CHAPTER – VI

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CHAPTER – VI

APPELLATE BODY STAGE AND IMPLEMENTATION
OF RECOMMENDATIONS AND RULINGS

6.1 General Introduction

The most important accomplishment introduced by the Uruguay Round negotiators is to ensure that the WTO dispute settlement process receives wide acceptance in appellate review.

The Appellate Body Process is the most visible institutional innovation in the WTO dispute settlement system. No such institution existed in the GATT system and does not exist in any other international legal context. The importance of Appellate Body Process aims to protect the interest of WTO Members by ensuring that the automatic dispute settlement system doesn’t produce unsound decisions that could upset the balance of rights and obligations under the WTO agreements.¹

The main WTO dispute settlement rules are set out in the Dispute Settlement Understanding (DSU). The DSU has right to establish Dispute Settlement Body (DSB) to administer the dispute settlement rules and procedures. The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation rulings and authorize Members to suspend concessions and others obligations.²

¹ P. Gallagher, GUIDE TO THE DISPUTE SETTLEMENT, 36(2002).
² Art.2.1 of the DSU.
The Dispute Settlement Body established the Appellate Body in February 1995.³

The most important changes from the GATT period are two, as the following:

**First,** the standing Appellate Body created by WTO 1995 in order to review panel reports from the legal side. **Secondly,** the DSB automatically adopts the Panel and Appellate Body Reports unless it decides not to do so by consensus. The major change in WTO is that no Member can block adoption of Panel or Appellate Body Report. In other words, 'negative consensus' eliminates the ability of members to block adoption of reports.⁴

The dispute settlement system through DSU provides the rights of appeal to the Panel Repots for the both sides of dispute except third parties.⁵ They also provide for the establishment of an Appellate body to hear appeals from panel cases.⁶

The parties to dispute can appeal a panel’s ruling, request for appeal submitted by losing parties but sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot request reexamination of existing evidence or examination of new evidence.⁷ Every appeal is heard by three members of a permanent seven-member Appellate Body set up by the DSB. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.⁸

The AB is limited in deciding matters of law and legal consistency of panel report. Besides that the AB has some comments or directions in key areas, e.g. in

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⁵Art.17.4 of the DSU.
⁶Art.17.1 of the DSU.
⁷Art.17.6 of the DSU.
⁸Art.17.1.2.3. of the DSU.
determining who has the burden of proof, a question on which it has reversed panel’s findings. The appeal can uphold, modify or reverse any of the panel’s legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. In other words, the Appellate Body should normally issue a report within 60 days from the date of the notice of appeal is filed. The DSB has to accept the panel report, as modified by the ruling of the Appellate Body, within 30 days following circulation of the Appellate Body’s report unless there is a consensus to reject it.

6.2. Appellate Body’s Members

According to Article 17.1 of the DSU, the Appellate Body is composed of seven persons as members of Appellate Body, three of whom shall serve on any case.

For the qualifications required to serve as a member of the Appellate Body, Article 17.3 of the DSU stipulates:

“The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government”.

Appointment of Members of the Appellate Body, on 6th December 1994, and the Preparatory Committee to the WTO approved its recommendations for the procedures for the appointment of Appellate Body members, as of 31st December 2004.

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10 Art.17.13 of the DSU.
11 Art.17.14 of the DSU.
12 The Members of the Appellate Body are Mr Georges M. Abi-Saab, Ms Merit E. Janow, Mr Luiz Olavo Baptista, Mr A.V. Ganesan, Mr John Lockart, Mr Giorgio Sacerdoti and Mr Yasuhei Taniguchi.
Table 6.1: The current Appellate Body Members and their respective terms of office

<table>
<thead>
<tr>
<th>Member's Name</th>
<th>Nationality</th>
<th>Term of Office</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ujal Singh Bhatia</td>
<td>India</td>
<td>11 December 2011 to 10 December 2015</td>
</tr>
<tr>
<td>Peter Van den Bossche</td>
<td>Belgium</td>
<td>12 December 2009 to 11 December 2013</td>
</tr>
<tr>
<td>Ricardo Ramírez-Hernández</td>
<td>Mexico</td>
<td>1 July 2009 to 30 June 2013</td>
</tr>
<tr>
<td>Thomas R. Graham</td>
<td>United States</td>
<td>11 December 2011 to 10 December 2015</td>
</tr>
<tr>
<td>Shotaro Oshima</td>
<td>Japan</td>
<td>1 June 2008 to 3 May 2012</td>
</tr>
<tr>
<td>David Unterhalter</td>
<td>South Africa</td>
<td>31 July 2006 to 11 Dec 2009</td>
</tr>
<tr>
<td></td>
<td></td>
<td>12 December 2009 to 11 December 2013</td>
</tr>
<tr>
<td>Yuejiao Zhang</td>
<td>China</td>
<td>1 June 2008 to 31 May 2012</td>
</tr>
</tbody>
</table>

Figure 6.1: From left to right: Ricardo Ramírez-Hernández, David Unterhalter, Yuejiao Zhang, Ujal Singh Bhatia, Shotaro Oshima, Peter Van den Bossche and Thomas R. Graham

The Appellate Body Members shall have expertise in law, International Trade, and the subject matters of the covered agreement, so they can resolve issues of law which is covered in the panel report and legal interpretation developed by the panel.

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Moreover, the Appellate Body Membership shall be selected from different geographical areas, level of development, and legal systems. The Appellate Body Membership shall be broadly representative of membership in the WTO.\textsuperscript{14}

In its decision establishing Appellate Body, the DSU stated:

‘The success of the WTO will depend greatly on the proper composition of the Appellate Body, and a person of highest calibre shall serve on it’.\textsuperscript{15}

A Chairman is elected among the Members to serve a one-year term, which can be extended for an additional period of one year. The Chairman is responsible for the overall direction of Appellate Body business. The current Chairman is Ms Jennifer Hillman.\textsuperscript{16}

Appellate Body Members serve a four years term, and may be reappointed once for a further four year term. The DSU requires that Appellate Body members be broadly representative of membership of the WTO. Appellate Body Members cannot be affiliated with any government, nor should they accept or seek instructions from any international or non-governmental organization or any private source.

The Members of Appellate Body are subject to the Rule of conduct and required to disclose the existence or development of any interest, relationship or matters likely to effect, or give rise to justifiable doubts as to his ‘independence or impartiality’.

Moreover, they may not participate in the consideration of any appeal that would create a direct or indirect conflict of interests.\textsuperscript{17}

\textsuperscript{14}Art.17.3 of the DSU.
\textsuperscript{16}http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm, visited on 13-09-2011.
\textsuperscript{17}A. K. Koul, GUIDE TO THE WTO AND GATT ECONOMICS, LAW AND POLITICS, 161(2005).
6.3. Composition and Structure of Appellate Body

The Appellate Body hear and decide appeals in division of three Members.

The DSU provides that three of the seven Appellate Body members to serve in each appeal and that the seven members are to serve in rotation as further specified in the Working Procedures.\textsuperscript{18}

The Rule 6 of the Working Procedures for the Appellate Body Review provides:

(1) In accordance with paragraph 1 of Article 17 of the DSU, a division consisting of three Members shall be established to hear and decide an appeal.

(2) The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.

(3) A Member selected pursuant to paragraph 2 to serve on a division shall serve on that division, unless:

(i) he/she is excused from that division pursuant to Rules 9 or 10:

(ii) he/she has notified the Chairman and the Presiding Member that he/she is prevented from serving on the division because of illness or other serious reasons pursuant to Rule 12; or (iii) he/she has notified his/her intentions to resign pursuant to Rule 14.

The Members constituting the division hearing and deciding a particular appeal are selected on the basis of rotation taking into account the principles of random selection and unpredictability and opportunity for all Members to serve, regardless of their nationality.

\textsuperscript{18}Art. 17.1. of the DSU.
This is different from panels, where a person holding the citizenship of a party or third party cannot serve, except with the agreement of the parties. Consequently, Appellate Body members who are citizens of Member States involved in many disputes, e.g. United States or European Union, are not excluded from serving on Appellate Body Division hearing and deciding cases involving their countries of citizenship.19

The Members of the division select their Presiding Member; the responsibility of the presiding Member shall include:

a) coordinating the overall conduct of the appeal proceeding;
b) chairing all oral hearings and meetings related to that appeal; and
c) coordinating the drafting of the appellate report.20

Decisions relating to an appeal are taken by the division assigned to that appeal. However, to ensure the consistency and coherence in its case law and to draw on the individual and collective expertise of all seven Members, the division responsible for deciding for any appeal exchange views with the other members in the issues raised by appeal. A division makes every effort to take its decision on the appeal by consensus, if not reached by consensus; it is decided by a majority vote as stipulated by Working Procedures.21

Yearly the Appellate Body Members elect a chairperson from among themselves.22

Whereas the term of office of the chairperson is one year, the AB may decide to extend the term of office for a further period of up to one year. However, no member can serve as Chairperson for more than two successive terms.23

20Rule 7.1 of the Working Procedures.
21Rule 3.2 of the Working Procedures.
22Rule 5.1 of the Working Procedures.
Replacement of Appellate Body member in a given appeal for the serious personal reasons, it is clear in two cases: First, in US - Offset Act (Byrd Amendment), Mr Giorgio Sacerdoti replaced Mr A.V. Ganesan as Presiding Member of the Division hearing this appeal because the latter was prevented from continuing to serve on the Division for serious personal reasons.

Second, in US - Softwood Lumber IV, Mr Giorgio Sacerdoti replaced Mr A.V. Ganesan as a Member of the Division hearing this appeal because the latter was prevented from continuing to serve on the Division for serious personal reasons.

Therefore, the rule of conduct and their requirements of independence, impartiality and confidentiality apply to the Appellate Body Members to maintain the credibility of dispute settlement system and the Members.

6.4. Appellate Body Review Procedures

6.4.1 Access to appellate review

According to Rule 20.1 of the Working Procedures, the appellate body proceeding initiate with Member’s announcement in writing to the DSB of its decision to appeal and the concurrent filing of notice of appeal. The right of appeal Panel Reports allow only the parties to the dispute may appeal report.

Third parties or other WTO Members cannot appeal a panel report. Nevertheless, the third parties who have a substantial interest in dispute at the time of establishment of panel can participate in the appellate review proceedings by written submissions to the Appellate Body.26 As mentioned in the previous chapter; the rights

26Art.17.4. of the DSU.
of third party in panel proceedings are limited. There are different parties in the appellate review proceeding, the parties are referred to as ‘participant’ the participant means any party to the dispute that has filed Notice of Appeal. A panel report is called ‘appellant’, whereas the ‘appellee’ of any party to the dispute that has filed a submission to appeal certain aspect of a panel report.

A participant ‘cross-appeals’ other aspect of report, third parties choosing to participate in the appellate review are referred to as ‘third participant’.

The next sections will deal with aspects of appellate review procedures and different issues that arise with respect to these procedures.

**6.5. Working Procedures of Appellate Review**

In difference to panel, the Appellate Body has detailed standard working procedures, set out in the Working Procedures for Appellate Body Review, pursuant to Article 17.9 of the DSU. The Working Procedures were drawn up by the Appellate Body itself, in consultation with the chairman of DSB and with WTO Director General. Moreover, when a procedural question arises that is not covered by the Working Procedures; the division adopts an appropriate procedures for the purpose of that appeal, in the interest of fairness and orderly procedures in the conduct of appeal.

