CHAPTER III

REMEDIES UNDER THE WTO LAW
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1 Introduction

In the World Trade Organization (WTO), compliance with and violation of the WTO Agreements have been addressed at different levels by different institutional mechanisms and procedural requirements. These include the Trade Policy Review Mechanism (TPRM) and the notification and reporting requirements under various agreements, which ‘contribute to improved adherence by all Members to rules, disciplines and commitments’ under the WTO Agreements. However, the most effective system through which the WTO rules are enforced is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU provides for rules and procedures whereby an aggrieved party could proceed against another Member in violation of their WTO obligation, and obtain remedy for nullification or impairment of benefits, including the ability to enforce such a remedy in case of non-compliance.

The WTO DSU is considered as one of the greatest achievements of the GATT Uruguay Round of Trade Negotiations and a cornerstone of the Marrakesh Agreement Establishing the WTO (1994). The DSU, particularly its procedure for implementing dispute settlement rulings, has been widely praised as a decisive improvement over the procedures codified and practiced under the General Agreement on Tariffs and Trade (GATT) and other contemporary international adjudicatory mechanisms. More importantly, it has been observed that the DSU’s evolution from a power oriented system under the GATT to a more rule-oriented system has enhanced ‘rule of law’, legitimacy and promote equality and fairness among the unequal membership of the WTO in accessing remedies (Jackson 2000b: 111; Jackson 2000c; Busch and Reinhardt 2003: 721-22).

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1 The TPRM and notification and reporting procedure are only recommendatory in nature. See http://www.wto.org.
The WTO Dispute Settlement System (DSS) has been working for the last 14 years and at first glance it seems to be working very well. Since its inception in 1995, the WTO DSS has so far attracted more than 390 complaints amplifying its successful existence. The WTO DSB had adopted 116 Panel and Panel/Appellate Body reports, of which, in nearly 90 percent cases the Panel and/or the Appellate Body have found violations of WTO obligations (Leitner and Lester 2008). This is excluding the compliance review reports under Article 21.5 of the DSU compliance proceedings, which have occurred in 24 cases where WTO violations have been found in the original WTO litigation proceedings. Out of the 116 adopted reports, in 17 instances arbitration process under Article 22.6 of the DSU for determination of level of countermeasures (suspension of concessions) have been undertaken, of which in 15 cases the DSB has authorized countermeasures.

With this impressive record of settlement and successful implementation of disputes, the WTO DSS has indeed been considered as one of the most effective multilateral adjudicatory system available in contemporary international legal system. In other words, it has been said that the WTO DSS achieved something that has eluded traditional international law and its institutional mechanisms - the ability to induce compliance with legal obligations and decisions. This unique feature and achievement of the WTO DSU has showcased it as a model for multilateral adjudication, - a system which should be emulated and followed in other areas of international law. Indeed, it is argued that the WTO DSS has changed even the positivist perception of international law from mere ‘positive morality’ (Austin 1954) to that of one with enforcement power, thereby settling the debate on “whether international law is law ‘properly so called?’

Of the many reasons cited for the improved performance and overwhelming response of States and scholars in favour of the new WTO DSU, the most prominent is its ability to provide remedies for violation of WTO rights and obligations. In other words, apart from establishing one of the most systematic and sophisticated

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3 WTO (2009), Update of WTO Dispute Settlement Cases, WT/DS/OV/34. The number of complaints is based on the number of notification for consultations received by the DSB. For statistical analysis of the WTO DSS, See Davey (2005a: 17); Leitner and Lester (2006); Leitner and Simon (2008).
4 This category covers arbitration proceedings pursuant to Article 22.6 and 22.7 of the DSU and Article 4.11 of the Subsidies Agreement.
5 As on 26 January 2009. WTO (2009), Update of WTO Dispute Settlement Cases, WT/DS/OV/34.
6 Austin concluded that international law was not true law but ‘international positive morality’ only analogous to the rules binding a club or society.
procedures for settlement of disputes, the DSU provides an injured Members with appropriate remedy for violations of obligations, and the ability to enforce the remedy in case of non-compliance, something that most other international adjudicatory processes lack. Without perceived and appropriate remedies for violations, States possibly will not have necessary incentive to either invoke the dispute settlement process or comply with the DSB rulings. The objective of enhancing compliance was to create a more stable and predictable trading system and thus to maximize the potential welfare effects of substantive rules of liberalizing trade (Schaefer 1996).

Quite contrary to this perception is the view that, in the WTO there may be law, but there is not always a remedy. In this respect, it has been noted that the WTO’s system of remedies remains in stark contrast to the adage of law - ‘ubi ius, ibi remedium’ (where there is a right there is a remedy) and more restricted than contemporary international law remedies (Bronckers and Broek 2005: 109). While they agree that the new WTO DSU has achieved significant procedural advancements, particularly in the area of compulsory jurisdiction and predictability, in many other respects, the DSU has taken a step backwards, limiting the scope of remedies available to an injured Member. Primarily it has been argued that a Member's responsibility for breach of a WTO obligation appears to be more constricted than a State's responsibility for a breach of an international obligation under general international law. In other words, what an injured Member could expect as remedy for violation of a WTO obligation is highly limited by the special rules under the DSU. Further, while the DSU provides for automatic countermeasures, a definite advancement, it is essentially bilateral in operational terms and therefore inflicted with the political and economic imbalances that inform the remedy of countermeasures.

The diluted nature of WTO remedies, diverge from the established practice on remedies in general international law. WTO offers only the primary remedy of ‘cessation’ of the wrongful act, requiring prospective compliance. No damages or compensation need be paid to the injured Member for violations that take place before or during the adjudication of the dispute and members need only comply with the Panel/Appellate Body ruling within a reasonable period of time. Countermeasures could be initiated only if a Member failed to comply within a reasonable period of

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7 Under general international law, a State that breaches an international legal obligation is required not only to cease the violation, but also to restore the situation that existed before the violation and to compensate for any past injury caused by the violation.
time. The amount of the suspended concessions cannot exceed the expected amount of
nullification or impairment of their obligations, calculated prospectively from the end
date of reasonable period of time. Finally, there is the problem of non-compliance,
particularly in cases involving critical interests of the Member concerned. In such
cases, the available remedies only contribute to prolonging the dispute rather than
resolving it. Thus, the remedies available under the WTO DSU appears to be much
narrower in scope and application than remedies available under general international
law, thus provoking the statement that WTO remedies are archaic and rudimentary.

In this background, the chapter attempts to study the nature, scope and
effectiveness of remedies available under the WTO DSU. While analyzing the
substantive and procedural aspects of remedial mechanisms of the WTO, a comparison
will be made with general international law (as discussed in the previous chapter),
with a view to identifying areas where WTO remedies offer a better alternative for the
injured Member than envisaged in the general international law and vice-a-versa. Most
importantly, the objective of this chapter is to identify areas where the WTO remedies
have 'fallen short of' expectations.

This chapter is structured as follows. The section 2 examines the relationship
between international law and WTO law. This section would enable us to appreciate
and understand the relationship between legal regimes, particularly in the context of
the applicable law in the WTO DSU. The remaining parts analysis the different aspects
of remedies under the WTO DSU. Section 3 focuses on the debate concerning the
nature of WTO's obligation as to whether it is bilateral or collective. Section 4
addresses the question of legal standing to initiate a dispute in the DSU. Section 5
examines the material aspect of remedies under the WTO DSU, i.e., an analysis into the
nature, scope and content of DSB recommendations and rulings (recommendations
and suggestions). In other words, this Section looks at the nature of remedies for
violation of its WTO obligations, which an injured Member initiating a WTO dispute
settlement procedure could aspire to, in the current set up. Section 6 analyses the
procedural aspects of remedies, i.e., the procedures for implementation of the DSB
recommendations and rulings and highlights the associated problems. Section 7 details
the remedy of compensation for non-compliance with the DSB recommendations or
rulings. The enforcement of remedies through countermeasures, the remedy of last
resort, has been given special attention in Chapter IV. Finally, section 8 analyses

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remedies for non-violation and situation complaints. The chapter will conclude with some thoughts on how WTO remedies might be improved.

2 Relationship between the WTO Law and the International Law

Much has been said and written about the relationship and applicability of international law in the WTO legal system. The views have been wide and varied, depending on the context and content of the relationship. Most agree that the WTO law, like any other treaty regime forms part of the wider corpus of international law, and the general principles of international law is applicable to the WTO legal system, unless the WTO Agreement explicitly ‘contract out’ of it. However, it has also been argued that international law does not apply to WTO legal system for the reason that it has been conceived as a special regime, excluding other international law unless explicitly so provided in the agreements. In other words, in case of an ambiguity or uncertainty in WTO law and if there is no explicit provision recognizing the applicability of general international law, it is not permissible for the WTO adjudicating bodies to rely on general international law principles. Under such circumstance the obvious course of action would be to declare a non-liquet and refer the matter to the WTO General Council for clarification.

These two contrasting views have direct implications on the nature and scope of remedies that the WTO DSU could recommend in a given dispute. The interpretation of the WTO texts against the background of public international law (as a fallback option or applicable law) may open up new perspectives, which could strengthen WTO remedies and standing of developing countries (Pauwelyn 2003b; Bianchi and Gradoni 2008). In this context this Section attempts to understand from a broader perspective the inter-relationship between international law and the WTO law. The objective is to highlight the different views on this issue and establish the inter-relationship. By accepting a relationship, general international law could offer the WTO adjudicating body not only a large body of well established rules which would be useful in filling gaps, settling uncertainties, and strengthen remedies, but also in ensuring the completeness of the WTO legal system as a whole.


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8 See generally, Pauwelyn (2001); Villalpando (2002); Mavroidis (2000: 764).
Since remedies under general international law have been extensively dealt with in Chapter II, this Section deals only with those aspects of international law which have direct bearing on the WTO law and its application. While this part attempts to set the general foundation of such relationship, the remaining Section of the chapter deal with specific aspects of the inter-relationship between these two legal systems in a comparative and critical perspective.

2.1 WTO Law as Lex Specialis – Understanding the Connection

2.1.2 Concept of lex specialis in international law

The concept of lex specialis is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts", meaning "specific prevails over the general" (Fitzmaurice 1957: 236). While in a domestic legal system, the application of lex specialis is fairly clear, international legal system is essentially different.

The international legal system due to its decentralized and fragmented nature comprises neither a central legislator nor authority creating its rules. Rather, international norms are the result of general 'consent' of the subjects of international law (States). International law making, thus, depends essentially on mutual consent, be it explicit or implicit, of States, in according with the fundamental principle of sovereign equality of States (Pauwelyn 2001: 536). “The equality of States and the resulting equality between law they create, as well as, the neutrality of international law (other than jus cogens) resulting in all norms being of the same legal value” (Pauwelyn 2003b: 13).

In other words, the notable character of international law is the non-existence of inherent hierarchy between general international law and treaties, except for the rules of jus cogens or peremptory norms of general international law. This is evident

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9 The maxim of lex specialis is deeply rooted in domestic law and has its origin in Roman law. See Fitzmaurice (1957: 236) in Lindroos (2005: 35). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. See Koskenniemi (2004: 4).

10 Norms are created by the subjects of international law themselves in a variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order. Lindroos (2005:28).

11 ‘Jus cogens’ are norms ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’. Pursuant to the Vienna Convention on the Law
from the Statute of the International Court of Justice (ICJ) on the sources of international law.\textsuperscript{12} The lack of hierarchy or their equal value could be explained on the ground that both derive their authority from the same source – the State (Pauwelyn 2001: 537).\textsuperscript{13} Thus, the lack of a Kelsenian type normative hierarchical structure such as found in the national legal systems, have some consequences in international law. First, there could be potential conflict with different norms of international law. Second, it permits States to “vary or even dispense altogether with most rules of international law” (Oppenheim 2003: 7), by concluding a treaty, thereby contracting out of or deviating from general international law and for providing treaty provisions setting up a tailor-made remedial mechanism (thus for example deviating from certain rules of general international law, including rules on state responsibility) (Pauwelyn 2001: 537). However, it has been generally held that a new treaty providing for special provisions or deviating from general international law must explicitly provide for the same in that treaty. This is because, as earlier noted, each new treaty is presumed to have been born into the international legal system comprising not only consent based treaty law but also general international law, which binds on them automatically. Therefore, the treaty must exclude the rules of general international law that the parties do not want to apply with respect to that treaty, not the reverse, i.e., the treaty does not have to list all such rules that are to apply to it (Pauwelyn 2001: 537).

\textit{AMOCO International Finance Corporation v. Iran}, the Iran-United States Claims Tribunal took a more liberal view than in the cases mentioned above and held that

“As a \textit{lex specialis} in the relations between the two countries, the Treaty supersedes the \textit{lex generalis}, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible \textit{lacunae} of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.”\textsuperscript{14}

\textsuperscript{12} The \textit{Statute of ICJ} does not provide for any hierarchy among different sources of international law which the court could apply while deciding a case. They are of equal legal value.

\textsuperscript{13} The lack of hierarchy exists among treaties as well. One treaty norm, once validly concluded, is as legally binding as any other.

2.1.2 WTO law as “lex specialis”

There is a general consensus among scholars that WTO law, like any other branch of international law (international environmental law, human rights etc), is an integral part and specialized branch of public international law regulating international trade (McRae 2000; McRae 1996; Petersmann 1999; Pauwelyn 2003b). WTO law is ‘just’ a branch of public international law. Scholars recognize that international law permits States to deviate or ‘contract out’ of general international law norms by concluding a treaty/agreement, in this case the WTO rules. The question then is whether the WTO legal system is a ‘self-contained regime’ (for example, an autonomous and exhaustive set of norms on State responsibility) or whether it represents special rules (a lex specialis) excluding the application of norms of general international law? (Villalpando 2002). In other words, the issue relates to extent to which the WTO rules have ‘contract out’ of general international law.

In a report of the International Law Commission (ILC) on Fragmentation of International Law (ILC 2005: paras. 19 and 494), Martti Koskenniemi, the Special Rapporteur notes that the notion of self-contained regimes is simply misleading and that there is no support for the view that anywhere general international law would be fully excluded. He goes on to suggest that ‘special regimes’ are a more appropriate term (Koskenniemi 2004: para. 134). All references to the notion of ‘self contained regime’ are expressed in the context of certain international legal regimes, in particular, those of diplomatic immunities, the European Community, and the human rights treaties, that, in terms of their compliance mechanism or secondary rules, may

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15 A self-contained regime covers the case where a set of primary rules relating to a particular subject-matter is connected with a special set of secondary rules that claims priority to the secondary rules provided by general law. Koskenniemi (2004: 8). For the distinction between primary and secondary rules, see Chapter II, at 58-59.

16 However, international law recognizes certain rules as binding, and that part of public international law which are binding, in principle, on all States are the general international law contained in the customary international law and the general principle of law (Oppenheim 2003: 4). This scenario is quite evident in the treaty based legal regimes, which most often does not provide for rules pertaining to remedies or responsibility of States for violations of treaty obligations or for committing internationally wrongful acts. However, the non-availability of rules/provisions pertaining to remedies in a specific treaty does not preclude the States or Judges (in a dispute) from devising appropriate remedy in a given situation. It is in this context that the substantive body of rules of customary international law, though often characterized as vague, that the States and Judges could seek guidance from in reaching an appropriate conclusion. See Mavroidis (2000: 764).

somehow be self-contained, without any or only limited "fallback" on general international law (Lindroos and Mehling 2005: 857). Consequently, the legal systems of these international regimes may operate in practice in relative isolation from each other, separated as "islands" in international law (Zapatero 2005: 65). The ICJ in its Tehran Hostages case asserted that the regime of specific legal consequences contained in the Vienna Convention on Diplomatic Relations was self-contained vis-à-vis the customary international law of State responsibility. Consequently, in the event of violations of the Vienna Convention, no resort may be had to any of the remedies provided for by general international law, because 'diplomatic law by itself provides the necessary means of defense against, and sanction for, illicit activities by members of diplomatic or consular missions'.

The ILC Articles on State Responsibility 2001 recognize the existence of lex specialis, excluding or limiting the application of general international law within that regime. Article 55 of the ILC Articles is designed to cover both 'strong' forms of lex specialis, including what are often referred to as self-contained regimes (a strong lex specialis designed to exclude completely the general international law of state responsibility), as well as 'weaker' forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. Article 55 provides that the ILC Articles on State Responsibility do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. The ILC Commentaries (2001: 357) note that it depends on the "special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be determined by the special rule .... In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example

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19 Where it is noted that a strong lex specialis designed to exclude completely the general international law of State responsibility is denoted as a 'self-contained regime', Simma and Pulkowski (2006).
20 Article 55: Lex Specialis - "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".

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of the former is the WTO Dispute Settlement Understanding (DSU) as it relates to certain remedies’.\(^{21}\)

From the above analysis it is clear that none has spoken of special regimes in the sense of treaty regimes that are completely isolated from all rules of general international law (including the law on treaties, judicial proceedings, and matters such as the use of force and human rights), let alone treaty regimes concluded completely outside the international legal system (Pauwelyn 2001: 539).\(^{22}\) The analysis of the ILC Commentaries and the opinion of the scholars reveals that the WTO rules are rules of international law that, and in certain respects, constitute \textit{lex specialis} vis-à-vis certain rules of general international law\(^{23}\), particularly so in the case of remedies. However, this does not mean that WTO rules are \textit{lex specialis} vis-à-vis all rules of international law or that of remedies. Contracting out of ‘some’ rules of general international law (for example, as does the WTO DSS vis-à-vis certain rules of general international law on State responsibility) does not mean that one has contracted out of ‘all’ of them, nor \textit{a fortiori} that WTO rules were created completely outside the system of international law. Thus the question that naturally arises is - if we consider WTO law as \textit{lex specialis} – not fully insulated from the influence of the general international law, how far does this influence extend or ‘fallback’ permitted, ie, whether the general international law is useful as ‘applicable law’ in WTO adjudication, or in clarifying the WTO law.

It is well supported by authoritative international decisions that for general international law to become ‘applicable law’ within a specialized regime such as the WTO, it is not necessary that such treaty should expressly provide for such eventuality. In other words, unless explicitly stated general international law cannot in totality be excluded. In the \textit{South West Africa} Advisory Opinion 1971, the ICJ noted that “the silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general

\(^{21}\) According to Article 22 of the WTO DSU, ‘compensation’ is provided ‘only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement’. For WTO purposes, ‘compensation’ refers to the future conduct, not past conduct and involves a form of countermeasure.

\(^{22}\) See also Kuiper (1994); Simma (1985); Simma and Pulkowski (2006).

international law. Further, in the *ELSI* case, the acting Chamber of the ICJ found itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so". This approach was confirmed again in the *Iran-U.S. Claims Tribunal* which noted that the treaty, as *lex specialis* in the relations between the two countries, supersedes the *lex generalis*, namely customary international law:

"[H]owever,... the rules of customary law may be useful in order to fill in possible *lacunae* of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions".

Several reports of the WTO Appellate Body and various Panels as well as some passages in the agreements, particularly in the DSU have actually referred to general international law as a pertinent consideration. The Panel in *Indonesia - Automobiles*, moreover, raised a general presumption that States negotiating a treaty have prior commitments in mind and will continue to abide by them unless explicit wording to the contrary reflects a different intent. An example of explicit recognition and confirmation of applicability of rules of general international law to the WTO legal system could be found in Article 3.2 of the DSU. This Article provides that WTO covered agreements must be clarified "in accordance with customary rules of interpretation of public international law." The relevance of international law to the WTO was also acknowledged by the very first report of the Appellate Body in *US - Gasoline*, where it states that "that direction [in Article 3.2 of the DSU] reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."
Another legal presumption that exists in the relationship between *lex specialis* rules and the general international law is the absence of conflict between them. A conflict exists when, in a dispute with the same Parties, the treaties in question deal with the same subject matter and these provisions establish mutually exclusive obligations or rights. Thus, only if it can be shown that the new treaty does contradict or aim at contracting out of a rule of general international law will the pre-existing rule be dis-applied with respect to the treaty in question. For example, some of these rules that the WTO seem to ‘contract out’ of general international law include, the DSU on remedies or responsibilities for violation of WTO obligations, in particular the “suspension of concessions,” (which contract out of some aspects of general international law rules on countermeasures) or deviate from, or even replace, other pre-existing rules of international law (such as bilateral quota or tariff arrangements and the Tokyo Round Codes). The ILC Commentaries clarified that for the *lex specialis* principle to apply “it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation” (ILC Commentaries 2001: 358). This was reiterated in *Indonesia – Automobile* that, if two articles have two different purposes, they are not in conflict. The extent to which such contracting out has occurred is a question of treaty interpretation, which evidently in this context is the job of the WTO Panels or the Appellate Body. Viewed from this perspective, the WTO agreements have no specific provision which ‘contracts out’ any general international law rules, thereby leaves the scope of such influence on the interpretation of WTO adjudicating bodies.

