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# Chapter Ten

## Implementation of Recommendations and Rulings in the WTO System

*Gabrielle Marceau and Jennifer A. Hamaoui*

### *I. Introduction: Countermeasures in WTO Law and Rulings in the WTO System*

The WTO dispute settlement system is often described as a unique system of resolving international trade disputes among governments. The WTO adjudication system has particular specificities that distinguish it from other adjudication procedures in international law. For instance, in the event that a panel or the Appellate Body concludes that a WTO Member is in breach of one of its obligations under the covered agreements the losing party is requested “to bring its measure into conformity with the relevant WTO agreements”. Therefore there is only a single conclusion and a single permanent remedy: full compliance with WTO law. Moreover, the implementation of WTO rulings is unique insofar as it has put in place a multilateral surveillance system of “post-judgment procedures”<sup>1</sup> for the supervision of implementation of the conclusions of its adjudication bodies and the articulation of remedies. In this sense, the WTO dispute settlement system includes some *lex specialis* provisions within the meaning of Article 55 of the International Law Commission’s Articles on State Responsibility (‘ASR’).<sup>2</sup>

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<sup>1</sup> Terminology used by John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006).

<sup>2</sup> Unlike in general international law where a unilateral measure constituting a violation of international law may be justified as a countermeasure so long as it is intended as a proportionate response to another violation of international law attributable to another State and it meets certain substantive and procedural pre-conditions, in WTO law Members are precluded from taking unilateral retaliatory actions. In addition, a WTO law violation taken as a unilateral action in response to another violation does not constitute a circumstance precluding wrongfulness (Article 22 ILC ASR) and therefore cannot be invoked as

But at the same time, the WTO dispute settlement proceedings share a common feature with other interstate dispute settlement proceedings, which flows from the sovereignty of the parties to the dispute: the involvement of diplomacy and negotiations throughout the judicial proceedings.

Whilst it is true that the diplomatic dispute settlement procedures of the GATT's early years have made way to a more judicial dispute settlement mechanism with the creation of the WTO, the Dispute Settlement Understanding ('DSU') still embodies multiple provisions that afford a privileged position to diplomacy and negotiated settlements and foresee negotiations on different subject matters.<sup>3</sup> Far from being a relic of the GATT era, diplomacy and negotiations continue to be at the centre of the dispute settlement mechanism ('DSM'), which aims at securing a positive solution to a dispute preferably through a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.<sup>4</sup>

Should we define diplomacy in broad terms as a tool of foreign policy for the management of international relations, it appears to play an important role in public international law at the different stages of conflict resolution.<sup>5</sup> In WTO proceedings, from the initiation of a dispute settlement procedure to the stage of the implementation of rulings, diplomacy comes into play either as a means to trigger the application of judicial proceedings or as a means of enforcement of the ruling.

This short article aims to explain the *lex specialis* system of retaliation in the context of the WTO, focusing on the diplomatic features of the dispute

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a valid defense in the context of a dispute before a WTO panel. The ILC has considered the WTO dispute settlement system as a system of *lex specialis*. (See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last accessed 16 November 2011)). See the *Gabčíkovo-Nagymaros Project* case (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*), Judgment, [1997] ICJ Reports 7), which conditioned the legitimacy of countermeasures upon meeting certain requirements related to the purpose of countermeasures and procedural requirements such as the need to request the responsible State to fulfill its obligations.

<sup>3</sup> Major changes such as the introduction of the negative consensus in the WTO political body (the Dispute Settlement Body ('DSB')) to refer a case to adjudication, to afford binding force to dispute settlement rulings and to authorize countermeasures, as well as the introduction of a stage of appeal, have contributed to a greater judicialization of the WTO dispute settlement system *vis-à-vis* the GATT system, affording the procedure a court-like character.

<sup>4</sup> Article 3.7 of the DSU.

<sup>5</sup> In a narrower sense, diplomacy refers to the practices of professional diplomats (Harold Nicolson). Whereas, according to a broader definition, diplomacy covers broad themes of statecraft and international relations (Henry Kissinger). See Christer Jönsson, "Diplomacy, Bargaining and Negotiation" in eds. Walter Carlsnaes and Beth A. Simmons, *Handbook of International Relations* (SAGE Publications, 2002), at 213.

settlement proceedings that have to be followed before a Member is entitled to retaliate against another WTO Member and negotiated settlements after the phase of adjudication. We first review briefly the main procedural stages preceding the implementation of the rulings and recommendations of WTO adjudicating bodies. Second, we discuss this unique multilateral system of surveillance of Members' implementation and retaliatory rights and obligations.

## II. Overview of the Procedural Steps Leading to an Authorization to Suspend Concessions or Other Obligations

As described by the Appellate Body, the authorization to retaliate is granted following a long process of multilateral dispute settlement in which relevant adjudicative bodies, as well as the Dispute Settlement Body ('DSB'),<sup>6</sup> render multilateral decisions at key stages of the process.<sup>7</sup> We explain hereafter the procedural stage leading to the adoption of panel and Appellate Body reports before discussing the WTO compliance process and the WTO surveillance over retaliation and the use of countermeasures in the form of suspension of concessions and obligations.

### A. Summary of the Adjudicatory Stages in a Typical Dispute Settlement Case

The dispute settlement mechanism of the WTO has been referred to as the "jewel of the crown"<sup>8</sup> of the multilateral trading system insofar as it is unique in international law, both in terms of its functions and in terms of results. In terms of results, the dispute settlement mechanism is arguably the most

<sup>6</sup> The DSB is a political organ composed of representatives of the entire membership of the WTO (153 Members, as of February 2011) and is responsible for administering the procedures under the DSU and supervising the dispute settlement process. In a nutshell, the DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorize retaliation.

<sup>7</sup> In that regard, the Appellate Body noted that the authorization to suspend concessions is necessarily preceded by a multi-stage dispute settlement process which encompasses: (i) consultations; (ii) panel proceedings; (iii) appellate review; (iv) the adoption of the panel and Appellate Body reports; (v) an arbitration to determine the reasonable period of time for implementation; (vi) compliance panel proceedings; (vii) compliance appellate review; and (viii) an arbitration to determine the level of suspension of concessions. Appellate Body report, *US – Continued Suspension*, at § 317.

<sup>8</sup> Speech by DG Supachai Panitchpakdi, 9 June 2004, Marrakesh, Morocco "Ten Years After Marrakesh: the WTO and Developing Countries".

prolific of all international dispute settlement systems.<sup>9</sup> As for its functions, the DSM has exclusive and compulsory jurisdiction over a broad range of issues, that is to say, any dispute arising under the covered agreements.<sup>10</sup> The WTO Members, by acceding to the WTO, have ratified the WTO Agreement as a single undertaking, thereby giving their consent to accept the jurisdiction of the DSM. In addition, the complaining Member is also precluded from using other for a for the resolution of a WTO-related dispute (Article 23 of the DSU).

