by it at the Temple, or in its vicinity on Cambodian territory, and to restore to Cambodia any objects which had been removed from the Temple or the Temple area by the Thai authorities); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14 (the Court decided that the US is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the legal obligations found by the Court, and to make reparation to Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law and the Treaty of Friendship, Commerce and Navigation between the two countries). In land and maritime frontier disputes, the Court's judgments were quite specific as to how the boundary lines are to be drawn, see e.g., *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, I.C.J. Reports 1992, p. 351; *North Sea Continental Shelf (Denmark and the Netherlands v. Germany)*, Merits, Judgment of 10 February 1969, I.C.J. Reports 1969; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 10 December 1985, I.C.J. Reports 1985, p. 192.
- 38 See M. N. Shaw, *INTERNATIONAL LAW* (3rd Ed. 1991). Cambridge University Press, Cambridge, UK, p. 672. Examples of non-compliance include the *Corfu Channel* case (ICJ Reports, 1949, p. 4; *INTERNATIONAL LAW* Report 16: 525), the *Fisheries Jurisdiction* case (ICJ Reports, 1974, p. 3; *INTERNATIONAL LAW* Report 55: 238) and the Iran case (ICJ Reports, 1980, p. 3; *INTERNATIONAL LAW* Report 61: 530).
- 39 See *id.*
- 40 See Article 53 (1) of the ICSID Convention. Compare it with Article 21.1 of the DSU, which reads: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." It seems clear that larger discretion is given to ICSID arbitrator in this regard.
- 41 See Article 54 (1) of the ICSID Convention.
- 42 See e.g., Award, ICSID Case No. ARB/99/6 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, dispatched to the parties on 12 April 2002; Award, ICSID Case No. ARB/97/7 *Emilio Agustín Maffezini v. the Kingdom of Spain*, dispatched to the parties on 13 November 2000; Final Award, ICSID Case No. ARB/96/1 *Compañía del Desarrollo de Santa Elena, S.A. v. the Republic of Costa Rica*, dispatched to the parties on 17 February 2000.
- 43 See Report of the Panel, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5 of the DSU by the United States ("Australia – Automotive Leather"), WT/DS126/RW, 21 January 2000, paras 6.22, 6.42.

- 44 See Award of the Arbitrator, *EC – Measures concerning Meat and Meat Products (Article 21.3(c) of the DSU)*, WT/DS/26/15, WT/DS/48/13, 29 May 1998, para XXXVIII; Award of the Arbitrator, *Australia – Measures Affecting Importation of Salmon (Article 21.3(c) of the DSU)*, WT/DS/18/9, 23 February 1999, para 35; Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages (Article 21.3(c) of the DSU)*, WT/DS/75/16, WT/DS/84/14, 4 June 1999, para 45; Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages (Article 21.3(c) of the DSU)*, WT/DS/87/15, WT/DS/110/14, 23 May 2000, para 42; Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 (Article 21.3(c) of the DSU)*, WT/DS/217/14, WT/DS/234/22, 13 June 2003, para 52.
- 45 See Communications from the European Communities dated 23 January 2003, *TN/DS/W/38*, p. 7 at para 23.
- 46 See Communication from Jordan dated 24 January 2003, *TN/DS/W/43*, p. 6 at para 26.
- 47 See Communication from the Republic of Korea dated 20 January 2003, *TN/DS/W/35*, pp. 1-2 at paras 3-6.
- 48 See EC, *TN/DS/W/1*, p. 13 at para 20; Proposal by Japan dated 15 January 2003, *TN/DS/W/32*, p. 4 at para 1.
- 49 See EC, *TN/DS/W/1*, p. 13 at para 20. See also Article 7.9 of the Agreement on Subsidies and Countervailing Measures.
- 50 See Communication from Costa Rica dated 5 March 2003, *TN/DS/W12/Rev.1*, p. 4; Proposal by Ecuador dated 17 January 2003, *TN/DS/W33*; *Japan, TN/DS/W/32*, pp. 2-3.
- 51 See EC, *TN/DS/W/1*, p. 14 at para 21.
- 52 See Communication from Mexico dated 21 January 2003, *TN/DS/W/40*, pp. 4-5.
- 53 See *id.*, p. 13 at para 19; Jordan, *TN/DS/W/43*, p. 6 at para 26.
- 54 See Mexico, *TN/DS/W/40*, pp. 4-5.
- 55 See Section III.B and D below.
- 56 See Article 21.6 of the DSU.
- 57 See Article 22.8 of the DSU.
- 58 See EC, *TN/DS/W/1*, p. 14 at para 22; *Japan, TN/DS/W/32*, pp. 4-5 at para 3; Communications from the European Communities dated 23 January 2003, *TN/DS/W/38*, pp. 7-8 at para 25.
- 59 See Communication from China dated 3 March 2003, *TN/DS/W/51*, p. 3 at para 5.
- 60 See EC, *TN/DS/W/1*, p. 14; *Japan, TN/DS/W/32*, p. 4.
- 61 See *id.*