2.2 Applicable Law in the WTO DSU – the possible wider relationship

As the *lex specialis* status of the WTO regime is settled beyond dispute, the follow-up issues that needs consideration is the extent and scope of ‘applicability’ of international law within the WTO legal system. In this section we would address the predominant view that general international law constitutes “applicable law” and consider the extent to which Panels and the Appellate Body may apply saliently rules and principles of international law deriving from sources other than the WTO covered

32 Koskenniemi (2004: para. 21) in his report explains that, “*lex specialis* is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts”.

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agreements. There are two views on this subject, the predominant being that the
general international law is applicable law unless explicitly excluded or there is a
direct conflict. The second view is that the general international law is applicable only
to the extent of its explicit mention in the WTO covered agreements, for example, like
in the case of Article 3.2 of the DSU (Pauwelyn 2003b).

The applicable law in an adjudication process determines the law on which it is
required to concentrate when it administers justice (Zapatero 2005: 64). ‘Applicable’
refers to direct validity when determining the merits of a claim, interpreting the
covered agreements, and establishing evidence of facts (Bartels 2001: 510). The issues
of ‘applicable law’ is relevant because it is the law that can be given (direct) effect
between the WTO Members. Thus the WTO applicable law is the system of law
(rights and obligations) that provides effective remedies in case of their violation
(Marceau 2002: 776). Article 38 of the Statute of the ICJ\(^3\) and the UN Convention on
the Law of the Sea\(^4\) provide for specific provisions dealing with the applicable law
that they could apply. The applicable law of specialized dispute settlement
mechanisms such as the WTO DSU could be predefined in a more restricted way, ie,
limiting the application of ‘other’ international law within the specified regime.

While the DSU clearly recognises the Panels and the Appellate Body as
tribunals of limited jurisdiction as they may only settle disputes based on the covered
agreements\(^5\), the DSU contains no provisions excluding a priori any sources of
international law from being applied to such disputes. This means that all sources of
international law should be accepted as potentially applicable in WTO dispute

\(^3\) The applicable law of the ICJ is equivalent to the generally accepted sources of international law,
except that the parties submitting a dispute to its jurisdiction agree to this being decided ex aequo et
bono. Article 38.1-2, ICJ Statute.

\(^4\) The UN Convention on the Law of the Sea provides that the International Tribunal for the Law of the
Sea has “jurisdiction over any dispute concerning the interpretation or application of this Convention
which is submitted to it in accordance with this Part”, and that, in determining these disputes, it “shall
apply this Convention and other rules of international law not incompatible with this Convention”.
Articles 288(1) and 293(1) United Nations Convention on the Law of the Sea. Article 288(2) provides
for a further “jurisdiction over any dispute concerning the interpretation or application of an
international agreement related to the purposes of this Convention, which is submitted to it in
accordance with the agreement”.

\(^5\) Article 1.1 of the DSU states: “The rules and procedures of this Understanding shall apply to disputes
brought pursuant to the consultation and dispute settlement provisions of the agreements listed in
Appendix I to this Understanding (referred to in this Understanding as the “covered agreements”)”. It
establishes ‘an integrated dispute settlement system’ which applies to all covered agreement. Guatemala
– Cement I, Appellate Body Report, para. 64. See Bossche (2005: 188). The covered agreement listed in
Appendix I to the DSU include the WTO Agreement, the GATT 1994 and all other multilateral
agreement on trade in goods, GATS, TRIPS Agreement and the DSU. TPRM is not included.
settlement proceedings. The one provision which explicitly recognizes the applicability of customary rules of international law is found in DSU Article 3.2. No other express provision or evident restriction is imposed on the Panel and the Appellate Body. However, the DSU contains an implied restriction on the scope of the power of the DSB, which states that: "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".36

However, this does not prohibit States from bringing claims which are also or largely sustained by rules other than those contained within the covered agreements. Naturally, the Panel or the Appellate Body is compelled to deal with questions as to the extent of applicability of other sources of international law to trade issues, and if so, to what extent. As noted above, while jurisdiction is mostly limited to the covered agreements, no similarly explicit statement could be found with regard to the sources of applicable law. As with any other treaty it is widely acknowledged that the agreement instituting the WTO was born into the wider corpus of international law. From this assumption, it would normally follow that the multilateral trading system continues to be governed by the precepts of public international law, at least to the extent that these have not been contracted out, deviated from, or otherwise replaced.37

In most cases, the covered agreements, properly interpreted, will be sufficient to resolve the claims presented to the Panels and the Appellate Body. However, there could be cases that cannot be solved by an application of the rules to a given fact and the Panel and the Appellate Body need to look beyond the covered agreements to devise an appropriate remedy. These cases could be of two types: those in which the Panels and the Appellate Body have to resolve conflicting obligations and those in which they have to adopt rules when the covered agreements are silent (Ford 1994: 45-46). In addition to this, there are also cases in which issues of fairness can require the restriction of the express treaty rights of a party as a result of that party’s conduct (Cottier and Nadakvukaren 1997 in Bartels 2001: 513). Lorand Bartels (2001: 500) identifies three different ways in which ‘other’ international law not part of the covered agreements, could be used in deciding a dispute: (a) as an aid to the

36 Article 19.2 DSU.
interpretation of a given provision of an agreement; (b) as evidence of a Member's compliance with its obligations; and (c) as law in the chain of legal reasoning.

While elaborating the power of the Panel in applying customary international law, in the context of DSU Article 3.2, the panel in Korea—Government Procurement, observed as follows:

"We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO." 38

The Panel also rejected the argument that the reference in DSU Article 3.2 only to rules of treaty interpretation of customary international law means that all other international law is excluded.39 Though this Panel Report was not appealed, this Report clearly underlines the wide discretion vested in the Panels and the Appellate Body as regards their legal reasoning. Support to this view could be found in the Appellate Body report in EC—Hormones where it observed that:

"Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a Panel freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration."40

Opinion of scholars on this issue diverges considerably. For example, Pascal Lamy (2007: 1), the Director General of the WTO notes that "...the WTO legal order respects, inter alia, the sovereign equality of States, good faith, international cooperation, and the obligation to settle disputes peacefully, not to mention the rules of interpretation of conventions which the Appellate Body, for example applies without

39 Ibid. The language of Article 3.2 of DSU in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law.
hesitation. The WTO respects general international law, while at the same time adapting it to the realities of international trade. In joining the international legal order, the WTO has ended up producing its own unique system of law". For him the WTO law is largely a circumstantial application of international law in general.

Pauwelyn (2003b: 459-61, 466) argues that because States are subject to their conventional and customary international legal obligations, the WTO dispute settlement must apply all international legal obligations unless they are specifically precluded from application. Thus, international tribunals such as WTO Panels are implicitly authorized to apply all laws. Trachtman (1999) on the other hand, takes a more restrictive approach. He noted that while WTO adjudicatory bodies are only permitted to apply WTO law, they refer to non-WTO international law in two types of cases. First, they could refer to customary rules of interpretation of international law as specifically authorized by Article 3.2 of the DSU. This reference does not appear to include substantive non-WTO international law. Other international law may be taken into consideration as provided under Article 31(3)(c) of the Vienna Convention, which is taken as reflective of customary rules of interpretation, however, only to indicate what materials should be taken into account in interpreting treaty texts. Thus, other international laws are not directly applicable but are taken into account by interpreting it in a manner so as to avoid conflict where possible. Second, substantive non-WTO international law may be incorporated by reference in WTO law, either by treaty language such as the references in TRIPS to intellectual property rights treaties or by a waiver such as the Lome waiver in the EU - Bananas decision. Finally, substantive non-WTO law may indirectly be incorporated by reference in provisions such as Article XX(b) of GATT (Trachtman 1999: 7).

However, these views are not exhaustive, and depending what side one chooses, scholars have used the very same Articles of the DSU to argue both sides of the argument. The relevant provisions could neither be relied on to expressly allow or forbid the application of international law. Regardless of an opinion to the contrary,

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41 Article 31(3)(c) of the VCLT specifies that relevant rules of international law applicable in the relations between the parties shall be taken into account in interpreting treaties.
42 Article XX(b) of GATT provides for measures "necessary to protect human, animal or plant life or health".
43 In Korea - Government Procurement, for instance, the panel clarified that the purpose of Article 7 of the DSU lies in identifying the claims submitted by the parties and 'is not meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel'.

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Panels and the Appellate Body have been quite prepared to solve these types of cases in the same way as other tribunals, which is to say, by applying the "definitions, principles or rules" of international law which are included neither in the covered agreements or in the "customary rules of interpretation of public international law" (Bartels 2001: 513).

For example, the Panels and Appellate Body have in reaching their recommendations and rulings have referred to several rules and principles of general international law such as rules of State responsibility, treaty law etc. In *US - Shrimp/Turtle* case, the Appellate Body decided, against clear guidance in the WTO agreements, that dispute settlement panels could consider *amicus curiae* briefs submitted by non state actors. In so ruling, the Appellate Body relied on the general language in DSU Article 13, which provides that a Panel may seek information and technical advice from any individual or body it deems appropriate. In *EC - Bananas*, the Appellate Body decided that private lawyers may represent members in oral proceedings, despite EC and US opposition on the ground that the practice, from the earliest years of the GATT, had been to permit presentations in dispute settlement proceedings exclusively by government lawyers or government trade experts. Other instances where principles of general international law was relied on or referred to were: *la compétence de la compétence*, burden of proof, the treatment of municipal law, the authority to draw adverse inferences, judicial economy, state responsibility concerning countermeasures, attributability etc.

It can thus be concluded that the Panel and Appellate Body have extensively relied on and are influenced by public international law, and particularly applied the ILC Articles on State Responsibility and other customary international law principle in

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50 *US - Wool Shirts and Blouses*, Section VI, 21.

their adjudicatory process. However, they have been highly cautious in exercising their interpretative freedom. At the same time, no one could deny the fact that there is definitely a shift towards greater acceptance of general international law in the WTO legal system than earlier thought possible.

2.3 Customary Rules of Interpretation under International Law and the WTO – the minimum level of interaction

Irrespective of the argument as to the applicability or non-applicability of general international law in the WTO, one provision that explicitly establishes the rule of international law in the WTO dispute settlement is rules pertaining to the customary rules of interpretation in Article 3.2 of the DSU. Though narrow, it may seem, this leeway provides the Panels and the Appellate Body considerable freedom in bringing most of the international law principles into the WTO legal system in the guise of clarifying WTO rules.

2.3.1 Customary rules of interpretation under international law

The Vienna Convention on the Law of Treaties (VCLT) 1969, Articles 31 to 33 set out the general and supplementary rules an adjudicatory body could use while interpreting a treaty. The intention of the rules of interpretation under Articles 31 and 32 was to achieve certainty to international law on treaties and provide consistency in treaty interpretation (Bederman 1994). The consistency in interpretation would then assist countries to better predict the results of their actions, and permit them to plan with more foresight.

The general rule of treaty interpretation under Article 31 states that a Court shall interpret treaty in good faith in accordance with the ordinary meaning of the words in light of the context, object, and purpose of the agreement. Particular

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52 In US - Cotton Yarn, Appellate Body Report, para. 120, the report made explicit reference to Articles and Commentaries on State Responsibility.
53 The Vienna Convention as such was partly considered a codification of existing international law, and an attempt at progressive modification of the existing customary law, attempting to bring certainty to international law on treaties.
54 The interpretative articles were developed in part to end the dispute between the ‘intentionalists and textualists’ and to provide consistency in treaty interpretation by courts. Courts interpreting treaties generally use one of these two methods of interpretation. The textualist believes that treaties should be objectively clear to all the parties to them, and therefore the textualist will find a meaning that is most objectively reasonable. The intentionalist, on the other hand, believes that the actual subjective expectations of the parties should be protected, and therefore, the intentionalist will look for evidence of what each party thought the words meant and which meaning captures the true intent. See Bederman (1994: 954) in Maki (2000: 348-349).
55 Ibid.
56 Article 31.1, VCLT.
attention is paid to the context of the treaty since a provision should not be interpreted in isolation but in its context, first in that part of the agreement and then in relation to the entire agreement. For this purpose the court shall take into account not only the text, Preamble and Annexure, but also any agreement relating to the treaty between the parties and any instrument which was made by one or more parties and accepted by the other parties as an instrument related to the treaty.\textsuperscript{57} The Court should also take into consideration any subsequent agreements and practice or any relevant rules of international law applicable in the relations between the Parties that may shed light on the meaning.\textsuperscript{58}

However, if Article 31 does not resolve a problem of interpretation and the meaning is still unclear, the court may resort to supplementary tools of interpretation, such as the negotiating history of the agreement, including the preparatory work of the treaty (travaux preparatoires) and the circumstances of its conclusion.\textsuperscript{59} The purpose of supplementary means of interpretation is to (i) confirm the meaning resulting from the application of Article 31, or (ii) to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.\textsuperscript{60}

2.3.2 \textit{Customary rules of interpretation in the WTO}

Providing security and predictability to the multilateral trading system is the central goals of the WTO DSS. In this context, the Members also recognize that the DSU serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Article 3.2 of the DSU states that:

"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" (Emphasis added).

\textsuperscript{57} Article 31.2 (a) and (b), VCLT.
\textsuperscript{58} Article 31.3, VCLT.
\textsuperscript{59} Article 32, VCLT.
\textsuperscript{60} Article 32 (a) and (b), VCLT (Emphasis added). Usually negotiating history has been given less weight during interpretation.
The VCLT, Article 31 which is recognized as representing the customary rules of interpretation of public international law, play a significant role in clarifying the provisions of the covered agreements, and thereby contributing towards enhancing 'security and predictability' of the multilateral legal system. It is unclear as to how far the Vienna Convention had been used to interpret the old GATT 1947. Most often, the Panels relied on the rules of interpretation in VCLT without any explicit reference to them and also referred to drafting history of the agreement (supplementary means of interpretation) or they would look to other materials beyond the text of the GATT (Cameron and Gray 2001: 248).

The WTO jurisprudence on treaty interpretation has been laid down in various cases over a period of time and for this purpose, has consistently relied on the general rule of treaty interpretation under Article 31 of the VCLT. The Appellate Body in US - Gasoline and Japan - Taxes stated that the "general rule of interpretation", contained in Article 31 of the Vienna Convention had attained the status of customary or general international law, thereby implicitly resolving any uncertainty about its application to non-parties to the Convention (for example, the US and the EC). The Appellate Body added that:

"The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement'). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."

As regards the rules of interpretation to be followed, the Appellate Body in Japan - Alcoholic Beverages observed:

61 In EEC - Regulation on Imports of Parts and Components (1990) 2 W.T.M. 3, Article XX(d) of the GATT 1947 was interpreted in accordance with Article 31 of the VCLT, see Klabbers (1992: 86). See US - Restrictions on Imports of Sugar, 36 Supp. BISD 331(1989) for the application of the "ordinary meaning" principle mirrored in Article 31(1).

62 US - Gasoline, Appellate Body Report, p. 17. Similarly, the Appellate Body in Japan - Alcoholic Beverages II, endorsed the view that Article 32 of the VCLT which deals with the role of supplementary means of interpretation, "has also attained the same status of a rule of customary or general international law". Japan - Alcoholic Beverages Appellate Body Report, at 10.
“Article 31 of the Vienna Convention provides that the words of the treaty form the foundation for the interpretative process: ‘interpretation must be based above all upon the text of the treaty’.63

The Panel on US - Section 301 Trade Act further clarified that “the elements referred to in VCLT Article 31 - text, context and object-and-purpose as well as good faith - are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.”64 However, the Appellate Body in US - Shrimp adopted a different approach and laid down the hierarchy that a treaty interpreter should follow:

“A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the States Parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.”

This approach was found favored in many other disputes.65 For example, in US - Underwear the entire text of the Agreement on Textiles and Clothing (ATC)62 was deemed relevant in order to interpret Articles 6.2 and 6.4 of the ATC.66

In India - Patents (US), however, the Appellate Body cautioned that the principles of treaty interpretation “neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty or concepts that were not intended.... Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement.”67 In other words, “[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used.”68 However, the textual context would not be limited to text, Preamble and Annexes of the agreement, but also to explicitly

64 US - Section 301 Trade Act, Panel Report, para. 7.22.
65 See also US - Section 301 Trade Act, Panel Reports, para. 7.22; India - Patents (US), para. 7.18; US - Underwear, para. 7.18; Appellate Body Report on Argentina - Footwear (EC), para. 91.
66 US - Underwear, para. 7.18, WT/DS33/2.
67 India - Patents (US), Appellate Body Report paras. 45-46. See also India - Quantitative Restrictions, Appellate Body Report, fn. 23, para. 94.
referred provisions of the other pre-existing international instruments, such as in the case of TRIPS Agreement.\textsuperscript{69}

Further, in \textit{US - Wool Shirts and Blouses}, the Appellate Body held:

"Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panel or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute".\textsuperscript{70}

Thus, WTO is clear about the applicability of Article 31 of the VCLT, however, cautions against indulging in 'law making'.

2.4 \textit{Non Liquef in the WTO and International Law – A possible fall out}

One possible consequence of restricted consideration of general international law as 'applicable law' or constricted interpretation of customary rules of interpretation in WTO dispute settlement process is the possibility of \textit{non liquet}, which could deny the complaining member any remedy against an injurious act. Though such situation may be rare in the present setup, it is definitely worth considering this scenario in some detail.

\textit{A non liquet}\textsuperscript{71} presents a situation where the judicial body decides not to rule a case because the law is not clear or there is a gap in the law (Davey 2001: 106). Unlike the civil law system, the concept of \textit{non-liquef} is not permissible in common law courts. A common law court would, more saliently, even in the absence of precedent, create law to apply. However, the international law presents a different situation.

In the international legal system, composed of both common law and civil law jurisdiction, the solution is not very apparent when faced with a \textit{non liquet} situation. Despite this factor, the international courts and tribunals tend to rely on the general customary international law and general principles of law to fill in gaps in the legal system that might occur in settling a dispute. The applicability of the general international law as a source of law could be seen as an attempt to prevent the use of \textit{non-liquef} by the courts and tribunals such as the ICJ in deciding a case.\textsuperscript{72} In \textit{Barcelona Traction} case, the ICJ noted that "[i]nternational law may not, in some

\textsuperscript{71} This legal term literally means, "it is not clear".
\textsuperscript{72} Article 38(1)(c), \textit{ICJ Statute}. See generally \textit{Legality of the Threat or Use of Nuclear Weapons}, (1996) ICJ Reports 226 at para. 105. There was a dispute between the judges in this case over whether the majority has in effect invoked \textit{non liquet} in declining to answer if a state could use nuclear weapon in self defense if its survival were at stake. Davey (2001: 106).
fields, provide specific rules in particular cases', it nevertheless proceeded to decide the case before it, arising in one of those fields, as a matter of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered (Oppenheim 2003: fn 26). However, the ICJ appears to declare a non liquet in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Bartels 2008: 873-874).

The existence of a lacuna, or non liquet, "is an expression of the principles of self-interpretation and polynormativity that are characteristics of the international legal system" (Weil 1997: 119). The view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law (Oppenheim 2003: 13; Weil 1997: 110). General principles of law and rules of equity provide rules of decision where custom and convention fail to do so. This perspective is important in light of the Lotus doctrine that the principle of sovereignty requires that what is not positively prohibited to States is permitted to them (Trachtman, 1999: 6). Lauterpacht (1933: 110-135), for example, noted that in deciding a case the courts and tribunals constantly draw upon analogy, general principles of law, balancing conflicting claims or having recourse to the needs of the international community or the effectiveness of treaty obligations (Koskenniemi 1997: 226). He argues that the completeness of the rule of law 'is an a priori assumption of every system of law, not a prescription of positive law'. Though particular laws or particular parts of law may be insufficiently covered, "there are no gaps in the legal system as a whole". Julius Stone (1959:124), on the contrary notes that while a tribunal is not compelled to declare a non liquet in cases where the law is unclear, neither is it prohibited for doing so. Trachtman (1999: 6) notes that there may be

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74 See Oil fields of Texas Inc v. Iran (1982) ILR, 69 at pp 581 and 594. In Desgranges v. ILO the Impermissibility for a judicial tribunal to pronounce a non liquet because of the silence or obscurity of the law was regarded as a 'fundamental tenant of all legal systems', (1953) ILR, 20, 523 p. 530.
75 In this case the court stated that: "In view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be in stake". Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion requested by the General Assembly (1996) ICJ Reports 226 at para. 105(2)(E).
77 Lauterpacht notes that even "spurious gaps could be filled: an unsatisfactory single rule may be bypassed to give effect to a major principle of law, the intention of the parties or the purposes of the legal system as a whole. That the legal order is unable to recognize the existence of gaps results from its inability to limit their scope", in Koskenniemi (1997: 227).
instances where, more saliently, the international institutional setting may permit \textit{non-liquet}, where positive law does not exist, whereby the complainant may simply lose by default.