In this regard Appellate Body has authority to adopt Procedural rules, when it’s appropriate, in US – Lead and Bismuth II: the Appellate Body examined whether

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27 Third parties only attend and hear at special session of the first substantive meeting of the panel, and receive the first written submission of the parties only, but in the Appellate Body Review they have much broader rights.

28 Pursuant to Rule 22 or paragraph 4 of Rule of Procedures.

29 Any party to the dispute that has filed a submission pursuant to Rule 22 or paragraph 4 of Rule, WT/AB/WP/5. Note from the authors: This consolidated version of the Appellate Body Working Procedures entered into force on 1 January 2005 and was circulated on 4 January 2005.

it could admit amicus curiae briefs; the Appellate Body confirmed its broad authority to adopt procedural rules:

"Article 17.9 of the DSU makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal".31

6.6. Initiation of Appellate Review

Pursuant to Rule (1) of the working procedures, appellate body review proceedings commence with the party’s notification in writing to the DSB in accordance with paragraph 4 of Article 16 of the DSU and simultaneous filing of a Notice of Appeal with the Secretariat.

The notice of appeal must adequately identify the finding or legal interpretation of the panel which are being appealed.

A Notice of Appeal shall include the following information:

(a) the title of the panel report under appeal;

(b) the name of the party to the dispute filing the Notice of Appeal; and

(c) the service address, telephone and facsimile numbers of the party to the dispute.32 Moreover, a Notice of Appeal will include:

A brief statement of the nature of the appeal, including the allegations of errors in the issue of law covered in the panel report and legal interpretations developed by the panel.\textsuperscript{33}

For better understanding of the purpose of the notice of appeal, there are claims that arose in \textit{US - Countervailing Measures on Certain EC Products}.\textsuperscript{34} The Appellate Body rejected the argument by the United States that the notice of appeal serves a limited purpose as simply a formal trigger for initiating the appeal and stressed the importance of the notice of appeal as the means to allow the appellees to exercise their right of defence. The Appellate Body stated:

"Our previous rulings have underscored the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively. Hence, we disagree with the contention of the United States here that the Notice of Appeal 'serves a limited purpose' as 'simply a formal trigger for initiating the appeal ... [The] additional requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel".\textsuperscript{35}

According to Rule 20(2) (d): "brief statement of the nature of appeal, including the allegations of error" that the appellant intend to argue on appeal. In \textit{US - Shrimp}, the Appellate Body discussed the requirement in the \textit{Working Procedures for

\textsuperscript{35}Appellate Body Report on US - Countervailing Measures on Certain EC Products, Para. 62. See also Appellate Body Report on US - Offset Act (Byrd Amendment), Para. 200. And also, The United States' comparison to the lack of notice provided to a cross-appellee is not appropriate because the Working Procedures do not impose any notification requirements under such circumstances.
Appellate Review according to which the appellant is to be brief in its notice of appeal in setting out “the nature of the appeal, including the allegations of errors”. The Appellate Body concluded that “the ‘nature of the appeal’ and ‘the allegations of errors’ are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel that are being appealed as erroneous”.^36

In case the notice of appeal fails to give the appellee sufficient notice of claim of error, then the claim cannot and will not be considered by the Appellate Body. In US - Offset Act (Byrd Amendment), held that the issue of panel’s jurisdiction, Appellate Body stated:

*We have said, ‘[an] objection to jurisdiction should be raised as early as possible’ and it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal. However, in our view, the issue of a panel’s jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal’.*^37

6.7. Written Submission

Under the Rule 20(1) of the Working Procedures, appellate review proceedings commence with a party’s notification in writing to the DSB of its decision to appeal and the simultaneous service of notice of appeal with the Appellate Body. The notice of appeal must adequately identify the finding or legal interpretation of panel which are being appealed. Within 10 days after the notice of appeal the

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appellant must file a written submission, setting-out in detail its legal arguments and the specified allegations of legal error in the panel report.\(^{38}\)

The period of 10 days for submission of notice of appeal, seems a short time, but an appellant is able to prepare its submission well before filing the notice of appeal.

Within 15 days from the notice of appeal, other parties to the dispute may join in the original appeal or appeal on the basis of other alleged legal errors in the panel report; this appeal is called 'other appeal' or 'cross appeal'.\(^{39}\)

After that, within 25 days from the notice of appeal, the appellees have to file their submissions in which they respond to the allegation of error made by the appellant(s).

The appellee submission must set out brief statement of the nature of appeal including a precise statement of the grounds for opposing the specific allegation of legal errors raised in the appellant's submission and include legal arguments in support thereof.\(^{40}\)

The notice of appeal must adequately identify the finding or legal interpretation of the panel which are being appealed as wrong.

In *US-Countervailing measures on certain EC products*, the Appellate body stated:

"*Our previous rulings have underscored the important balance that must be maintained between the right of members to exercise the right of appeal meaningfully and effectively, and rights of appeal to receive notice through the Notice of Appeal of*
the finding under the appeal, so that they may exercise their right of defence effectively."  

The notice of appeal is not expected to contain the reason, why the appellant regards those findings or interpretation erroneous, so if the notice of appeal fails to give the appellee sufficient notice of the claim of error, that claim cannot and will not be considered by the Appellate Body.

The WTO Member can appeal a panel report after the report is circulated to the WTO members and it can do so as long as the report has not yet been adopted by the Dispute Settlement Body. Members commonly appeal before the meeting of the DSB that would consider the adoption of the report.

Also within 25 days from the notice of appeal, the third participant (s) must file their written submission setting forth their position and legal arguments.

Around 35 to 45 days after the notice of appeal, the Appellate Body division assigned to the case hold an oral hearing, according to the Working Procedures; the oral hearing as a general rule, is held 30 days after the notice of appeal is filed.

The period of hearing between 35 to 45 days for oral hearing is considered as general rule; that’s no delay or postponement; that principle is clear in two cases: in EC – Bananas III, Jamaica asked the Appellate Body to postpone the dates of the oral hearing, set out in the working schedule. This request was not granted as the AB was not persuaded that there were exceptional circumstances resulting in manifest unfairness to any participant or third participant that justified the postponement of the

**Footnotes:**

41 DS212/US — Countervailing Measures on Certain EC Products — Complainant: EC.
42 Appendix 3.6 of the Working Procedures.
43 Rule 27.1 of the Working Procedures.
oral hearing in the appeal. In another case in US – Shrimp, the US requested that the Division hearing this appeal to change the date of the oral hearing set out in the working schedule. After inviting the participants to make their views known with respect to this request, the Division ruled that it would not change the date of the oral hearing. The oral hearing is not open to the public. The aim of oral hearing is to provide participants with an opportunity to present and argue their case before the division, in order to clarify the legal issues in the appeal.

At the oral hearing, the participants ‘appellant (s)’ and third participants ‘appellee (s)’ make a brief opening statement, after that the Appellate body division pose questions to the participants and third participants regarding the issues raised in the appeal. The questions addressed to them in the appeal are often given an opportunity to respond. In fact the oral hearing is similar to the substantive meeting at panel stage. The main differences between an oral hearing and substantive meeting of the panel are as follows:

a) there is only hearing on appeal;

b) oral statement are kept short;

c) an oral hearing rarely lasts longer than one full day;

d) the participants in an oral hearing may not ask questions directly of each other.


Art.17.10 of the DSU


6.8. Exchange of Views, Deliberation and the Adoption of Reports

According to WTO’s DSU, the AB must consider all the legal issues and panel interpretations that have been appealed.49

The Appellate Body ‘division’ responsible for deciding an appeal will exchange views on issues raised by the appeal with the other members of the Appellate Body before finalising its report. The exchange of views put into practice the principle of collegiality set out in the Working procedures, in order to ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members. The Members shall convene on a regular basis to discuss matters of policy, practice and procedure, and also stay abreast of dispute settlement activities and other relevant activities of the WTO.50

The appellate Body after exchange of views continues its deliberations and drafts the report. When the division is finished, the reports are signed by the three Members of the division; the reports issued are translated into three languages available in the WTO.51 After that the report is circulated to the WTO Members as an unrestricted document available to the public.52

6.9. Withdrawal of Appeal

The Member-appellant can withdraw its appeal at any time, according to Rule 30.1 of the Working Procedures; the appellant can withdraw its appeal the day before oral hearing, following that, the Appellate Body informs the DSB of the withdrawal and after a few days circulates a short report in which it briefly describes the measures

49 Art. 17.6, 12 of the DSU.
50 Rule 4.1.2 of the working procedures.
51 The English has been the working language of the Appellate Body, and then translated into French and Spanish languages.
at issue. As of 31st December 2004, appellants have withdrawn their notices of appeal on five occasions. On four of these occasions the withdrawals were “conditional” upon the filing of a new notice of appeal.53

To understand the Nature of the right to withdraw an appeal, the case before AB on EC – Sardines considered that Rule 30(1) grants the appellant the right to withdraw an appeal; the AB however warned that, in spite of the permissive language of Rule 30(1), the Working Procedures must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system. The AB stated:

"This rule accords to the appellant a broad right to withdraw of an appeal at any time. This right appears, on its face, to be unfettered: an appellant is not subject to any deadline by which to withdraw its appeal; an appellant need not provide any reason for the withdrawal; and an appellant need not provide any notice thereof to other participants in an appeal".54

In fact the AB emphasised on the right to withdraw an appeal be more significant for this appeal, there is nothing in the Rules prohibiting the attachment of conditions to a withdrawal; surely in previous cases, notices of appeal were withdrawn subject to the condition that new notices would be filed. The AB also emphasised on that the Working Procedures must not be interpreted in a way that could undermine the effectiveness of the DSS, to ensure that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.55

In other cases in US – Software Lumber VI, the US filed a notice of appeal on 2nd October 2003 and withdrew this notice on the following day for schedule reasons.

55 Appellate Body Report on EC – Sardines, Para. 138–139 and see also Article 3.7 of the DSU.
The withdrawal was conditional to re-file the notice of appeal at later date, indeed on 21\textsuperscript{st} October 2003; the US re-filed a substantively identical notice of appeal.\textsuperscript{56}

Other example, in \textit{India – Autos}, India withdrew its appeal on the day before the oral hearing. The Appellate Body directly informed the DSB of the withdrawal and a few days later circulated a short report in which it briefly discussed the measures at issue. The Appellate Body concluded its report and stated that “in view of India’s withdrawal of the appeal, the Appellate Body hereby completes its work in this appeal”.