- 62 See *id.*
- 63 See Article 21.5 of the DSU.
- 64 In its proposal, the EC has proposed to expressly mention this in the text. See *TN/DS/W/1*, p. 16.
- 65 See *EC, TN/DS/W/1*, p. 15.
- 66 See *id.*, p. 16; *Japan, TN/DS/W/32*, p. 6.
- 67 See Report of Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities (“EC – Bananas III (EC) (Article 21.5)”)*, WT/DS27/RW/EEC, 12 April 1999.
- 68 See Report of Panel, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador (“EC – Bananas III (Ecuador) (Article 21.5)”)*, WT/DS27/RW/ECU, 12 April 1999.
- 69 See *EC – Bananas III (US) (Article 22.6 – EC)*.
- 70 See *id.*, paras 4.8-4.15.
- 71 See *id.*, paras 5.96-5.98.
- 72 See *id.*, para 6.2. Nearly two years after *EC – Bananas III (US)*, the Appellate Body, however, took the opposite view when they affirmed the panel decision in *US – Certain EC Products* that an Article 22.6 arbitrator cannot determine the WTO consistency of a measure taken by a Member to comply with the DSB recommendations or rulings. See Report of Appellate Body, *United States – Import Measures on Certain Products from the European Communities (“US – Certain EC Products”)*, WT/DS165/AB/R, adopted 10 January 2001, paras 83-92, 128.
- 73 See Zimmermann, T.A. (2005). “WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation”, *Aussenwirtschaft*, Vol. 60, No. 1, p. 50. The US, which initially opposed the sequencing approach, also has concluded such bilateral agreements with its disputing party as well. See e.g., Understanding between the European Communities and the United States regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS/108/12, 5 October 2000; Agreement between Antigua and Barbuda and the US regarding Procedures under Articles 21 and 22 of the DSU, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/16, 26 May 2006.
- 74 See Report of Panel, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada (“Australia – Salmon (Article 21.5)”)*, WT/DS18/RW, 18 February 2000, para 1.3.
- 75 See Understanding between the European Communities and the *United States Regarding Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/12, 5 October 2000. Report of the Panel, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW,

11 July 2001. See also Understanding between *Thailand and Poland Regarding Procedures under Articles 21 and 22 of the DSU, Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*, WT/DS122/10, 4 January 2002, p. 2.

- 76 See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.6-3.10.
- 77 See *EC, TN/DS/W/1*, pp. 14-16 at para 23; *Japan, TN/DS/W/32*, pp. 5-6 at para 4; *EC, TN/DS/W/38*, pp. 8-9 at para 27.
- 78 See *Japan, TN/DS/W/32*, p. 5 at para 4; *EC, TN/DS/W/38*, p. 8 at para 27.
- 79 See *EC, TN/DS/W/1*, pp. 14-15 at para 23.
- 80 See *id.*, p. 16 at para 23; *Japan, TN/DS/W/32*, p. 6 at para 4.
- 81 See *EC, TN/DS/W/1*, p. 16 at para 23.
- 82 See Section I above.
- 83 See Article XXIII:2 of the GATT 1947.
- 84 MTN.GNG/NG13/W/4/Rev.1, 10 November 1989, p. 131. This was the case of *United States – Import Restrictions on Dairy Products*, in which the Netherlands succeeded in getting authorisation to suspension obligations to the US between 1951-1958. See *Import Restriction on Dairy Products*, Resolution of 26 October 1951 (II/16), 8 November 1952 (1S/31), 13 October 1953 (2S/28), 5 November 1954 (3S/46); Determination (suspension of certain obligations) of 1 December 1955 (4S/31, 36), 16 November 1956 (5S/28/136), 28 November 1957 (6S/14, 152), 20 November 1958 (7S/23, 124).
- 85 Up to February 2007, the DSB has authorised suspension of concessions in 15 cases: *EC – Bananas III (US)*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 19 April 1999, WT/DSB/M/59; *EC – Hormones (Canada)* and *EC – Hormones (US)*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 26 July 1999, WT/DSB/M/65; *EC – Bananas III (Ecuador)*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 18 May 2000, WT/DSB/M/80; *Brazil – Aircraft*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 12 December 2000, WT/DSB/M/94; *Canada – Aircraft Credits and Guarantees*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 18 March 2003, WT/DSB/M/145; *US – FSC*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 7 May 2003, WT/DSB/M/149; *US – Byrd Amendment (Canada)* and *US – Byrd Amendment (Mexico)*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 26 November 2004 WT/DSB/M/178; *US – Byrd Amendment (Brazil)*, *US – Byrd Amendment (EC)*, *US – Byrd Amendment (India)*, *US – Byrd Amendment (Japan)*, *US – Byrd Amendment (Korea)*, and *US – Byrd Amendment (Chile)*, see Dispute Settlement Body – Minutes of Meeting – Held in the Centre William Rappard on 17 December 2004, WT/DSB/M/180.
- 86 See *EC, TN/DS/W/1*, pp. 16-17 at para 24; *Ecuador, TN/DS/W/33*, p. 2.
- 87 See *Ecuador, TN/DS/W/33*, p. 3.

- 88 See Communication from Australia dated 14 February 2003, *TN/DS/W/49*, p. 4.
- 89 See Mexico, *TN/DS/W/40*, p. 4.
- 90 The panel established pursuant to Article 21.5 of the current DSU, or a new compliance panel, as proposed by some Members See *EC, TN/DS/W/1*, pp. 15-16 and *TN/DS/W/38*, pp. 8-9; *Japan, TN/DS/W/32*, pp. 5-6.
- 91 In accordance with existing rules of procedure, 10 days would be allowed. See Rule 2, Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161, which is also applicable to DSB meetings: see Rules of Procedure for Meeting of the Dispute Settlement Body, WT/DSB/9, adopted on 10 February and 25 April 1995, paragraph 1.
- 92 See Section I.B.2 above.
- 93 See *EC, TN/DS/W/1*, pp. 17-18 at paras 25-26. Compensation was considered by the EC in the *EC – Hormones cases*. At the DSB meeting on 28 April 1999, the EC informed the DSB that it would consider offering compensation in view of the likelihood that it may not be able to comply with the recommendations and rulings of the DSB by the deadline of 13 May 1999. However, compensation did not happen.
- 94 See Section IV.A.2.a below.
- 95 See Communication from Haiti (on behalf of the LDC Group) dated 17 January 2003, *TN/DS/W/37*, para VII.
- 96 See Communication from Kenya dated 24 January 2003, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations (“*African Group*”), *TN/DS/W/42*, para VIII.
- 97 See *EC, TN/DS/W/1*, pp. 16-17 at para 24; *Japan, TN/DS/W/32*, pp. 6-7 at paras 5-6.
- 98 See *EC, TN/DS/W/1*, pp. 16-17 at paras 24-25.
- 99 See also Section IV.A.1.b below; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 19; *EC – Hormones (US) (Article 22.6 – EC)*, para 19; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 4.11.
- 100 See *Australia, TN/DS/W/49*, p. 4.
- 101 See *Mexico, TN/DS/W/40*, pp. 2-3.
- 102 *Id.*
- 103 See Article 3.2 of the DSU.
- 104 See Collier, J. and Lowe, V. (1999). *The Settlement of Disputes in International Law*. Oxford University Press, Oxford, UK. P. 168.
- 105 See *Nuclear Tests Case (Australia v. France)*, Provisional Measures, Order of 22 June 1973, I.C.J. Reports 1973, p. 105 at para 30; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*,