The WTO because of its character as a specialized regime generally isolates itself from much of the broader public international law. As elaborately discussed above, the WTO DSS, the Panels and the Appellate Body are limited to the application of substantive WTO law and are not explicitly authorized to apply general substantive international law or other conventional international law, except in the case of rules of interpretation of customary international law which have been received into WTO law.\footnote{Article 3.2, DSU.} Over and above, there is also a general prohibition imposed under Article 3.2 and 19.2 that the “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” This is indeed a clear indication that the framers of the WTO Agreements do not want the Panel and Appellate Body to create new laws in the name of “filling the gaps” in the WTO, thereby creating additional obligations on the Member states. Despite this clear direction the panel/Appellate Body had been indulging in ‘filling the gaps’ or ‘clarifying ambiguities’ though sharp reservations were expressed by many Members.\footnote{Bartels (2008: 876) notes that “there are two provisions that seem to contradict the notion that panels and the Appellate Body may declare a non liquet. Article 7.2 DSU states that “[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties in the dispute”. In the same vain, Article 17.12 DSU requires the Appellate Body to “address each of the issues” raised on appeal”.}

However, there could also be instance where, in a \textit{non liquet} situation, a Panel would find that it has substantive jurisdiction and that its exercise would be appropriate, but nevertheless conclude that it cannot come to a substantive legal conclusion on the ground that there is no law to be applied or that the applicable law is unclear. The implication of this finding would be that the complainant would find repeatedly before the WTO dispute settlement mechanism which cannot offer a ‘remedy’, because of the application of the doctrine of \textit{non liquet}.

The prime example of \textit{non liquet} in the GATT dispute statement was the unadopted Panel Report on \textit{EEC- Wheat flour Export Subsidies}, where in a somewhat confusing Panel Report, the Panel, \textit{inter alia}, noted an absence of legal certainty as to the meaning of the Tokyo Round Subsidies Code. That Panel Report is generally

\footnote{Article 3.2, DSU.}
viewed as unsatisfactory. In WTO jurisprudence, the Desiccated Coconuts case80 has been viewed as another instance of *non liquet* (Pescatore 2002: 21-22 in Davey 2001: 106). In that case, the complainant was essentially denied WTO relief, but in circumstances where it could have pursued a claim under the Tokyo Round Antidumping Agreement.

Scholars have expressed different and contrasting views on the applicability of the *non liquet* in the WTO legal system, a concept which is often portrayed as prohibited under general international law (Weil 1997: 109). Joost Pauwelyn (2001), for example, notes that the WTO dispute settlement, as a claim-specific mechanism, generally precludes *non liquet*. A WTO claim is either valid (and the complainant wins) or unfounded (and the complainant loses). Thus, a Panel or Appellate Body should not normally be allowed to conclude that the WTO rules invoked are unclear and on that basis proclaim a *non liquet* (Pauwelyn 2001: 559). Agreeing to this view, William Davey (2001: 106) noted that *non liquet* is and should be a disfavoured judicial technique and that the WTO dispute settlement should not embrace it. The WTO DSS is typically asked if a measure violates one or more of the covered agreements. Normally, the Appellate Body and Panel should be able to answer that question using standard treaty interpretation methods.

Claude Barfield (2001) makes the strongest case for the use of the doctrine of *non liquet* in the WTO dispute settlement. She argues that “given the widespread agreement that WTO texts are replete with lacunae and contradictory provisions, and given that questions concerning the legitimacy of judicial decisions are magnified at the international level, the Panels and the Appellate Body should be instructed to utilize this doctrine much more frequently and throw the decision back to the WTO General Council or to trade round negotiations”. She notes that the *non liquet* is prohibited in international law because it is necessarily “complete”, or that it is the duty of judges to step in and fill gaps, particularly in contentious areas. However, WTO rules, by common consent, are certainly not “complete” and argument for “gap-filling” by Judges reflects a dangerous – even antidemocratic – myopia” (Barfield 2001). Bourgeois (1998: 271) argues that *non liquet* could be possible in unregulated areas in the WTO, allowing Panels and the Appellate Body to refuse jurisdiction.

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Before examining in detail the material and procedural aspects of remedies in the WTO, it would be appropriate to briefly consider two important aspects having direct implication on remedies—the nature of WTO obligations; and the scope of legal standing in the WTO DSU.

3 Nature of WTO Obligations: Bilateral or collective?

There is a continuing debate among scholars about the nature of WTO’s obligation as to whether it is bilateral (collection of contracts with reciprocal rights and obligations) or collective (integral). The nature of obligations under the WTO has important implications on the remedies under the WTO legal system. Depending on the nature of obligation, whether it is bilateral or collective, it would give rise to different set of rights and obligations. Therefore it is worthwhile to understand the debate as to whether the WTO obligations are essentially bilateral in character and therefore independent of one another, or do they constitute a common interest ‘over and above’ the individual interests of the States concerned? (Carmody 2006: 420) This question appears critical because it has direct affect on (a) rules on standing; (b) the permissibility to suspend WTO obligations as a form of countermeasure in response to breach; and (c) the way in which WTO Members can respond to non-compliance - the option for a WTO violation to continue pursuant to a bilateral settlement (Pauwelyn 2003a: 908-909).

There are international rules which, even though they may be of universal application, do not in any particular situation give rise to rights and obligations _erga omnes_, and those which do. 81 The ICJ in Reservations to the Genocide Convention case (1951), while referring to the ‘object’ of the Convention in the context of permissible ‘reservations’, laid the foundation of what was to become the distinction between bilateral and collective obligations. The Court observed that:

"In such a Convention [as the Genocide Convention] the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the _raison d’être_ of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages to states, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which

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inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.\textsuperscript{82}

Fitzmaurice (1958, II: 27), in his Report on the Law of Treaties, identified treaties as either ‘bilateral’ or ‘multilateral’, and further divided multilateral treaties into ‘reciprocal’ or ‘integral’ categories depending on the consequences arising from their breach. Bilateral treaties can be suspended or terminated by either party since they involve a simple exchange of obligations. The same could be said of multilateral treaties of a reciprocal type. By comparison, multilateral treaties of an integral type cannot be suspended or terminated by any party because they involve ‘a mutual interchange of benefits between the parties, with rights and obligations for each’ (Pauwelyn 2002: 911). Further, multilateral treaties of an integral type cannot be suspended or terminated since ‘the force of the obligation is self-existent, absolute and inherent for each party’ (Fitzmaurice 1958, II: 28).\textsuperscript{83}

Unlike the VCLT,\textsuperscript{84} the ILC Articles on State Responsibility draw a general distinction between bilateral and collective obligations, which has legal consequence on the right to invoke the responsibility of a State, i.e. the question of standing (Pauwelyn 2003a: 916). The ILC Articles distinguish between ‘injured states’ and ‘other’ states that are entitled to invoke responsibility. Injured States are affected individually, in their own right, or at least ‘specially affected’ by the breach (Article 42). States other than injured states may also be entitled to invoke responsibility (albeit in a more limited way), ‘in some shared general interest’\textsuperscript{85} (ILC Commentaries 2001: 295).

Article 42(a) of the ILC Articles dealing with bilateral obligations, states that breach of a bilateral obligation, an ‘obligation ... owed to [another] state individually’,

\textsuperscript{82} Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, (1951) ICJ Reports at 23. Judge Alvarez in his dissenting opinion went further to classify treaties of the type of the Genocide Convention as follows: ‘To begin with, they have a universal character; they are, in a sense, the Constitution of international society, the new international constitutional law. They are not established for the benefit of private interests but for that of the general interest.’ at p. 51. Sometime the ‘integral treaty could be binding even on non-parties. In the Wimbledon case, PCIJ found that the international regime for the Kiel Canal (set out in the Versailles Peace Treaty) was binding also on Germany, even though Germany was not a party to the treaty. (1923) PCIJ Reports, Series A, No. 1, in Pauwelyn (2002: at 3-4).

\textsuperscript{83} Article 19, ILC Articles on State Responsibility (2001). See also Udombana (2004: 1190).

\textsuperscript{84} Article 60(2)(c) of the Vienna Convention permits any party to a treaty - not just the party specially affected by the breach - to suspend the treaty, in whole or in part, with respect to itself “if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.”

\textsuperscript{85} Article 48, ILC Articles on State Responsibility (2001).
can only be invoked by the State(s) at the other end of the bilateral relationship(s). Article 48.1(a), in contrast, addresses collective obligations. It provides that if an 'obligation ... is owed to a group of states ... and is established for the protection of a collective interest of the group', then all states in that group can invoke responsibility for breach, not as injured states, but in the collective interest of the group. As the Commentary to the ILC Articles states, a 'collective interest' is one that 'transcends the sphere of bilateral relations of the states parties' and goes 'over and above any interests of the States concerned individually'.

Under the WTO, there is no specific provision declaring the nature of WTO rights and obligations as bilateral or collective. However, the WTO Agreement is considered as integrated in a 'single undertaking' which forms an entity that is meant to be coherent (Lamy 2007). Support for this view could be found in Article II:2, which states that the multilateral trade agreements "are integral part" of the Agreement Establishing the WTO and "binding on all Members". Reiterating this view, the Panel in the Turkey -Textile and Clothing case, declared that "as a general principle, WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal conflict between them. This flows from the fact that the WTO Agreement is a 'Single Undertaking."

In Indonesia - Auto case the Panel noted there is a presumption against conflict between the different provisions of the WTO treaty since they formed part of agreements having different scopes of application or whose application took place in different circumstances. Further, the arbitrator in US - 'Foreign Sales Corporations' (Article 22:6 Arbitration) case characterized the WTO prohibition to provide export subsidies as 'an erga omnes obligation owed in its entirety to each and every Member. It cannot be considered to be "allocatable" across the Membership. Otherwise, the Member concerned would be only partially obliged in respect of each and every

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86 The ILC Articles draws a distinction between (i) multilateral treaty obligations that can be reduced to a compilation or 'bundle' of bilateral relations, each of them detachable one from the other; and (ii) multilateral treaty obligations whose binding effect is collective and cannot be separated into bilateral components, on the ground that they are concluded for the protection of a 'collective interest', over and above any interests of the contracting parties individually. The former (bundles of bilateral relations) give rise to 'bilateral obligations', the latter (concluded in the collective interest) lead to what can be referred to as 'collective obligations' or obligations erga omnes partes.

87 See Brazil -Desiccated Coconut, WTO Document WT/DS22/AB/R, at 12, where the Appellate Body explained that the WTO is a 'single undertaking' except for the plurilateral Agreements with non-signatories.
Member, which is manifestly inconsistent with an *erga omnes per se* obligation.\(^8^8\)

Finally, in *Brazil – Desiccated Coconut* case, the Panel noted that WTO was intended by the parties to be an integrated legal system, unlike the GATT where different parties would have different obligations because of the optional nature of the Tokyo Round Codes.\(^8^9\) The collective nature of the WTO obligations is also evident from the permissibility of legal standing in a WTO dispute settlement to all Members.

The view that both GATT and the WTO treaty remain treaties establishing bilateral right-obligation between the WTO Members was put forward by the US in their statement before the DSB. They noted that “the concept *erga omnes* is squarely at odds with the fundamentally bilateral nature of WTO and GATT dispute settlement and with the notion that WTO disputes concern nullification and impairment of negotiated benefits to a particular Member. WTO adjudicators are tasked with resolving disputes between specific complaining and defending parties. Adjudicators may not, through improper importation of the concept *erga omnes*, enforce WTO obligations on behalf of non-parties to a dispute.”\(^9^0\) The ILC Commentaries (2001: 297) on the other hand notes that, “it will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes”. Hence, some WTO obligations may be bilateral, others collective and the distinction between bilateral and collective is to be determined obligation-by-obligation, not treaty-by-treaty”.

Different scholars have expressed contrasting views on this issue. Pauwelyn (2003a: 907), for example, argues that the WTO obligations remains essentially bilateral and are not collective in nature.\(^9^1\) According to him (2002: 4), “the fact that WTO rules derive from a multilateral treaty is not enough for WTO obligations to be of the integral type”. Pauwelyn’s principal contention is that the ‘object of WTO obligations is trade’, that this trade is effectively between pairs of countries and is therefore “identifiable, divisible and determinable”. He notes that in WTO the trade

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\(^8^8\) *US – ‘Foreign Sales Corporations’,* Article 22.6 Report, WTO Document WT/DS108/ARB, 30 August 2002, para. 6.10


\(^9^1\) Pauwelyn (2003a: 909) notes that classifying WTO obligations as bundles of bilateral obligations would bring them closer to the domestic law analogy of a *contract*. Construing WTO obligations as ‘collective’ in nature would make them comparable to a domestic *criminal law statute* or even domestic *constitutions*. 

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concessions were traditionally negotiated bilaterally and the bilateral form of much of the WTO dispute settlement. While he concedes that WTO Members do share an interest in free and open trade, this does not necessarily mean that free and open trade possesses the intrinsic value of ‘common interest’ that is independent of the individual interest of each Member. Instead, the benefits of free and open trade can ultimately be said to satisfy the individual interest of each Member. In this sense, free and open trade cannot be placed on the same footing as environment and human rights that obviously possess an intrinsic universal value. Thus, the WTO Agreements protect individual interest of Members, and this is in stark contrast to other areas of public international law such as environment and human rights agreements (Pauwelyn, 2003b: 52–88). Finally, he cites as an example the Commentaries on ILC Articles on State Responsibility which do not refer to trade or WTO obligations as an instance of collective obligations. 92

The bilateral nature of WTO obligations is perhaps most apparent when examining their enforcement under the WTO DSU. Three particular features of the DSU are noteworthy in this respect. First, WTO dispute settlement does not tackle breach, but rather nullification of benefits that accrue to a particular member. 93 Second, Panel and Appellate Body proceedings only examine claims made by one WTO Member against another, in a purely bilateral fashion. 94 Third, in case the defendant does not comply with adverse recommendations within a reasonable period of time, only the complainant State may be authorized to suspend some of its obligations as they apply to the defaulting State. 95 This State-to-State, bilateral suspension usually takes the form of a 100 per cent tariff imposed by the complaining party on a list of imports from the defaulting State (Carmody 2006). The amount of trade thus suspended must be ‘equivalent to the level of the nullification or

92 Pauwelyn (2000: 341) contradicts the position, in the context of remedies, and argues that WTO obligations cannot be the subject of compensation but must, instead, meet full compliance even where the victim could be fully compensated. He states that “with the advent of the WTO[,] . . . it may be time to move away from the idea of the GATT/WTO only as a package of bilateral balances between governments”. 93 See Article XXIII.1 of the GATT 1994, setting out the requirement that ‘any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired’. The other avenue in Article XXIII.1 to start a WTO complaint, ‘that the attainment of any objective of the Agreement is being impeded’, one that is arguably of a less explicit bilateral nature, has not been used in practice. The same can be said about so-called ‘situation complaints’ in Article XXIII.1(c). 94 This, however, does not prevent one panel from examining more than one such bilateral relationships in the so-called procedure for multiple complainants (Article 9, DSU). 95 Article 22.6 DSU.
impairment’ suffered by the complainant State\textsuperscript{96}, once again, a purely State-to-State calculation. Indeed, if WTO obligations were of the collective type, their suspension as between two countries would necessarily affect also the rights of all other WTO Members. This bilateral enforcement of WTO rules is an important indication that most WTO obligations are, indeed, bilateral in nature. Pauwelyn’s conclusion is ‘that WTO obligations are bilateral obligations, even if some of the more recent WTO obligations, especially those of a regulatory type, may have certain collective features’ (Pauwelyn 2003a: 907).

Chios Carmody (2006), on the other hand takes an opposite view. He argues, disagreeing with Pauwelyn that “WTO obligations are not about trade \textit{per se}, but rather about expectations concerning the trade-related behaviour of governments. These are unquantifiable and indivisible, and therefore fundamentally unitary in nature. They cannot be conceived of as bilateral. Rather, they should be thought of as collective (Carmody 2006: 421). He notes that Pauwelyn’s conclusion that WTO obligations must be bilateral, limits standing to that envisaged in Article 42(a) of the Articles on State Responsibility, that is, where the obligation is owed to a State \textit{individually}. Carmody notes that WTO Agreement is about collective expectations concerning trade-related behaviour, \textit{and consequently}, any breach will automatically impair the benefits accruing to them \textit{collectively}. Thus any WTO Member therefore can mount a claim (Carmody 2006: 440). Supporting this view, Pascal Lamy (2007: 5) notes that any important and innovative feature of the WTO DSS is the “presumption of legal and economic interest in bringing proceedings, which confirms the hypothesis of a “communitization” of WTO law: each Member State can enforce WTO law whether or not it has a direct and personal interest –in the interests … of the “community of State parties”.

On the Pauwelyn’s point that suspension of obligations is permissible under the WTO Agreement because they are bilateral obligations and therefore, suspension is authorized without affecting the rights of third parties,\textsuperscript{97} Carmody notes that there are no third parties within a treaty, there are only simply parties. The rule against affecting third-party interests is not applicable and countermeasures can be authorized to reinforce collective obligations, as per VCLT Article 58.1(a) and DSU Article 22.7.

\textsuperscript{96} Article 22.4 DSU.
\textsuperscript{97} Article 58.1(b), VCLT.
Indirect effects of WTO action must be regarded as part of the WTO acquis. As regards the argument that remedies for breach of a WTO obligation are generally bilateral in nature, Carmody, notes that though this is factually correct, plurilateral retaliation is not unknown in the WTO, and in any event, it should be kept in mind that perfect consistency with the VCLT and Articles on State Responsibility is not required.

On a general and plain reading of the WTO Agreement, particularly the DSU, one might favour the conclusion drawn by Pauwelyn that the WTO obligations are primarily bilateral in nature, based on reciprocity. Another argument which could support the 'bilateral' argument is the nature of Membership of the WTO, which include custom territories. The admission of membership, not strictly on the basis of 'statehood' or 'sovereignty' but on economic independence, could mean that the WTO obligation might be essentially 'bilateral' or 'private' in character, unlike the 'universal' obligations under the human rights and environmental law.

The argument in favour of treating WTO obligations as a collective (even though of a special nature), on the other hand, has various advantages. First and foremost is that 'collective' obligation premise would permit the WTO legal system to evolve as a body of law, based on the 'collective' objective of protecting and promoting international trade, and the Appellate Body and the Panel could play a constructive role in this regard. Most importantly, the 'collective' obligation argument would favour the developing countries interest, especially in the context of enforcement of WTO obligations. The 'collective obligation argument could relax fully the requirement of 'standing' in the DSU and 'all for one' method could be utilized in approaching a violation against a developing country. However, this has a limitation at the enforcement stage because of the limitation imposed by the DSU that only an 'injured' party could be entitled to retaliate or take countermeasures. The view that the WTO obligation should be viewed as essentially bilateral would have the effect of making the WTO law 'static' rather than something that is evolving or organic.
Access to the WTO Dispute Settlement System: Legal standing

Access to the WTO DSS is limited to the Members of the WTO. The Appellate Body in *US - Shrimp* noted that:

"It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel.98 Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel.99 Correlatively, a panel is *obliged in law* to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding."100

However, which WTO Member has the *locus standi* to bring a dispute to the WTO DSS is a matter which needs further attention.

An important issue that needs special consideration is "legal standing" or *locus standi* of the complaining party to bring a dispute before the WTO DSS. In all major legal systems, for a complainant to have a legal standing must allege 'injury',101 causation,102 and redressability.103 Further, the party could assert only his right, cannot sue for collective interest or generalized grievances and the complainant must be within the zone of interests protected by a statute (Davey 2001: 106). The concept of 'standing' is said to promote the "separation of powers by limiting judicial review, to serve judicial efficiency by preventing a flood of lawsuits, to improve the quality of judicial decision-making by ensuring the existence of a specific factual dispute and to ensure fairness by preventing intermeddling" (Davey 2001: 106). In public

98 Original footnote: See Articles 4, 6, 9 and 10 of the DSU.
99 Original footnote: Articles 10 and 12, and Appendix 3 of the DSU. We note that Article 17.4 of the DSU limits the right to appeal a panel report to parties to a dispute, and permits third parties which have notified the DSB of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.
101 The complainant must have suffered or imminently will suffer injury. The injury must be actual or imminent, distinct and palpable, not abstract. This injury could be economic or non-economic.
102 There must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the respondent.
103 It must be likely, as opposed to merely speculative that a favourable court decision will redress the injury.
international law, a State can approach an international adjudicatory forum, only when it can prove a legal interest.