Article 3.7 of the DSU provides that: "A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred". Consistent with this article, the DSU is sprinkled with provisions that open the door to diplomatic exchanges between the parties to the dispute for them to reach an agreement on different procedural matters such as the appointment of the members of the panel or the time frame in which the losing party is expected to implement the ruling, topics on which it is not infrequent for the parties to reach an agreement. The institutionalization of the possibility to negotiate a series of procedural issues seems to serve the broader objective of creating a productive atmosphere between the parties, which ultimately may promote the goal of settling the substantive matter through a mutually acceptable solution as provided for in Article 3.7 of the DSU. It is important to emphasize that at any time in the proceedings the parties can opt out of the court-like procedure and request the panel to suspend its work under Article 12.12 of the DSU in order to negotiate a mutually acceptable solution. A bilateral settlement always remains possible at all stages of the proceedings and parties are encouraged to continue to hold consultations in parallel with dispute settlement proceedings.

#### (a) *Consultations*

The object and purpose of dispute settlement is that Members resolve their disputes promptly, preferably through consultations and, in any case multilaterally, foreclosing any recourse to unilateral actions.<sup>11</sup> That is why the first stage of the process is to launch formal consultations in the WTO; that procedural step triggers the application of the provisions of the DSU. When a positive solution cannot be secured though consultations amongst the parties to the dispute, resort to adjudication becomes necessary. In that event, the DSM achieves another goal apart from settling the dispute given that it not only serves to preserve the rights and obligations of the Members under the

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<sup>9</sup> Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2005), at 182.

<sup>10</sup> Article 23 of the DSU.

<sup>11</sup> Articles 3.7 and 23.1 of the DSU.

covered agreements but it also helps to “clarify the existing provisions under those agreements”.<sup>12</sup>

Consultations are described as one of the key non-judicial or diplomatic features of the dispute settlement system.<sup>13</sup> Consultations are also deemed to be mandatory insofar as the request for consultations is a necessary pre-condition for further proceedings. However, technically, it is only the request for consultations that is mandatory and the lack of consultations does not prevent the establishment of a panel.<sup>14</sup> Despite this, in practice Members do engage meaningfully in consultations, usually significantly exceeding the 60-day period in which the DSU precludes the complainant from requesting the establishment of a panel following the receipt of its request for consultations.<sup>15</sup> In addition, it is noteworthy that less than half of the requests for consultations proceed to the panel stage.

### (b) *The Panel Process*

If consultations among the parties fail to settle the dispute within the deadlines provided in the DSU, the complaining party is entitled to resort to litigation by requesting that a Panel be established. However, the possibility remains for the parties to find a mutually agreed solution at a later stage of the process.<sup>16</sup> In fact, the DSU explicitly indicates, when describing the manner in which panels should perform their function of settling disputes, that they should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.<sup>17</sup> In

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<sup>12</sup> Article 3.2 of the DSU.

<sup>13</sup> WTO Dispute Settlement Handbook.

<sup>14</sup> The Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)* clarified that Article 4.3 of the DSU relates the responding party's conduct towards consultations to the complaining party's right to request the establishment of a panel and that when the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. Appellate Body report, *Mexico – Corn Syrup (Article 21.5 – US)*, at §§ 58–59. It also added that, “pursuant to Article 6.2 of the DSU, one of the requirements for requests for establishment of a panel is that such requests must indicate ‘whether consultations were held’. The phrase ‘whether consultations were held’ shows that this requirement in Article 6.2 may be satisfied by an express statement that *no consultations were held*. In other words, Article 6.2 also envisages the possibility that a panel may be validly established without being preceded by consultations.” Appellate Body report, *Mexico – Corn Syrup (Article 21.5 – US)*, at § 62.

<sup>15</sup> In practice, the average duration of consultations as of July 2012 has been 162 days (counting from the date of request for consultations to the date of the first request for the panel's establishment).

<sup>16</sup> See Article 4.7 of the DSU.

<sup>17</sup> Article 11 of the DSU.

practice, panels consult the parties at the earliest stage of the proceedings mostly on procedural issues, either when this is explicitly provided for in the DSU or as a matter of current practice in order to accommodate the needs of the parties.

At a party's request, the DSB will automatically establish a Panel unless the DSB decides otherwise by consensus. This is the so-called "reverse consensus" that characterizes every stage of the dispute process and renders the WTO DSM "quasi-automatic".<sup>18</sup> In other words, the DSU provides for procedural stages that automatically take place unless, by consensus, WTO Members—including the disputing parties—decide to the contrary.

The established panel will generally be composed of three governmental or non-governmental individuals serving in their individual capacities chosen by the parties or appointed by the Director-General if parties fail to agree on the panelists. The process of panel composition illustrates the procedural consultations between the panel and the parties and negotiations between the parties explicitly foreseen in the DSU. Article 8.6 of the DSU establishes that the Secretariat shall propose nominations for the panel to the parties to the dispute and that the parties shall not oppose nominations except for compelling reasons. In practice, parties oppose nominations suggested by the Secretariat very frequently and do not agree on the identity of the three individuals to serve on the panel. Usually when the DSU affords the possibility of negotiating on certain procedural issues, it also foresees a back-up option in the event that the parties are unable to reach an agreement. In the case of panel composition, the DSU establishes a procedure for the Director-General to determine the composition if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party. However, parties are free to devote more than 20 days in an attempt to agree on the identity of the panel, requesting the Secretariat to provide them with additional candidates to consider when they have failed to agree on the first slate of proposed candidates.

Once established and composed, the panel can start work to carry out its function: assisting the DSB to resolve the dispute within a time span that normally shall not exceed six months.<sup>19</sup> The panel process commences with an organizational phase and continues with a substantive phase. However, in some instances objections that could potentially render further proceedings

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<sup>18</sup> Pursuant to Article 6.1 of the DSU, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item of the agenda. At the first DSB meeting, there is still a possibility to block the establishment because the rule of negative consensus only applies at the second DSB meeting in which the establishment is requested.

<sup>19</sup> See also Article 12.9 of the DSU.

impossible or unnecessary are raised and resolved at an early stage giving rise to preliminary rulings. Consultations also take place during the organizational meeting between the parties and the panel on procedural issues such as the timetable and working procedures for the panel's work. It is in this context that parties can negotiate on a series of provisions not explicitly foreseen in the DSU such as special procedures for Business Confidential Information (BCI), providing translations of certain documents, or opening the hearing to the public, for example.