Provisional Measures, Order of 11 September 1976, I.C.J. Reports 1976, p. 13 at para 42; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 180 at para 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 342 at para 35.

- 106 In cases cited in the previous footnote, only in the *Aegean Sea Continental Shelf Case* that the Court refused to order interim measures.
- 107 See Collier and Lowe, *supra*, p. 173.
- 108 See *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, I.C.J. Reports 2003, para 48.
- 109 See *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Provisional Measures, I.C.J. Reports 2003, para 55. See also *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, I.C.J. Reports 1991, para 23; *Case concerning the Vienna Convention on Consular Relations (Germany v. United States of America) ("LaGrand case")*, Provisional Measures, I.C.J. Reports 1999, para 22.
- 110 See e.g., Collier and Lowe, *supra*, p. 175.
- 111 See *LaGrand case*, Judgment of 27 June 2001, I.C.J. Reports 2001, paras 99-109, particularly para 102.
- 112 *LaGrand case*, I.C.J. Reports 2001, para 103 (quoting *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79, p. 199).
- 113 Article 290, paragraph 1, of the UNCLOS.
- 114 See Article 290, paragraph 6, of the UNCLOS.
- 115 See also Section II.A.2 above.
- 116 See Article 41 of the ICSID Convention.
- 117 We note, however, that, in practice, virtually none of the ICJ interim measures has been complied with. See Collier and Lowe, *supra*, p. 175.
- 118 May we remind our readers that this study is intended to cover violation complaints only.
- 119 See Article 22.8 of the DSU.
- 120 See *EC, TN/DS/W/1*, p. 6 at para II.E, pp. 14-16 at para 23 and pp. 18-19 at para 28; *Japan, TN/DS/W/32*, pp. 5-6 at para 4, pp. 8-9 at para 9; *EC, TN/DS/W/38*, pp. 8-9 at para 27.
- 121 *LDC Group, TN/DS/W/37*, para VII; *African Group, TN/DS/W/42*, para VIII.



- 122 See *Mexico, TN/DS/W/40*, p. 5.
- 123 An example of a domestic system that allows such “retroactivity” would be the US customs law. In anticipation to the DSB granting authorisation for suspension of concessions or other obligations under Article 22.6 in *EC – Bananas III*, the US adopted an administrative measure under which its Customs Service began “withholding liquidation” on imports of selected products from the European Union such that contingent liability for 100 per cent duties was imposed on these products one month in advance. The measure took effect on 3 March 1999 while the US was authorised to suspend concessions on 7 April 1999. See Report of Panel, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R, 17 July 2000, paras 2.21-2.25.
- 124 Compensation may take the form of monetary compensation or further trade concessions, as discussed in sub-Section A above.
- 125 See also Section IV.A.2.b below.
- 126 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 4.9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 37; *EC – Hormones (US) (Article 22.6 – EC)*, para 38. See also Section IV.A.2.a below.
- 127 One case in which compensation was offered as a mutually acceptable solution for implementation is *Japan – Taxes on Alcoholic Beverages*. See WT/DS8/19, WT/DS10/19, WT/DS11/17, 12 January 1998.
- 128 See endnote 2 above.
- 129 See Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU (“US – Section 110(5) Copyright Act (Article 25.3)”)*, WT/DS160/ARB25/1, 9 November 2001.
- 130 See *EC – Banana III (Ecuador) (Article 22.6 – EC)*, para 20.
- 131 See *EC – Hormones (US) (Article 22.6 – EC)*, para. 16; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 16.
- 132 See *EC – Banana III (Ecuador) (Article 22.6 – EC)*, para 24.
- 133 See *EC – Banana III (Ecuador) (Article 22.6 – EC)*, paras 35-36. See also *EC – Hormones (US) (Article 22.6 – EC)*, para. 16; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 16.
- 134 See *EC – Banana III (Ecuador) (Article 22.6 – EC)*, para 29.
- 135 See *US - 1916 Act (EC) (Article 22.6 – US)*, para 3.10.
- 136 See *id.*, paras 2.1, 2.7.
- 137 See *id.*, para 2.9.
- 138 See *id.*, paras 3.10-3.14; *US – Byrd Amendment (EC) (Article 22.6 – EC)*, paras 2.19-2.22.
- 139 See *US - 1916 Act (EC) (Article 22.6 – US)*, paras 7.1 – 8.1; *US – Byrd Amendment (EC) (Article 22.6 – EC)*, paras 5.1-5.2.