The *locus standi* of a WTO Member is much wider than that available in public international law. Under the WTO, all Members have an automatic right to recourse to its dispute settlement system, unless rejected by consensus in the DSB. A WTO member can approach the dispute settlement system if there is *prima facie* "nullification or impairment"\(^{104}\) of their rights accruing directly or indirectly under any of the WTO covered agreements.\(^{105}\) This situation covers not only "violation", but also 'non-violation" and "situation" complaints. To access the dispute settlement a Member is only required to show 'substantial trade interest' for proceeding under the DSU. This was confirmed by the Panel in *EC - Bananas* case and reiterated by the Appellate Body on appeal. In this case, the US was neither a producer of bananas nor it exported any to the EC. The EC argued that the US did not export bananas and it has no legal interest in claims related to trade in bananas as goods. The Panel noted that the US market was indirectly affected by the EC import regime for bananas and so there was a potential trading interest, which was sufficient in determining rights and obligations under the various WTO agreements. The Appellate Body while upholding the Panel report stated:

"We agree with the panel report that 'neither Article 3(3) nor 3(7) of the DSU nor any other provisions of the DSU contain any explicit requirement that a Member must have a legal interest as a prerequisite for requesting a panel'. We do not accept that the need for a legal interest is implied in the DSU or in any other provision of the WTO Agreement."\(^{106}\)

The Appellate Body further noted "with increased interdependence of global economy ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly".\(^{107}\) The Appellate Body observed that the practice of ICJ does not indicate that there is a general international law rule where a party must have a legal interest to bring a case. Further the wording of the GATT Article

\(^{104}\) This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Members against whom the complaint has been brought to rebut the charge, ie, the burden of proof is on the respondent.

\(^{105}\) See Article 3.8, DSU; the Uruguay's *Recourse to Article XXIII* case, GATT BISD (1965); *DISC-United States Tax Legislation*, 12 November 1976, GATT BISD (23\(^{rd}\) Supp.), (1977), p. 98


\(^{107}\) Ibid, para 136.
XXIII, that ‘If a Member should consider that any benefit accruing to it is being nullified or impaired …’, suggests that a Member is permitted to initiate consultations and dispute settlement procedures. Read with Article 3.7, which requires Members to exercise judgement in deciding whether to bring cases, the Appellate Body concluded that it is largely upto the Members concerned to decide whether they wished to initiate an action and whether it would be fruitful (Davey 2001).

Other cases where the Panel/Appellate Body gave wider standing in the DSU are: In US — Section 211 Appropriations Act, the Appellate Body upheld a claim made by the EC against the United States, based on discrimination between original owners of intellectual property rights who are nationals of, on one hand, Cuba and, on the other, the United States.108 Although less favourable treatment was given only to Cuban nationals, not to EC nationals, the EC succeeded in its claim under Article 3.1 of the TRIPS Agreement. In US - Line Pipe, Korea was allowed to make a claim under Article 9.1 of the Safeguards Agreement on the ground that the US treated developing countries in the same way as all other suppliers, even though Article 9.1 requires that safeguard measures ‘not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent’.109 Even though Korea is generally not regarded as a developing country (newly industrialized economy), it succeeded under this claim. Crucially, however, the defendant (the US), did not object, in either case, to the EC and Korea, respectively, making such claims essentially on behalf of other WTO Members (Carmody 2006). Further, in Korea - Dairy, the Panel rejected Korea’s argument that there was a requirement for an economic interest to bring a matter to the Panel and noted that the DSU does not provide any requirement for an ‘economic interest’.110

These decisions seem logical in the context of the WTO, because under the DSU a member does not require to show ‘injury’ as the nullification and impairment is presumed if a violation is established and the remedy in the form of withdrawal of inconsistent measure, if found in violation, is available for the Member. However, the remedy of “suspension of concession” may not be available for all Members because

of the lack of 'injury' and the suspension of concession is granted based on the equivalence of 'injury' suffered. Clarifying this part the Article 22.6 Arbitration Panel in *EC- Banana* case; while considering interest of the US in the context of determination of level of suspension of concession held that an 'interest' in invoking the WTO dispute settlement process does not necessarily entail the remedy of retaliation. It observed:

A member's legal interest in compliance by other member does not automatically imply that it is entitled to obtain authorization to suspend concession under Article 22 of the DSU.\textsuperscript{111} Thus, to access the WTO legal system, there is a presumption of legal and economic interest in bringing proceedings which is an important and innovative feature of this system. Pascal Lamy (2007) calls this "‘communitization’ of the WTO law: each Member State can enforce WTO law whether or not it has a direct or personal interest – in the interests, so to speak, of the ‘community of state parties’." Thus, a WTO member that has "substantial trade interest" can invoke the WTO adjudication process almost automatically, even though it might not have suffered any injury. In other words, any WTO member can establish a Panel, however, as the Appellate Body stressed, the Members are “self-regulating” in their decisions whether to bring a case or such action would be 'fruitful'.\textsuperscript{112}

However, if one considers these decisions as valid, and thus permits states to approach the WTO DSS only by showing a violation, then there is danger that the complainant’s remedy would stop at the Article 21.5 compliance review stage. In other words, complainant would be devoid of ‘suspension of concessions’ option as its calculation is based on the equivalent ‘loss’ suffered. This would also mean that the inducement objective of the ‘suspension of concessions’ would be lost from the perspective of the respondent and in case of non-compliance, the complaining member could end up without any remedy.

5 Material Aspects of Remedies under the WTO Dispute Settlement System

Failure to comply with international law obligations attracts certain responsibilities towards the injured State and the perpetrator State has to remedy the

\textsuperscript{111} *EC- Banana*, WTO Document WT/DS27/ARB, para. 6.10.

\textsuperscript{112} This ‘substantial trade interest’, as clarified by the Panel, does not automatically result in authorization for retaliation, if there is non-compliance.
situation in an adequate form. The ILC Articles on State Responsibility provides that the perpetrator of illegal act, has the primary obligation to ‘cease’ the wrongful conduct ie, to stop the illegal act with immediate effect and the secondary obligation to provide ‘reparation’ to the injured parties i.e., the right to request reparation for the injury suffered. Reparation may be in the form of *restitutio in integrum* (to bring the illegal act in question to its *status quo ante*); or restitution by equivalence (compensation), satisfaction and/or guarantee for non-repetition.

The WTO DSU sets out a hierarchy of remedies. It seeks to encourage, in descending order of preference (i) bilateral settlement; (ii) withdrawal by the defendant of the WTO inconsistent measures (iii) compensation and (iv) as ‘last resort’ retaliation. Article 3.7 of the DSU clearly prefers a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements. In the absence of a mutually agreed solution, the first objective is usually to secure the withdrawal of the measures. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and *as a temporary measure* pending the withdrawal of the measure. The last resort which the DSU provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

Thus the basic remedy that a Member approaching the WTO DSS could anticipate is initially ‘cessation’ ie, securing withdrawal of measure found illegal by recommending the respondent member to bring the measure in to consistency. In case of non-compliance or not bringing the measure into conformity, the Member could opt for consensual compensation, and ultimately inducing compliance through a non-consensual suspension of concessions or other obligations. Under the present system, if withdrawal of inconsistent measure occurs on a timely basis, no further remedies are permitted. If consensual compensation is negotiated, unilateral suspension of concessions or other obligations is not permitted (Trachtman 2007: 127). In other words the remedy of compensation and suspension of concession are alternatives available only in cases where withdrawal of the measures found to be illegal by the DSB cannot be secured.
The 'recommendation' and 'suggestion' of the Panel or the Appellate Body once adopted by the DSB is due for implementation for which a complicated procedure is provided under Article 21 and 22 of the DSU. Implementation of adverse DSB reports raises several important issues. The first and foremost issue for consideration is the nature, scope and content of remedies that the Panel and Appellate Body could 'recommend' and 'suggest' to mitigate the breach of WTO obligations. The attempt in the next Section is to identify the consequence of violations or breach of WTO rules and the remedy that the DSB could offer for such violations. The material aspect of what the WTO adjudication body could offer for the complaining Member has direct correlation with the incentive, relevance and utility of the WTO dispute settlement for the injured Member and its ultimate success as an effective mechanism for satisfactory settlement of claims.

5.1 Object and Purpose of Remedies

GATT 1947, because of its temporary nature, did not contain a specific provision addressing the issue of remedies. GATT Article XXIII only provided that "if no satisfactory adjustment is effected between the contracting parties concerned within a reasonable period of time", the Contracting Parties shall promptly investigate and make "appropriate recommendations ..., or give a ruling on the matter as appropriate". Usually, this recommendation or ruling takes the form of withdrawal of inconsistent measures. This remedy was devised keeping in view the historical character and purpose of GATT 1947 as a mechanism for reciprocal tariff reduction and maintenance of the delicate balance of negotiated tariff concessions. Any violation of the GATT was considered as departure from the subtle balance of tariff concessions negotiated between parties.

Thus, the remedy under GATT 1947 which the CONTRACTING PARTIES recommended was "intended to 'restore' the delicate balance of interests that contracting parties had laboured to establish through a series of tariff reduction negotiations" (Cho 2004: 766-767). For this purpose, the Contracting Parties had to only determine whether there was "nullification or impairment of benefits," a

113 Article XXIII, GATT 1947.
114 Nullification or Impairment: "Basis of a claim under the GATT/WTO dispute settlement system, namely that a benefit accruing to a WTO member directly or indirectly under the Agreement is being nullified or impaired as a result of the failure of another member to carry out its obligations under the Agreement. Non-violation nullification or impairment is a claim that a benefit is being nullified or impaired as a result of the application of a measure whether or not it conflicts with the provisions of the
concept similar to injury in the law of contracts (Cho 2004: 763). Once the Contracting Parties made an affirmative determination as to the existence of “nullification or impairment,” the Contracting Parties recommended the elimination of the “adverse effects”. In other words, cease the violation against GATT.

With the evolution of GATT, the concept of “nullification or impairment” also went under considerable change. While interpreting GATT Article XXIII, the Panel in Uruguayan Recourse case focused on the ‘violation’ itself rather than its effect (nullification or impairment) in that it shifted the burden of proving the existence of nullification or impairment from the complainant to the defendant.\(^{115}\) In other words, the panel created a presumption of the existence of nullification or impairment in case of violations of the GATT provisions.\(^{116}\) Again, the Panel in the Superfund case made the injury requirement, ie, nullification or impairment, literally meaningless by ruling that the violation would \textit{ipso facto} constitute nullification or impairment.\(^{117}\)

Gradually, the GATT slowly turned into “something greater than a contract that could be withdrawn from by any Contracting Party whenever it found the obligations too onerous.” Consequently, the global trading community began to be more interested in preserving such a legal system, which turned the nature of remedies into compliance with the system that would basically require the withdrawal of violations, but not necessarily the rebalancing of tariff concessions to undo the injuries, ie, nullification or impairment (Grane 2001: 763).\(^{118}\) The concept of violations and thus the withdrawal of them as remedies, developed under the GATT Agreement.” SICE, “Dictionary of Trade Terms”, Foreign Trade Information System, See URL: http://www.sice.oas.org/Dictionary/DS_e.asp. The WTO (Glossary of terms) defines Nullification or impairment as “Damage to a country’s benefits and expectations from its WTO membership through another country’s change in its trade regime or failure to carry out its WTO obligations”.

\(^{115}\) The Panel in the Uruguayan Recourse case ruled that “in cases where measures violate the GATT provisions, they would, prima facie, constitute a case of nullification or impairment”. Uruguayan Recourse to Article XXIII, Nov. 16, 1962, GATT BISD 11th Supp. (1963) at 95.

\(^{116}\) This ruling was later codified in the Annex to Dispute Settlement Understanding. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (1979), GATT BISD 26th Supp. at 210 (1980) [L/4907].


\(^{118}\) In US – Bryd Amendments case, the Arbitrator noted that “we have interpreted the concept of nullification or impairment, \textit{inter alia}, from the terms of Article XXIII of GATT 1994 and Article 3.8 of the DSU. We believe, however, from the extensive discussion of this concept by the parties, that the actual meaning of this provision is disputed and needs to be addressed in the appropriate forum”. See US – Bryd Amendment Article 22.6 Report, WTO Document WT/DS217/ARB/BRA, para. 6.6.
1947, got institutionalized in the new WTO system. Thus, one could witness the gradual shift of the objective of remedies from the concept of ‘rebalancing’ of negotiated benefits to ‘compliance’ with the WTO Agreement.

This transformation in objective of remedies is evident from the statement of objective of the WTO DSU, that is in ensuring “security and predictability” of the multilateral trading system. It serves to preserve the rights and obligations of Members under the covered agreements. The WTO DSS is to provide “prompt settlement of situations” in which a Member considers that any benefit accruing to it directly or indirectly under the covered agreements is being impaired by measures taken by another Member. Further, the DSU require prompt compliance with the DSB recommendations and rulings, and Article 21.5 provides a legal ground for a "compliance panel" which is convened to resolve disputes on "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings..." Furthermore, Article 22 upholds the remedial priority of the removal of violations by expressly stating that other remedial options, such as compensation and countermeasures, are only temporary and never preferred over the removal of violations and conformity with the WTO rules. Such clear-cut language eloquently indicates that the WTO system prioritizes, in terms of remedies, consistency and conformity with the WTO rules over compensation whose concept is deeply associated with such elements as injury, damages and nullification or impairment. Finally, continuous surveillance of implementation of the DSB recommendation is undertaken till full compliance is achieved.

It is this objective that the recommendations or rulings of the DSB intend to achieve.

119 The WTO DSU, confirmed the presumption of ‘nullification and impairment’ in case of infringement of any of the covered agreements. Article 3.8 of the DSU states: “In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge”. Article 3.2, DSU.
120 DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it.” US – Section 301, Panel Report, WTO Document WT/DS39, para. 7.75.
122 Article 3.3, DSU.
5.2 Nature and Content of Remedies under DSU

The GATT 1947, as noted earlier, did not contain a specific provision addressing the issue of remedies. However, the WTO DSU introduced a new article, Article 19, which specifically addresses the issue of material aspect of remedies that could be recommended by the WTO adjudicatory body. Article 19 provides that:

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.\(^{123}\)

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”.

This Article obligates the WTO Panel/Appellate Body to ‘recommend’ that the Member whose measures have been found not to be in conformity with the relevant WTO rules bring its measure into compliance (through withdrawal or amendment) with their WTO obligations. Article 19 “envisages a situation where a violation is in existence”,\(^{124}\) and does not contemplate situations where the measures at issue in this dispute was no longer in existence.\(^{125}\) This article offers the complainant two types of remedies – a finding of a violation of WTO Agreement would be accompanied by a recommendation addressed to the WTO Member responsible of the inconsistent act that it bring the measures into compliance. The second remedy of ‘suggestion’, is optional at the discretion of the adjudicating bodies. Both these aspects of Article 19 need closer attention.

Article 19.2 DSU on the other hand, imposes a clear restriction on the power of the Panel and the Appellate Body that while providing the remedy prescribed under Article 19.1, their findings and recommendations, cannot add to or diminish the rights and obligations provided in the covered agreements.

\(^{123}\) Article 19.1, DSU (Emphasis added).
\(^{124}\) India - Autos, Panel Report, WTO Document WT/DS/175R, para. 8.15.
\(^{125}\) US - Certain EC Products, Appellate Body Report, WTO Document WT/DS/165ABR, para. 81. In this case the Appellate Body opined that the measures found to be inconsistent with the relevant WTO rules has ceased to exist by the time the Panel was established, so the Panel erred in recommending that the DSB request the US to bring into conformity with its WTO obligations a measure which the Panel found no longer in exists.
5.2.1 Recommendation to ‘bring the measures in to conformity’: the ultimate remedy under the WTO

The primary and only remedy that a Panel or Appellate Body can recommend to the DSB, in case of a measure found to be in violation of a WTO obligations is to direct the violating Member to “bring the measures in to conformity” with the Agreements. This is also reflected in the terms of reference which require Panel and Appellate Body to determine whether the questioned measure is inconsistent with the WTO law, and, if so, to recommend such measure to be brought in conformity to the WTO law. Such a recommendation once adopted by the DSB become legally binding on the Member concerned.

A comparison of this ultimate remedy with that of the remedies available under public international law, particularly with the ILC Articles on State Responsibility, is worthwhile and revealing. According to the ILC Articles a State which is the perpetrator of an illegal act has the primary obligation (under Article 30) to stop the illegal act with immediate effect. Cessation is prospective in nature, which means that a state is responsible for putting an end to its illegal behavior from the time that an illegality is found to exist and into the future.

A second obligation under Article 31 speaks of a right to request reparation for the injury suffered in addition to the obligation to stop the illegal act. Reparation may be in the form of: restitutio in integrum (to bring the illegal act in question to its status quo ante); restitution by equivalence (compensation) satisfaction and/or guarantee for non-repetition. This article however, does not limit the discretion of the injured state with respect to the form of reparation. The obligation placed on the responsible State by Article 31 is to make ‘full reparation’. In other words, as noted in the Factory at Chorzów the responsible State must endeavour to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

The remedy described in Article 30 (a) ‘cessation’ could be compared to the remedy under the WTO system, namely the withdrawal of the questioned measure to conform to the WTO rules. The determination of the violation and the

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126 For a detailed discussion, see Chapter II.
127 "In particular the victim of an internationally wrongful act is, under normal circumstances, entitled to elect compensation rather than restitution in kind, to forgo a claim on satisfaction, or indeed to focus on cessation and future performance rather than seeking reparation at all. See Crowford (2000: 15).
128 Factory at Chorzów, Merit, (1928), PCIJ Series A, No. 17, p. 47.
recommendation of conformity, as combined, can be said to signify the withdrawal of the questioned measure. However, cessation in WTO has a dual function - First, by halting the questioned measure, it resolves the dispute as well as remedies the situation in which a complaining party has suffered. Second, by bringing the questioned measure in consistency with WTO law, it eventually contributes to realizing the objective and purpose that the WTO pursues. Of course, the effect of withdrawal of illegal measures is prospective.\textsuperscript{129}

In a limited sense, bringing a measure in to consistency with the WTO agreement, could also be compared with the remedy of *restitutio in integrum* (to bring the illegal act in question to its *status quo ante*) as it may require the respondent state to repeal or modify its laws which might resemble *restitutio in integrum*, (something that most tribunals were unable to achieve). At the same time, the other international law remedy of ‘reparation’ is not available in the WTO law. In other words, the Panel does not have the power to grant reparation for past damages. The alternative remedy of compensation and retaliation are also calculated prospectively. Further, the remedy provided under Article 30 (b) of ILC Articles, i.e., ‘non repetition’ is not explicitly contemplated under the WTO law, even though it could be noted that ‘implicitly’ the measure found to be in violation of a WTO law *ipso facto* is declarative that the same measures if repeated’ will be violative of WTO obligations.

Reasoning the nature and function of ‘recommendations’ in the WTO legal system and the need for discretion for the Member States when it comes to implementing the reports of the WTO DSB, the panel in *US – Section 301 Trade Act* states that:

"The obligation on Members to bring their laws into conformity with WTO obligations is a fundamental feature of the system and, despite the fact that it affects the internal legal system of a State, has to be applied rigorously. At the same time, enforcement of this obligation must be done in the least intrusive way possible. The Member concerned must be allowed the maximum autonomy in ensuring such conformity and, if there is more than one lawful way to achieve this, should have the freedom to choose that way which suits it best."\textsuperscript{130}

\textsuperscript{129} The remedy of ‘cessation’ in the customary international law sense is a combination of the remedy of recommendation and suggestion. The international courts or tribunals usually have the power to declare an act illegal, direct ‘cessation’ and devise measures to be taken by the respondent to achieve cessation. By bifurcating ‘cessation’ into binding recommendation and non-binding suggestion, and limiting the power of the Panel/AB in terms of ‘suggestion’, the remedies in WTO seem to be severely constrained.\textsuperscript{130}

In other words, it is the discretion of the sovereign Member States to decide as how an adverse recommendations and rulings must be implemented.

From this analysis it could be concluded that the WTO DSU seem to ‘contracted out’ of general international law remedy of ‘reparation’. The DSU only provides for the primary remedy of ‘cessation’. While the WTO practice seems to support that conclusion, there is no provision which explicitly ‘contract out’ or prohibits application of general international law remedies. In other words, what is not prohibited is permitted, meaning, there is a possibility for an argument for application of general international law remedies to supplement WTO remedies, albeit, the matter is one of interpretation.