\textbf{6.9.1. Legality of a Conditional Withdrawal of an Appeal}

Regarding to the Legality of a conditional withdrawal of an appeal, when it is withdrawn there must be attachment of conditions for withdrawal. In \textit{EC – Sardines}, Peru claimed that Rule 30 did not permit conditions to be attached to a withdrawal of an appeal. The Appellate Body differed from that opinion and stated:

“Peru submits that nothing in Rule 30 of the \textit{Working Procedures} permits the attachment of conditions to the withdrawal of a notice of appeal, and that, therefore, this appeal must be deemed to have been withdrawn irrespective of whether the conditions are met. We find no support in Rule 30 for Peru’s position. While it is true that nothing in the text of Rule 30(1) explicitly permits an appellant to exercise its right subject to conditions, it is also true that nothing in the same text prohibits an appellant from doing so”.\textsuperscript{57}

\textbf{6.10. Issuance of Report}

For the issuing of AB report, the AB must address all legal issues in the panel report that have been appealed. Within thirty days following circulation of the AB

\textsuperscript{57}Appellate Body Report on EC – Sardines, Pare. 141.
report and the Panel report, A B may uphold, modify or reverse the legal findings and conclusions of the panel.58

The panel report and Appellate Body report are adopted by the DSB unless decided by consensus not to adopt the reports.59

However, where certain legal findings of the panel are no longer relevant because they are related to or based on a legal interpretation reversed or modified by the division, the AB sometimes declares such panel finding as “moot and having no legal effect”.60

In several cases, the AB report will be partly modified by the panel’s legal findings and conclusions because it agrees with the panel’s final conclusion but not necessarily with the panel’s reasoning. When the AB agrees with report, it upholds the panel’s finding and conclusion. Where the AB disagrees with the panel’s conclusion, it reverses it.

6.10.1. Conclusion and Recommendations of Report

An Appellate Body report has two sections: (I) the descriptive part and (II) the findings section. The descriptive part contains the factual and procedural background of the dispute and summarizes the argument of the participants and third participants. The finding section, addresses in detail the issues raised on appeal, elaborates its conclusions and reasoning in support of such conclusions, and states whether the appealed panel finding and conclusions are upheld, modified or reversed.

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58Art. 17.13. of the DSU.
59Art. 17.13. of the DSU.
Also in *Chile — Price Band System*[^61], the Panel remarked that, pursuant to Article 19.1, “a panel is required to make the recommendation to bring a measure which it has found inconsistent into conformity if that measure is still in force. Conversely, when a panel concludes that a measure *was* inconsistent with a covered agreement, the said recommendation cannot and should not be made”[^62].

*Moreover the Measure no longer in existence, it shown in US — Certain EC Products*[^63], the Panel had recommended that the DSB request the United States to bring its measure into conformity with its obligations under the WTO Agreement.[^64]

However, the Appellate Body, having upheld the Panel’s finding that the “measure at issue in this dispute [was] no longer in existence”, so the AB decided that the Panel’s recommendation was dissimilar and stated that:

“*There is an obvious inconsistency between the finding of the Panel that ‘the 3rd March Measure is no longer in existence’ and the subsequent recommendation of the Panel that the DSB request that the United States bring it 3rd March Measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure no longer exists*.”[^65]

The panel may have *discretion* to suggest ways in which the member concerned could implement the recommendation; it’s clear in *US — Steel Plate*[^66], the Panel indicated that it was “free to suggest ways in which we believe the [defendant]

[^64]: Panel Report on US — Certain EC Products, Para. 7.3.
[^65]: Appellate Body Report on US — Certain EC Products, Para. 81. See also Para. 129.
[^66]: DS/206/United States of America — Anti-Dumping and Countervailing Measures on Steel Plate from India (Complainant: India) 4 October 2000.
could appropriately implement our recommendation. Likewise in *US – Softwood Lumber* V\(^68\), the Panel considered that "by virtue of Article 19.1, panels have discretion “may” to suggest ways in which a Member could implement the relevant recommendation. However, a panel is not required to make a suggestion should it not deem it appropriate to do so".\(^69\)

The adopted AB report is accepted unconditionally by the parties to the dispute. The adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.\(^70\)

**6.10.2. Suggestions made by Panel on way to Implementation**

In some cases, before DSB’s panel stage, the panel suggests the way of implementation or give discretion in ways in which the Member concerned could implement the recommendation.

In *US – Underwear*\(^71\) case, the Panel recommended the DSB to request the United States to bring its measure into compliance with United States obligations under the *Agreement on Textiles and Clothing* by removing the measure inconsistent with the United States’ obligation.

The Panel emphasises on their suggestions as following:

"We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States."

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\(^70\) Art.17.14 of the DSU.

We further suggest that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure.  

It also seems clear in Guatemala — Cement case, the Panel concluded that Guatemala had violated the provisions of the Anti-Dumping Agreement by initiating an investigation when there was no sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. Therefore it suggested that the anti-dumping measure be revoked.

Panel report clarifies that idea and states:

"The entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."  

It also viewed in India — Quantitative Restrictions, the Panel suggested that a reasonable period of time to be granted to India in order to remove the imports restrictions which were not justified under Article XVIII: B. The Panel also brought to the attention of the DSB some factors to be taken into consideration that had an added importance for the principle of special and differential treatment.

The Suggestion made by panel of ways to implement panel report and recommendations are more obvious in US — Cotton Yarn: Pakistan requested the

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73 DS60/Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico (Complainant: Mexico) 17 October 1996.
Panel to suggest that the most suitable way for the US to implement the Panel’s ruling would be to withdraw the safeguard action immediately, so the panel agreed and stated:

“In this case, we recommend that the Dispute Settlement Body request that the United States bring the measure at issue into conformity with its obligations under the ATC. We suggest that this can best be achieved by prompt removal of the import restriction.”

6.11. The Panel Reports Circulated and Appealed

The most important features and major development of the DSU is the opportunity for appellate review. It’s noticed that appellate review has been used quite seriously and continuously at the WTO dispute settlement system. As on 1st January 2010, a total of 212 cases of circulated panel reports are mentioned in the Table 6.1 and Table 6.2.

6.11.1. The Number of Appellate Body Reports Circulated each Year has been as Follows in Table (1)

Table 6.2: Number of Appellate Body Reports Circulated

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1995-1999</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000-2005</td>
<td></td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>2005-20011</td>
<td></td>
<td></td>
<td>25</td>
</tr>
</tbody>
</table>

76 Panel Report on US – Cotton Yarn, Para. 8.5
6.11.2. Number of Appellate Body Reports adopted

Table 6.3: Number of Appellate Body Reports adopted

<table>
<thead>
<tr>
<th>Year of adoption</th>
<th>All Appellate Body Reports</th>
<th>Appellate Body Reports other than those arising from Reports of Panels established pursuant to DSU Article 21.5(1)</th>
<th>Appellate Body Reports arising from Reports of Panels established pursuant to DSU Article 21.5</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>2</td>
<td>2</td>
<td>0</td>
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<tr>
<td>1997</td>
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<td>2006</td>
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<td>2008</td>
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<td>2010</td>
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<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>5</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Total(2)</td>
<td>105</td>
<td>81</td>
<td>21</td>
</tr>
</tbody>
</table>

1. Panels established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") relate to "disagreement[s] as to the existence or consistency with a covered agreement of

measures taken to comply with the recommendations and rulings” of the Dispute Settlement Body (the “DSB”).

2. Appellate Body Reports adopted as at 05 October 2011.

6.11.3. Total Panel Reports Circulated and Panel Reports that were Appealed

<table>
<thead>
<tr>
<th>Year</th>
<th>Panel Reports circulated</th>
<th>Panel Reports circulated and appealed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1996</td>
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<td>1997</td>
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<td>2008</td>
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<td>7</td>
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<tr>
<td>2009</td>
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<td>1</td>
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<tr>
<td>2010</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>2011</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>135</strong></td>
<td><strong>94</strong></td>
</tr>
</tbody>
</table>

An appeal of a panel report occurs when one of the parties to the dispute files a notice of appeal. In addition, the other parties to the dispute may file a notice of other appeal, as of 1st January 2010, 56.25% of completed appellate proceedings.
According to above tables, the percentage of panel reports appealed is 69% panel reports.

6.11.4. The dispute cases appealed before Appellate Body

The total panel reports in 2010 is six, three reports appealed to the AB, within 60-days of deadline for adoption or appeal expired during the year. All three appeals related to original panel proceedings. There were no appeals relating to compliance with earlier rulings and recommendations, the panel reports appealed in 2010 mentioned in the Table 6.3.79

6.11.5. Appeals filed in 2010 and 2011.80

Table 6.5: Appeals filed in 2010

<table>
<thead>
<tr>
<th>Panel reports appealed</th>
<th>Date of appeal</th>
<th>Appellant</th>
<th>Document number</th>
<th>Other appellant</th>
<th>Document number</th>
</tr>
</thead>
<tbody>
<tr>
<td>EC and Certain Member States - Large Civil Aircraft</td>
<td>21 July 2010</td>
<td>European Union</td>
<td>WT/DS316/12</td>
<td>United States</td>
<td>WT/DS316/13</td>
</tr>
<tr>
<td>US - Anti-Dumping and Countervailing</td>
<td>1 Dec 2010</td>
<td>China</td>
<td>WT/DS379/6</td>
<td>---</td>
<td>---</td>
</tr>
</tbody>
</table>

80 The appellant Pursuant to Rule 20 of the Working Procedures and Pursuant to Rule 23(1) of the Working Procedures.
Appeals filed in 2011.\textsuperscript{81}

(3) Cases

DS/353, United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint (Complainant: European Communities) 27\textsuperscript{th} June 2005.

DS/381, United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complainant: Mexico) 24\textsuperscript{th} October 2008.

DS/406, United States — Measures Affecting the Production and Sale of Clove Cigarettes (Complainant: Indonesia) 7\textsuperscript{th} April 2010.

6.12. Panel Declines to Suggest Ways to Implement

As discussed in the above section, the panel report in different case respond to the request for suggestion for the way of implementation. But in some case the panel declines to suggest ways to implement.

In \textit{India – Patents (US)}\textsuperscript{82}, the Panel declined the US request to the Panel to suggest a way in which India should implement its commitments, since in its opinion it would impair India’s right to choose how to implement the TRIPS Agreement under the Article 1.1.\textsuperscript{83}

However it did suggest to India to take into account the interests of those persons who would have filed patent applications.

\textsuperscript{81}See \url{http://www.wto.org/}, file://E:/last\%20statisticals/WTO\%20\%20dispute\%20settlement\%20chronological\%20list\%20of\%20disputes\%20cases.htm,Visited in 10-02-2012.

\textsuperscript{82}DS/50/India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States of America) 2 July 1996.

\textsuperscript{83}Panel Report on India – Patents (US), Para. 5.65.
In *US – Oil Country Tubular Goods Sunset Reviews*, Argentina requested that the Panel suggest to the United States that it has to bring its measures into conformity with its WTO obligations by withdrawing the antidumping order and cancelling or modifying the laws and regulations at issue. However, the Panel saw "no particular reason to make such a suggestion and therefore declined Argentina’s request".\(^\text{85}\)

But in other cases the panel rejected the request of the winning party when suggesting it in the way of implementation: in *US – Line Pipe*, the Panel declined Korea’s request for a specific suggestion on ways in which the United States might implement the recommendations, stating that there might be other ways in which the United States could implement its recommendation.\(^\text{86}\)

Likewise, the panel declined request in order to make specific suggestions to implement panel report, as in *EC – Sardines*: Peru\(^\text{87}\) requested the Panel to make a specific suggestion, i.e. that the European Communities license Peru without any additional delay to market its sardines in accordance with the naming standard consistent with the *TBT Agreement*. However, the Panel declined to make the suggestion stating that the authority under Article 19.1 was a discretionary one.\(^\text{88}\)

The panel report suggests ways for implementation through choice of means of implementation, it responds to it some cases and rejects on other cases, in *US – Steel Plate case*, the Panel stated to Article 21.3, which concerns the defendant’s

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\(^{84}\) DS/268/United States of America — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Complainant: Argentina) 7 October 2002.