- 140 See *US – FSC (EC) (Article 22.6 – US)*, para 2.7.
- 141 See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.11-3.18.
- 142 *US – Byrd Amendment (EC) (Article 22.6 – EC)*, para 2.4.
- 143 See *id.*, paras 2.2-2.10.
- 144 See *EC Hormones (US) (Article 22.6 – EC)*, paras 8-12.
- 145 See *id.*, para 9; *EC – Bananas III (Ecuador) (Article 22.6)*, paras 37-41 (in particular para 38) and also paras 59, 78. See also *Brazil – Aircraft (Article 22.6 – Brazil)*, para 2.8; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 2.7-2.8; *US – FSC (Article 22.6 – US)*, paras 2.8-2.11; *US – 1916 Act (EC) (Article 22.6 – US)*, paras 3.1-3.6; *US – Byrd Amendment (EC) (Article 22.6)*, paras 2.23-2.27.
- 146 See *EC – Bananas III (Ecuador) (Article 22.6)*, paras 37-38. See also *Brazil – Aircraft (Article 22.6 – Brazil)*, para 2.9; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 2.6-2.7.
- 147 See *EC – Bananas III (Ecuador) (Article 22.6)*, para 38. See also *EC Hormones (US) (Article 22.6 – EC)*, para 11.
- 148 See *EC – Bananas III (Ecuador) (Article 22.6)*, para 40.
- 149 See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 2.8-2.9.
- 150 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 2.7. See also *US – FSC (Article 22.6 – US)*, para 2.11; *US – 1916 Act (EC) (Article 22.6 – US)*, para 3.5; *US – Byrd Amendment (EC) (Article 22.6)*, paras 2.23-2.27.
- 151 See *EC – Hormones (Canada) (Article 22.6 – EC)*, para 7; *EC – Hormones (US) (Article 22.6 – EC)*, para 7.
- 152 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 2.8.
- 153 The arbitrator's view is based on the fact that Australia never initiated dispute settlement proceedings against Brazil with respect to the export financing programme at issue, and did not draw the attention of the arbitrator to any benefits accruing to it or any WTO rights that might be affected by the arbitration. See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 2.4-2.6.
- 154 See *US – Byrd Amendment (Article 22.6 – US)*, paras 1.15-1.16.
- 155 See Article 22.7 of the DSU.
- 156 See *EC – Hormones (US) (Article 22.6 – EC)*, para 12; *EC – Bananas III (Ecuador) (Article 22.6 – US)*, paras 12-13; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 3.51; *US – 1916 Act (EC) (Article 22.6 – US)*, para 4.6.
- 157 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.3; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*,

para 76; *US – 1916 Act (EC) (Article 22.6 – EC)*, para 5.5; *US – Byrd Amendment (EC) (Article 22.6 – EC)*, para 3.74.

158 See *US – Byrd Amendment (EC) (Article 22.6 – EC)*, paras 3.20-3.30, 3.53.

159 See *id.*, para 3.54.

160 See *id.*, para 3.22.

161 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 4.9; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 37; *EC – Hormones (US) (Article 22.6 – EC)*, para 38.

162 See *EC – Bananas III (US) (Article 22.6 – EC)*, paras 4.8-4.9; *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para 168; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 37; *EC – Hormones (US) (Article 22.6 – EC)*, para 38.

163 It is the situation that would exist if the responding party has brought the WTO-inconsistent measure into conformity within the reasonable period of time.

164 See *EC – Hormones (US) (Article 22.6 – EC)*, paras 38-39; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras 37-38.

165 See *EC – Hormones (US) (Article 22.6 – EC)*, para 78; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 68. For another example of the “counter-factual” approach, see *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras 166-170.

166 See e.g., *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.53.

167 See *EC – Hormones (US) (Article 22.6 – EC)*, para 41; *EC – Bananas III (US) (Article 22.6)*, para 6.12; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.22; *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.57; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.76.

168 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.22; See also *US – 1916 Act (EC) (Article 22.6 – US)*, paras 5.54-5.57.

169 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.72.

170 See *id.*, para 5.78.

171 See *id.*, para 7.8.

172 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, para. 3.63-3.67. See also *id.*, paras 4.9 – 4.10.

173 See *Brazil – Aircraft (Article 22.6 – Brazil)*, para 3.18; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para. 3.15.

174 See *EC – Hormones (Canada) (Article 22.6 – EC)*, para 12; *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 1.5, 3.18; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para. 3.15.

- 175 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.23; *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 3.35, 3.37-3.41; *US - Section 110(5) Copyright Act (Article 25.3)*, para 3.18. See also *EC – Bananas III (US) (Article 22.6)*, para 6.12; *EC – Bananas III (Ecuador) (Article 22.6)*, footnote 52; *EC – Hormones (US) (Article 22.6 – EC)*, para 41; – *Hormones (Canada) (Article 22.6 – EC)*, para 40.
- 176 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.23; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.35.
- 177 See *US - Section 110(5) Copyright Act (Article 25.3)*, para 3.18; *US – 1916 Act (EC) (Article 22.6 – US)*, paras 5.23, 7.2.
- 178 See *US - Section 110(5) Copyright Act (Article 25.3)*, para 3.18 and footnote 38; *US – 1916 Act (EC) (Article 22.6 – US)*, paras 5.26-5.27.
- 179 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.72.
- 180 See *id.*, paras 3.69-3.79. The economic model would measure “the extent to which disbursement under the CDSOA affects exports from the requesting parties to the US. Such model “produces more credible result than any method applying ‘the total disbursement’ as a proxy for the level of nullification or impairment.” See *id.*, para 3.78.
- 181 See *US – FSC (Article 22.6 – US)*, para 5.61; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.48.
- 182 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.50.
- 183 See *id.*, paras 5.48, 5.50.
- 184 See *EC – Banana III (US) (Article 22.6 – EC)*, para 6.10; *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.50; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.50.
- 185 See *EC – Bananas III (US) (Article 22.6)*, para 7.8.
- 186 See *EC – Hormones (US) (Article 22.6 – EC)*, paras 83-84 (116.8 million USD per year); *EC – Hormones (Canada) (Article 22.6 – EC)*, paras 72-73 (11.3 million CDND per year); *EC – Banana III (Ecuador) (Article 22.6 – EC)*, para 173 (201.6 million USD per year); *Brazil – Aircraft (Article 22.6 – Brazil)*, para 4.1 (344.2 million CDND per year; *US – FSC (Article 22.6 – US)*, paras 6.2, 8.1 (an amount based on the amount expended by the US in granting subsidy, i.e. 4,043 million USD); *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 4.1 ( 247,797,000 USD).
- 187 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 2.1.
- 188 See *id.*, paras 5.40-5.44.
- 189 See *id.*, paras 6.1-6.17.
- 190 See *id.*, para 8.1.
- 191 See *id.*, para 8.2.