Thus, the question would be, can the panel/Appellate Body ‘fall back’ on principles of general international law not explicitly sanctioned by the DSU while interpreting WTO remedies. As seen above, the WTO/GATT practice on ‘reparation’ and state responsibility for past damages seem to suggest an exclusion of this remedy from DSU. However, in general international law ‘reparation’ is an automatic consequence of an internationally wrongful act and the adjudicating bodies have implied power to award such remedy even in cases were no such explicit sanction is provided. The 1947 GATT practice also is not fully devoid of instance where awards were made for past damages, particularly in the areas of dumping and subsidies. Further, the panel did not award reparations for past damage because no such request was made and “they did so because of the non ultra petita rule, not on the ground of a legal finding that such reparation was not available” (Pauwelyn 2003b: 223). In the WTO, the panel in *Australia – Leather* case, though in the context of subsidies, did not rule out the possibility of remedy of past damage. In this context it is worth noting the statement of the Ecuador while adoption of the recommendations in the *EC – Banana* dispute:

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131 The GATT Panels, within the constraints of the non ultra petita rule, have attempted to provide remedies which are more retrospective in nature. In total, five Panels, all of them dealing with anti-dumping/countervailing duties, recommended revocation and reimbursement of illegally imposed duties. However, this deviation from the usual GATT remedy was limited to anti-dumping/countervailing cases, even when they realised the ineffectiveness of the ‘usual GATT remedy’. See *The Trondheim* case.

132 In public international law the non ultra petita rule circumscribes the ambit of the powers of the adjudicating body: according to this rule, an adjudicating body cannot decide more than it has been asked to. See Mavroidis (2000: 767).

“A careful reading of Article 3.2 of the DSU in conjunction with Article 31.3 of the [Vienna Convention] confirmed that the general principles of international on state responsibilities were applicable in this case ... Articles 19 and 22 of the DSU did not exclude the general principle of international law on reparations of injury caused by a violation of international law ... it might be appropriate to initiate a new legal action in order to determine whether Ecuador has the right to compensation”. 134

Pauwelyn (2003b: 224-225) suggest two ways how international law remedies could be a ‘fallback’ option for panel/Appellate Body to award ‘reparation’ for past damage. First, the panel could make a separate recommendation, on top of the usual recommendations, that the violator make reparations. “Nothing in the DSU Article 19 prohibits them from making other recommendations”. Secondly, the panel could interpret the phrase “into conformity” in DSU Article 19.1, to include reparations for past damage. However, he expresses his scepticism about this interpretation been followed in near future and feels that for reparation to become a standard remedy in the WTO law will take time (Pauwelyn 2003b: 226). Given the current trend of interpretation in the WTO, it does seem unlikely to develop such an interpretation.

5.2.2 **Special rules on remedies: subsidies practice – “withdrawal” vs. “bring into conformity”**

Under Article 4.7 of the SCM Agreement, which provides for special provision on remedies, the Panel in case of prohibited subsidy shall recommend that the subsidizing Member ‘withdraw’ the subsidy ‘without delay’. While the DSU Article 19.1 seems to provide an option for the respondent member in using the words ‘bring the measure into conformity’, the use of the phrase ‘withdrawal’ tends to have a more direct action from the respondent member.

Under the SCM Agreement, increasingly the mere halting of future illegal activity is being supplemented by a compliance standard that amounts to an immediate ‘withdrawal’ of subsidies. In the DSU Article 21.5 case, Australia—Leather, 135 a Panel was convened to examine the question whether Australian actions were adequate enough for a ‘withdrawal’ of an illegal export subsidy. 136 Australia claimed that it had fully complied with the order to ‘withdraw’ the subsidy. On the other hand, the United

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136 Australia was deemed to have granted an illegal export subsidy of A$ 30 million under a grant contract to Howe & Company Proprietary Ltd. Upon repayment of approximately A$ 8 million, which represented the portion of the unused grant that remained in the possession of Howe after the expiration of the 90 day implementation period,
States asserted that in order to 'withdraw the subsidy,' Australia was required to withdraw the 'prospective portion' of the prohibited subsidies. Australia argued that "because Article 3.7 of the DSU appears to equate 'bring the measure into conformity' in Article 19.1 of the DSU, with withdrawal of the inconsistent measure, "withdraw the subsidy" recommendation provided for in Article 4.7 of the SCM Agreement should also be equated with 'bring the subsidy into conformity.'"\textsuperscript{137}

The Australian argument stems from the notion that there is an equivalency between 'withdraw' and 'bring into conformity'. The Panel declined this line of argumentation and opted instead for a stricter interpretation of 'withdraw.' The Panel stated that

"an interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."\textsuperscript{138}

Thus the Panel required Australia to do more than merely cease a certain prohibited practice and noted that the term "'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity,'" Australia--Leather represents a break with the conservatism of earlier Panels. The decision increases the pressure on governments to truly "withdraw" subsidies in the sense of eliminating the prohibited subsidies (Krnptotic 2002: 673).

On the other hand, in Brazil--Aircraft (Article 21.5),\textsuperscript{139} a decision released six months after the Australia--Leather, the Appellate Body, although it went to great lengths to distinguish SCM Article 4.7 from the "bring into conformity" standard of DSU Article 19.1, came to the conclusion that to "withdraw" a subsidy within the meaning of SCM Article 4.7 has the same meaning as "to bring into conformity" with DSU Article 19.1. Thus, Brazil--Aircraft represents the polar opposite notion, under which it is sufficient for a nation to "bring into conformity" its export subsidy standard in order to be deemed in compliance with SCM Article 4.7. Thus the Panel's interpretation in Australia -- Leather was 'overruled' by Appellate Body in Brazil -- Aircraft.

\textsuperscript{137} Australia -- Automotive Leather, Article 21.5 Report, para. 6.30.
\textsuperscript{138} Ibid, para. 6.31.
\textsuperscript{139} See Brazil - Aircrafts, Article 21.5 Appellate Body Report, pp. 73-74. The term "withdraw" was held to mean to "take away what has been enjoyed" or "remove".
5.2.3 **Suggest ways to comply – the non-binding option**

The second part of Article 19.1 of DSU gives the Panel/Appellate Body, the discretion to “suggest” ways in which the Member concerned could bring their measures into compliance with their international obligations (Mavroidis 2000: 778). In *US - Steel Plate*, the Panel indicated that it was “free to suggest ways in which we believe the [defendant] could appropriately implement our recommendation”. Suggestions are perceived as extra clarifications to help implementation. It is the discretion of the panel to make or not to make suggestion. “Article 19.1 allows but does not require a panel to make a suggestion where it deems it appropriate to do so”.140

In *US – Zeroing Methodology*,141 the EC appealed that the Panel made a legal error in rejecting the ECs' request for a suggestion pursuant to Article 19.1 of the DSU.142 The EC argued that “to suggest that the steps the United States might take in the implementation of the DSB recommendations and rulings following this dispute should be WTO-consistent, particularly with regard to the issue of zeroing.”143 The US responded that there is no basis in the DSU for a panel to make a suggestion for “purposes of avoiding unnecessary discussions about what might or might not fall within the scope of a compliance panel.”144 The United States further emphasized that, it is unreasonable that the EC is even asking this Panel to start from the premise that there would be a dispute as to compliance.145 The Appellate Body noted that the second sentence of Article 19.1 of the DSU confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which those recommendations may be implemented. Therefore,

“as the right to make a suggestion is discretionary, a panel declining a request for such a suggestion does not act contrary to Article 19 of the DSU. Accordingly, we do not find that the Panel committed legal error in declining to make a suggestion under the second sentence of Article 19.1.”146

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140 US – Stainless Steel, Panel Report, WTO Document WT/DS179/R, para. 7.8
142 The Panel declined to make a suggestion as to how the DSB recommendations and rulings could be implemented by the United States. The Panel said that it is "evident" under the DSU, including Article 19.1, that "Members must implement DSB recommendations and rulings in a WTO-consistent manner." The Panel added that it could not "presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings.", US – Zeroing Methodology, Panel Report, WTO Document WT/DS350/R, para. 8.7.
143 Ibid, para. 8.4.
144 Ibid.
146 Ibid, para. 389
There are very few cases in which the Panel has utilized this option of ‘suggesting’ how to implement their rulings (10 cases\textsuperscript{147}) and till date, the Appellate Body have not made a suggestion under Article 19.1. Even where there is a specific request from the complaining member, there is no obligation on the panel to make such suggestion as to how the recommendation could be implemented and occasionally, have rejected an explicit request made by the complaining party to make a suggestion under Article 19.1. For example, in \textit{India - Patents (US)}, where the Panel declined the United States' request to the Panel to suggest a manner in which India should implement its obligation, since in its opinion it would have impaired India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1.\textsuperscript{148}

The DSU does not expressly address the question of the legal status of suggestions that form part of report, not does it specify the legal consequences when a Member chooses to implement DSB recommendations and rulings by following a suggestion for implementation.\textsuperscript{149} A Member may choose whether or not to follow a suggestion. In other words, the suggestions are not binding on the Member. The use of the word ‘could’ in Article 19.1 of the DSU clarifies that Members are not obliged to follow suggestions for implementation.\textsuperscript{150} It is an option which the respondent Member could implement (Mavroidis 2000). There is a general trend among the Panel and Appellate Body not to provide suggestions even when requested for by the parties. One possible reason for this attitude is the attempt to steer clear of controversies and the accusation of being pro-active.

It may be noted, however, that a suggestion as to how to implement its ruling or recommendations by the Panel/Appellate Body could play an important role in

\textsuperscript{147} See \textit{In US - Underwear}, wherein the Panel suggested that “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. 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.” \textit{US - Underwear}, Panel Report, WTO Document WT/DS/24R, para. 8.3. See also \textit{EC - Bananas III}, Article 21.5 Report (Ecuador), WTO Document WT/DS27, paras. 6.155-6.158; \textit{Guatemala - Cement I}, Panel Report, WTO Document WT/DS/60R, para. 8.6.


\textsuperscript{149} \textit{EC - Banana}, Second Recourse to Article 21.5, Appellate Body Report, para. 321.

\textsuperscript{150} Ibid.
bringing clarity to the remedy and its implementation process. Further, if the respondent member implements the ruling according to the Panel’s suggestion, it would provide an irrefutable presumption of compliance with the recommendation, and would reduce instance of establishing Article 21.5 compliance review panel. In *EC – Banana*, Second Recourse to Article 21.5, the Appellate Body noted that:

“We consider that suggestions made by the panels or the Appellate Body may, if correctly and fully implemented, lead to compliance with the DSB’s recommendations and rulings.”

The Appellate Body, however, clarified that “full compliance with DSB ruling and WTO-consistency of the measures actually taken to comply cannot be presumed simply because a Member declares that its measures taken to comply conform to suggestion made under Article 19.1 of the DSU”. In other words, following a suggestion does not guarantee substantive compliance with the recommendations and rulings.

Suggestions made by the panels or the Appellate Body could provide “useful guidance and assistance to Members and facilitate implementation of DSB recommendations, particularly in complex cases.” Further, the practice of giving ‘suggestions’ for implementation if properly utilized could be a tool for addressing the concerns of the special needs of the developing countries, reflected in the DSU provisions. Thus, Article 19 suggestions should be redrafted to make sure that the panel and Appellate Body have no choice but to address a request for suggestion.

5.3 Legal Effect of Rulings under Article 19.1

Technically the recommendations and suggestions of the Panel and Appellate Body do not have any legal value unless adopted by the DSB. Unlike in the GATT 1947 dispute settlement procedure where the Contracting Parties could block the adoption of a Panel Report, thereby denying any legal effect, the new DSU provided for a negative consensus principle. According to this principle, a report of the panel and Appellate Body shall be adopted by the DSB even if a single member so decided. This change in procedure has considerably improved the effectiveness of the DSU procedure and made the adoption of the report almost automatic, eliminating any possibility of ‘blocking’ unless there is a consensus in the DSB not to adopt the report.

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151 Ibid, para. 323.
152 Ibid.
153 *EC – Bananas III (Ecuador)/EC – Bananas (US)*, Article 21.5 Appellate Body Reports, para. 325.
The Member, against whom a violation is found, shall implement the DSB recommendations. With respect to the ‘bindingness’ of the DSB recommendations, it is widely acknowledged that the Member concerned whose measures have been found to be in violation of the WTO Agreements is ‘bound’ or bears a ‘legal obligation’ to implement the DSB recommendations.\(^\text{154}\) However, there exists some skepticism with regard to the ‘bindingness’ of the DSB recommendations (Bello 1996; Reif and Florestal 1998: 763). While it may be noted that the text of the DSU is unclear about the ‘bindingness’ of the DSB recommendations, however, several provisions of the DSU such as Articles 3.7, 21.1, 22.1, and 21.6 show a clear preference for compliance with the recommendations (Fukunag 2006: 395-96).

Article 21 DSU which deals with Surveillance of Implementation of Recommendations and Rulings, require “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members”.\(^\text{155}\) Substantiating this, Article 22.1 states that “Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time” (emphasis added). It further adds that neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Such requirement could be found in Article 3.7 DSU also. Further, Article 21.6 of the DSU provides that the adopted recommendations would be kept under surveillance by the DSB till its full implementation.

A combined reading of these provisions, leads to a conclusion that the negotiators of the WTO Agreements have adopted ‘recommendations’ as the primary remedy option in the WTO DSS. Nothing in the DSU provides that the DSB can choose either to make recommendations or to award damages. Compensation and suspension of concessions or other obligations are available only ‘in the event that the recommendations . . . are not implemented within a reasonable period of time’, and they are not an alternative remedy option of equal value. However, a Member concerned might choose not to implement the DSB recommendations in consideration of the political and economic costs of the implementation. This does not imply that the

\(^\text{154}\) See, for example, Jackson (1997: 62–63); Jackson (2004: 115–17); Lowenfeld (2002: 156); Hudec (2000a: 377).

\(^\text{155}\) Article 21.1, DSU.
Member is not 'bound' or does not have a 'legal obligation' to implement the DSB recommendations. Rather, it provides the members with the leeway or flexibility for a limited period of time.

However there is an alternative view that a Member should be given the 'option' to not comply with the WTO Agreements or the DSB recommendations and instead to pay 'damages' in the form of compensation or suspension of concessions or other obligations. In this view is also no 'legal obligation' to implement the DSB recommendations (for detailed discussion see chapter IV).156

'Suggestions', on the other hand, unlike the 'recommendations', are non-binding on the parties.157 They may or may not implement the suggestions however, the DSB is expected to provide the Member concerned with guidance regarding appropriate implementation measures. Article 26(1)(c) of the DSU, however, deals with suggestion by Panel in the realm of non-violation complaints which states "... such suggestions shall not be binding upon the parties to the dispute". It is argued that if in the realm of non-violation complaints, the DSU explicitly provides that suggestions are not binding upon the parties to a dispute, and the same is not provided in the case of a violation complaint, it may be interpreted that the suggestions under Article 19.1 are binding on the Members (Horn and Mavroidis 1999: 14). This ambiguity was cleared in Guatemala – Antidumping, where the Panel held that "Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member".158 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.159 It was thought that any attempt to make the suggestions binding would be too much of an intrusion on national sovereignty. Thus, the practice in the WTO DSS shows a disposition towards sticking to the rather less controversial recommendation stage without entering the potentially problematic suggestion stage.

As the only recommendation that a Panel or Appellate Body could provide as per Article 19.1 is 'withdrawal of the inconsistent measure', it provides ample discretion on

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the losing parties to choose the appropriate remedy. This does not necessarily mean that there is no value for the Panel/Appellate Body suggestions. Mavroidis (2000: 778) notes that any compliance in accordance with the suggestions may create an irrefutable presumption of compliance with the panel’s decisions. In other words, any time a Panel suggests a way for the WTO member concerned to bring the measures into compliance with its international obligation and the WTO member in question implements the Panel’s suggestion, there must be an irrefutable presumption that the WTO Member in question has complied with its obligations. And in a compliance panel proceeding under Article 21.5, the Panel, consisting of the original Panel members who suggested the way for implementation couldn’t come to a different conclusion. Hence, implementation of suggestions would be a highly recommended legal strategy.

5.4 Value of GATT/WTO Reports as Precedent

It has been reiterated on several occasions by the Panel and Appellate Body that “adopted panel reports are an important part of the GATT acquis” In Japan - Alcoholic Beverages, for example, the Appellate Body held that:

"Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 - and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement."160

However, the adopted reports of Panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. Like in the sphere of public international law, the WTO dispute settlement does not apply the rule of stare decisis in accordance to which previous rulings bind panels and

the Appellate Body in subsequent cases. However, the reports are often considered by subsequent panels. The Appellate Body in *US - Shrimp (Article 21.5 - Malaysia)* reiterated its finding in *Japan - Alcoholic Beverages II* that they “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”

In the case of unadopted panel reports of GATT era, though it does not have any formal legal status in the GATT or WTO system, the reasoning contained in an unadopted panel report can nevertheless provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question.

5.5 Prospective Nature of Remedies

The remedy of restitution, under public international law, has been generally understood as a retrospective form of reparation. The PCIJ, in *Factory at Chorzow* decision, held that:

> The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

This principle has been subsequently reaffirmed (Oppenheim 2003: 528). The court which has a jurisdiction to determine a dispute also, in general, has jurisdiction to determine the question of reparation – past, present and even future damages. However, the parties could by agreement limit the scope of the court or tribunal.

The WTO law though provides for *lex specialis*, does not operate in ‘clinical isolation from public international law’. The *lex specialis* situation should be explicitly provided, otherwise there is general presumption that the general international law would apply unless there is a conflict. The WTO DSU does not contain any provision which specifically prohibits retrospective remedy. One of the basic tenets of interpretation is that what is not prohibited is permitted. Thus it could safely be said that the Panel could rely on international law while interpreting the availability of

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161 For possibility of the existence of *stare decisis* in WTO law, see Zhu (2003); Chua (1998).
164 *Case Concerning the Factory at Chorzow*, (1928) PCIJ (serv. A) No. 17.
retrospective remedies under the WTO law in general and under the special provisions. In other words, ‘bring measures into conformity’ could be interpreted to allow retrospective remedy.

The pertinent question then would be whether the WTO provides ‘reparation’ to wipe out all consequence of illegality. The answer quite clearly seems to be negative i.e., the WTO legal system does not conceive a full remedy which is close to restitution in the public international law sense. As has been discussed elsewhere, the WTO only provides for the primary remedy of ‘cessation’ and the secondary remedy of reparation in the form of status quo ante or compensation is not provided.\(^ {166}\) The mandate and the power of the panel/Appellate body do not allow them to grant such remedy unless DSU Article 19.1 is liberally constructed.\(^ {167}\) This has made the WTO remedies highly constricted.

One possible explanation for this scenario is that international trade law is a discipline which is inconsistent with or fundamentally opposed to the idea of sovereignty (McRae 1996: 116-117). Trade was a matter of private sphere and not a matter for government. WTO/GATT law has been seen as ‘private’ in nature in that it affects mainly private economic operators subject to the government regulations involved, more so than it effects government-to-government relationship (Pauwelyn 2003b: 30). In other words, the impact of a government measures, for instance, collection of anti-dumping duties, is directed at the industry/sector and not from the complaining Members. In such situations, the Member State, whether developed or developing country, is not directly injured, whereas, could gain directly from such anti-dumping measures if they are the one imposing it. This could be the primary incentive for State not to include ‘retroactive’ remedy in the framework of WTO law and most States continue to adhere to this view. Another possible reason for not granting this remedy could be the difficulty in quantifying the injury caused due to lost trade. This argument would not sustain for the reason that quantification of lost trade is undertaken at the final stage of Article 22.6 arbitration for the purpose of determination of the level of countermeasures.

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\(^ {166}\) For a detailed discussion, see Chapter II.
\(^ {167}\) See section 5.3 of this chapter.
However what would be the situation where the injury resulting from such violation can easily be quantified in monetary terms.\textsuperscript{168} For example, in cases of anti-dumping or subsidies, those illegally imposed duties can be calculated without difficulty and reimbursed. The reimbursement of duties (retrospective remedies), even though represents only a part of the injury suffered, tends to make such remedies credible in terms of undoing the injuries and preventing the chances of illicit enrichment by the concerned Member from an act adjudicated as wrongful.

A survey of the GATT/WTO jurisprudence on retrospective remedies reveals that there are only few decisions where a recommendation of retrospective nature has been made.\textsuperscript{169} Even though, nothing in the WTO or GATT prevents the retroactive nature of remedies, in practice, it was never regarded as part of the remedial mechanism mainly because both GATT 1947 and WTO prioritized the withdrawal of the violative measures, which is prospective in nature, over other forms of remedies. Moreover, it has been observed that the bar on awarding retrospective remedies has been installed at the behest of the United States, which was attempting to minimize the impact of the binding effect of anti-dumping measures and the need to refund illegally imposed anti-dumping duties (Roessler 2007: 144 in Sebastian 2007: 349).