\(^{86}\) Panel Report on US – Line Pipe, Para. 8.6.DS/202

\(^{87}\) DS/231/European Communities — Trade Description of Sardines (Complainant: Peru) 20 March 2001.

\(^{88}\) Panel Report on EC – Sardines, Para. 8.3.

\(^{89}\) DS/206/United States of America — Anti-Dumping and Countervailing Measures on Steel Plate from India (Complainant: India) 4 October 2000.
obligation to inform the DSB of its intent regarding implementation, as supporting its statement that

"While a panel may suggest ways of implementing its recommendation, the choice of means of implementation is decided, in the first instance, by the Member concerned". 90

In another case US - Countervailing Measures on Certain EC Products case91, the Panel rejected a request by the European Community to make suggestions on the manner that the United States should bring its measure into conformity and pointed out that "the Members have discretion in how to bring a measure found to be WTO-inconsistent into conformity with WTO obligations". 92

6.13. Time-Frame for Completion of the Appellate Review

The DSU establishes a number of standards for accomplishment of various stages of the dispute settlement process. Those are intended to prevent the delays that had led to criticism of the GATT system.

Appellate review proceedings must generally be completed within sixty days, and in no case can take more than ninety days after notice of appeal is filed. 93 When the appellate body believes that, it cannot render its report within sixty days, it shall inform DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. Practically the AB has in most cases, taken more than sixty days to complete the Appellate Body review. 94

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91 DS212/United States of America — Countervailing Measures Concerning Certain Products from the European Communities (Complainant: European Communities) 10 November 2000.
93 Art.17.5. of the DSU.
In a few cases of exceptional circumstance, and with the agreement of the participants, the AB has circulated its report later than 90 days.


Amendments to the Working Procedures for Appellate Review came into effect on 15th September 2010 and are applicable to appeals initiated after that date. Consolidated versions of the Working Procedures incorporating these amendments were circulated on 16th August 2010. The amendments modify the deadlines for written submissions during an appeal and provide for the filing and service of written submissions in electronic form.

6.15. Implementation of Recommendations and Rulings

The credibility of the dispute settlement machinery of the WTO depends to a large extent on the prompt implementation of the rules and recommendations of the Dispute Settlement Body.

The question arises, how are the DSB rules and recommendation enforced?

WTO rules are enforced through a WTO specific Dispute settlement system: this system governed by the WTO DSU, is one of the cornerstones of the 1994 Marrakesh Agreement establishing the WTO.95

If the WTO’s dispute settlement understanding (DSU) arguably is the most significant achievement of the Uruguay Round, its provisions concerning adoption and implementation of reports arguably are the most significant parts of the DSU.96

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The remedies available under the dispute settlement system, particularly the DSU is considered as one of the remarkable innovations of the Uruguay Round. The DSU is an antidote to the procedural deficiencies of Article XXII and XXIII of the GATT.  

In the GATT 1947, when they seek adoption and implementation of report, a consensus in favour of a report was required for its adoption. Dissatisfied party could block consensus and prevent adoption of report. But in the WTO’s DSU, reports are adopted unless there is a “negative consensus” not to do so.  

Therefore, at the DSB meeting held within thirty days of the adoption of the panel or Appellate Body report, the Member concerned must inform the DSB of its intentions in respect of the implementation of the recommendations and ruling.  

When a Panel or the Appellate Body concludes that a measure is inconsistent with the WTO agreements, it recommends that the offending measure should be brought into conformity. If the offending Member cannot comply with the recommendation immediately, it will have a 'reasonable period of time to do so' under Article 21.3 of the WTO DSU.  

For the effective implementations, the dispute settlement system, the Dispute Settlement Body keeps implementation process under their surveillance, furthermore, the DSU emphasis on the implementation processes shall be on “prompt compliance” to make sure effective and actual implementations that benefit all WTO’s Members.  

In the next sections, researcher will discuss the matters relating to the implementations of rules and recommendations through analysis it will be discussed...
to clarify the difficulties arising out with the stages of implementation with evidence and elaborate of all stages by practical cases and providing proposals for effective remedies.

6.16. Surveillance of Implementations by Dispute Settlement Body

The WTO’s dispute settlement system (DSS) desires to conclude their process by implantations of Panel and Appellate Body reports; so the DSS emphasises the importance of surveillance of implementations in the final stage of the WTO dispute settlement process.

The DSU provides an elaborate mechanism of surveillance of implementation of recommendation and ruling of Panels and Appellate Body reports.

As mentioned in the previous chapter, when the panel found that any agreement has been violated by WTO Member, it recommended the member concerned to bring the offending measures into conformity with the WTO obligations. Although the panel may suggest in their report the ways of implementations, sometimes it leaves to the Member to determine how to implement. DSU keeps implementation by a Member of its recommendation or ruling under surveillance.

When the report is accepted, the DSB is empowered to monitor whether or not its recommendations have been implemented. So, the DSB is further empowered to keep watch in respect of measures which a losing Member has to take to remedy a violation of WTO agreements pursuant to the recommendations of Panel and Appellate Body reports.

Any member can request the issue of implementation at any time in the DSB. Unless the DSB decides otherwise, the issue of implementation is placed on the

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102 Art.21.6 of the DSU.
agenda of the DSB for six months following the date of implementation in the reasonable period of time. The issue remains on the DSB’s agenda until the issue is resolved e.g. the EC-Banana III dispute has been on the DSB agenda for years and opened at every regular DSB meeting during that time.103

For the effective implementation by prompt compliance, however the respondent member requires at least ten days’ notice. Prior to such a DSB meeting, the Member concerned must provide the DSB with ‘status report’ on its progress on the implementation of the recommendations or rulings.104

The ‘status reports’ ensure transparency and they may also give an incentive to progress implementation. When the implementing member delivers these status reports in the DSB, it is common for other Members, particularly the complainant(s), to take the opportunity to demand full and prompt implementation and to declare that they are following the matter with close attention.105

When a Member does not implement within reasonable period of time, surveillance by the DSB will continue even if compensation has been provided or the DSB authorised sanctions or retaliation in the form of suspension of concessions.106 In fact, the compensation and retaliation are considered to be temporary measures. Thus, this procedure usually creates an incentive for Members to implement adopted rules and recommendations.

106Art.21.6 of the DSU.
6.17. Implementation of Panel and Appellate Body Rulings: An Overview

Brendan McGivern, view the implementation of panel and appellate body rulings, he focuses on the steps that a prevailing complaining party need to take to secure the implementation of the ruling and the recommendations of the panel and the appellate body, as adopted by WTO Dispute Settlement Body (DSB). In practice, the DSB surveillance function has proven to be disappointment. The status reports on progress in implementation tend to be short, uninformative, and highly repetitive. Some member notably the United States files virtually identical status reports month after month. Similarly, the DSB discussions on implementation have not fulfilled their objective of applying multilateral pressure on the non-implementing Member to comply with its obligation. Instead, in many disputes when the same discussions on implementation take place month after month, the exchange tends to become rotten. Thus, the surveillance function of the DSB can lapse into ritual rather than any meaningful surveillance by the collective body of the DSB. Indeed, the implementation of Panel and Appellate Body reports has given rise to some of the most difficult and contentious issues in the WTO. Moreover, the tools available to the complaining party to secure compliance—including the rather blunt tool of retaliation—are far from ideal. In certain circumstances, therefore, the adoption of panel or Appellate Body report may not be the end of this case, but only one (albeit important) step in the long process towards the resolution of the dispute.107

6.18. Implementation in WTO Dispute Settlement

William J. DAVEY, points out to assess the effectiveness of the dispute settlement system of the World Trade Organization (WTO), it is necessary to evaluate

whether WTO members promptly take the actions required to bring themselves into compliance with their WTO obligations, as those obligations have been defined or clarified in the dispute settlement reports issued by WTO panels and the Appellate Body. An effective dispute settlement system is critical to the operation of the World Trade Organization. It would make little sense to spend years negotiating detailed rules in international trade agreements if those rules could be ignored. Therefore, a system of rule enforcement is necessary. In the WTO that functions is performed by the Dispute Settlement Understanding. As stated in Article 3.2 of the DSU, the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. There are four phases to dispute settlement: consultation, the panel process, the appeal and the surveillance of implementation.\textsuperscript{108}

6.19. Prompt Compliance

According to Article 21.1 of the DSU, the implementations of ruling panel and appellate body through DSB shall be in “prompt compliance” to ensure effective resolution of dispute to the benefit of all the Members. The concept of “prompt compliance” and “implementation” is elaborated by the Arbitrator in Argentina – Hides and Leather; Article 21.3 defined the concept of “compliance” or “implementation” as a technical concept with a specific content: “the withdrawal or modification of a measure, or part of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement”.\textsuperscript{109}

\textsuperscript{108} W. Davey, Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solution, 15 (2005).
\textsuperscript{109} Award of the Arbitrator on Argentina – Hides and Leather (Article 21.3), Paras.40–41. See also the Award of the Arbitrator.
Furthermore the Arbitrator differentiated the concept of "compliance" within the meaning of the DSU from the removal or modification of the underlying economic, social, and other conditions which may have caused the enactment or application of the WTO-inconsistent governmental measure; the Arbitrator stated:

"Compliance within the meaning of the DSU is distinguishable from the removal or modification of the underlying economic or social or other conditions of the existence of which might well have caused or contributed to the enactment or application of the WTO -inconsistent governmental measure in the first place. The WTO Member concerned will have complied with the DSB recommendations and rulings and with its obligations under the relevant covered agreement. The need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied."\(^{110}\)

It's also noted in Chile – Alcoholic Beverages (Article 21.3), the Arbitrator considered that the existence of a certain element of flexibility in respect of time in complying with the recommendations and rulings of the DSB. So The DSU clearly stressed the systemic interest of all WTO Members in the Member concerned complying ‘immediately’ with the recommendations and rulings of the DSB. The flexibility appears in the text of DSU Article 21.1,3 of the DSU, through using flexible words as ‘prompt’ or ‘immediate’ for compliance, the DSU doesn’t use hard word as impossible, that means the member concerned is entitled for reasonable period of time’ to bring itself into a state of conformity with its WTO obligations.

\(^{110}\) Award of the Arbitrator under Article 21.3(c) of the DSU, Indonesia –Automobile Industry, WT/DS54/15, supra, footnote 10 Para. 23; and Award of the Arbitrator under Article 21.3(c) of the DSU, Canada – Pharmaceutical Patents, supra, footnote 9 Para. 52. See also, Award of the Arbitrator on Argentina.
Obviously, a certain element of flexibility in respect of time is built into the notion of compliance with the recommendations and rulings of the DSB.\textsuperscript{111}

\textbf{6.20. Arbitration on the "Reasonable Period of Time"}

Article 21.1 of the DSU provides that "prompt compliance" with recommendations or rulings of the DSU is essential in order to ensure effective resolution of dispute to the benefit of all Members. The complaining party has won the case which is hardly requested 'prompt compliance' by respondent. But if it is not practicable to comply immediately with the DSB's recommendations and rulings, the member concerned shall have a 'reasonable period of time' to do so.