- 192 See a) above.
- 193 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 3.80-3.151.
- 194 See *id.*, paras 5.1-5.2.
- 195 See *EC – Hormones (US) (Article 22.6 – EC)*, para 19; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 19; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 4.11.
- 196 See *Brazil – Aircraft (Article 22.6 – Brazil)*, para 3.59; *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 4.16, 6.7.
- 197 See *EC – Hormones (US) (Article 22.6 – EC)*, para 20; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 20.
- 198 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 4.2.
- 199 *US – FSC (EC) (Article 22.6 – US)*, para 5.46.
- 200 *Id.*, para 5.47.
- 201 See e.g., the two *EC – Hormones cases and the two EC – Bananas III cases*.
- 202 See e.g., *US – 1916 Act (EC) (Article 22.6 – US) (in particular, paras 5.21-5.35)*; *US – Byrd Amendment (EC) (Article 22.6 – US)*.
- 203 See *US – 1916 Act (EC) (Article 22.6 – US)*, para 5.30.
- 204 See *EC – Hormones (US) (Article 22.6 – EC)*, paras 34-36; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras 33-35.
- 205 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 4.1.
- 206 According to the arbitrator, “appropriate” only suggests a certain degree of relation between the level of the proposed suspension and the level of the nullification or impairment, where as “equivalent” implies a higher degree of correspondence between the two levels. See *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.5.
- 207 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.3; *US – 1916 Act (EC) (Article 22.6 – US)*, paras 5.8, 5.22.
- 208 See *EC – Hormones (US) (Article 22.6 – EC)*, para 39; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 38.
- 209 See a) above.
- 210 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 4.5-4.11.
- 211 See *id.*, para 4.20.

- 212 See *id.*, para 4.25.
- 213 See *id.*, para 4.24.
- 214 See *US – FSC (EC) (Article 22.6 – US)*, para 5.12.
- 215 See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.11, 3.18; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 2.4.
- 216 See *Brazil – Aircraft (Article 22.6 – Brazil)*, para 3.29.
- 217 See *US – Byrd Amendment (EC) (Article 22.6)*, para 3.28; *US – FSC (EC) (Article 22.6)*, para 5.16.
- 218 For the arbitrator, this is particularly true for subsidies or government procurement cases not involving non-market offers by both parties. See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.25.
- 219 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.26.
- 220 *US – FSC (EC) (Article 22.6 – US)*, para 5.6.
- 221 As one of the recognised sources of international law under Article 38 of the Statute of the ICJ.
- 222 See *Brazil – Aircraft (Article 22.6 – Brazil)*, para 3.44 and endnote 46.
- 223 See Article 47 of the Draft Articles on State Responsibility With Commentaries Thereto Adopted by the International Law Commission on First Reading (January 1997), A/CN.4/L 600, 11 August 2000.
- 224 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.3.
- 225 *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.44-3.45. The arbitrator also noted that the concept of nullification or impairment is not found in Part II of the SCM Agreement dealing with prohibited subsidies whilst it is expressly mentioned in Article 5 dealing with actionable subsidies. See *id.* paras 3.46-3.58.
- 226 *Brazil – Aircraft (Article 22.6 – Brazil)*, para 3.60.
- 227 See *US – FSC (EC) (Article 22.6 – US)*, para 6.31; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.51.
- 228 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.36; *US – FSC (EC) (Article 22.6 – US)*, para 5.62.
- 229 *US – FSC (EC) (Article 22.6 – US)*, para 5.18. As basis of its reasoning, the arbitrator refers here to a 1978 arbitration between the US and France concerning the air services agreement of 27 March 1946. See *International Law Report*, 54: 304.
- 230 See *US – FSC (EC) (Article 22.6 – US)*, para 5.18.



- 231 See *id.*, para 5.18.
- 232 Or, strictly speaking, the requirement that countermeasures must not be disproportionate. In fact, according to the arbitrator in *US – FSC*, Article 4.10 of the SCM Agreement does not require strict or “positive” proportionality. Rather, it is intended to prevent “countermeasures that would be ‘disproportionate’”. *Id.*, para 5.26.
- 233 *Id.*, para 5.24. The arbitrator reached this conclusion based on ordinary meaning of the SCM Agreement text, and after examination of the object and purpose of the text: the countermeasures must offset the original wrongful act and the upset of the balance of rights and obligations which that wrongful act entails. See *id.*, paras 5.28 – 5.62.
- 234 See *id.*, para 5.62.
- 235 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 3.3-3.14.
- 236 See *US – FSC (EC) (Article 22.6 – US)*, para 5.12; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.37, above.
- 237 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.37-3.51.
- 238 *Id.*, para 3.92.
- 239 *Id.*, para 3.119. See also *id.*, paras 3.91-3.121. In this case, the countermeasures include an additional amount of 20 per cent of the amount of subsidy. See *id.*, paras 3.121-3.122.
- 240 See Section I.A.1.c (iii) above.
- 241 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 3.7.
- 242 See *id.*, para 3.7.
- 243 The revised EC banana regime was found to be inconsistent with Articles I and XIII of GATT and Articles II and XVII of GATS. See *id.*, para 14.
- 244 See *Recourse by Ecuador to Article 22.2 of the DSU, European Communities – Regime for the Importation, Sales and Distribution of Bananas*, WT/DS27/52, 9 November 1999, p. 3. See also *EC – Bananas III (Ecuador) (Article 22.6)*, para 5.
- 245 See *EC – Bananas III (Ecuador) (Article 22.6)*, para 29. See also Section I.B.1.a above.
- 246 See *EC – Bananas III (Ecuador) (Article 22.6)*, para 30.
- 247 See *EC – Bananas III (US) (Article 22.6 – EC)*, para 3.10; *EC – Bananas III (Ecuador) (Article 22.6)*, paras 62-64.
- 248 See *EC – Bananas III (Ecuador) (Article 22.6)*, paras 75-78.
- 249 See *id.*, paras 101, 173(b).