However, after the adoption of the Tokyo Round Anti-Dumping Code in 1979, there was a departure from this usual practice and there are five reports in which the panel had recommended retrospective remedy and these cases pertain exclusively to illegal collected duties on the pretext of anti-dumping and countervailing action.\textsuperscript{170} In these cases the Panel recommended revocation of the measure and the reimbursement of the anti-dumping duties paid. In US - Cement, the Panel noted that:

The Panel recommended that the Committee request the United States to revoke the anti-dumping duty order on grey Portland cement and cement clinker from Mexico and to reimburse any anti-dumping duties paid or deposited under this order.\textsuperscript{171}

The Panels in other similar disputes took the view that the anti-dumping/countervailing duties orders in question were illegal when they were enacted

\textsuperscript{168} Article 35 (Restitution), \textit{ILC Articles on State Responsibility} (2001).
\textsuperscript{169} Patricio Grane (2001: 763-69) comprehensively surveyed retrospective remedies in GATT/WTO case law that mostly fall under the anti-dumping or subsidies law. See also Petersmann (1993).
\textsuperscript{170} The first panel which recommended retrospective was in New Zealand v. Finland (the Transformers Case), US – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47 20 August 1990, unadopted, in Mavroidis (2000: 775, 778).
\textsuperscript{171} US – Anti-Dumping Duties on Grey Portland cement and cement clinker from Mexico (unadopted), ADP/82 (9July 1992), para. 6.2.
and hence, they had to be revoked as of then. Finally, based on the principle that no legal act can stem from an illegality (ex injuria non oritur jus), the panels recommended the wiping out of all consequences stemming from the proclaimed illegal act (Mavroidis 2000: 775-776). Even in these exceptional cases where the Panel decisions have recommended retrospective remedies, it provoked substantial controversy (Grane 2001: 764; Palmeter 1999: 162-63). This negative attitude under GATT 1947 towards retrospective remedies led to the blocking of those Panel reports by the losing party and thus failed to be adopted. No such remedies have been recommended by the panel in any other areas of GATT/WTO law, where the 'usual' remedy of withdrawal of illegal measure persisted. For example, the issue of retrospective effect of judgment came up for consideration in the Trondheim case, which in the context of Government Procurement, spelt out the customary GATT practice. The panel noted that it 'did not consider it appropriate to make such a recommendation' which have the impact of annulling the already granted procurement contract.

This consistently negative attitude toward the retrospective remedies seems to be continued under the WTO system (Grane 2001: 766-69). Despite the fact that there is nothing in WTO which prohibits retrospective application of remedies, the WTO Member considers that the remedies under the DSU are only prospective (Georgiev and Borght 2006: 41). The WTO remedy continues to be ex nunc (prospective) in nature and would not have a retrospective effect, as in the case of public international law. The new DSU also provided for a new Article 19 which at least in the face of it, endorsed the view that the WTO remedies are only prospective. The practice so far in the WTO DSU has adopted the 'usual' GATT remedy of prospective implications, has been preferred.

However, exceptions like in the GATT could be found in the WTO also, at least in the context of some of the Agreements which provides for special and additional rules on remedies. For instance, the Panel in Australian – Leather (Article 21.5) case, in the context of the special rules in the Agreement on Subsidies and Countervailing Measures

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173 See also Section 129(c)(1) of the Uruguay Round Agreements Act, Panel Report, WTO Document WT/DS221/R, of July 15, 2002, para. 3.41 (noting that both disputing parties, the US and Canada, agreed on the "principle of prospective implementation" under the DSU).
(SCM), observed, differing interestingly from the argument advanced by both the complainant (US) and the respondent (Australia), that:

"However, we do not believe that Article 19(1) of the DSU, even in conjunction with Article 3(7) of the DSU, requires the limitation of the specific remedy provided for in Article 4(7) of the SCM Agreement to purely prospective action." 174

The Panel held that under the WTO Subsidy Code, to withdraw the violation, ie, the prohibited subsidy may include a retrospective remedy, i.e., repayment of the prohibited subsidy. The Panel summarizes its conclusions that:

"Based on the ordinary meaning of the term "withdraw a subsidy", read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is not limited to prospective action only but may encompass repayment of the prohibited subsidy." 175

The Panel further stated:

"Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to 'withdraw the subsidy' in a case where repayment is necessary." 176

The Panel, however, rejected the inclusion of interest in the repayment of prohibited subsidies, opining that the remedy under Article 4.7 was not designed to "fully restore the status quo ante nor was it a remedy intended to provide for reparation or compensation". 177 The Australia--Leather case represents a definite and significant advancement for WTO jurisprudence in the area of remedies as till this decision it was widely understood by the WTO members that the WTO did not provide for retrospective remedies. 178 The panel report also did not rule out the possibility of retrospective remedy from the WTO jurisprudence, at least in the specific circumstance such as in the Agreement on Subsidies and Countervailing Measures (SCM), Safeguards Agreement and Anti-Dumping Agreement (ADA).

175 Ibid, para. 6.39
176 Ibid, para. 6.45.
177 Ibid, para. 6.49. With respect to the issue of repayment of anti-dumping duties, see Panel Report on Guatemala - Cement II, WTO Document WT/DS/126/R, paras. 9.4-9.7. The US in this case viewed that "Retroactive remedies are inconsistent with the established practice of panels of refraining from refraining from recommending remedies that attempt somehow to restore the status quo ante or otherwise compensate the prevailing party for WTO-inconsistent actions taken by the defending party". WTO Documents WT/DS60/AB/R, para. 5.63
178 For a detailed analysis on Australia-Leather case, see Goh and Ziegler (2003).
This decision has, however, generated considerable debate inside and outside the WTO. Moreover, this Panel report was adopted without an appeal, said to reduce its validity as a precedent.\footnote{The matter was not appealed to the Appellate Body, as Australia and the US reached a settlement involving \textit{inter alia} the repayment by the beneficiary of the Australian subsidy of AUS$ 7.2 million. See Georgiev and Borght (2006: 42).} During DSB adoption, most member countries harshly criticized it, noted that this was contrary to the intention of the drafters of Article 19 of the DSU. This demonstrates the members' reluctance in accepting retrospective remedies (Grane 2001: 769). While adopting the report in the DSB Australia joined by Canada, Brazil, Japan, the EC and Malaysia expressed their concerns about the ruling. Canada noted that the customary practice under GATT and the WTO, as established in a number of cases, was to interpret remedies to be purely prospective. Retroactivity should only be inferred where the language of the treaty clearly indicated that it had to be inferred as Members would have made this explicit as it was a significant departure from past practice.\footnote{Even the US, which was the complainant, in this case, expressed his disagreement. Only Hong Kong expressed unqualified support for the panel's finding on retrospective remedy. See Goh and Ziegler (2003: 548).} In the subsequent reports also, the Panel and the Appellate Body confined itself to granting only prospective remedies as the complainant did not request for the same (Goh and Ziegler 2003: 548). In the \textit{US – Import Measures}, the Panel noted that "US did not request retroactivity, and retrospective remedies are alien to the long established GATT/WTO practice where remedies have traditionally been prospective". Further, in \textit{Canada – Aircraft Subsidies} the Panel noted that "Brazil does not in fact want us to make a finding along the lines of \textit{Australia – Leather} Article 21.5. The same is more obviously true of Canada. As noted above, we consider that a panel's findings under Article 21.5 of the DSU should be restricted to the scope of the 'disagreement' between the parties. In the present case, therefore, we do not consider it necessary to make any finding as to whether Article 4.7 of the SCM Agreement may encompass repayment of subsidies found to be prohibited."\footnote{\textit{Canada – Measures Affecting Aircraft}, Article 21.5 Report, WTO Document WT/DS70/RW, of 4 August 2000, para 5.48.}

In \textit{Canada – Aircraft}, the Panel further emphasized the prospective nature of WTO dispute settlement remedies and that such an approach was also applicable to the \textit{SCM Agreement}: "In any event, even if the WTO dispute settlement mechanism does only provide for prospective remedies, we note that it does so in respect of all cases, and not only those involving prohibited export subsidies. ... Thus, to the extent that the WTO dispute settlement system only provides for prospective
remedies, that is clearly the result of a policy choice by the WTO Membership.”

The panel in Brazil--Aircraft (Article 21.5), also came to a similar conclusion that their role under Article 21.5 is to render a decision ‘where there is disagreement’. However, it observed that “Our silence on issues that are not before us should not be taken as expressing any view, express or implied, as to whether or not a recommendation to ‘withdraw’ a prohibited subsidy may encompass repayment of that subsidy”. This statement has kept the debate wide open.

These cases highlight that the complainants – the WTO Members, are reluctant to bring a claim for retrospective remedy before the Panel, which definitely could have agreed with the findings in the Australia – Leather, thereby making retrospective remedy a practice in subsequent decisions and WTO law atleast in trade remedy cases. One possible reason for the reluctance could be that anti-dumping or countervailing duties or other illegal measures are a form of ‘revenue’ levied by the States from private person or companies, not directly from the complaining Member. One could also understand the reluctance of the Panel to intrude into areas which has been viewed disapprovingly by most Members in the DSB.

A pure prospective remedy hardly has the deterrent effect against potential violators and a retrospective remedy in appropriate context would provide a “curative” remedy as in the public international law. The Panel view in Australia – Leather was therefore right in interpreting the existence of retrospective remedies under special agreements such as the Subsidies agreement and Anti-dumping agreement. In the absence of WTO specifically addressing this issue, the Panel has only recognized the customary rule of “restitution” within the WTO. As noted earlier, the remedy under Article 4.7 SCM Agreement, which provides for special and additional rules offer more than what was provided in the general rule provided under Article 19.1, that is bringing the measure into conformity with the WTO agreement. It is a matter of interpretation as to where the remedy is available in the specific context of the SCM Agreement, and other trade remedies agreements. Further, practice in GATT 1947 era, through reflected only in unadopted reports owing to positive consensus requirement, provides sufficient support for a legal reasoning for retroactive remedy in the WTO.

182 Canada - Aircraft Credits and Guarantees, Panel Report, para. 7.170.
One of the basic tenets of law is that no one should be allowed to reap benefit from their illegal act. Non-reimbursement of anti-dumping and countervailing duties, which has been found to be illegally collected questions the foundation of remedies. Apart from reducing the attractiveness of remedies, the duties which could be collected till the end of the reasonable period of time, it encourages Members to violate WTO rules. It is time that the Members accept the basic aspects of remedies within the WTO legal system, which otherwise could make them redundant or meaningless. Even if the government action of collecting duties was based on ‘good faith’, it would only be appropriate for it to keep them separately till its “legality” is established. Further, the chance of collecting money knowing that if found illegal need not be returned would have the effect of providing an incentive for the member States to resort to trade protectionist measures, which not only provide them with monetary incentive, but at the same time destroys the export market of the complaining Member. Finally, the disputes in Government Procurement Agreement (GPA) present a unique situation of no remedy. The rights protected under the GPA are the opportunity to bid in response to the government tender. Any infringement of GPA rules normally means that his opportunity is irretrievably lost, as the panel cannot order re-tendering as the remedy is only prospective. Thus the only remedy available is compliance in the future.  

To minimize this problem and to create incentives among Members for prompt compliance with adverse findings, the DSU should provide that ‘reparation’ have to be calculated from the date of establishment of the Panel. This would also give the Members sufficient incentive for a successful consultation.

6 Implementation of Adverse DSB Rulings: The Procedural Aspect of Remedies

Once the findings of the Panel and Appellate Body are adopted by the DSB\textsuperscript{185}, the report acquires legally binding character and is set for implementation, which is the final stage in the dispute settlement process. In normal cases, the DSB recommendations and rulings are one that requires a losing Member to bring the measure into conformity with the covered agreement.\textsuperscript{186} The WTO DSU provides for a

\textsuperscript{184} This was the situation in 1947 GATT cases: Norway — Tendering procedures on Trondheim toll ring project (GATT BISD 40S/319).

\textsuperscript{185} Article 16.1, DSU.

\textsuperscript{186} Article 19.1, DSU.
very detailed and time bound procedure for the implementation of the recommendations and rulings of the DSB and could be considered as one of the finest achievement under the WTO.

Compliance with the DSB ruling and recommendations proceeds through different time bound stages. Prompt compliance with the DSB recommendations is the primary and preferred requirement under the DSU. However, if a Member expresses its inability to promptly comply, a reasonable period of time is granted the determination of which is either through mutual agreement or by arbitration under Article 21.3 (c) DSU. At the end of the reasonable period of time, if there is any disagreement as to the consistence of the measure taken to comply with the recommendations and rulings, the parties could settle the disagreement through a compliance review panel. However, if no compliance with the recommendation or ruling is forthcoming, the DSU provides for two options, a consensual compensation and nonconsensual countermeasures, which are the last tool in the DSU to rebalance the negotiated concession as well as to induce compliance from the respondent Member. While enforcement is covered under chapter V, this section of the chapter undertakes a close examination of the procedural aspect of remedies from a critical perspective. Though not directly contributing towards the behaviors of the Member States attitude towards remedy, the procedural remedy play considerable role in determining the efficiency of the WTO dispute settlement in ensuring prompt delivery of remedy established as a legal right through the DSB recommendations and rulings.

6.1 Prompt Compliance

Prompt compliance with the adverse DSB recommendations and ruling is the most preferred option under the DSU. This primary aspect of remedy is provided in Article 3.7 and reiterated in Article 22.8 of the DSU which provides: “In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” This intention is also expressed in Article 21.1 of the DSU, which provides that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”

187 Article 3.7, DSU.
188 Article 21.1, DSU.
Prompt compliance has been compared with the primary remedy of "cessation" of wrongful acts available under general international law which shall be performed immediately on a finding of illegality (Aznar 2004: 43). Some have even equated compliance in WTO with the secondary remedy available under international law i.e., "status quo anti", though in a limited sense.\textsuperscript{189} As noted in the last section, the compliance in the form of 'cessation' has only limited effect – without possibility to realizing reparation for retrospective damages.

The preference and importance of prompt compliance in the WTO legal system was observed by the Appellate Body in \textit{EC – Hormones}:

"Article 21.1 stipulates that 'Prompt compliance' with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members' (emphasis added). Article 3.3 states: 'The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members' (emphasis added). The Concise Oxford Dictionary defines the word, "prompt", as meaning "a. acting with alacrity; ready. b. made, done, etc. readily or at once".\textsuperscript{190}"

In \textit{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 "would appear to be essential if 'prompt' compliance, in a world of sovereign States, is to be a balanced conception and objective":

"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. Reading Articles 21.1 and 21.3 together, 'prompt' compliance is, in principle, 'immediate' compliance. At the same time, however, should 'immediate' compliance be 'impracticable' - it may be noted that the DSU does not use the far more rigorous term 'impossible' - the Member concerned becomes entitled to a 'reasonable period of time' to bring itself into a state of conformity with its WTO obligations. Clearly, a certain element of flexibility in respect of time is built into the notion of compliance with the recommendations and rulings of the DSB. That element would appear to be essential if 'prompt' compliance, in a world of sovereign states, is to be a balanced conception and objective."\textsuperscript{191}

\textsuperscript{189} Sometimes, 'withdrawal of an inconsistent measure' would involve amending or repealing national laws or administrative orders, which could be equated with granting of 'status quo anti' as in the public international law.


6.1.1 Concept of compliance

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":

"[T]he non-conforming measure is to be brought into a state of conformity with specified treaty provisions either by withdrawing such measure completely, or by modifying it by excising or correcting the offending portion of the measure involved. Where the non-conforming measure is a statute, a repealing or amendatory statute is commonly needed. Where the measure involved is an administrative regulation, a new statute may or may not be necessary, but a repealing or amendatory regulation is commonly required."

It thus appears that the concept of compliance or implementation prescribed in the DSU is 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 ...."

The Arbitrator also differentiated the concept of "compliance" within the meaning of the DSU from the removal or modification of the underlying economic/social/other conditions which may have caused the enactment or application of the WTO-inconsistent governmental measure:

"Compliance within the meaning of the DSU is distinguishable from the removal or modification of the underlying economic or social or other conditions 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. Those economic or other conditions might, in certain situations, survive the removal or modification of the non-conforming measure; nevertheless, the WTO Member concerned will have complied with the DSB recommendations and rulings and with its obligations under the relevant covered agreement. To my mind, it is inter alia for the above reason that the need for structural adjustment of the industry or industries in respect of which the WTO-inconsistent measure was promulgated and applied, has generally been regarded, in prior arbitrations under Article 21.3(c) of the DSU, as not bearing upon the

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Footnote original: The non-conforming measure might also assume other forms: e.g., an executive or administrative practice actually carried out but not specifically mandated or authorized by statute or administrative regulation; or a "quasi-judicial" determination by an administrative body. Since the Argentine measures involved in this arbitration are not of these kinds, it is not necessary to examine the requirements of compliance where those other kinds of measures are concerned.

6.2 Reasonable Period of Time for Implementation

The concept of reasonable period of time for implementation represents the flexibility available for an implementing member (respondent) to comply with the Panel/Appellate Body recommendations or rulings. It also represents the intention of the drafters to provide the ‘sovereign’ Member states to bring the ‘measures’ into conformity with the WTO Agreement, which might require certain domestic procedures, including change in domestic law or administrated order. The reasonable period of time also ensures that losing parties would not have the open-ended time frame to comply with the recommendation, which they had under GATT (Gleason and Walther 2000). Further, the right for the complainant to retaliate is clearly linked to the expiry of the reasonable period of time. Moreover, even if the compliance Panel of Article 21.5 of the DSU does not refer explicitly to the reasonable period of time, the Article 21.5 Panel report in Australia—Salmon case chose the expiry of the reasonable period of time as a benchmark to assess whether “measures taken to comply existed or will exist in the sense of Article 21.5”. The DSU has, for this purpose, established procedures for fixing the losing party’s deadline for implementing dispute settlement rulings and recommendations.

The setting and length of reasonable period of time and the factors determining the same has direct correlation with ‘remedies’ by which the violating member would comply with the recommendations and bring dispute to its desired conclusion – implementation.

Article 21 of the DSU does not precisely define the term ‘reasonable period of time’. Defining the concept “reasonable” in the context of the Anti-Dumping Agreement, the Appellate Body in US - Hot-Rolled Steel noted that:

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Footnote original: Award of the Arbitrator under Article 21.3(c) of the DSU, Indonesia - Automobile Industry, WT/DS54/15, para. 23; and Award of the Arbitrator under Article 21.3(c) of the DSU, Canada - Pharmaceutical Patents, WTO Document WT/DS/114-13, para. 52.


Article 22.2 of the Understanding on rules and procedures governing the settlement of disputes (DSU) says "... 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 suspend concessions or other obligations ...”

The word “reasonable”... implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.

In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case.198

This above view of the Appellate Body, although advanced in the context of the Anti-Dumping Agreement, and not the DSU, brings out the essence of 'reasonableness' and was considered by the Article 21.3 Arbitrator in US - Hot-Rolled Steel (Article 21.3), to be equally pertinent for an arbitrator faced with the task of determining what constitutes 'a reasonable period of time' in the context of the DSU.199

As noted in the previous section, Article 21 of the DSU governing the implementation procedures opens with an ambitious statement of preference for “prompt compliance” on the part of the losing party, a preference it describes as “essential in order to ensure effective resolution of disputes to the benefit of all Members.”200 Article 21 goes on to recognize, however, that immediate compliance may be impracticable and in those circumstances, it permits members to have a “reasonable period of time” to implement the rulings. In other words, if the immediate implementation of the adopted Panel recommendation is impossible, the implementing member can request for a reasonable period of time for implementation.201

Over a period of time, the practice in this area has given rise to various issues, interpretative and procedural, which has the ability/tendency to delay or defeat the object and purpose of remedies under the WTO law

6.2.1 The procedure

As per Article 21.3, the reasonable period can be determined in one of three ways202: (a) the losing party can propose a period that the DSB would thereafter approve; (b) the winning and losing parties can agree on an implementation period

200 Article 21.1, DSU
201 Article 21.3, DSU.
202 Ibid.
within 45 days following adoption of the ruling; or (c) if neither of the first two methods are achievable, the period can be set by binding arbitration, to be completed within 90 days following adoption of the ruling. These provisions seem to imply a preferential order between the three paragraphs. If the parties cannot agree upon an arbitrator within ten days, the Director General shall appoint him, after consulting with the parties. In practice, a member of the Appellate Body acts as 21.3 (c) arbitrator (Marceau 2001: 4). Would it be permissible to reach an agreement between the parties to extent the reasonable period of time established through an Article 21.3 Arbitration? It seems possible. During its meeting on 24 July 2001, the DSB approved the US proposals to extend two reasonable period of time previously settled by arbitrators with regard to the disputes Section 110(5) of the US Copyright Act and Anti-Dumping Act of 1916. These DSB agreements could be seen as an implicit application of paragraph (a) (Monnier 2001).207

6.2.2 Scope of 21.3 (c) Arbitration

The sole mandate of the Article 21.3(c) Arbitration is to determine the reasonable period of time; the recommendation could require taking into consideration the circumstance of the Members involved. The DSU provided a clear direction to the Arbitrator 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”. Clarifying this further, the arbitration in Korea – Alcoholic Beverages (Article 21.3 Arbitration) took the opportunity in defining his mandate.