Moreover, the Article 21.3 of the DSU provides that where immediate compliance with an adverse panel or Appellate Body report is 'impracticable', implementation must be completed within a reasonable period of time, where the parties to the dispute cannot reach agreement on the length of this period, Article 21.3(c) determined through binding arbitration by establishing arbitration process. The arbitrator in all such proceedings has been a past or present Appellate Body Member.

There are three ways of determining the reasonable period of time. It shall be:

I. a period proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval;

II. a time mutually agreed by the parties to the dispute within 45 days of the adoption of the report, in the absence of such an agreement; and

III. if neither of the above occur, the period determined through binding arbitration within 90 days of adoption of report.\textsuperscript{112}

\textsuperscript{111} Award of the Arbitrator on Chile – Alcoholic Beverages (Article 21.3), Para.38.
The Member concerned usually first informs DSB of its intention to implement the ruling of the DSB. (When the prompt compliance is not practicable to comply immediately, the responding party will be given reasonable period of time to comply with WTO’s obligations, or the Member concerned proposes what it considers to be reasonable period of time to comply with the ruling of the DSB and consult with other parties to the dispute in an attempt to reach agreement. If not, the parties request binding arbitration to determine the reasonable period of time of implementations.

The number of arbitration awards circulated over the past 15 years according to Article 21.3(c) is as shown in the table 6.5.113

<table>
<thead>
<tr>
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<tbody>
<tr>
<td></td>
<td>6</td>
<td>11</td>
<td>8</td>
</tr>
</tbody>
</table>

### 6.21. The Arbitrator

According to Article 21.3 (c) of the DSU, the parties must agree on an arbitrator within ten days after referring the matter to arbitration; however, if they can’t agree on an arbitrator within ten days, either party may request the Director-General of the WTO to appoint an arbitrator within 10 days.

Typically, the parties are not able to agree and the arbitrator has been named, usually a Member of Appellate Body. In *EC-Hormone*, the Director-General

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112 Article 21.3 of the DSU.
appointed two Arbitrators, a Member of Appellate Body and the former chair of the
DSB and General Council.\textsuperscript{114}

The DSU does not provide for any rule or guideline as to the professional or
other requirements a person should meet to serve as an Arbitrator. They often choose
a Member of the Appellate Body but in personal Capacity.\textsuperscript{115}

WTO’s DSU Article 25 stipulated a general provision for arbitration, only one
arbitration has been conducted under this provision. This arbitration occurred in the
\textit{U.S. Copyright} dispute, and it related to the level of nullification or impairment
resulting from the findings of violation by the panel in that case.\textsuperscript{116}

There was also another arbitration in 2005; arbitration was carried out
pursuant to the procedures in the Annex to the ACP-EC Partnership Agreement 'Doha
Waiver'.\textsuperscript{117}

The issue was whether the European Union's 'envisaged rebinding' of its tariff
on bananas would result in at least maintaining total market access for MFN banana
suppliers, in considering the relevant EU commitments, as necessary by the Waiver.
The second arbitration was later carried out to determine whether the EU had
'resolved the matter' built on the first arbitration decision.

\textbf{6.21.1. Mandate of the Arbitrator}

The mandate of arbitrator has raises the question of what exactly are the
functions and scope of arbitrator in each case under his consideration. Article 21.3(c)

\begin{footnotesize}
\begin{enumerate}
\item[D. Palmeter and P. C. Mavroidis, \textit{DISPUTE SETTLEMENT IN THE WORLD TRADE
ORGANIZATION PRACTICES AND PROCEDURE}, 235 (2\textsuperscript{nd} edn., 2005).]
\item[P. v. Bossche, \textit{THE LAW AND POLICY OF WORLD TRADE ORGANIZATION}, 278 (2005).]
\item[DS/160/United States of America — Section 110(5) of US Copyright Act (Complainant: European
Communities) 26 January 1999.]
\item[WT/MIN(01)/15, 14 November 2001.]
\end{enumerate}
\end{footnotesize}
of the DSU is guideline for the arbitrator.\textsuperscript{118} The case is decided by the mandate of arbitrator to recommend ways and means through which the responding Member could bring its measures into conformity with WTO agreement.

The Arbitrator observed his mandate or jurisdiction in \textit{EC – Hormones}, the way or means of implementation of the recommendations and ruling of the DSU under Article 21.3 of the DSU; it is not within my mandate to suggest ways or means through which the responding member could bring its measures into conformity with WTO agreements of their task stipulated under Art.21.3 of the DSU was determined what would be a reasonable period of time for the responding member to bring its measures into conformity with WTO Agreements taking into account the relevant facts and surrounding circumstances, they stated:

“It is clear that the reasonable period of time, as determined under Article 21.3 (c) should be shortest period possible within the legal system of the member to implement the recommendations and ruling of the DSB”.

Moreover the arbitrator stated:

“It is not within my mandate under Article 21.3(c) of the DSU, to suggest ways or means to the European Communities to implement the recommendations and rulings of the Appellate Body Report and Panel Reports. My task is to determine the reasonable period of time within which implementation must be completed”.\textsuperscript{119}

The mandate of the arbitrator ‘jurisdiction’ stated in \textit{Australia -Salmon}, the Arbitrator quoted the \textit{EC – Hormones}, award, and saying “I am mindful of the limits

\textsuperscript{118} The Art.21.3(c) stated: “In such arbitration, a guideline for the arbitrator (13) should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances”. Also the expression “Arbitrator” shall be interpreted as referring either to an individual or group.

\textsuperscript{119}Award of the Arbitrator on EC – Hormones (Article 21.3), Para.38.WT/D48/13, 29 May 1998.
of my mandate in this arbitration. I am particularly aware that suggesting way and means of implementations is not part of my mandate and that my task is confined to the determination of the 'reasonable period of time'. Choosing the means of implementation is, and should be, the privilege of the implementing Member.\textsuperscript{120}

In \textit{Chile – Price Band System Article 21.3}, the Arbitrator further clarified that, although the way of implementation is up to the Member concerned, the extra information provided on the details of the implementing measure, the greater the guidance to an Arbitrator in selecting a reasonable period of time.\textsuperscript{121}

It also seems clear in \textit{Canada-pharmaceutical patent} while expressing agreement with the award in \textit{Korea-Alcoholic Beverage}, who explains to determine whether the means chosen are consistent with the recommendations and the ruling of the DSB and the provision of the covered agreement stated that:

"Whether the means chosen by the Member are consistent with that Member’s obligations under the WTO covered agreements, is not a question that falls within the jurisdiction of the arbitrator under the Article 21,3 (c)". So the arbitrator says that his responsibility does not include in any manner of determination of the consistency of the proposed implementing measures with recommendations and the ruling of the DSB.\textsuperscript{122}

\textbf{6.22. Concept of "Reasonableness"}

To insure that losing members would not have the open time frame to bring their measures in conformity with WTO agreement, so the WTO’s DSU stated and fixed timeframe for losing Member to implement within deadline.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{120} Award of the Arbitrator, Australia –Salmon measures affecting importations, WT/DS18/9, 23February 1999.
  \item \textsuperscript{121} Award of the Arbitrator on Chile – Price Band System (Article 21.3), Para. 37.
  \item \textsuperscript{122} WT/DS114, March 2000.
  \item \textsuperscript{123} Art.21 of the DSU stated the procedures for the purpose of surveillance of implementation of recommendations and rulings.
\end{itemize}
On a number of occasions, the parties have been able, pursuant to Art.23.3 (b) of the DSU, to agree on the reasonable period of time without the necessity of arbitration. In Canada –Dairy, the parties reached agreement on a four-stage implementation process, with consultations scheduled for each stage. Also the parties in India-quantitative Restrictions agreed on stage implementation, with some steps to take place a full year after others.

But in other dispute parties do not reach mutually agreed timeframe for implementation; so the Arbitrator’s task to determine the reasonable time. The question that arises in the concept of ‘reasonableness’ how they interpret it, it is clarified in Hot-Rolled Steel, the implementation of which is involved here, the Appellate Body had occasion to interpret the phrase ‘reasonable period’. The Appellate Body specified that the ‘reasonable period’ must be interpreted consistently with the concepts of flexibility and balance that are inherent in the concept of ‘reasonableness’, and in a manner that allows for account to be taken of the particular circumstances of each case.124

Although the Appellate Body dealt with the Anti-Dumping Agreement, and not the DSU, the essence of ‘reasonableness’ so articulated is, in my view, equally relevant for an arbitrator faced with the task of determining what constitutes ‘a reasonable period of time’ in the context of the DSU.125

6.23. Disagreement on Implementation Article 25.5

An important development in WTO dispute settlement rules agreed during the Uruguay Round was the inclusion of special dispute settlement provisions that may be

124 Appellate Body Report [on US – Hot-Rolled Steel], Paras. 84–85.
125 Award of the Arbitrator on US – Hot-Rolled Steel (Article 21.3), Pares.25–26. See also the Award of the Arbitrator on US – Offset Act (Byrd Amendment) (Article 21.3), Para. 42.
raised where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings.\textsuperscript{126}

If the losing member fails to bring its measures into conformity with its WTO obligation by adoption and implementation of recommendation and ruling of DSB, within the reasonable period of time allowed, the prevailing complainant is entitled to resort to temporary measures which can be either compensation or the suspension of the WTO obligations.

While disagreement arises as to the existence or consistency with a covered agreement of measures taken to comply, that future disagreement itself shall be decided through resort to dispute settlement also.\textsuperscript{127}

In most cases the responding member argues that it has implemented the DSB’s recommendation and rulings, and the complaining party disagree that the responding member has taken any measures which constitute full compliance.

Accordingly, the conflict point of views between the parties of dispute on implementations appears in almost all the cases.

Therefore, the provisions are stated under Article 22.1 of the DSU as the compensation and suspension of concessions are the remedies made available by DSU when a Member fails to bring a non-conforming measure into compliance with DSB recommendations and rulings; compensation takes the form of reduction in tariff or other trade barriers on most favoured nation basis, implemented by the member concerned in lieu of compliance.

\textsuperscript{127}Art.21.5 of the DSU.
Also suspension of concessions or other obligations typically would take the form of imposition of tariffs or other trade barriers, on non-most favoured nation basis, against the non-complying Member by the successful complainant.

Article 21.5 of the DSU provides that (disagreement), when possible, this shall be done through reference to the original panel, which should circulate its report within 90 days; it will notify the DSB in writing of the reasons for delay, together with an estimate of the time within which it will submit its report.\textsuperscript{128}

No maximum time is provided in the DSU. In proceeding under the Agreement on Government procurement, the 90 days period is reduced to 60 days.\textsuperscript{129}

Therefore, the question of compliance with the rules and recommendations of the DSB is linked to the question of remedies, for the reason of an apparent fault of the drafting of timing requirements of the relevant provisions of the DSU, Art.21.5 and Art. 22.6 of the DSU.

In this situation, DSU Article 21(5) allows for a complaint under procedures that use a shortened time-frame.

\textbf{6.24. The Sequence Issue or Problems}

The procedural difficulty that has become 'sequence' problem begins with expiration of the reasonable period of time within which the Member concerned must bring its non-conforming measures into compliance with WTO requirements.\textsuperscript{130}

\textsuperscript{128} Art.21.5 stated that "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report".