- 250 See *id.*, paras 80-86.
- 251 See *id.*, para 125.
- 252 See *id.*, para 84.
- 253 See *id.*, para 85.
- 254 See *id.*, para 86.
- 255 See *id.*, para 130.
- 256 See *id.*, para 133.
- 257 See *id.*, para 136.
- 258 See *id.*, para 176.
- 259 In *EC – Bananas III (Ecuador)*, the arbitrator even recommends to the requesting party that, in making its request for suspension to the DSB, it submits a list identifying the product with respect to which it intends to implement its suspension once it is authorised. See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para 173(b).
- 260 In *EC – Hormones*, for example, the US proposed a list covering trade in the amount of 918.073 million USD while the proposed level of suspension is 202 million USD. See *EC – Hormones (US) (Article 22.6 – EC)*, para 13 and endnote 10. Canada proposed a list covering trade in the amount of 316,412,782 CDND but proposed to suspend concessions for the amount of 75 million CDND. See *EC – Hormones (Canada) (Article 22.6 – EC)*, para 13 and endnote 10.
- 261 See *EC – Hormones (US) (Article 22.6 – EC)*, paras 14-15; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras 14-15.
- 262 See *EC – Hormones (US) (Article 22.6 – EC)*, para 18; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 18.
- 263 See *EC – Hormones (US) (Article 22.6 – EC)*, para 19; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 19.
- 264 See *EC – Hormones (US) (Article 22.6 – EC)*, para 21; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 21.
- 265 See *EC – Hormones (US) (Article 22.6 – EC)*, para 22.
- 266 See *EC – Hormones (US) (Article 22.6 – EC)*, para 22. Based on the US' confirmation that the actual level of suspension will be equivalent to the determined level of the nullification or impairment, the arbitrator "encourage[s]" the US to stand by its confirmation and to abide by Article 22.4 of the DSU. See *id.*, para 82. On 18 May 2000, the US Congress enacted the Trade and Development Act of 2000, which amended section 306(b)(2) of the Trade Act of 1974 to mandate the US Trade Representative to periodically revise the retaliation list. See 106 P.L. 200, 407; 114 Stat. 251, 293-

294. See also 19 U.S.C. 2416(b)(2). So far, no retaliation list has been revised under the carousel provision of this legislation. See <http://www.ita.doc.gov/td/industry/otea/301alert/index.html> (last visited on 19 February 2007). See also *Gilda Industries, Inc. v. United States*, Slip Op. 06-149, US Court of International Trade, 10 October 2006 (also available at [http://www.cit.uscourts.gov/slip\\_op/Slip\\_op06/06-149.pdf](http://www.cit.uscourts.gov/slip_op/Slip_op06/06-149.pdf), last visited on 19 February 2007).
- 267 See *EC, TN/DS/W/1*, p. 17 at para 25; *Japan, TN/DS/W/32*, p. 7 at para 6; *Ecuador, TN/DS/W/33*, p. 4.
- 268 See *EC, TN/DS/W/1*, p. 17 at para 25.
- 269 See *EC, TN/DS/W/1*, pp. 16-17 at para 24; *Japan, TN/DS/W/32*, pp. 6-7 at para 5.
- 270 See II.F above.
- 271 See *EC, TN/DS/W/1*, pp. 16-17 at para 24; *Japan, TN/DS/W/32*, pp. 6-7 at para 5.
- 272 See *Ecuador, TN/DS/W/33*, p. 2.
- 273 See *Mexico, TN/DS/W/40*, pp. 5-6.
- 274 See Communication from Haiti (on behalf of the LDC Group) dated 17 January 2003, *TN/DS/W/37*, p. 3 at para VIII.
- 275 See Communication from Kenya dated 24 January 2003, Text for the African Group Proposals on Dispute Settlement Understanding Negotiations ("*African Group*"), *TN/DS/W/42*, pp. 3-4 at para 9.
- 276 See *the Philippines and Thailand, TN/DS/W/3*, pp. 1-3; Section I.B.2 above.
- 277 The arbitrators in *EC – Bananas III (US)*, laying down founding stones for this counter-factual approach, affirmed nonetheless that they were aiming primarily at inducing compliance. See *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.3.
- 278 See e.g., *EC – Hormones (Canada) (Article 22.6 – EC)*; *EC – Hormones (US) (Article 22.6 – EC)*; *US – Byrd Amendment (EC) (Article 22.6 – US)*. See also endnote 32 above.
- 279 See *US – FSC (EC) (Article 22.6 – US)*, paras 5.45-5.47.
- 280 See *id.*, para 5.61; *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.48.
- 281 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.25.
- 282 See *id.*, para 3.116.
- 283 *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 6.2 and endnote 130. The arbitrator also stressed that the concept of inducing compliance is not expressly referred to in any provision of the DSU, and that it can at most be just one of a number of purposes in authorising retaliation. See *id.*, para 3.74.
- 284 See *id.*, paras 6.5, 6.6.