Generally, the substantive phase starts with the exchange of a first set of parties' written submissions; these are the complainants' arguments substantiating factually and legally the claims made in its request for panel establishment and the respondent's defense against the allegations of violations of WTO obligations. The first oral hearing (also called a substantive meeting as opposed to the organizational meeting) that follows the first exchange of submissions is the occasion for the parties to present their views orally and to respond to questions from the panel and from the other party. These questions are usually distributed and answered in writing after the meeting. Advanced questions can also be distributed prior to the meeting in order for the parties to prepare and make an efficient use of the time allocated during the meeting. In a subsequent stage parties will exchange simultaneously rebuttals to the other party's arguments and the panel will hold a second substantive meeting. Once the oral hearings are concluded, and if necessary after seeking information and technical advice from experts, the panel carries out internal and confidential deliberations with the view to issuing a report determining whether the respondent has acted, as the complainant argues, inconsistently with its WTO obligations. The panel then submits a final report to the parties, which after being translated into the two other official WTO languages, is circulated to all WTO Members and transmitted to the DSB for its adoption within 60 days. The report becomes binding once adopted. However, the parties can decide to appeal the report, in which case the DSB cannot yet adopt it.

At any stage of the proceedings parties can negotiate and conclude agreements on all sorts of topics, personalizing the proceedings to the particular needs of the dispute. It is in that context that the possibility of "enhanced third parties' rights" were invented to provide additional rights beyond those codified in the DSU (Articles 10.2 and 10.3) in disputes where third parties can be specially affected by a panel process.<sup>20</sup>

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<sup>20</sup> In the first WTO case where these enhanced rights were granted, the panel decided after consultations with the parties to grant broader participatory rights noting that under prior GATT practice more expansive rights had been granted to third parties subject to the agreement of the parties. In the case at hand despite the parties' disagreement on the issue



(c) *The Appeal Process*

Any party to a dispute may appeal a panel report to the Appellate Body, which unlike panels, is a standing permanent body composed of seven Members that sits in divisions of three members. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel;<sup>21</sup> hence the Appellate Body's mandate is restricted to upholding, modifying or reversing the panel's legal interpretation and determining whether the panel has committed a legal error.

(d) *Panel's Conclusions and Recommendations and Reasonable Period of Time to Implement*

When a panel or the Appellate Body concludes that a measure is inconsistent with the provision of a covered agreement it shall recommend that the responding Member "bring its measure into conformity";<sup>22</sup> in addition it may also suggest ways in which the Member concerned could implement the recommendation. Therefore, all panel reports have only a single recommendation, and there is only a single remedy: to bring a WTO inconsistent measure into compliance with WTO law.

As for the losing party, its first obligation is to inform the DSB of its intention to comply with the recommendations at the DSB meeting following the adoption of the report. It is on this occasion that the Member concerned reports whether it is able to comply immediately with the recommendations and rulings and bring its measure into conformity with WTO law or states that it will only be able to achieve compliance within a reasonable period of time (RPT) because immediate compliance is impracticable.<sup>23</sup> The RPT for implementation constitutes another example where the DSU makes room for a negotiated agreement between the parties or, if it is not possible provides for a procedure to determine this issue. Indeed, the RPT for implementation will be either (i) the time-period proposed by the losing party and approved by consensus by the DSB, (ii) the time-period mutually agreed by the parties to the dispute,<sup>24</sup> or (iii) where neither of the first two prove possible, determined within 60 days by an arbitrator who is usually a member of the Appellate Body who was involved at the appeal stage, if any.

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the panel considered it was appropriate to grant additional rights based on the effects of the challenged measures on the economy of third parties. (Panel report, *EC – Bananas III* (Ecuador), § 7.8.)

<sup>21</sup> Article 17.6 of the DSU.

<sup>22</sup> Article 19 of the DSU.

<sup>23</sup> The RPT does not apply in the case of prohibited subsidies, which have to be withdrawn without delay (Article 4.7 of the SCM Agreement).

<sup>24</sup> Within 45 days after the adoption of the report.

### III. Implementation, Non-Compliance and Countermeasures

#### A. The So-Called "Sequencing Problem"

Article 22.2 of the DSU provides that if the losing respondent fails to bring the measure found to be inconsistent into compliance within a RPT the prevailing complaining party may request DSB authorization to suspend concessions or other obligations. In addition, Article 22.6 of the DSU states that the DSB must grant such authorization within 30 days of the expiry of the RPT or refer the matter to arbitration. Article 21.5 of the DSU articulates the procedure to resolve disagreements regarding the consistency with WTO law of measures taken to comply with the recommendations and rulings.<sup>25</sup> However, nowhere in the DSU is there a provision that clearly establishes that the initiation of retaliation proceedings under Article 22.2 is only possible after a compliance panel has issued a ruling under Article 21.5.

In practice, once a Member is mandated by a ruling to bring its measure into conformity with the agreements, the tendency is for the losing Member to report to the DSB the steps undertaken and to declare itself in full compliance. However, the prevailing complaining party often disagrees as to whether compliance has been achieved and tends to immediately request the DSB's authorization to suspend concessions and other obligations at a level that is claimed to be "equivalent" to the nullification of benefits caused by the WTO-inconsistent measure. In those circumstances, the responding party will request that a compliance panel (Article 21.5 DSU) be established to determine whether the measures it has undertaken do comply with the original recommendations and rulings.

<sup>25</sup> If once the RPT has elapsed, the losing party has still not implemented the Panel or Appellate Body ruling, two situations can arise. One possibility is that the losing Member, when reporting to the DSB on whether it has implemented the ruling, acknowledges it has not yet put its measure into conformity (for instance because of internal reasons such as having to amend the laws through a lengthy legislative process). The other situation that arises frequently is that both parties disagree whether the implementing Member has complied with the ruling by putting its measure into conformity. While the losing Member maintains it has taken steps to implement, the winning party argues the measure taken by the losing Member is not WTO consistent and does not achieve full compliance. When such disagreement arises, either of the parties is in a position to request a so-called "compliance panel" under Article 21.5 of the DSU. If possible, the matter will be referred to the individuals that served on the original panel, which will decide in an expedited procedure whether compliance has occurred. A noteworthy feature of the mandate of the compliance panel is that it is not limited to examining whether the new measure taken to implement complies with the ruling of the original panel but it may also include a complete assessment (or a *de novo* review) of the new measure put in place allegedly to implement and ensure its consistency with the covered agreements. Therefore its examination is not curtailed by the claims made in the context of the original panel.