\textsuperscript{129} Art. 22.6 of the Agreement on Government procurement.

\textsuperscript{130} D. Palmeter and P. C. Mavroidis, \textit{DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION PRACTICES AND PROCEDURE}, 278 (2\textsuperscript{nd} edn., 2004).
The complainant may request authorisation from the DSB to suspend concessions or other obligation. It is clear that such reaction is called for only when the respondent fails to implement the recommendations and rulings.

There are complex issues arising in the implementation stage of the dispute settlement system.

It's the relationship between Article 21.5 and Article 22.2 of the DSU. According to the issue in which of the two procedures has priority, the compliance proceeding or the suspension of obligation, by other means, the issue is whether the complainant is entitled to request authorisation to suspend obligations before a panel or Appellate Body.

Article 21.5 of the DSU states:

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

The complainant and the respondent may often disagree on whether the respondent did indeed fail to implement the recommendations and rulings. However, the Article 22.5 requires the compliance panel to circulate its report within ninety days after the date of referral of the matter of it. There is conflict between the time-frame for this Art. 22.5 procedures and the suspension of concession or other obligation which must be requested and obtained from the DSB.

With reference to Article 22.2, “when the Member concerned fails to bring the measures found to be inconsistent with a covered agreement into compliance” within reasonable period of time. Article 22.2 makes no reference as to how or by when that
failure is to be determined. In some cases, the Member concerned itself may state that it does not intend to comply. In other cases the respondent member asserts that he has complied, and the complaining party disagrees.

Article 22.2 states that, if the Member has not been brought into compliance within reasonable period of time, the Member concerned shall enter compensation negotiations. If negotiation does not result in an agreement on compensation within 20 days, the complaining party has right to request authorisation to suspend. Requesting for authorisation to suspend concessions shall be within 30 days of the expiry of reasonable period of time.\footnote{Article 22.6 of the DSU.}

It is obvious that it's not possible to obtain authorisation for the retaliation within thirty days, where the complaint first submit the disagreement on implementation to an Art.21.5 compliance panel. In the \textit{EC-Banana III case}, this inconsistency led to a serious institutional crisis in which the US insisted on its right to obtain authorisation for retaliation and the EC asserted that an Article 21.5 compliance panel first had to establish that the implementation measures taken by EC were not WTO-consistent. Therefore the problem of the relationship between those two procedures, so-called "sequence issue" and change to the DSU is required to resolve the problem. So, in the interim, the parties of disputes basically agree on an ad hoc basis, that the procedure of examining the WTO consistency of the implementing measures will need to be terminated before the authorisation for retaliation measure may be granted.\footnote{P. v. Bossche, THE LAW AND POLICY OF WORLD TRADE ORGANIZATION, 281 (2005).}
6.25. Compensation and the Suspension of Concessions or other Obligations

When compliance is not achieved, there are two possibilities for resolution of dispute; the DSB may authorize temporary, and voluntary, compensation for an inconsistent measure to be offered by the respondent pending restoration of compliance, or it may authorize the complainant to withdraw concessions or suspend its obligations to the respondent under the Agreement. Therefore, the procedures for determining suitable compensation or the level of compensation or retaliation, potentially involve still further arbitration on the level of compensation.133

6.25.1. Compensation

If the implementing Member fails to comply fully with the rulings and recommendations of the DSB by the end of the reasonable period of time,134 the DSB may authorize compensation or the suspension of concessions. When the member requests, they enter into negotiations, with the view to agree on compensation, with the party having invoked the dispute settlement procedures.135

First let us understand the meaning of compensation. Compensation is a sort of temporary ‘Band-Aid’ relief for damage caused by a violation of WTO rules. In fact, the DSU is very specific in stating that it is not intended to be a substitute for bringing measures into conformity with the agreements.136 If it were to be permitted as permanent solution to the dispute, then large Member economies especially might use compensation to buy their way out of their obligation to conform to the WTO Agreements.

134Art.22.1 of the DSU.
135Art. 22.2of the DSU.
136Art. 22.1 of the DSU.
Compensation, as the term is used in the DSU, does not necessarily mean monetary or other benefits. It usually takes the form of additional trade benefit to the complaining Member as improved access to the responding Member’s market, also in the form of reduction of tariff rate on other products, on the basis of Most-Favoured-Nation principles, i.e. it must be extended to the like products of all WTO Members, not just that of the complainant. Compensation must be equivalent to the benefit of the Member concerned has nullified or impaired through the continued application of its measure. Therefore, compensation is not retroactive, in that it does not compensate the complaining party for the past damaging effects of the measure of the member concerned; compensation is prospective in that the Member concerned will compensate the complaining Member for its continuing breach of its WTO obligations.

Generally, the WTO’s principles aim to trade-liberalizing rather than trade-restriction, so the compensation is to be preferred from the economic perspective, better than suspension of concessions or other obligations. However, compensation usually has serious disadvantages for both parties of dispute and is for that reason, relatively rare.

6.25.2. Why Compensation cannot replace Trade Retaliation in the WTO Dispute Settlement Understanding?

Bryan Mercurio, points out the efficiency of compensation to replace trade retaliation in dispute settlement, more than a decade after its inception, the DSU remains one of the crown jewels of the Uruguay Round which created the World

137 Art.22.4 of the DSU.
Trade Organization (WTO). The WTO Dispute Settlement Understanding (DSU) has served as an integral role in increasing the legitimacy of the multilateral trading system by providing rules based, binding, and impartial forum for WTO Members to resolve their disputes. Throughout the course of the DSU Review, Members and commentators like to have proposed numerous modifications to the WTO DSU covering a wide range of areas. One area, which has received quite a bit of attention, is that of retaliatory measures in the implementation phase of the dispute settlement process. This article does not attempt to recap the debate over the appropriateness of trade retaliation or even to discuss all potential amendments targeting this issue. It does, however, identify some of the key criticisms of trade retaliation before analysing and evaluating the worthiness of trade and/or financial compensation as an alternative. The article finds that neither trade nor financial compensation will do much to resolve the prominent criticisms of trade retaliation while also finding both options would add several uncertainties to the system and, far from increasing compliance with the rulings and recommendations of the DSB, could in fact increase the instances of noncompliance.

Over the past few years, many commentators have criticized the implementation phase of dispute settlement in the WTO for a variety of reasons. The appropriateness of trade retaliation has been a particular favourite target, with commentators criticizing trade retaliation for, inter alia, being economically inefficient, incongruous with the aims and objectives of the WTO, for being designed to harm innocent industries instead of the offending industries, and for not encouraging prompt compliance. While it is true that the system is far from perfect, no system is without its flaws. It is also important to remember that each amendment could potentially have unknown or unanticipated consequences. Finally, and most
importantly, before recommendations can truly be considered, a standard must be developed by which to judge the current system and any possible alternatives.¹⁴⁰

6.25.3. Retaliation (Suspension of Concessions)

The dispute resolution procedures of the WTO allow sanctions to be imposed when a country is unwilling to bring a WTO-inconsistent trade measure into conformity.

Retaliation is different in nature from compensation; there is no need for the parties to agree on it. When the reasonable time for implementation has expired and the parties of dispute have not been able to reach on compensation, the damaged Member may request authorisation from DSB to retaliate against the noncompliant Member by suspending concessions or other obligations.¹⁴¹

Retaliation takes the form of suspension of equivalent concessions or obligations that would normally be owed by the complainant party to the respondent party. The level of retaliation authorized by the DSB, and suspension must be equivalent to the nullification or impairment.

The authorization to suspend concessions or other obligation shall be as stated by the provisions of Article 22.3 as:

"In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which

¹⁴⁰Bryan Mercurio, Why compensation cannot replace trade retaliation in the WTO Dispute Settlement Understanding, United Kingdom, World Trade Review, 8: 2, 315–338 (2009).
the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement”.

It is clear that the suspending of concession or other obligations should be first pursued in the same sector. But in the case of that retaliation action is not practicable or effective; the suspension may be pursued in another sector under same agreement; if the Member considers that it is not practicable or effective so the member seeks to suspend concessions under another covered agreement.142

The levels of suspension of concessions have been complied with are resolved through arbitration by the original panel.

In the case US-FSC, the DSB authorised the EC to suspend concessions or other obligation for the very significant amount of US$ 4 billion a year. Also in the case EC- Banana III, retaliation by US for an amount US$191.4 million a year, in EC-Hormones, retaliation by US and Canada for an amount of US$116.8 million and C$11.3 million a year respectively, and in US-FSC, retaliation by the EC for an initial amount of US$4,043 million per year.

142 Art. 22.3(a, b, c) of the DSU.
As noted above retaliation measures usually take the form of an extreme increase in the custom duties e.g. up to an additional 100 per cent ad valorem on selected products of export interest to the offending party.

Retaliation measures also take the form of suspension obligations, in US-1916 Acts, the EC requested the DSB to authorise the suspension of the application of the obligations under GATT 1994 and the Anti-Dumping Agreement in order to adopt an equivalent regulation to the 1916 Act against the import from the US.\textsuperscript{143}

There is some debate whether the suspension of obligations is to enforce recommendation and rulings or merely to rebalance reciprocal trade benefit; it’s clear that the suspension of obligation has the effect of rebalancing mutual trade benefits.

For better understanding of the nature and purpose of suspension of concessions, EC – Bananas III (US) (Article 22.6 – EC), the Arbitrators confirmed that the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. They further agreed with the United States “that this temporary nature indicates that, it is the purpose of countermeasures to induce compliance”. However, the Arbitrators considered that “this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is equivalent to the level of nullification or impairment.\textsuperscript{144}

Retaliation has been authorized in eight disputes (six cases). Except EC-Banana III (Ecuador) and US-Gambling, the authorization has targeted trade in goods. In practice retaliation has been implemented in six disputes (four cases).\textsuperscript{145}

\textsuperscript{144}Decision by the Arbitrators on EC – Bananas III (US) (Article 22.6 – EC), Para. 6.3. See also Decision by the Arbitrators in EC – Hormones (Article 22.6 – Canada), Para. 39.
\textsuperscript{145}Namely: EU- Banana III by the US), EU- Harmon (by Canada and US), (US-Offset Act (Byrd Agreement) by the EC, Japan, Canada and Mexico) and US- FSC (by the EC).
In fact, the powerful trading nations have taken retaliation measures. But in case, Ecuador and Antigua – relatively small countries have not put retaliation into practice. Practically, retaliatory measures have applied vis-à-vis the US and the EC, the two most significant players in the WTO system.

Retaliation against two other big economies powers Canada and Brazil was authorized but not implemented. This suggests that in practice retaliation has been an instrument used by and against big trading countries.\textsuperscript{146}

Regarding implementation of decisions, it's difficult for any developing country to take retaliatory action against a developed country even if authorized to do so by the DSB. This difficulty can be resolved by modifying Article 22 to provide opportunities when dispute case brought and gained by developing or least-developing countries against developed countries:

1. joint retaliatory action by all WTO members against the offending member which has refused to either remove the offending measure or to pay compensation; it is called ‘collective retaliation’; and

2. mandatory removal of the measure violate of WTO rules, that reduce the options of the defendant developed country.