- 285 Id., para 6.3.
- 286 See id., para 6.4.
- 287 It was decided that the level of suspension is the total amount of disbursement multiplied by the coefficient of 0.72. See Section IV.A.2.d above. See also *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 4.9-4.10.
- 288 See Section IV.A.2.a above.
- 289 The arbitrator in *US- Byrd Amendment* found it “inappropriate” to just apply “a counter-factual based on a relatively simple equation and simple parameter” as in previous arbitrations. See *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.77.
- 290 *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.92. The relevant factors in this case include: the value of imports from the responding party to the requesting party; the gravity of the breach; proportionality; deterrence of future violation; and whether the measure at issue can be considered as an action of “self defence”. See id., paras 3.38-3.49, 3.96, 3.108-3.113.
- 291 *US – Byrd Amendment (EC) (Article 22.6 – US)*, para 3.77. In this case, factors or variables taken into account are: the value of the subsidy; *ad valorem* price reduction caused by application of the measure at issue; substitution elasticity of imports; and import penetration. See id., para 3.117.
- 292 A precedent exists in *Canada – Aircraft Credits and Guarantees*. See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 3.103-3.107, 3.119-3.122. In this case, the amount of countermeasures was adjusted by an amount corresponding to 20 percent of the amount of subsidy disbursed.
- 293 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 4.25-4.27.
- 294 We remind our reader that non-violation and situation complaints are not included in the scope of this study.
- 295 Other remedies would include cessation of wrongful conduct, assurances and guarantee of non-repetition, satisfaction, restitution in kind, retortion. See Aust, A. (2000). *Modern Treaty Law and Practice*. Cambridge University Press, Cambridge, UK. Pp. 301-304.
- 296 See Article 22 of the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC, “Report of the International Law Commission, Fifty-third Session, 23 April – 1 June and 2 July – 10 August 2001”, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p. 48; Article 30 of the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) on first reading, “Report of the International Law Commission on the work of its forty-eight session, 6 May – 26 July 1996”, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, p. 61.
- 297 See Article 51 of the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC, “Report of the International Law Commission, Fifty-third Session, 23 April – 1 June and 2 July – 10 August 2001”, *supra*, p. 57; *Case concerning the Gab ikovo – Nagymaros*

*Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, paras 82-87 (quoting Articles 47-50 of the Draft Articles on State Responsibility adopted by the ILC, “Report of the International Law Commission on the work of its forty-eight session, 6 May – 26 July 1996”, *supra*, pp. 63-64); Aust, *supra*, p. 303.

- 298 See Section I.B.2.d above. In *Canada – Aircraft Credits and Guarantees*, the “wrongful” act is a prohibited subsidy, the level of which could be quantified with relative accuracy. In *US – Byrd Amendment*, the wrongful acts are disbursement to US producers pursuant to CDSOA, which indeed can be quantified.
- 299 Past arbitrations considered that a level of suspension that exceeds the level of nullification and impairment is of punitive nature. See e.g., *EC – Bananas III (US) (Article 22.6 – EC)*, para 6.3; *US – 1916 Act (Article 22.6 – US)*, paras 5.8, 5.22, 7.1.
- 300 See *Mexico, TN/DS/W/40*, pp. 4-5. Instead, “collective” suspension has been suggested. Mexico proposes that the right to suspend concessions or other obligations can be transferred to one or more Members, and that suspension can remain in force until its level becomes equivalent to the level of the nullification or impairment. Also, the suspending Member must notify the DSB of any measure taken in this regard within three months after the authorisation and thereafter, every six months. See *id.*, p. 6. For an analysis of Mexico’s proposal, see Bagwell, K., Mavroidis, P. C. and Staiger, R. W., (2005). “The Case for Tradable Remedies in WTO Dispute Settlement” in *Economic Development & Multilateral Trade Cooperation (2006)*. Evenett, S. and Hoekman, B. (eds). Also available at <http://www.ycsg.yale.edu/focus/researchPapers.html> (last visited on 12 February 2007).
- 301 See *India et al, TN/DS/W/47*, p. 2.
- 302 See also discussion in Section III.A above.
- 303 See also Section IV.A.2.e above.
- 304 *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para 30.
- 305 See *id.*
- 306 See *id.*, paras 80-86.
- 307 See *id.*, paras 176-177.
- 308 See *id.*
- 309 See *id.*, para 177.
- 310 See *EC – Hormones (US) (Article 22.6 – EC)*, para 18; *EC – Hormones (Canada) (Article 22.6 – EC)*, para 18. See also Section IV.A.2.f above.
- 311 So far, the arbitrator decided to reduce the level of suspension of concessions or other obligations proposed by the complaining party in every case, except for *US – 1916 Act (EC)*. See *US – 1916 Act (EC) (Article 22.6 – US)*, paras 8.1-8.2.

- 312 See *EC – Hormones (US) (Article 22.6 – EC)*, para 23.
- 313 See *id.*, para 20.
- 314 See *id.*, paras 14-21.
- 315 *Id.*, para 22.
- 316 *Id.*, paras 22-23.
- 317 See e.g., Trade Act of 1974, § 306(b)(2), 19 U.S.C. 2416(b)(2).
- 318 See *Mexico, TN/DS/W/40*, pp. 5-6.
- 319 See *Japan, TN/DS/W/32*, p. 11 at para 21.
- 320 See *Australia, TN/DS/W/49*, p. 6.
- 321 See *the Philippines and Thailand, TN/DS/W/3*, p. 2.
- 322 See *EC, TN/DS/W/1*, p. 18 at para 27; *Japan, TN/DS/W/32*, p. 8 at para 8.
- 323 19 U.S.C. 2416(b)(2). This legislation was one of the responses to the EC failure to comply with the DSB recommendations and rulings in the *Hormones and Bananas* cases, possibly attributable to political pressure from the US banana and meat producers. See CRS Report RS20715, *Trade Retaliation: the “Carousel” Approach*, by Lenore Sek (5 March 2002). Smaller WTO Members, on which the US has no need to exert extra pressure for compliance, were probably not the intended targets. In fact, the carousel retaliation has never actually been applied, even against the EC.
- 324 See Report of Panel, *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999.
- 325 See Section IV.A.2.e above.
- 326 See Section IV.A.2.a – c above.
- 327 See Section IV.A.2.c above.
- 328 See *US – Byrd Amendment (Article 22.6 (US))*, paras 3.149-3.151. See also Section IV.A.2.c above.
- 329 See Article 22.8 of the DSU.
- 330 See also Section III.C above.
- 331 See *EC, TN/DS/W/1*, p. 6 at para II.E and pp. 18-19 at para 28; *Japan, TN/DS/W/32*, pp. 8-9 at para 9.
- 332 See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para 2.8.