This legal vacuum has also been filled by negotiations between the parties. In practice, the issue of sequencing has been solved by *ad hoc* agreements between the parties to the disputes, usually called "Agreement or Understanding Between X and Y Concerning the Procedures under Article 21 and 22 of the DSU". The core obligations embodied in these agreements are, on the one hand, a commitment on the part of the losing respondent not to claim that the complainant requesting the DSB authorization is precluded from obtaining it because the request has been made outside the 30 day time-period and, on the other hand, the complainant's commitment to resort to the suspension of concessions or other obligations only after the completion of the compliance proceedings. An amendment of the DSU has been advocated to clarify the logical sequence of the two proceedings and several proposals have been made in the context of the DSU negotiations to avoid the triggering of retaliation before the conclusion of compliance proceedings.<sup>26</sup>

*B. When There is Failure to Comply, the Winning Party May Accept Temporary Compensation*

Leaving aside the issue of disagreement about compliance, the objective of the DSM, where a multilateral determination of inconsistency has been made, is to ensure the withdrawal of WTO-inconsistent measures within the RPT. If the losing Member fails to bring its measure into conformity with its WTO obligations within the RPT, the prevailing complainant is entitled to resort to either compensation or countermeasures. However given that compensation is voluntary, if the parties do not agree, the winning complainant will move to the retaliation stage and request countermeasures. Countermeasures are however limited to non-performance and may only be taken in order to induce compliance. Both compensation and countermeasures are only temporary measures and are not substitutes for full implementation of the DSB recommendations and rulings. Therefore Members can only resort to compensation or countermeasures when the immediate compliance or withdrawal of the measure is impracticable.

Compensation will generally take the form of market access advantages the respondent offers to the winning complaining party, for instance tariff reductions.<sup>27</sup> As noted above, compensation is voluntary and must be agreed

<sup>26</sup> Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee for the Purpose of the TNC Stocktaking Exercise TN/DS/24 22 March 2010, Special DSB Session. See also footnote 25.

<sup>27</sup> In the *Japan - Alcoholic Beverages II* dispute, Japan agreed to grant tariff concessions to the US, Canada and the EC in the form of tariff reductions and eliminations for certain products. However, such compensation did not come as an alternative to full compliance unlike compensation under Article 22.1 of the DSU insofar as it was embodied in a mutually

upon by the parties to the dispute. Compensation is therefore an instance in which the DSU explicitly introduces the use of diplomatic tools not to settle the dispute but rather to provide temporary relief to the party suffering from the consequences of a WTO inconsistency. Moreover, Article 22.1 of the DSU requires that compensation be consistent with the covered agreements. This requirement has been seen as the reason why Members seldom have recourse to compensation because, depending on the form of compensation chosen, the respondent may have to extend the compensation granted to the winning complaining party to all WTO Members in order to comply with the Most Favored Nation principle ("MFN").<sup>28</sup>

If compensation cannot be agreed upon, there is the possibility for the winning complainant to request the suspension of concessions or other obligations. If no satisfactory compensation is agreed within 20 days of the expiration of the RPT or compliance is not achieved within 30 days of the expiry of the RPT, any party having invoked the dispute settlement procedures may request authorization from the DSB to retaliate.

### *C. If Compensation Cannot Be Agreed, the Winning Party May Rely on Countermeasures*

#### *(a) Request to Suspend Concessions or Other Obligations (Article 22.2): Requirements*

If compensation cannot be agreed upon, the winning party may use countermeasures. In the WTO specific system, the winning party must first obtain the permission of the DSB to impose retaliation. As regards the procedure,

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acceptable solution notified by the parties. Although the parties did not notify the solution under Article 3.6 of the DSU, pursuant to the mutually agreed solution Japan committed to revise its liquor tax scheme in order to implement the recommendations and rulings. (See Mutually Acceptable Solution on Modalities for Implementation WT/DS/10/17; WT/DS/11/715; WT/DS/8/17; WT/DS10/17/Add.1; WT/DS11/15/Add.1; WT/DS8/17/Add.1.) On this basis, the parties considered that Article 21.6 of the DSU no longer required that the issue of implementation be on the agenda since they had resolved the matter. In the *US - Section 110(5) Copyright Act* case, the US agreed to make a lump-sum payment in the amount of US\$3.3 million to a fund to be set up by performing rights societies in the European Communities for the provision of general assistance to their members and the promotion of authors' rights. This was agreed through a mutually satisfactory temporary arrangement in force until full implementation (WT/DS160/23). However, it is not clear whether compensation can take the form of monetary payments. Therefore, neither of these cases can be strictly speaking defined as compensation of the type provided for in Article 22.1 of the DSU.

<sup>28</sup> Whilst this statement holds true when compensation takes the form of a benefit in terms of market access for instance through a tariff reduction, it may not necessarily be the case if compensations take another form. The MFN principle is explained in footnote 9 above.

it is for the winning complainant to request the DSB's authorization to suspend identified concessions. The suspension of concessions or other obligations is subject to two types of requirements: a *quantitative requirement* that results in a limitation on the level of suspension that can be authorized, and a requirement concerning the *type of obligation* that can be suspended. Concerning the level of suspension of concessions or other obligations, Article 22.4 of the DSU provides that it shall be equivalent to the level of nullification or impairment caused by the measure found WTO inconsistent.<sup>29</sup> As for the type of obligation to be suspended, Article 22.3 of the DSU sets out the principles and procedures that must be followed.

There are *three types of retaliation* that can be requested depending on the WTO obligations that are being suspended:

- (a) suspension of concessions in the same economic sector in which the nullification or impairment has been found (a sector is an area of trade);<sup>30</sup>
- (b) suspension of concessions relating to different sectors under the same agreement (the so-called cross-retaliation or cross-sector retaliation); and
- (c) suspension of concessions under a different agreement from the one in which the violation was found (cross-agreement retaliation).

The complainant has a limited margin of discretion to choose the type of retaliation that suits it best given that, as it has been observed in past arbitrations, Article 22.3 provides a "hierarchy of remedies" that a complaining party must follow in determining which sectors or under which agreements

<sup>29</sup> Article 22.4 of the DSU. The Subsidies and Countervailing Measures Agreement ('SCM' Agreement) contains two specific rules regarding the level of suspension that can be authorized; for prohibited subsidies the level does not have to be equivalent to the level of nullification or impairment: Articles 4.10 and 4.11 of the SCM Agreement instead speak of "appropriate countermeasures" and defines them as "not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited". For actionable subsidies, Articles 7.9 and 7.10 of the SCM Agreement refer to "countermeasures commensurate with the degree and nature of the adverse effects determined to exist".

<sup>30</sup> Article 22.3 (f) provides:

- for purposes of this paragraph, "sector" means: (i) with respect to goods, all goods;
- (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors; (The list in document MTN.GNS/W/120 identifies eleven sectors)
- (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the TRIPS Agreement.

suspension can be sought.<sup>31</sup> Article 22.3 states that the complaining party should first seek to suspend in the same economic sector and under the same agreement in which the panel or Appellate Body has found a violation or other nullification or impairment, and only if that is impracticable or ineffective can it cross-retaliate, that is to say seek to suspend in a different economic sector within the same agreement. Finally, if cross-retaliation within the same covered agreement is either impracticable or ineffective and the circumstances are serious enough the complaining Member may seek to suspend concessions under another covered agreement.