6.26. Specificity in the Suspension of Concessions or other Obligations

The specific requirement to request for suspension of concessions or other obligations, according to Article 6.2. \textbf{First}, notice is given to the other party. This enables it to reply to the request for suspension or the request for arbitration. \textbf{Second},

\textsuperscript{146} S. Shadikhjadeve, RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM, 182,183 (2009).
a request under Article 22.2 by a complaining party defines the jurisdiction of the
DSB in authorizing suspension by the complaining party.\textsuperscript{147}

Minimum specificity requirements for the request of suspension of
concessions or other obligations, the request must set out (1) a specific level of
suspension, i.e., a level equivalent to the nullification and impairment caused by the
WTO -inconsistent measure, pursuant to Article 22.4; and (2) the request must specify
the agreement and sector(s) under which concessions or other obligations would be
suspended, pursuant to Article 22.3."\textsuperscript{148}

In EC – Bananas III (Ecuador) (Article 22.6 – EC), in joining with the first
minimum requirement for making a request for the suspension of concessions or other
obligations, Ecuador requested suspension under Article 22.2 of the DSU in the
amount of US$ 450 million. Ecuador claimed that, pursuant to Article 21.8 of the
DSU, the total economic effect of the EC banana regime should be reflected by the
Arbitrators by applying a multiplier when calculating the level of nullification and
impairment suffered by Ecuador. The Arbitrator specified in the report as follows:

"The level of suspension specified in Ecuador’s request under Article 22.2 is
the relevant one and defines the amount of requested suspension for purposes of this
arbitration proceeding. Additional estimates advanced by Ecuador in its methodology
document and submissions were not addressed to the DSB and thus cannot form part
of the DSB’s referral of the matter to arbitration. Belated supplementary requests and
arguments concerning additional amounts of alleged nullification or impairment are,
in our view, not compatible with the minimum specificity requirements for such a

\textsuperscript{147} Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), Para. 20.
\textsuperscript{148} The more precise a request for suspension is in terms of product coverage, type and degree of
suspension, etc., the better. Such precision can only be encouraged in Pursuit of the DSU objectives of
“providing security and Predictability to the multilateral trading system” (Article 3.2) and seeking
prompt and positive solutions to disputes (Articles 3.3 and 3.7).
request because they were not included in Ecuador’s request for suspension under Article 22.2 of the DSB”. 149

6.27. The Level of Trade Suspension

When the DSB authorises winning Member to take retaliation actions against respondent member who failed to implement rules and recommendation, there are issues arising out regarding to retaliation measures, so the research will examine the features of retaliation. Those features are the concepts of equivalence, the inherent injustices that remain, the choice of counterfactual to the WTO-inconsistent system, and the cross-retaliation issue.

First the concept of ‘equivalence’; Article 22.7 requires the Arbitrator to determine whether the level of retaliation for which authorization is being sought is ‘equivalent’ to the damage caused by the WTO-inconsistent measure. The kind of retaliation most commonly considered involves the complainant listing a range of products it imports from the respondent on which it will impose prohibitively high tariffs until the respondent’s offending measures are brought into conformity.

In accordance to Article 22.4 of the e DSU “The level of the suspension of concessions or other obligations . . . shall be equivalent to the level of the nullification or impairment”.

In US – Offset Act (Byrd Amendment) (Article 22.6), examining the possibility of setting for the “level of suspension”, the Arbitrator considered:

“While we note that Article 22.4 refers to ‘the level’ (singular) of nullification or impairment and to ‘the level’ of suspension of concessions or other obligations, we are not persuaded that these terms impose an obligation to identify a single and

149Decision by the Arbitrators on EC – Bananas III (Ecuador) (Article 22.6 – EC), Para. 29.
enduring level of nullification or impairment. The requirement of Article 22.4 is simply that the two levels be equivalent... Most previous arbitrators have established one single level of nullification or impairment at the level that existed at the end of the reasonable period of time granted to the responding party to bring its legislation into conformity.\textsuperscript{150}

Second, the inherent injustice of retaliation: the concept is violated under WTO retaliation rules. It will be considered in four points:

(I) former damage goes uncompensated. Thus, trade retaliation under WTO only aims at non-compliance after the “reasonable period of time” has passed following a Panel or Appellate Body finding against a respondent's policy regime. The damage done in preceding years to the complainant's export industry is simply ignored by WTO’s DSU processes.

(II) Retaliation does nothing to help the export industry that has been denied market access by the respondent in the first place.\textsuperscript{151} Rather, it is the complainant's import-competing industries that enjoy provisional aid when the prohibitive retaliatory level of tariffs enforced.

(III) While the remedy chosen is a withdrawal of concessions by the appellant towards the respondent's exports, the appellant’s economy is not aided but harmed by retaliation. As small or developing economies confronting a much larger trader, that may well prevent them from seeking recourse through the DSU or, should the Arbitrator rule in their favor, from

\textsuperscript{150} See, e.g., EC - Hormones (Canada) (Article 22.6 – EC), Para.37; Brazil – Aircraft (Article 22.6 – Brazil), Paras. 3.63–3.65; US – FSC (Article 22.6 – US), Paras. 2.12–2.15; Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada), Paras. 3.67–3.73.

\textsuperscript{151} This point was made as long ago as the 18\textsuperscript{th} century by Adam Smith (1776, Book IV, Chapter II).
adopting retaliatory measures, e.g. case Ecuador following the decision reported in WTO (2000).\textsuperscript{152}

\textbf{(IV)} The defendant's industries that are harmed by the complainant's retaliatory actions are not the industries that have been benefiting from the WTO-inconsistent measure. Rather, they are the ones chosen by the complainant typically with a view to have the largest negative political influence on the respondent government.

\textbf{Third}, the select of counterfactual to the present system, and to count the export harm, the WTO-inconsistent import policy regime needs to be compared with what it would be once amended to become WTO-consistent. This raises the obvious difficulty that many alternative policy measures, to be followed, including even-more trade restrictive ones, could be WTO-consistent. The respondent is not likely to be supportive in suggesting what the alternatives measures should be, including free trade would have been implemented already if they were not so unattractive politically.

Thus, that leaves the complainant with the task of recommending some counterfactual possibilities and evaluates the damage under those different situations. The damage is considered to be the difference in the value of the imports of this product set under the counterfactual system as compared with under the present WTO-inconsistent system.

\textbf{Fourth}, the limitations on cross-retaliation. The important point in the retaliation procedures has to do with Article 22.3. of the DSU this Article states that the winning member should retaliate in the same sector which is practicable. For

\textsuperscript{152} This is not to say that small countries would be better off without a multilateral dispute settlement process of course. On the contrary, Maggi (2001) provides a clear analysis of why bilateral agreements would be inferior from the viewpoint of small countries.
instance, retaliation against a goods violation should be in goods, or services violation should be in services as well. However, WTO’s DSU Art. 22.3(f) is even more accurate. There are 11 services categories and 9 TRIPs categories separately identified, and the retaliation should be practicable match to the services or TRIPs category of the violation. In case of damages in more than one category, the retaliation is expected to be in the same categories in similar proportion.

The conditions under which it is allowed are laid out in Article 22.3 of the DSU. And previously it has been used in the case of the EC banana import regime, it was known by the Arbitrator that Ecuador imported goods from the EC to be able to retaliate in just goods, or even goods plus services, and so a suspension of concessions relating to TRIPS were permitted by the arbitrator.\textsuperscript{153}

The DSB adopted report that an \textit{EC Ban on Importation of Beef}\textsuperscript{154} treated with hormones, the EC obligations under the WTO Agreements on Sanitary and Photsanitary measures. The EC ban was found not to be based on a risk assessment as required under Art.5 of the SPs agreement. The reasonable period of time\textsuperscript{155} for the EC to implement the DSB ruling and recommendations was set at 15 months, starting on February 13\textsuperscript{th}, 1998 and ending on May 13\textsuperscript{th}, 1999. In the end of this reasonable period of time, the EC had not yet implemented the DSB rulings. Thus, the United States requested authorisation to suspend concession as against the EC to an amount of US$202 million per year, and also Canada as the co-complainant, requested CDN$75 million per year.

\textsuperscript{154} On February 13, 1998.
\textsuperscript{155} Pursuant to Art.23.3(c) of the DSU.
In the EC- Hormones beef, the arbitrators are called to determine whether the level of suspension of tariff concession is equivalent to the level of nullification or impairment caused to the US by the EC ban.156

6.28. Rights of Third Party

Before several compliance panels, the EC raised the issue of the rights of third parties to receive all the submissions of the parties to the panel. The issue centres on Article 10.3 of the WTO’s DSU which provides that, “third parties shall receive all the parties to the dispute at the first meeting of the panel.” That means the third parties do not receive the second, rebuttal submissions of the parties that typically are submitted to the second meeting of the panel. However, the shorter time allowed by the DSU for compliance proceeding, Article 21.5 panel typically hold a single meeting with parties that is preceded by the filing of each party of an initial and a rebuttal submission.157

In EC – Hormones (US) (Article 22.6 – EC) and in EC – Hormones (Canada) (Article 22.6 – EC), the United States and Canada respectively had requested the Arbitrators to accord them third-party rights in each other’s arbitration processes. In this regard, the Arbitrators reminding their will to decide on procedural matters under Article 12.1 of the DSU and the absence of a reference to third-party participation in Article 22, did grant the permission on the grounds that the rights of the United States and Canada might be affected in both arbitration actions:

“The US and Canada are allowed to attend both arbitration hearings, to make a statement at the end of each hearing and to receive a copy of the written submissions made in both proceedings.”

But in other cases, the right of third parties are limited only to the first submission. In Australia - Automotive leather II (Article 21.5-US) the panel allowed for one meeting with the parties also allowed to receive only the first submissions. So the panel rejected the EC’s objection, because, that had decided it to hold two sessions with the parties, third parties permitted only to the first submissions. In Brazil - Aircraft (Article 22.6 - Brazil), Australia requested that, it be granted the authorization to participate as a third party in the Article 22.6 arbitration in light of its participation in that capacity in the Article 21.5 Panel. The Arbitrator rejected this request and reasoned that in the absence of a particular provision, according to Article 22, the third-party rights are governed as follows:

“[W]e informed Australia that we declined its request. Our decision took into account of the views expressed by the parties, the fact that there is no provision in the DSU as regards third party status under Article 22, and the fact that we do not believe that Australia’s rights would be affected by this proceeding.”

6.29. Response to the Case against Reforming the WTO Enforcement Mechanism

Ernst-Ulrich Peterman point out in the public international law and economics:

why rational choice theory requires a multilevel constitutional approach to

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158 Decisions by the Arbitrators on EC - Hormones (US) (Article 22.6 - EC) and EC - Hormones (Canada) (Article 22.6 - EC), Para. 7.
160 Our decision may have been different if Australia had demonstrated that the countermeasures which Canada plans to adopt may affect Australia’s rights or benefits under the WTO Agreement. See DS46/ Brazil — Export Financing Programme for Aircraft (Complainant: Canada) 19 June 1996.
international economic law, so he argues that from a citizen perspective, it is rational to insist that state-centered and intergovernmental approaches to international economic law must be complemented by constitutional methods which offer more efficient, democratically legitimate and legally coherent instruments for multilevel regulation of international trade among private competitors and for judicial enforcement of trade rules. Just as the transformation of the intergovernmental European system of international law into a citizen-centered, European constitutional order was driven by multilevel judicial governance (notably by the EC Court of Justice, the European Court of Human Rights, and national courts), so could a more coherent, multilevel judicial governance system of the WTO play a crucial role in promoting international rule of law, as well as in clarifying and strengthening the "principles of justice" underlying WTO law, for the benefit of citizens and of citizen-oriented interpretations of WTO rules and procedures. For instance, both the EC and the US permit only their export industries to petition WTO dispute settlement proceedings against foreign governments (e.g., pursuant to Section 301 of the US Trade Act and the corresponding "Trade Barriers Regulation" of the EC), without allowing their domestic industries and state governments to challenge violations of WTO rules in domestic courts.  