- 333 See *EC – Hormones (Canada) (Article 22.6 – EC)*, para 7; *EC – Hormones (US) (Article 22.6 – EC)*, para 7.
- 334 See *id.*
- 335 See *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 2.4-2.5.
- 336 See *id.*, paras 2.5-2.6.
- 337 See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras 15-16, 39.
- 338 See *US – Byrd Amendment (EC) (Article 22.6 – US)*, paras 1.15-1.16.
- 339 See endnote 2 above.
- 340 The Article 22.6 arbitrator in *EC – Bananas III* applies Article 21.8 in considering whether Ecuador could have recourse to cross retaliation under Article 22.3, but it would seem that with or without this provision, this recourse could have been justified under the term of Article 22.3 standing alone. See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras 131-138.
- 341 Cases in which a developing country requests for suspension are: *EC – Bananas III (Ecuador) and Canada – Aircraft Credits and Guarantees* – both of which actual suspension did not occur. See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*; *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*.
- 342 See *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para 3.42.
- 343 See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras 84, 177.
- 344 See also Section IV.B.5 above.
- 345 See India et al, *TN/DS/W/47*, pp. 3-4.
- 346 See *id.*
- 347 See *id.*
- 348 See Article 21.1 of the DSU.
- 349 The EC proposes that Article 21.2 be amended so that in the implementation of the DSB recommendations or rulings, particular attention must be paid to matters affecting the interest of developing countries. See *EC, TN/DS/W/1*, p. 13 at para 8. The LDC Group makes a proposal along the same line but adds a footnote specifying that this provision also qualifies the obligation of prompt compliance under paragraph 1 of the same Article. See *LDC Group, TN/DS/W/37*, p. 2 at para VII.
- 350 For example, the African Group has come up with an idea of possible gradual implementation of the DSB recommendations or rulings, if the implementing party is a developing country. This is to be achieved through an adjustment programme drawn up by arbitration under Article 25 as recommended by the DSB and taking into account, inter alia, reports of development institutions. See *African Group, TN/DS/W/42*, p. 3 at para VII.

- 351 See Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe dated 20 September 2002, *TN/DS/W/19*, p. 2 at para II; Communication from Jamaica dated 8 October 2002, *TN/DS/W/21*, p. 3 at para 7.
- 352 See *India et al*, *TN/DS/W/47*, p. 2.
- 353 See *Jamaica*, *TN/DS/W/21*, p. 3 at para 7; *China*, *TN/DS/W/57*, pp. 2-3 at para 2.
- 354 See *India et al*, *TN/DS/W/47*, p. 2. See also *India et al*, *TN/DS/W/19*, p. 2.
- 355 See Communication from China dated 3 March 2003, *TN/DS/W/51*, pp. 2-3 at para 2.
- 356 See *Jamaica*, *TN/DS/W/21*, p. 3 at para 7.
- 357 See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies* (ICTSD Resource Paper No. 5, March 2003), p. 44.
- 358 See *id.*, at 46.
- 359 See Shaffer, G. (2006), "The Challenges of WTO Law: Strategies for Developing Country Adaptation", *World Trade Review* 5 (2). Pp. 187-89; Zimmermann, *supra*, p. 51.
- 360 See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras 125-127.
- 361 See *id.*, paras 139-165.
- 362 This concern is perhaps reflected in some developing Members' proposals to strengthen developing countries' enforcement power. For example, for the case when a developing country brings a case against a developed country, the LDC Group together with the African Group propose an obligation for the DSB to recommend monetary or other compensation, taking into account any injury suffered, with retroactive effect from the date of adoption of the measure found to be inconsistent with the covered agreement. See *LDC Group*, *TN/DS/W/37*, p. 3 at para VII; *African Group*, *TN/DS/W/42*, p. 3 at para VIII. Mexico and the LCD Group also propose that "collective" suspension be allowed. See *Mexico*, *TN/DS/W/40*, pp. 2-3; *LDC Group*, *TN/DS/W/37*, p. 3 at para VIII.
- 363 See Shaffer (2003), *supra*, p. 38.
- 364 See *id.*
- 365 See also Section IV.B.3 above.
- 366 See Maristela Basso & Edson Beas May 2005). "Cross-retaliation through TRIPS in the Cotton Dispute?" *Bridges Monthly Review* 9 (5) May 2005:19-20.
- 367 See "Cross-retaliation in Cotton and FSC Compliance" (2005). *Bridges Monthly Review* 9 (9) 9: 10. (Available at <http://www.ictsd.org/monthly/archive.htm>, last visited on 12 February 2007). In any case, Brazil has been perceived as one of the countries most responsible for holding up the Doha Round negotiations. This may be one of the main reasons for the US to review its GSP programme. See CRS Report RL33663, *Generalized System of Preferences: Background and Renewal Debate*, by

Vivian C. Jones (26 September 2006), pp. 15-16.

368 See *id.*

369 Between 1947 - April 1995, there were about 132 adopted GATT cases. Up to February 2007, approximately 128 panel decisions and 80 Appellate Body decisions have been issued at the WTO.

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