In practice, when a winning complaining party requests authorization to retaliate it includes in its request to the DSB a proposed level of suspension (an estimate of the level of nullification or impairment the violation has caused to its economy that is to say the economic harm caused) and a list of products to which it wishes to suspend obligations *vis-à-vis* the losing Member. For instance, a winning Member can retaliate against a WTO-inconsistent charge (tariff) on bananas (a good) by imposing a tariff surcharge on the same or any other goods (bananas, cookies, cosmetics, automobiles...) because they are considered part of the same sector.<sup>32</sup>

As mentioned, when the initial inconsistent measures violate obligations in trade in goods, the winning complaining Member can suspend WTO obligations only if the imposition of a tariff on goods is impracticable or ineffective. Unlike the situation for goods where all goods are part of a single sector, in services there are eleven sectors. Therefore if, for example, the measure found inconsistent is a measure that relates to trade in services, and the winning party does not export a certain type of service, it may be authorized to

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<sup>31</sup> Decisions by the Arbitrators, *US – Gambling* (Article 22.6 – US), § 4.19 and *US – Upland Cotton* (Article 22.6 – US I), § 5.62.

<sup>32</sup> For instance, in the *US – FSC* case the Panel report, as modified by the Appellate Body, found the US measure establishing special tax treatment for profits from US exports that are channeled through the so-called “Foreign Sales Corporations” constituted a prohibited subsidy (contrary to the SCM Agreement) and a violation of export subsidy commitments under the Agriculture Agreement. Given that the SCM Agreement and the Agriculture Agreement are agreements that govern trade in goods, when the European Union (“EU”), as the winning complaining party, requested the suspension of concessions, it presented a list of products that included chapters of the Common Customs Tariff without identifying individual products, but all were part of the same sectors in trade in goods. That list constituted the universe of products within which the European Union would then select products imported from the United States on which it would impose a tariff higher than its bound level. It is worth recalling that these higher tariffs would only be applied once the arbitrator had determined the level of nullification or impairment caused to the EU and thus the level of permissible countermeasures. The EU then submitted to the WTO a final selection of products representing the value equivalent to the amount of suspension authorized in line of the arbitrator’s decision.

suspend in another services sector, or even under another covered agreement, if it is impracticable and ineffective to suspend in the area of services and circumstances are serious enough.<sup>33</sup>

(b) *Arbitration Procedures under Article 22.6 of the DSU*

When faced with the possibility of retaliation, the targeted Member (called in the DSU the “Member concerned”) can object to the proposed level of suspension, arguing that it is not equivalent to the level of nullification or impairment caused by its measures. It can also claim that the hierarchy between the types of retaliation (Article 22.3) has not been respected. In that case, the Member concerned can request that the matter be referred to arbitration. This specific multilateral surveillance and control over the type and the level of retaliation is unique to the WTO DSM and reinforces the general prohibition against unilateral measures (Article 23).

This arbitration is usually carried out by the members of the original panel serving as the “arbitrators”; if this is not possible (for instance, if the members of the original panel are not available), the arbitrator is appointed by the Director-General. The arbitration is an expedited procedure that must be completed within 60 days after the date of expiry of the RPT. In practice, this short time period is never respected and arbitration reports usually take on average 190 days to complete.<sup>34</sup>

(i) *Legal Basis and Applicable Legal Standards*

The functions of the arbitrator are explained in Article 22.7 of the DSU, which provides that:

<sup>33</sup> In the *US – Gambling* case, the Panel report, as modified by the Appellate Body, found the United States had violated its GATS commitments (Recreational, Cultural and Sporting Services); however, when it came to the request for suspension of obligations, the winning complainant, Antigua, requested approval to suspend its concessions in intellectual property rights with respect to American copyrighted and trademarked products under the TRIPS Agreement because it deemed suspending obligations in the same sector (Recreational, Cultural and Sporting Services) was impracticable and ineffective. Indeed, although Antigua had made commitments in that sector, trade in this sector was negligible. In addition, suspension in another sector under the GATS, where Antigua had undertaken commitments (telecommunication services for instance), was also found impracticable and ineffective; this was not only due to the low volume of the trade but also due to the disruption that would be caused by changing services and suppliers and the resulting increased cost to Antigua consumers and a heavier burden on Antiguan citizens while having no perceptible impact on the United States. Finally, the Arbitrator found the circumstances to be serious enough to authorize suspension under another agreement because of the great imbalance in terms of trade volume and economic power that exists between Antigua and the United States.

<sup>34</sup> From the date of referral to the date of circulation of the arbitrator’s decision, as of July 2012.

The arbitrator<sup>16</sup> acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3.

<sup>16</sup>The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

Therefore, as noted, there are two possible legal bases on which the losing respondent may challenge the request to suspend concessions or other obligations: the proposed level of suspension, and the principles and procedures of Article 22.3 of the DSU (cross-retaliation).

#### (ii) The Mandate of the Arbitrator in General

Depending on which aspects of the proposed suspension are being challenged (the level or the type of suspension that is being sought or both), the mandate of the Arbitrator is to determine whether the proposed level of suspension is equivalent to the level of nullification or impairment and/or whether the principles and procedures for the suspension have been respected.<sup>35</sup>

#### (iii) The mandate of the Arbitrator with Respect to the Level of Nullification or Impairment

##### a. The Permissible Level of Countermeasures/Suspension of Concessions or Obligations

With respect to the level of countermeasures, the Arbitrator's mandate requires it to determine, first, whether the proposed level of suspension is equivalent to the level of nullification or impairment suffered by the complainant as a result of the inconsistent measures. The Arbitrator's mandate under Article 22.7 of the DSU requires it to determine whether the level of suspension of concessions or other obligations sought by the requesting Member is "equivalent to the level of nullification or impairment" of benefits

<sup>35</sup> Past arbitrators have considered that a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrator, while a complaining party's request to the DSB under Article 22.2 defines the jurisdiction of the DSB in authorizing suspension by the complaining party and that referrals to arbitration under Article 22.6 as well as requests for suspension under Article 22.2 serve due process objectives similar to those of requests under Article 6.2 of the DSU. *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, at § 20.



that have accrued as a result of the WTO violation pursuant to Article 22.4 of the DSU. The burden rests on the party challenging the request for the suspension to prove that the level of suspension proposed is not equivalent to the level of nullification or impairment. Therefore, the Arbitrator has to consider the proposed level of suspension and in light of the arguments presented by both parties, determine whether it leads to an overestimation of the level of nullification or impairment and, hence, to a level of suspension in excess of the level of the nullification or impairment. This implies that the Arbitrator's task is to calculate the approximate value of the adverse economic impact due to the measure found to be WTO-inconsistent.

This assessment is based on the methodology paper presented by the requesting Member, to the extent the trade data and other economic assumptions are not rebutted by better economic data provided in the respondent's written submission. The economic impact of the WTO-inconsistent measure (the nullification or impairment) is usually estimated by means of a counterfactual that calculates how much trade would have occurred had the WTO-inconsistent measures been brought into conformity by the end of the RPT. The level of nullification or impairment is calculated by estimating what level of trade the complaining party would have had and comparing it to the trade that actually occurred.