“My mandate in this arbitration relates exclusively to determining the reasonable period of time for implementation under Article 21.3(c) of the DSU. It is not within my mandate to suggest ways and means to implement the recommendations and rulings of the DSB. Choosing the means of implementation is, and should be, the prerogative of the implementing

203 Article 21.3 (c), DSU. In Japan–Alcoholic Beverages (Article 21.3 Arbitration), the Arbitrator while determining the reasonable period of time noted that as full review of the matter is not possible within the stipulated time, the deadline for the arbitrator's award was extended by two weeks. The parties gave written assurances that they would nevertheless accept the arbitrator's award as 'binding arbitration' within the meaning of Article 21(3)(c). Japan–Alcoholic Beverages, Article 21.3 Report, para. 3.
204 Footnote 12, DSU.
207 The request of the US that the DSB approves their proposal to modify the time-period in the FSC case so as to expire on 1 November 2000 could also be considered as an implicit application of paragraph (a). See WTO Document WT/DS108/11, of 2 October 2000, in Monnier (2001).
Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements. I consider it, therefore, inappropriate to determine whether, and to what extent, amendments to various regulatory instruments are required before the new tax legislation comes into effect.\textsuperscript{208}

Further, in \textit{US - Hot-Rolled Steel (Article 21.3 Arbitration)}, the Arbitrator confirmed that it is for the implementing WTO Member to determine the proper scope and content of anticipated legislation. However, he also indicated that:

"The degree of complexity of the contemplated implementing legislation may be relevant for the arbitrator, to the extent that such complexity bears upon the length of time that may reasonably be allocated to the enactment of such legislation. But the proper scope and content of anticipated legislation are, in principle, left to the implementing WTO Member to determine,"\textsuperscript{209}

In both these cases the Arbitrator's declined to interfere with the 'flexibility' available for the Member States in 'bringing the measures into the WTO agreements. While the Arbitrator may analyse the complexity of the contemplated implementing measure, for the purpose of determining the reasonable period of time, it would not look into the scope and content of the measure.

6.2.3 \textbf{Factors determining the reasonable period of time}

In determining the reasonable period of time, the arbitrators are bound to consider many factors which could facilitate the arbitrator in setting an appropriate timetable.

The standard guideline in DSU which the arbitrator should follow in determining the reasonable period of time should be 15 months from the date of adoption of the report.\textsuperscript{210} However, a member approaching for reasonable period would not automatically be entitled for the 15 months period. The period may be shorter or longer depending on the 'particular circumstance'. The burden is on the parties who claim the shorter or longer period to prove the existence of the 'particular circumstance'. In \textit{EC - Bananas (Article 21.3 Arbitration)}, the EC requested a period of 15 months and one week based on the complexity and difficulty of amending the existing EC import regime for bananas. The Arbitrator stated that:

"When the 'reasonable period of time' is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision

\textsuperscript{208} Korea - Alcoholic Beverages, Article 21.3 Report, para. 45. See also on Canada - Pharmaceutical Patents, Article 21.3 Report, para. 42.


\textsuperscript{210} Article 21.3 (c), DSU.
states that a 'guideline' for the arbitrator should be that the 'reasonable period of time' should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the 'reasonable period of time' may be shorter or longer than 15 months, depending upon the 'particular circumstances'.

The Complaining Parties have not persuaded me that there are 'particular circumstances' in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the 'reasonable period' of time for implementation would expire by 1 January 1999.211

There are several cases where the Article 21.3 (c) arbitration has been called for in determining the reasonable period of time.212 In most of these cases, it was the complainant who invoked this procedure.213 The practice suggests that the 15 months functions increasingly as an outer limit. In fact, the 15 months guideline has been progressively translated into a zero delay benchmark (Monnier 2001).

(a) "Shortest time possible" for Implementation

One of the major problems with this procedural recourse is the issue of deliberate delays by the member concerned on the pretext of requiring a reasonable time for implementation. Though the system of 'reasonable period of time' has been introduced to bring about flexibility and adaptability to the dispute settlement system, the evolving trend shows that the Member States are claiming it on a regular basis, as a tactic to delay implementation. This has delayed the entire process of dispute settlement by another 15 months on an average. This has direct impact on one of the main object of the DSU, i.e., effective and speedy remedy.

Apart from the general requirement that the "prompt compliance" is essential, the only other interpretative guidance provided by the article is the suggestion that the reasonable period should not exceed fifteen months from the date the ruling was adopted, but "may be shorter or longer, depending upon the particular

211 EC – Bananas III, Article 21.3 Report, paras. 18-20. See also Australia – Salmon, Article 21.3 Report, para. 30; and Canada – Auto Pact, para. 39.

212 Japan – Tax on Alcoholic Beverages, WT/DS8, 10 and 11; Indonesia – Automobile Industry, WT/DS54, 55, 59, and 64; Korea – Taxes on Alcoholic Beverages, DS75 and 84; Australia – Salmon, DS18; EC – Hormones, DS26 and 48; EC – Bananas, DS27; and Chile – Alcoholic Beverages, WT/DS87 and 110.

213 But in the Beef - Hormones WT/DS26 and the Chile – Alcoholic Beverage, WT/DS87 case, it was the respondents who resorted to this procedure.
circumstances.” The Arbitrator in *EC– Bananas (Article 21.3 Arbitration)*, has reiterated this point. In the early reasonable period awards, the arbitrator had been consistently granting a fifteen months period, thereby establishing a belief that the losing parties were automatically entitled to a compliance period of fifteen months. This trend was seen as contrary to the “prompt compliance” standard established under Article 21 of the DSU.

The first of the reasonable period arbitration was the *Japan – Taxes on Alcohol*, where the US argued for a five months implementation period, while Japan claimed five years. The Arbitrator, without offering any reasons, decided that the arguments advanced by US and Japan did not prove any particular circumstance and stuck to the fifteen months ‘guideline’. The fifteen months ‘guideline’ was adhered to in the *EC – Bananas (Article 21.3 Arbitration)* where the Arbitrator gave weight to the complexities of the EC’s implementation process. Again in *EC – Hormones (Article 21.3 Arbitration)*, the Arbitrator while granting the 15 months implementation period to EC interpreted Article 21.3 and stated:

> “The ordinary meaning of the terms of Article 21.3(c) indicates that 15 months is a 'guideline for the arbitrator', and not a rule. This guideline is stated expressly to be that 'the reasonable period of time ... should not exceed 15 months from the date of adoption of a panel or Appellate Body report' (emphasis added). In other words, the 15-month guideline is an outer limit or a maximum in the usual case. For example, when implementation can be effected by administrative means, the reasonable period of time should be considerably shorter than 15 months. However, the reasonable period of time could be shorter or longer, depending upon the particular circumstances, as specified in Article 21.3(c).”

The Arbitrator further noted that Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Read in context of Articles 21.1 and 3.3 of the DSU which require prompt compliance with recommendations and rulings and prompt settlement of disputes, they concluded that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within

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214 Article 21.1 and 21.3 (c), DSU.
the legal system of the Member to implement the report of the DSB. In the usual case, this should not be greater than 15 months, but could also be less.218

The reasoning of this arbitral award for “the shortest period possible” in calculating the reasonable period of time began to establish the analytical framework for shorter periods in future “reasonable period awards.” The arbitration award further made it clear that the losing party cannot use “the shorter period possible” to develop additional justifications for its inconsistent measures. The first case where this new interpretation was put in practice was in Indonesia – Automobiles case where Indonesia was awarded 12 months, despite Indonesia invoked the “special and differential treatment” rule available to the developing countries under Article 21.2.219 The Arbitrator by taking into consideration the near collapse of the Indonesian economy, allowed a twelve months compliance period, which was an additional six-month over and above the six months reasonable period of time.220 The remaining cases have shown a trend of shorter implementation period. Other examples where shorter implementation time was in Australia – Salmon221 and Canada – Patents222 case where the arbitrator settled for eight months and six months respectively.

The trend for a shorter implementation period, of course, is to be welcomed and would certainly promote speedy settlement of disputes in WTO with the only condition that the “special situation” of the developing countries, as provided under Article 21.2 of the DSU needs to be considered. But the question left open is what factors do the arbitrators follow while ruling for a shorter period. What other guidelines can the arbitrator be offered in determining whether the ‘particular circumstance’ exists for granting a shorter or longer implementation period?

(b) Interpretation of the term “particular circumstances”

Article 21.3 of the DSU provides that the guideline of 15 months may be shorter or longer depending on the “particular circumstance”. The DSU does not

220 The developing countries interest is dealt in detail in Chapter V.
provide any guideline as to what constitutes “particular circumstance” which would
determine the length of reasonable period of time. This has been clarified and
developed by the arbitrators on a case-to-case basis. In Canada—Patent (Article 21.3
Arbitration) case, the arbitrator defined the concept of “particular circumstance” as
“those that can influence what the shortest period possible for implementation may be
within the legal system of the implementing Member”.223 Some clue was also offered
by the arbitrators in Argentina – Hides and Leather (Article 21.3 Arbitration) in the
definition of what the government might possibly be recognized to do to comply with
a recommendation. It added that

“a state of conformity with specified treaty provisions either by withdrawing
such measure completely, or by modifying it by excising or correcting the
offending portion of the measure involved. Where the non-conforming
measure is a statute, a repealing or amendatory statute is commonly needed.
Where the measure involved is an administrative regulation, a new statute may
or may not be necessary, but a repealing or amendatory regulation is
commonly required”.

In Japan – Alcoholic Beverages II (Article 21.3 Arbitration), Japan argued that
a period of 23 months was a reasonable period of time on the basis that there were
“particular circumstances”. Japan claimed that the limited powers of the executive
branch over tax matters and the need for a formal adoption of a legislation by the
Parliament, the adverse effects of the tax increases on Japanese consumers of shochu,
and the administrative constraints on the execution of taxation are “particular
circumstances” justifying a 23-month period needed to implement the
recommendations and rulings of the DSB. The Arbitrator observed:

“Article 21(3)(c), which stipulates that a 'reasonable period of time' for
implementation should not exceed 15 months unless there are 'particular
circumstances' justifying a longer or shorter period. In this case, I am not
persuaded that the 'particular circumstances' advanced by Japan and the United
States justify a departure from the 15-month 'guideline' either way. I conclude,
therefore, that a 'reasonable period of time' within the meaning of Article
21(3)(c)...is 15 months.”

The Arbitrator in Canada – Pharmaceutical Patents (Article 21.3 Arbitration), for the
first time provided a guideline as to what would constitute a “particular circumstance”.
It concluded that such “particular circumstance” could include whether the

224 Argentina – Hides and Leather, Article 21.3 Report, para 40.
225 Japan – Alcoholic Beverages II, Article 21.3 Report, para. 27. See also on EC – Bananas, Article
21.3 Report, paras. 6-10.
implementation will be done by administrative or legislative means, the complexity of the proposed implementation and whether the component steps leading to implementation were legally binding or discretionary (Marceau 2001: 4). The Arbitrator stated:

"The 'particular circumstances' mentioned in Article 21.3 are, therefore, those that can influence what the shortest period possible for implementation may be within the legal system of the implementing Member.

... if implementation is by administrative means, such as through a regulation, then the 'reasonable period of time' will normally be shorter than for implementation through legislative means.

Likewise, the complexity of the proposed implementation can be a relevant factor. If implementation is accomplished through extensive new regulations affecting many sectors of activity, then adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed. On the other hand, if the proposed implementation is the simple repeal of a single provision of perhaps a sentence or two, then, obviously, less time will be needed for drafting, consulting, and finalizing the procedure." 226

However, the arbitrator maintained that these guidelines are only examples. The Arbitrator then proceeded to describe the considerations that should be excluded while considering the "particular circumstance":

"However, in my view, the 'particular circumstance' mentioned in Article 21.3 do not include factors unrelated to an assessment of the shortest period possible for implementation within the legal system of a Member. Any such unrelated factors are irrelevant to determining the 'reasonable period of time' for implementation. For example, as others have ruled in previous Article 21.3 arbitrations, any proposed period intended to allow for the "structural adjustment" of an affected domestic industry will not be relevant to an assessment of the legal process. The determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements." 227 (Emphasis added)

The Arbitrator further observed:

"I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation." 228

Similarly, in US – Anti-dumping Act 1916 case the Arbitrator while granting a 10 months period for implementation, rejected the US argument that the volume of the legislative work, Members legislative practice and the "additional special

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227 Ibid. para. 52.
228 Ibid. para. 60.
circumstance" of transition period for newly elected President are "particular circumstance" to qualify for a longer implementation period.229

In short, the conclusion that one may draw after the analysis of these arbitration awards is that "prompt compliance" with the adopted reports remains the rule under the DSU. The members shall be entitled for a reasonable period of time for the implementation of the recommendations, except in specific instances such as prohibited subsides where the DSU demands compliance "without delay." But the time period for the implementation of these reports may be shorter or longer than 15 months, and depends on the existence of the "particular circumstance." And, it is for the interested party to prove, and the Arbitrator to determine, as to whether there is "particular circumstance," which "should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB." 230

6.2.4 Special rules in SCM Agreement

While Article 21.3 of the DSU relies mainly on the "reasonable period of time" in determining the compliance period, the Agreement on Subsidies and Countervailing Measures SCM relies on the concept of "without delay" provided for in prohibited subsidy cases. 231 Article 4.7 of SCM Agreement enjoins that "If the measure in question is found to be a prohibited subsidy, the Panel shall recommend that the subsidizing Member withdraw the subsidy without delay". In this regard, the Panel shall specify in its recommendation the time-period within which the measure must be withdrawn. 232 This "zero delay" standard under the SCM "looked probably unrealistic to the negotiators of the WTO agreements who installed safety-valves, such as "Reasonable Period of Time" in the DSU or "time-period within which the measure must be withdrawn", in Part II of the ASCM" (Monnier 2001: 825).

Unlike the cases falling under the DSU regarding reasonable period of time, in the SCM the defending Member has no choice but to withdraw the subsidy. Thus, it would be the original Panel, rather than the 21.3 Arbitrator, to specify the time period

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230 Ibid.
231 For the sake of completeness, the six-month period provided by Article 7.9 of the Agreement on Subsidies for actionable subsidy cases should be mentioned, but such a period has never been applied yet.
232 Appendix 2, Special or additional rule and procedure of the DSU.
for implementation even if this recommendation has to be approved by the DSB with the Panel report in order to acquire legal force (Monnier 2001: 829). In other words, in cases involving prohibited subsidy, the procedure under Article 21.3 would not be relevant because the Panel would recommend that the subsidizing member “withdraw the subsidy without delay.”233 In Brazil—Aircraft, the Appellate Body noted that the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of the SCM Agreement. The Panel also noted that the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement.234

Period of implementation in “without delay” cases

A question that arises in the context of withdrawal of prohibited subsidies is how long does this “without delay” means? Does this mean immediately compliance or a minimum implementation period is given to the subsidising member. The SCM agreement does not provide any clue as to the expression “without delay” mean. However, the general trend in the subsidies cases show that a ninety days time period was given for implementation of the report.235

In its first case the Appellate Body in Brazil—Aircraft (Article 21.5 - Canada) firstly analyzed the meaning of the word "withdraw" and observed that “this word has been defined as 'remove', or 'take away', and as 'to take away what has been enjoyed; to take from."236 This definition suggests that 'withdrawal' of a subsidy, under Article 4.7 of the SCM Agreement, refers to the 'removal' or 'taking away' of that subsidy." As regards “withdraw without delay" they expressed the view that such a specification is an issue of law subject to appeal, and concluded that there is “no reason to disturb the Panel's recommendation that, in this case, ‘without delay' means 90 days and, therefore, Brazil must withdraw the export subsidies for regional aircraft under PROEX within 90 days”.237

233 Article 4.7, SCM Agreement.
236 Brazil—Aircraft, Article 21.5 Appellate Body Report (Canada), WTO Document WT/DS/46ABRW, para. 45.
"With respect to implementation of the recommendations or rulings of the DSB in a dispute brought under Article 4 of the SCM Agreement, there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the SCM Agreement. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement. Furthermore, we do not agree with Brazil that Article 4.12 of the SCM Agreement is applicable in this situation. In our view, the Panel was correct in its reasoning and conclusion on this issue. Article 4.7 of the SCM Agreement, which is applicable to this case, stipulates a time-period. It states that a subsidy must be withdrawn "without delay". That is the recommendation the Panel made."

However, Article 4.12 of the SCM provides that for purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein. Taking this line of argument, in Australia – Leather Panel, Australia argued that since the “normal” period of time for implementation of Panel decisions under the DSU is 15 months, and time periods in export subsidy disputes are halved pursuant to Article 4.12, a period of seven and one-half months would be appropriate. But the panel objected:

“Even assuming Australia is correct in its consideration of fifteen months as the ‘normal’ period of time for implementation of panel decisions, a question we do not reach, we do not agree that one-half of that period is appropriate in a dispute involving export subsidies. In the first place, Article 4.12 specifically provides that ‘except for time periods specifically prescribed in this Article’ the time periods otherwise provided for in the DSU should be halved in export subsidy disputes. Article 4.7, which provides that the subsidy shall be withdrawn ‘without delay’, and that the panel shall specify the time-period for withdrawal of the measure in its recommendation, in our view establishes that the time-period for withdrawal is ‘specifically prescribed in this Article’, that is, in Article 4 of the SCM Agreement itself. Moreover, we do not, as a factual matter, believe that a period of seven and one-half months can reasonably be described as corresponding to the requirement that the measure must be withdrawn ‘without delay’.”

Most panels came to a similar conclusion and granted a time period of 90 days for ‘withdrawal’ of prohibited subsidy from the date of adoption of the report by the DSB.

238 Ibid, para. 192.
6.2.5 Nature of burden of proof

In the earlier arbitral awards, as seen above, the trend was for providing a 15 months implementation period in normal course, unless the complaining member proved that the “particular circumstance” demands a shorter implementation period. It was initially thought that only when the implementing member needs an implementation period more than 15 months, should it prove “particular circumstance.” Australia in Australia – Salmon (21.3 Arbitration) case,241 argued that as it is only claiming 15 months (which according to Australia, it is naturally entitled to), it is for the member who is arguing for a shorter implementation period to prove the existence of “particular circumstances.” This argument was rejected by the arbitrator, who took the same line of approach taken by the arbitrator in EC – Hormones (Article 21.3 Arbitration) case. In EC – Hormones (Article 21.3 Arbitration), the Arbitrator clarified the issue of burden of proof and 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.”242

This interpretation should be seen from within the confines of the basic principle set by the Arbitrator in Canada – Pharmaceutical Patents (Article 21.3 Arbitration):

“...it is...for the implementing Member to bear the burden of proof in showing – ‘[i]f it is impracticable to comply immediately’ – that the duration of any proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time."243

Thus the burden of proof for proving the existence of ‘particular circumstance’ rests on both the parties claiming a shorter or longer period respectively. This interpretation makes the purpose of 15 months guideline in Article 21.3 irrelevant. Moreover, this line of interpretation has a minor contradiction with the implementation procedure, like the provision for surveillance. Article 21.6 provides that surveillance of


242 EC – Hormones, Article 21.3 Report, para. 27.

243 Canada – Pharmaceutical Patents, Article 21.3 Report, para. 47.

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implementation will begin after six months of commencement of the reasonable period. But if the panel gave, for example, a reasonable period of less than six months, no surveillance is possible till the end of the reasonable period of time or even after the date of implementation.

6.3 "Surveillance" During the Reasonable Period

Under Article 21.3 of the DSU, a member has right to reasonable period of time for implementing adverse Panel/Appellate Body reports. Once the reasonable period is underway, the DSB is required to keep the losing party “under surveillance.” For this purpose, Article 21 provides that the “issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time” and the “Member concerned shall provide the DSB with a status report” of the progress in implementation. Other than this, no interim requirements are imposed on that member by the DSU. The members are not required to identify the measures it will seek to remove or implement, nor is it required to specify any sort of implementation schedule. Thus, the losing member can simply sit idle till the end of the reasonable period of time and the DSU demands only a “status report” on every DSB meeting. This status report again, may be specific or vague as the losing party elects to make it.

As regard the application of WTO-inconsistent measures during the reasonable period of time, the Panel in US - Section 129(c)(1) URAA, considered that nothing suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure or to provide relief for the past effects of such measure:

"Nothing in Article 21.3 suggests that Members are obliged, during the course of the reasonable period of time, to suspend application of the offending measure, much less to provide relief for past effects. Rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time may continue to be liable for the payment of duties.