6.30. Proposal for reform of Art.21 of the DSU

6.30.1 Surveillance of implementation by the DSB

Almost all proposals for reforming focus on the DSB's role in achieving compliance with WTO roles. Most suggestions for corrections refer to the more or less purely bilateral and juridical dispute settlement procedures in the DSU.

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Nonetheless, it could be argued that, now some of the weaknesses of this bilateral or judicial system have become obvious, the role of DSB as a collective compliance or monitoring body should be rectified.

The DSB could be better equipped to deal with: (1) specific problems that developing countries face e.g. as winning complainants or losing defendants; (2) the problem of persistent non-compliance; (3) repeated violation e.g. situation where member repeatedly applied its laws and regulations in a manner inconsistent with safeguard rules on injury determination; (4) multiple complainants e.g. cases where not only the complainant but also other members are harmed by the WTO inconsistent trade practice. To deal with those four problems, as part of its collective compliance and monitoring role, the DSB could then offer remedies e.g. compensation and retaliation, not only for complaining party in dispute, but also to all the other members harmed by the WTO inconsistent trade practice.

For disputes involving developing countries, the current DSU already reserves a prominent role for the DSB in Art.21.2, 21.7 and 21.8. Certainly, of the eight paragraph in Art. 21.3 of the DSU deal with LDCs. The EC and India proposed to replace “should” with “shall” in Art.21.2. However, Art. 21.7 and Art.21.8 already use the mandatory “shall” oblige the DSB to consider what further action it might take in case of the matters relating to developing countries. Prof. Roessler’s suggests the provisions in favour of LSDs should be made more specific, both in the terms of mandatory character and their substantive objective.

Lastly, three more specific comments on the DSB’s involvement in obtaining compliance with WTO rules can be made. First, in order to make up for more time given elsewhere, one could question whether the members really need 30 days after
adoption to express their intention in respect of implementation according to Art.21.3 of the DSU.

Second, Art. 21.6 mandates that the issue of implementation shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time. So, the e.g. in the question of implementation in the EC-Hormones dispute, has not been in the DSB agenda for a month, even a year. However since the implementation of the DSB ruling regards all WTO members and since the Art.212.6 explicitly provides can decide otherwise, it is able to question whether this practice should be permitted. To understand how to develop the implementation of rules and recommendations of the WTO’s dispute settlement body, it is necessary first to study the present remedies for non-implementation cases. In fact, possibly in the cases that are generally positive record of implementation in the WTO is due to the good faith and desire of its Members to realize the dispute settlement system works effectively. Actually the most active users of the dispute settlement system are repeat players, and they appear as both complainants and respondents. Accordingly, it is in their overall interests that the system functions are successful.

In the case of non-implementation within the reasonable period of time provided, the DSU provides two possible remedies, as compensation or suspension of concessions, with the equivalent and temporary nature. With one exception, compensation has not often been used, except to excuse compliance for a limited period of time. The exception was US Copyright, where the US made a cash payment

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to the EC to excuse three years or so of non-compliance. In the case of implementation of rulings, the political problems that prevent implementation will also preclude reasonable compensation in favor of winning party. The suspension of concessions is typically thought of as the basic remedy for non-implementation of WTO dispute settlement results. In fact, however, it has not often been used. The GATT Contracting Parties authorized it only once and it was supposedly never actually implemented. In the WTO to date, suspension of concessions has been authorized and used only four times: by the US in EC Bananas and EC Hormones, by Canada in EC Hormones, and by the EC in US FSC. It has been authorized, but not yet used by Ecuador in EC Bananas, by Canada in Brazil Aircraft, and by Brazil in Canada Aircraft. The level of suspension was arbitrated in US 1916 Act, but the EC never sought authority to suspend concessions. Finally, in late 2004, eight Members were authorized to suspend concessions in US Byrd, although they had not actually done so as of this year. To understand the effect of an authorization to suspend concessions, it is important to remember that WTO remedies are prospective.

The level of suspension is considered from the end of the reasonable period of time. In addition, it is important to consider the two principal objectives of authorization to suspend concessions:

The current problem with achieving the first objective is rebalancing - is that if retaliation is authorized, rebalancing takes place at a lower level of trade liberalization than had been agreed to. It would be desirable if a remedy could be devised that would not lead to less liberalization overall. Moreover, retaliation harms the Member imposing the higher tariffs as well as the goal of the retaliation.

163 DS160/United States of America — Section 110(5) of US Copyright Act (Complainant: European Communities) 26 January 1999.
In respect of the second objective - motivation to comply - there are two issues - timing and level of compensation or retaliation. At present, because remedies are prospective, there is an incentive initially to delay the time at which point they might be implemented.

Furthermore, if the threat of retaliation does not work, it is probable that the actual existence of retaliation will become viewed as the status quo\textsuperscript{164} and a long-term solution, even though the WTO rules in theory require compliance. This is a real possibility given under the DSU the level of retaliation is to be equivalent to the level of nullification or impairment.

There is a more common problem with suspension of concessions. While it seems to work when threatened by a large country against a smaller country, and has worked when implemented by one major power against another, it may not be an effective remedy for a small country even if it can target sensitive large country sectors such as copyright holders. Moreover, the EC Bananas and EC Hormones cases show that it is not always effective, at least not immediately, between major powers. It should be noted, however, that retaliation by the EC against the US seemed to have a political effect in the FSC case that led to US implementation, even if the significance of the economic impact of the retaliation was not clear. In addition, the EC and others' threat of retaliation seemed to work in the US Steel Safeguards case. However, occasional inefficacy of suspension of concessions and the unfavorable position in which it leaves developing countries may soon combine to create a serious credibility problem for the system that must be confronted.\textsuperscript{165}

\textsuperscript{164}The status quo is state of a situation as it is maintain/preserve/defend the status quo, that means notto make any changes.Cited from Longman Dictionary.

6.31. Burden of Proof

The burden of proof shown in EC – Bananas III (Article 21.3), the Arbitrator implicitly found that it was up to the complaining Members to persuade him “that there are ‘particular circumstances’ in this case to rationalize a shorter period of time than specified by the instruction of Article 21.3(c) of the DSU 15 months.¹⁶⁶

According to Article 21.5 of the DSU review, the Members emphasizing a fact have to bear the burden of proof and the Members emphasising an affirmative defence have the burden to institute it. In Brazil – Aircraft under Article 21.5-Canada, Brazil claimed that the change made in the program at issue qualified it for an exemption to the SCM Agreement’s general prohibition of export subsidies. Subsequently the new measures were intended to comply with WTO agreements, it enjoyed a presupposition of compliance, and it was up to the challenging Member to establish the conflict.¹⁶⁷ Consequently the Appellate Body disagreed. Thus, the point that a measure was taken to comply with recommendations and ruling of DSB, the AB held, doesn’t change the allocation of the burden of proof of a member asserting eligibility for an affirmative defence has the burden of establishing that eligibility in an article 21.5 as in regular panel proceeding.¹⁶⁸

In another case, EC – Hormones (Article 21.3), the Arbitrator held that the burden of proof regarding the existence of specific circumstances falls on any member disagreeing for a period longer or shorter than 15 months for implementing rules and recommendations of DSB. Thus, the arbitrator stated:

"In my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or a longer time has the burden of proof under Article 21.3(c). In this arbitration, therefore, the onus is on the European Communities to demonstrate that there are particular circumstances which call for a reasonable period of time of 39 months, and it is likewise up to the United States and Canada to demonstrate that there are particular circumstances which lead to the conclusion that 10 months is reasonable.\textsuperscript{169}

6.32. Conclusion

To consider the success of the dispute settlement system of the World Trade Organization (WTO), it is essential to evaluate whether WTO Members promptly take the actions required to take themselves into compliance with their WTO obligations, as those obligations have been clear or explained in the dispute settlement reports issued by WTO panels and the Appellate Body. The disputing parties should follow the rules and recommendations of the DSB as stated in the adopted Panel report and Appellate Body Report. Hence, the prompt compliance with the DSB rulings is essential in order to ensure effective resolution of dispute. Though, dispute concerning the implementation of the dispute ruling continually being raised. In order to ensure the effectiveness of the implementation of rules and recommendation, the WTO has provided surveillance mechanism to ensure the implementation by the Member of the result of dispute settlement.

Thus, when disagreement as to the existence or consistency with covered agreement of the measures taken to comply with the DSB rulings, such dispute should be decided through recourse of these dispute settlements procedures. In the case if DSB rulings are not implemented within reasonable period of time, it's possible to

\textsuperscript{169} Award of the Arbitrator on EC – Hormones (Article 21.3), Para.27.
provide compensation or authorisation for retaliation through suspension of concessions or other obligations. By other means, if the Member fails to bring the measures found to be inconsistent with a covered agreement into compliance or to comply with DSB’s rulings.

If cannot do so the member should, if so requested, enter into negotiations with any party having invoked the dispute settlement procedures with a view of developing mutually acceptable compensation. But if no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to impose retaliatory measures such as suspension of concessions or other obligations under the covered agreement against the other party. However, if there is an objection to the level of suspension proposed, the matter should be referred to the arbitration.

Retaliation has been authorized in eight disputes. Except EC-Banana III (Ecuador) and US-Gambling, the authorization has targeted trade in goods. In practice retaliation has been implemented in six disputes. As it can be seen, mainly powerful trading nations have taken retaliation actions. In contrast, Ecuador and Antigua – relatively small countries have not put retaliation into practice. At the same time, retaliatory measures have applied vis-a-vis the US and the EC, the two most significant players in the WTO system. According to the present state of implementation has surveyed of decisions in WTO dispute settlement. Whereas the overall record of implementation is relatively good, there are problems raised. The problems could be solved by the modification of the remedies provided for in WTO dispute settlement so that some suggestions like (a) money payments could be substituted for the right to suspend concessions, (b) such payments or suspension of
concessions could be calculated on a retrospective basis, and (c) such payments or suspension of concessions could be increased periodically over time in the event of continued non-implementation.

In the light of above general considerations, what practical improvements might be suggested to improve implementation of WTO dispute settlement decisions? I believe that several changes should be given serious consideration. Particularly, I think that the WTO remedies for non-implementation should incorporate (a) the possibility of substituting fines or damages as a remedy in lieu of suspension of concessions; (b) some degree of retroactivity, so as to encourage compliance within the reasonable period of time; and (c) some adjustment mechanism to increase the sanctions over time, so as to preclude non-compliance from becoming an acceptable status quo position.