In practice, only when the Arbitrator concludes that the proposed level is not consistent with the equivalence requirement does its mandate also include making an estimate of the level of suspension that it considers to be equivalent to the nullification or impairment suffered.

When assessing the equivalence of the proposed level of suspension and type of retaliation requested, the Arbitrator is precluded from examining the nature of concessions or other obligations to be suspended. Thus, for instance, the Arbitrator is precluded from questioning the requesting Member's choice to retaliate with respect to one specific good over another. As in general international law, the retaliating Member enjoys a wide margin of discretion for selecting the measure to be taken as a countermeasure.

#### b. Burden of Proof

The complainant typically provides in its methodology paper a proposed calculation, which is then challenged by the respondent. Often the respondent will question the economic assumptions on which the complainant has premised its calculation (for instance the elasticities that are used to estimate the counterfactual). In that case, it can propose alternative and more suitable assumptions. If the respondent makes a *prima facie* case that the proposed level of suspension would lead to a suspension in excess of the level of nullification or impairment, the Arbitrator may then develop a methodology to calculate the level of suspension equivalent to the level of nullification or impairment. It must be noted that determining with exactitude the level of

nullification or impairment caused by a WTO-inconsistent measure may not be possible and it is an exercise that admits a certain margin of error.

Initially, the burden of proof rests on the losing respondent, as the party challenging the request for suspension, to prove that the proposed level of suspension is not equivalent to the level of nullification or impairment. Accordingly, the losing respondent will need to adduce sufficient evidence to challenge the presumption that the proposed level of suspension is equivalent to the level of nullification or impairment and create a presumption that the level of suspension proposed by the requesting Member is not "equivalent" to the level of nullification or impairment.<sup>36</sup> Should the losing respondent successfully challenge the proposed level of suspension, demonstrating that it is not equivalent to the level of nullification or impairment, the Arbitrator will typically recalculate the level itself.<sup>37</sup>

<sup>36</sup> For instance, the Arbitrator in *EC – Hormones (Canada)* stated:

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

*EC – Hormones (Canada) (Article 22.6 – EC)*, at § 9.

<sup>37</sup> Arbitrators have considered that, if they determine that the proposed level is not equivalent to the level of nullification or impairment they have then the obligation to estimate the level of suspension that they consider to be equivalent. As expressed by the Arbitrator in *EC – Hormones*:

In the event we decide that the Canadian proposal is *not* WTO consistent (i.e. the suggested amount is too high), we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US\$520 million was reduced to US\$191.4 million – we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered.

*EC – Hormones (Canada) (Article 22.6 – EC)*, at § 12.

## (iv) Mandate of the Arbitrator with Respect to the Choice of Obligations to Suspend – the Issue of Cross-Retaliation

The Arbitrator's mandate in assessing whether the principles and procedures of suspension have been followed consists essentially in determining whether the requesting Member's proposal has followed the hierarchy between the types of retaliation – i.e. has it requested retaliation under the same economic sector and the same agreement where the violation was found. Therefore, when cross-sector retaliation is requested, the Arbitrator must first examine the requesting Member's arguments on why parallel retaliation was "impracticable" or "ineffective". As far as the burden of proof is concerned, it is for the party claiming that suspension within the same sector and that agreement is impracticable or ineffective to discharge this. In the case law, practicability and effectiveness have been measured in terms of contribution to the objective of inducing compliance.<sup>38</sup> In particular, past arbitrators have considered that a suspension is "not practicable" when it is not available in practice or not feasible, for example where the countermeasure exceeds the total amount of the trade available to be countered.<sup>39</sup> Therefore, if the requesting Member shows that retaliation under the same sector and agreement does not achieve the goal of inducing compliance by the WTO recalcitrant Member, it will request authorization to retaliate under another agreement.

When cross-agreement retaliation is requested, Article 22.3 requires that the arbitrator also consider whether circumstances are "serious enough" to justify cross-agreement retaliation. Although past arbitrators have described it as a case-by-case assessment,<sup>40</sup> they have noted that this assessment could include a consideration of the elements identified in Article 22.3 DSU, namely the level of trade in the sector in which a violation has been found and its importance to the complaining party as well as the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension.<sup>41</sup> Past arbitrators have also observed that these circumstances could be directly related to the practicability and effectiveness of the suspension under the same agreement.<sup>42</sup> As noted, the Arbitrator in *US – Gambling* considered that the extremely unbalanced nature of the trading relations between the parties made it more difficult for Antigua to ensure the effectiveness of the suspension of concessions or other obligations against the US under the same agreement.<sup>43</sup> The disproportionate

<sup>38</sup> *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, at §§ 70–73 and 76.

<sup>39</sup> *US – Upland Cotton (Article 22.6 – US I)*, at § 5.73.

<sup>40</sup> *US – Gambling (Article 22.6 – US)*, at § 4.108, *US – Upland Cotton (Article 22.6 – US II)*, at §§ 5.84 and 5.123.

<sup>41</sup> *US – Upland Cotton (Article 22.6 – US II)*, at § 5.215.

<sup>42</sup> *US – Gambling (Article 22.6 – US)*, at § 4.115.

<sup>43</sup> *US – Gambling (Article 22.6 – US)*, at § 4.114.

adverse impact on the requesting Member's economy of applying retaliation under the same agreement has also been considered as serious enough to justify cross-agreement retaliation.<sup>44</sup>

Finally, once all those determinations have been made, the award of the Arbitrator is issued. The DSB is then informed promptly of the result of the arbitration.<sup>45</sup> Upon request, the DSB automatically<sup>46</sup> grants the authorization to suspend concessions and other obligations, provided that the request is consistent with the Arbitrator's decision. Despite having obtained an arbitral award recognizing a certain level of suspension and even despite having obtained DSB authorization to retaliate, the complainant may choose not to do so and attempt to negotiate with the losing respondent a mutually agreed solution or negotiate the modalities of implementation.

#### *D. WTO Surveillance over Mutually Acceptable Solutions and Special Implementation Agreements*

WTO-related countermeasures are temporary measures that are not substitutes for full implementation.<sup>47</sup> In that context, the DSB's surveillance continues so long as the losing respondent has not brought its measure into compliance with its WTO obligations.

Given that the dispute settlement system aims to secure a positive solution to a dispute, the DSU provides that a solution mutually acceptable to the parties to a dispute is clearly the option to be preferred.<sup>48</sup> Mutually acceptable solutions may be reached at any time; whether during consultations or in parallel to dispute settlement proceedings, parties are encouraged to continue

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<sup>44</sup> *US – Gambling (Article 22.6 – US)*, at § 4.114 and *US – Upland Cotton (Article 22.6 – US II)*, at § 5.221.

<sup>45</sup> Article 22.7 of the DSU provides:

The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. *The parties shall accept the arbitrator's decision as final* and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request. (Emphasis added).

<sup>46</sup> Unless the entire Membership rejects it by way of reversed consensus.

<sup>47</sup> Article 22.8 of the DSU.

<sup>48</sup> Article 3.7 of the DSU.

their talks with a view to settling definitively the dispute. As far as mutually agreed solutions are concerned, when the parties settle the dispute permanently, they are not allowed to settle on whatever terms they wish. Article 22.5 of the DSU requires all solutions to matters formally raised under the consultations and dispute settlement provisions of the covered agreements to be consistent with those agreements. Therefore the most common type of solution notified as mutually acceptable is the withdrawal or the amendment of the contentious measure, the outcome being the same as that of a WTO panel ruling.

A common practice observed in the context of DSM implementation is that parties to disputes tend to conclude amongst themselves specific "deals", the legal nature or "DSU classification" thereof remains unclear. Those specific deals are the result of the use of diplomatic means of resolving the dispute at the implementation stage of the ruling. Those special agreements are not notified as mutually agreed solutions under Article 3.6 of the DSU but normally take the form of a "Memorandum of Understanding" ("MoU") or "Framework Agreement" and are notified as a joint communication from the parties. These temporary deals aim to avoid the imposition of countermeasures by the winning complaining party and are in force only on a temporary basis, until full implementation is carried out by the losing Member.

For instance, in the *US – Upland Cotton* dispute,<sup>49</sup> Brazil had complete freedom to decide which products would be subject to retaliatory surcharges in import tariffs and which intellectual property and services rights could be targeted by supplementary countermeasures up to a certain annual amount of trade.<sup>50</sup> However, Brazil informed the DSB that it had decided to postpone the imposition of countermeasures and that Brazil and the United States were currently engaged in a dialogue with a view to reaching a mutually satisfactory solution.<sup>51</sup>

<sup>49</sup> The United States was required to withdraw the prohibited subsidies and to remove the adverse effects caused by the subsidies causing serious prejudice to the Brazilian cotton industry.

<sup>50</sup> The arbitral award and the DSB authorized it to suspend concessions or other obligations under the Agreements on trade in goods, at a level not to exceed a certain value of annual trade and to suspend under the TRIPS Agreement and/or the GATS in the event that the total level of countermeasures would exceed a certain threshold.

<sup>51</sup> Brazil notified the DSB that starting from 7 April 2010, Brazil would suspend the application to the United States of concessions or other obligations under the GATT 1994 in the form of increased import duties on certain products when they are imported from the United States. Brazil supplied the list of products that would be subject to the increased duties, together with the total rate of ad valorem duty that would be applied as a result of the increase. Brazil also informed the DSB that it would suspend the application to the United States of certain concessions or obligations under the TRIPS Agreement and/or the GATS and that it would notify to the DSB the specific concessions or obligations under

The settlement was phased in two stages: first, the parties signed a “Memorandum of Understanding” on 20 April 2010 that created a fund for technical assistance and capacity building for the Brazilian cotton producing sector; then on 17 June 2010, the parties concluded a “Framework Agreement for a mutually agreed solution”.

Neither the MoU nor the Framework Agreement was a substitute for full compliance with the DSB’s conclusions that required the United States to withdraw the prohibited subsidies and to remove the adverse effects caused by the US subsidies to the Brazilian cotton industry. However, both aimed to avoid the imposition of countermeasures on the United States. In the MoU, Brazil stated that it was still pursuing full compliance with the WTO dispute settlement ruling. However, any changes to farm programs would likely have to be made in the context of the 2012 US Farm Bill. The Framework Agreement also specified that it did not constitute a mutually agreed solution *per se* but that it laid out the parameters for discussions on a solution with respect to the subsidies provided to the US cotton industry and US export credit guarantees.

Under the MoU, aside from financing the annual cotton fund of US\$147.3 million which would continue in place until the passage of the next US farm bill or achievement of a mutually agreed solution to the dispute (whichever is sooner), the United States agreed to make some modifications to the operation of its Export Credit Guarantee Program and to declare the Brazilian State of Santa Catarina free of foot-and-mouth disease and other diseases. The Framework Agreement foresees periodic discussions on limits of cotton subsidies and identifies parameters for a future annual limit on domestic support for US cotton producers.

Another example of a specific deal concluded between parties to a dispute may be found in the *US – Section 110(5) of the Copyright Act* dispute.<sup>52</sup> The US Copyright Act which permitted, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee was found inconsistent with the TRIPS Agreement and the United States was requested to amend it (by removing the so-called “business” and “homestyle” exemptions). After the expiry of the RPT and the determination of the level of nullification or impairment by an arbitrator, the parties informed the DSB of a mutually satisfactory temporary agreement. The US Congress voted compensation of US\$1.1 million per annum for a three-year period ending 2004. Therefore, the solution consisted not in implementing the ruling but in setting up a fund for

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the TRIPS Agreement and/or GATS whose application to the United States would be suspended before such suspension comes into force.

<sup>52</sup> WT/DS160/24.

making payments directly to European copyrights collection societies. Again this solution is temporary and does not replace the full implementation. For this reason, pursuant to Article 22.6 of the DSU, the dispute continues to appear on the first point of the agenda of each DSB meeting dealing with non-implementation.

Both those special and temporary deals are examples of situations where parties to a dispute were able to make good use of the important diplomatic space left out by the DSU. The operation of such temporary implementation agreements remains under the continued WTO multilateral surveillance that guarantees a strict prohibition against unilateral measures.

#### IV. *Conclusion*

The current system of countermeasures has been heavily criticized for being contrary to the ultimate policy goal of the WTO of trade liberalization as it involves trade restrictions. But more importantly, in economic terms, the restrictions imposed as countermeasures are sometimes referred to as self-inflicted wounds actually harming the Member imposing them because they usually have the effect of raising prices paid for imported goods by its domestic consumers. This effect is likely to be exacerbated with the growing importance of global supply chains in today's economy and industries' reliance on the supply of intermediate goods of other countries for their own production. Added to the loss in consumers' welfare will be the loss in producers' welfare resulting in products that would be subject to increased duties, together with the total rate of *ad valorem* duty that would be applied as a result of the increase. The potential negative impact of the imposition of countermeasures is undoubtedly one of the reasons why Members have chosen to resort to alternative temporary solutions, which, without substituting for full compliance, avoid the imposition of retaliatory measures whilst the implementing Member takes all necessary steps to withdraw any WTO inconsistency from its measures.

Yet the threat of cross-retaliation has been hailed by developing countries as an important tool in their ability to cause difficulties for more powerful Members able to delay full compliance based on their economic power in the sector in which the original dispute took place.

The WTO dispute settlement system has proved to be an effective system insofar as it offers positive prospects of changes or withdrawal of WTO-law inconsistent measures. Proof of such effectiveness can be found in the fact that most cases do not proceed to the consultations stage. In addition, even when cases proceed to the adjudication phase, requests for DSB authorization to suspend concessions and other obligations are still relatively few.

Finally, even when authorized it is not infrequent for parties to avoid imposing countermeasures by settling the dispute through temporary arrangements. The possibility of having recourse to concrete sanctions is another element that reinforces the effectiveness of the DSM. In addition, the many possibilities of having recourse to negotiations between the parties constitute a mechanism which reinforces the effectiveness of the WTO DSM. The DSU illustrates how diplomacy can be introduced as a pillar of effective adjudication. Due to the flexibilities embedded in the text of the DSU there is room for both court-like proceedings and parties-driven processes, but depending on the use the parties make of such flexibilities.

The WTO has put in place controls and limitations to the exercise of State sovereignty in the area of countermeasures by introducing a multilateral procedure that obliges the winning complainant to have its request for countermeasures authorized by the rest of the WTO Members; even if this authorization is quasi automatic it maintains a system of checks and balances. Bilateral negotiations between the parties, MAS and those new sorts of temporary implementation agreements offer an alternative to the imposition of countermeasures. Like the MAS that must be notified to the DSB, those new sorts of "implementation deals" remain subject to WTO multilateral control insofar as the losing Member has the obligation to report on its status of implementation<sup>53</sup> and in practice parties always notify those temporary implementation agreements as a step towards full implementation. By alternating multilateral and bilateral stages, the proceedings strike a balance between judicial and diplomatic means of dispute resolution.

### *Annex: Status of Implementation of Arbitrations*

*EC – Bananas III (US)*: level of suspension authorized: US\$191.4 million (annual); cross retaliation not requested. Status of implementation: countermeasures not currently imposed (WT/DS27).

*EC – Bananas III (Ecuador)*: level of suspension authorized: US\$201.6 million (annual) (annual); cross retaliation. Status of implementation: countermeasures not currently imposed (WT/DS27).

*EC – Hormones (US)*: level of suspension authorized: US\$116.8 million (annual); cross retaliation not requested. Status of implementation: countermeasures not currently imposed; parties have signed and notified a MoU (WT/DS26/28).

*EC – Hormones (Canada)*: level of suspension authorized: US\$116.8 million (annual); cross retaliation not requested. Status of implementation:

<sup>53</sup> Temporary agreements between the parties should arguably be reported.



countermeasures not currently imposed; the press has reported parties had finalized a MoU but it has not been yet notified to the DSB (WT/DS26, WT/DS48).

*Brazil – Aircraft*: level of suspension authorized: CAN\$344.2 million (annual); cross retaliation not requested. Status of implementation: countermeasures not currently imposed (WT/DS46).

*US – FSC*: level of suspension authorized: US\$4,043 million (annual); cross retaliation not requested. Status of implementation: countermeasures not currently imposed. The EU considered the legislative steps as satisfactory (WT/DS108).

*US – Offset Act (Byrd Amendment)*: level of suspension authorized: (same for all co-complainants): additional duties on yearly value of trade equal to amount of Byrd duties distributed times 0.72; cross retaliation not requested. Status of implementation: in February 2006, the United States repealed the Byrd Amendment effective October 1, 2007. While duties are no longer collected under the Byrd Amendment, distributions of previously collected duties continue. Canada and Mexico ceased retaliatory tariffs against the US in 2006. On 15 April 2010, the European Union published in Commission Regulation (EC) 305/2010 a revised list of US exports subject to trade sanctions. Effective 1 May 2010, the number of products subject to an additional 15percent import duty was increased. On 6 August 2010, Japan announced in its Press Release that it would extend countermeasures against the US (WT/DS217/234).

*US – Upland Cotton (Article 4.11 SCM)*: level of suspension authorized: variable annual amount based on a formula (US\$147,4 million for 2006); cross retaliation: yes, if total level of applied countermeasures exceeds a variable threshold (US\$406 million for 2006). Status of implementation: countermeasures not currently imposed. The parties notified a MoU and a framework Agreement (WT/DS267/45).

*US – Upland Cotton (Article 7.10 of the SCM Agreement) level of suspension authorized* US\$147.3 million per year; cross retaliation: Yes, if total level of applied countermeasures exceeds a variable threshold (US\$406 million for 2006). The parties notified a MoU and a framework agreement (WT/DS267/45).

*US – 1916 Act*: level of suspension authorized: variable annual level not to exceed quantified. level of nullification or impairment sustained by the EC as a result of the 1916 Act; cross retaliation: not requested. Status of implementation: countermeasures not currently imposed. On 19 May 2003, legislation repealing the 1916 Act was introduced in the US Senate. Other bills repealing the 1916 Act were introduced in the US House of Representatives on 4 March 2003 (WT/DSB/M/178).

*US – Gambling* level of suspension authorized: US\$21 million annually; cross retaliation: yes. Status of implementation: countermeasures not currently imposed and cannot be imposed insofar as the US has modified its schedule of services commitments through the procedures of Article XXI of the GATS. At the DSB meeting on 24 April 2012, Dominica read a statement on behalf of Antigua and Barbuda which stated that the United States was not in compliance with the ruling of the panel, the Appellate Body and the compliance panel. Antigua and Barbuda had formally notified the United States of its desire to seek recourse to the good offices of the Director-General in finding a mediated solution to this dispute. Antigua and Barbuda requested that this matter remain under the DSB's surveillance (WT/DS285).

*US – Zeroing (EC)*: Following successive joint requests for a suspension of the Arbitrator's work, the EU and the US informed the DSB of a Memorandum envisioning a roadmap to solve the dispute. On 22 June 2012, the European Union withdrew its request for authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. The withdrawal followed the completion by the United States of the steps undertaken pursuant to the roadmap. On 2 July 2012, the Chairman of the Arbitrator informed the DSB that the Arbitrator had received a joint communication from the parties in which they stated that as the EU had withdrawn its request under Article 22.2 of the DSU, the US no longer made objections under Article 22.6 of the DSU. Therefore the parties requested the Arbitrator to notify the DSB that it was not necessary for it to issue an award in this dispute. Pursuant to this joint communication, the Arbitrator considered that it was not necessary for it to issue a decision and that it had completed its work (WT/DS294).

*US – Zeroing (Japan)*: Following successive joint requests for a suspension of the Arbitrator's work, Japan and the US informed the DSB of a Memorandum of Understanding regarding this dispute. On 3 August 2012 Japan withdrew its request for authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU pursuant the Memorandum of Understanding. On 2 July 2012, the Chairman of the Arbitrator informed the DSB that the Arbitrator had received a joint communication from the parties in which they stated that as the EU had withdrawn its request under Article 22.2 of the DSU, the US no longer made objections under Article 22.6 of the DSU. Therefore the parties requested the Arbitrator to notify the DSB that it was not necessary for it to issue an award in this dispute. Pursuant to this joint communication, the Arbitrator considered that it was not necessary for it to issue a decision and that it had completed its work (WT/DS322).