....

When panels and the Appellate Body have been asked to make recommendations for retroactive relief, they have rejected those requests,
recognizing that a Member's obligation under the DSU is to provide prospective relief in the form of withdrawing a measure inconsistent with a WTO agreement, or bringing that measure into conformity with the agreement by the end of the reasonable period of time. In the six years of dispute settlement under the WTO agreements, no panel or the Appellate Body has ever suggested that bringing a WTO-inconsistent antidumping or countervailing duty measure into conformity with a Member's WTO obligations requires the refund of antidumping or countervailing duties collected on merchandise that entered prior to the date of implementation.\textsuperscript{246}

The Panel in \textit{US - Section 129(c)(1) URAA} also added that Articles 22.1 and 22.2 of the \textit{DSU} confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of that reasonable period of time.\textsuperscript{247}

The fact that some losing member countries use its reasonable period merely as a tool for buying several months of additional time to evade it obligations is proven by the cases before the WTO itself, and nothing in the DSU prevents this either. The best possible example is the \textit{EC – Bananas} and \textit{EC – Hormone} where the EC showed from the very start, a clear reluctance to lift the inconsistent measures. In each of the two disputes there existed an initial question as to how long the reasonable time for compliance would be. Each case went to arbitration to determine the issue and each resulted in a fifteen-month time frame. While these decisions helped to clarify the WTO's interpretation of a reasonable time, they also saw the losing party fail to achieve full compliance within that time frame. A clear definition of reasonable time will be of little consequence if the losing party has no intention of complying with the WTO decision. Though the "shortest possible time" interpretation developed by the Arbitrators may check the time period to a certain extent, much more is needed on the part of the DSB to make the implementing member accountable within the reasonable period of time.

\textsuperscript{246} \textit{US - Section 129(c)(1) URAA}, Panel Report, WTO Document WT/DS/221R, paras. 3.90 and 3.93.
\textsuperscript{247} Ibid, para. 3.91.
6.4 Disagreements Regarding Implementation: The Compliance Review Procedure

6.4.1 The Compliance review procedure

Compliance review is one of the most important stages in the WTO adjudicatory proceedings. It transfers the compliance determination of adverse Panel/Appellate Body Reports from the national adjudicatory mechanism (as in case of Section 301 proceedings by the US; which made unilateral national determination) to the WTO adjudicatory system ie, from unilateral to multilateral determination of compliance. This provision is completely in consonance with Article 25 of the DSU which prohibits unilateralism and provides that Members shall not unilaterally or conjointly make determinations of whether a Member has complied with the DSB’s recommendations and rulings but shall have “recourse to the dispute settlement rules and procedures” of the DSU (Kunoy 2007: 43). This procedural recourse did not exist before the establishment of the WTO. While the Contracting Parties to the GATT formally introduced the idea of post-panel surveillance in 1979, that mechanism did not provide for an independent review. However, a similar mechanism, though not regularly established, was provided under GATT Article XXIII (Kearna and Charnovitz 2002: 332).248

Article 21.5 compliance review reflects three basic principles (i) promote 'prompt compliance' with the recommendations and ruling of the DSB; (ii) be based on an 'objective assessment' of any measures taken to comply; and (iii) further the 'security and predictability' of the multilateral system (Kearna and Charnovitz 2002: 332-333; Kunoy 2007: 44). Compliance review procedure has direct implication on WTO remedies. This is because currently remedies being prospective, incentive to comply for the Member would be less and there is an incentive initially to delay the time at which point they might be implemented, such as by seeking a long reasonable period of time for compliance and then forcing the complainant to go through an Article 21.5 Panel (and Appellate Body) proceeding (Davey 2005b). However, compliance review is a cost that is paid for the success of multilateralism and prohibition of unilateralism.

Article 22.5 of the DSU provides 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.”249

The Member concerned, who has requested for the reasonable period of time, shall implement the adverse Panel/Appellate Body report within the time period allotted to them. At the end of the reasonable period of time, if 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 the dispute settlement procedure under the WTO. The Compliance Review Panel in US – Certain Measures case explained:

“...when an assessment of the WTO compatibility of a measures taken to comply with panel and Appellate Body recommendations (an “implementation measure”) is necessary (because parties disagree),...Members are obliged to have recourse exclusively to a WTO/DSU dispute settlement mechanism to obtain a determination that [the] measure is WTO inconsistent. We consider that the obligation to use the WTO multilateral dispute settlement mechanism (i.e. as opposed to unilateral or even regional mechanisms) to obtain any determination of WTO compatibility, is a fundamental obligation that finds application through the DSU. ...We do not consider that the first sentence of Article 21.5 is only of a procedural nature but rather contains a substantive obligation....”250

The Appellate Body reaffirmed this statement of the Panel.251 An Article 21.5 Panel shall be established to examine the consistency of the implemented measure.252 The original Panel (first level panel) shall be resorted to as compliance Panel, wherever possible. The Panel is to submit its report within 90 days from the date of referral of the matter to it. Though nothing in the DSU provides for an appeal, in practice, an appeal shall lie from the report of the compliance Panel to the Appellate Body.

The procedure under Article 21.5 differs from the original WTO Panel in two fundamental aspects. The Article 21.5 panel only has 90 days to complete the procedure, where as the original panel has six months ie, Article 21.5 Panel have only half of the time taken by the original Panel. Further, there is no reasonable period of

249 Article 22.5 of the DSU (Emphasis added).
252 Article 21.5, DSU.
time or 'grace period' after the Article 21.5 Panel finds violation and the complainant is entitled to request suspension of concession immediate after the DSB adopts an adverse Article 21.5 report. However, practice also shows that Members sometimes resort to the Article 21.5 compliance review for a second time for measures taken by the respondent after the first compliance review, even though the complainant is entitled to request countermeasures or have already authorization for countermeasures. The second time resort to compliance review may be because of the realization that there is no advantage of resorting to suspension of concession as it may be self defeating or counterproductive.

6.4.2 Scope of Article 21.5 review

The scope of Article 21.5 proceedings not only includes the assessment of whether the measures taken to comply do actually implement DSB’s recommendations and rulings, but also covers the determination of whether the measures are consistent with the covered agreements (Kunoy 2007: 44).253 In Australia – Salmon case, the Article 21.5 Arbitrator examined the scope of the review mechanism of implementation measure. Rejecting the request of Australia not to consider certain measures, allegedly not addressed by the original Panel, as measures taken to comply, the panel observed that the mandate given to the original Panel pursuant to Article 21.5 of the DSU includes the consideration of issue relating to two types of disagreements, namely disagreements as to the existence or the consistency with a covered agreement of measures taken to comply with the recommendations and ruling. The reference to “disagreement as to the ...consistency with the covered agreement” of certain measures, implies that an Article 21.5 compliance Panel can potentially examine the consistency of the measures taken to comply with a DSB recommendation or ruling with any provision of any of the covered agreements. The Article 21.5 compliance review panel observed:

“Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violations... The text refers generally to “consistency with a covered agreement”. The rationale behind this is obvious: a complainant, after having prevailed in an original

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dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breached, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU.\(^{255}\)

In Canada – Aircraft (Article 21.5 – Brazil) where the Appellate Body disagreed with the Panel that the scope of Article 21.5 proceedings was limited to the issue of whether or not the defendant had implemented the DSB recommendations, but also is obliged to examine the consistency of the "measures taken to comply" with WTO law.\(^{256}\) The Appellate Body in Canada – Aircraft (Article 21.5 Appellate Body – Brazil), while examining the consistency of the measure taken by Brazil again observed that:

"...the obligation of the Article 21.5 Panel, in reviewing 'consistency' under Article 21.5 of the DSU, was to examine whether the new measure – the revised TPC [Technology Partnership Canada] programme – was 'in conformity with', 'adhering to the same principles of' or 'compatible with' Article 3.1(a) of the SCM Agreement. In short, both the DSU and the Article 21.5 Panel's terms of reference required the Article 21.5 Panel to determine whether the revised TPC programme involved prohibited export subsidies within the meaning of Article 3.1(a) of the SCM Agreement.\(^{257}\)

....

Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited to 'the issue of whether or not Canada has implemented the DSB recommendation'. The recommendation of the DSB was that the measure found to be a prohibited export subsidy must be withdrawn within 90 days of the adoption of the Appellate Body Report and the original panel report, as modified – that is, by 18 November 1999. That recommendation to 'withdraw' the prohibited export subsidy did not, of course, cover the new measure – because the new measure did not exist when the DSB made its recommendation. It follows then that the task of the Article 21.5 Panel in this case is, in fact, to determine whether the new measure – the revised TPC programme – is consistent with Article 3.1(a) of the SCM Agreement.\(^{258}\)

Accordingly, the Appellate Body observed that in carrying out its review under Article 21.5 of the DSU, a Panel is not confined to examining the 'measures taken to comply'
from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. It also includes rather a new and different measure which was not before the original Panel. The Appellate Body added that the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 Panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU.259

In US - Shrimp (Article 21.5 - Malaysia), the Appellate Body explained that, when the issue concerns the consistency of a new measure "taken to comply", the task of a 21.5 panel is to consider that new measure in its totality, meaning the measure itself and its application, but only in respect of the claims included in the request for establishment of that 21.5 panel:

"When the issue concerns the consistency of a new measure 'taken to comply', the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of panels under Article 21.5 forms part of the process of the "Surveillance of Implementation of the Recommendations and Rulings" of the DSB. Toward that end, the task of a panel under Article 21.5 is to examine the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB."

Thus in achieving the overall objective of the 21.5 compliance review, the Panel and Appellate Body has been looking to (i) whether the inconsistent measure has been removed or brought into consistency, and (ii) new and different measure which was not before the original panel, there by considering measures other than those raised in the original proceedings to be set forward in compliance proceedings. This is based on the understanding that the compliance proceeding is an on-going process in which previous DSB recommendations and rulings function partly as the basis for determining which new claims to admit.261

259 Ibid, para. 41.
261 Even though compliance panels are keen to accept new claims in Article 21.5 proceedings, it is less clear which criteria are applied to determine which measures may be challenged in the compliance proceedings, see Kunoy (2007: 55).
As regards burden of proof, the Appellate Body in *Canada - Aircraft (Article 21.5 - Brazil)* ruled that the examination of "measures taken to comply" is based on the relevant facts proved by the complainant, to the Article 21.5 Panel, during the panel proceedings, and reiterated in *US - Shirts and Blouses from India*, where it said: 'It is only reasonable that the burden of establishing [an affirmative] defence should rest on the party asserting it.'

6.4.3 “Measures” taken to comply

While Article 21.5 of the DSU refers to a measure taken to comply, it does not define what a measure taken to comply may be. Defining the concept of “measure” the Appellate Body in *US - Sunset Review* stated: “... we start with the concept of ‘measure’. Article 3.3 of the DSU refers to ‘situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member’. This phrase identifies the relevant nexus, for the purposes of dispute settlement proceedings, between the ‘measure’ and a ‘Member’. In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.”

As regards the meaning and scope of the term ‘measure taken to comply’ which is the object of Article 21.5 process, the Appellate Body in *Brazil - Aircraft (Article 21.5 Arbitration)* observed:

"Proceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those ‘measures taken to comply with the recommendations and rulings’ of the DSB. In our view, the phrase ‘measures taken to comply’ refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will not be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which gave rise to the recommendations and rulings of the DSB, and the ‘measures taken to comply’ which are – or should be – adopted to implement those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the revised TPC programme,

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which became effective on 18 November 1999 and which Canada presents as a ‘measure taken to comply with the recommendations and rulings’ of the DSB. 264

Following the same interpretation in Canada - Aircraft (Article 21.5 - Brazil), 265 the Appellate Body held that proceedings under Article 21.5 concern only measures “taken to comply” with the recommendations of the DSB and interpreted this concept as referring to “measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB”. However, it may not be the full discretion of the implementing Member to decide whether or not a measure is one “taken to comply”. The Panel in Australia – Salmon stated that the Article 21.5 panel couldn’t leave it to the full discretion of the implementing Member. The Panel observed:

“Previous panels have examined measures not explicitly mentioned in the panel request on the ground that they were implementing, subsidiary or so closely related to measures that were specifically mentioned, that the responding party could reasonably be found to have received adequate notice of the scope of the claims asserted by the complainant...” 266 What is referred in this Article 21.5 panel is basically a disagreement as to implementation. One measure was explicitly identified, with the knowledge, however, that further measures from our mandate once we have found that they are “measures taken to comply”, would go against the objective of “prompt compliance” set out in Article 3.3 and 21.1 of the DSU....” 267

The Panel added that they do not consider even measures taken subsequently to the establishment of an Article 21.5 compliance Panel should per force be excluded from its mandate. The compliance panel viewed that there may be different and, arguably, even more compelling reasons to examine measures introduced during the proceedings. This is because compliance is often an ongoing or continuous process and once it has been identified as such in the panel request any “measure taken to comply” can be presumed to fall within the Panel’s mandate, unless a genuine lack of notice can be pointed to. Especially under the first leg of Article 21.5 when it comes to disagreements on the existence of measures taken to comply, one can hardly expect

264 Brazil – Aircraft, Article 21.5 Appellate Body Report, para. 36.
266 Original footnote: EC – Banana, para.7.27 and para.140; Japan – Film, para.10.8; Australia – Salmon, para. 90-105; and Argentina – Footwear, paras.8.23-8.46.
that all such measures – when there is no clarity on their very existence – be explicitly mentioned up-front in the panel request.268

In Japan - Apples (Article 21.5–US), the panel conclusion that for the panel to make an objective examination of the facts pursuant to Article 11 of the DSU, it was under the obligation to assess the measures adopted by Japan after the request for the establishment of the Article 21.5 panel, as a fact, if they are properly before it. Accordingly, the panel held that to exclude the measure from the Panel’s jurisdiction would be inconsistent with Article 3.3 of the DSU, as Japan’s measure provides information “of how Japan intends to implement the recommendations and rulings of the DSB at the time this panel was called upon to review the ‘measures taken to comply’ by Japan”.269

In US - Softwood Lumber IV (Article 21.5 Arbitration), the Appellate Body noted that it is not up to either the complaining or implementing Member to decide whether a particular measure is one that is “taken to comply”. A panel’s mandate under Article 21.5 is not necessarily limited to an examination of an implementing Member’s measure declared to be “taken to comply”. The Appellate Body further noted that “some measures with a particularly close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB may also be susceptible to review by a panel acting under Article 21.5”.270

As to the issue of whether or not the new measure “exist” the same panel in Australia - Salmon observed: “...a new regime of implementation measure can be said to “exist” when this regime sets out all requirements and criteria under which the product concerned can enter the market of the implementing Member”. However, if there is no "measures taken to comply", a Panel may find that there is no new measure.271

Since 1995 there have been 26 instances where the service of the compliance review panel has been resorted. These cases establish that there are no consistent criteria for determining the “measures taken to comply”. Kunoy (2007: 60) notes that for an act, other than the declared compliance measure, to be identified as a measure

268 Ibid.
271 Footnote to Brazil – Aircraft, para 36.
taken to comply, the fact that it is inextricably linked to the compliance measure is only indicative of that measure being a measure taken to comply. The real emphasis for that determination is set on the effect of the measure.\textsuperscript{272} Compliance Panels and the Appellate Body have established several limitations in order to limit the ambit of potential claims and measures that may fall within the expeditious Article 21.5 proceeding. It is also evident that some of the recent case law indicate that a more liberal approach is emerging with regard to the determination of which new claims can be introduced in the compliance proceedings and which measures are susceptible to being characterized as measures taken to comply (Kunoy 2007: 66).

Another interesting aspect is that the Article 21.5 Panel and Appellate Body have regularly found that the measures taken to comply are inconsistent with the WTO agreement (Kearna and Charnoviz 2002: 339-340). While the procedure has been found noteworthy for the WTO Member, the finding of inconsistency in most cases suggested that Members could be abusing the system and thereby defeating the procedural remedial recourse.

6.5 Relationship between Article 21.5 and 22: The Problem of Sequencing

Under the WTO DSU, the members are left with two possible procedural recourses if the losing party fails to observe full compliance. This procedural recourse is provided in Article 21.5 and 22 of the DSU. But the DSU fails to specify the relationship between the two procedures. The first of the procedures is set forth in DSU Article 21.5, provides 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.”\textsuperscript{273}

On the other hand, the second procedure set forth in Article 22 provides that if the losing party has neither implemented the WTO ruling within the compliance period nor negotiated mutually accepted compensation within 20 days after the reasonable period expires, the DSB, upon request, shall grant authorization to suspend concessions or other obligations.\textsuperscript{274} The lack of explicit hierarchy between

\textsuperscript{272} See also Kearna and Charnoviz (2002: 344-346).
\textsuperscript{273} Article 21.5, DSU (Emphasis added).
\textsuperscript{274} Article 22.2, DSU.
these two procedural recourses has serious institutional consequences threatening the effectiveness of the WTO DSS and the unilateralism it attempts to prohibit.

6.5.1 Statement of the problem

The conflict between these two alternative procedures is brought out by the EC – Bananas. In this case, the EC argued that Article 21.5 compliance review should be resorted to before requesting the DSB for suspension of concessions as per Article 22. On the other hand, the US countered that it can request authorisation to suspend concessions within 20 days after the end of the reasonable time period, without resorting to Article 21.5 compliance review. These wholly opposite interpretations has thrown open a host of issues which has direct consequences on the credibility of the WTO DSS (Salas and Jackson 2000: 153). Can the procedure be followed simultaneously or must the Article 21.5 procedure precede the Article 22 procedures? Can the deadline for DSB authorization of suspension pursuant to negative consensus rule be suspended until completion of the Article 21.5 proceedings? Or will the complaining Member loose opportunity to retaliate after 10 day ‘window of opportunity’. These issues need clarification. For, any direct recourse to Article 22 could amount to unilateral determination of compliance level. On the other hand, a requirement to go once again through the dispute settlement process as provided under Article 21.5 in its entirety would make the procedure circular, and could defeat the very purpose of the rule based, time-bound dispute settlement procedure.

6.5.2 The EC – US controversy: EC- Banana case

The EC – Bananas case was initiated by the US joined by Ecuador, Guatemala, Honduras and Mexico in 1996. On 25 September 1997, the DSB adopted the panel and Appellate Body reports, and recommended that the EC bring its banana regime into conformity with its WTO obligations. The reasonable period allotted for the implementation of the report ended on 1 January 1999.275 During the implementation period, the EC came up with a new banana regime, which was strongly criticized by the US as WTO inconsistent. On the other hand, the EC maintained that the new banana regime was WTO consistent. The standoff led to the US request for authorization from the DSB for suspension of concessions to the EC. This led to a debate in the WTO as to whether the Article 21.5 procedure was a mandatory

condition to the successful invocation of the right to request for suspension of concessions under Article 22 (Valles and McGivern 2000).

(a) **The US Position**

The US interpreted Article 22.2 and 22.6 as providing the complainant with a ten day “window of opportunity" to seek authorization of suspension of concessions. Accordingly, the US argued that Article 22.2 allows a prevailing party to request authorization from the DSB within 20 days after the expiry of the implementation period. Article 22.6 requires the DSB to grant authorization within 30 days of the expiry of that period, unless there is consensus to reject, or the implementing Member request authorization.

The US argued that given the narrow window of opportunity, recourse to the 90-day procedure under Article 21.5 could not be a precondition for invoking Article 22. The remedy of suspension of concessions would be frustrated because if Article 21.5 is resorted to, the panel will render a decision long after the “window of opportunity” had closed. According to the US, once the “window of opportunity” is closed, the negative consensus rule will lapse and thereafter, the DSB shall authorize suspension of concession only by positive consensus principle. Further, the US noted that if the EC interpretation of these dispute settlement procedures in Article 21.5 encompassed regular DSU procedures such as prior consultation and appeal, with an additional reasonable period of time, could result in an “endless loop of litigation” (Valles and McGivern 2000: 74).

(b) **The EC’s Position**

The EC, on the other hand, argued that any decision of the DSB to authorize suspension of concessions has to be based on a multilateral determination of non-compliance and not on unilateral assertion of the complaining party (Valles and McGivern 2000: 73). According to EC, the DSB was not in a position to authorize the suspension of concession, as until the completion of the Article 21.5 procedure the DSB could not know whether the EC’s implementing measures were in compliance with the DSB recommendations. The EC also rejected the “window of opportunity" thesis developed by the US.

The right to seek authorization for suspension of concession is a “conditional" right and not an “absolute” right. The condition being the fulfillment of the 21.5
procedure if there is any disagreement as to the implementation of the recommendations. Thus, the EC concluded that as this precondition is not fulfilled by the US, no DSB decision for the suspension of concessions would be made.

(c) The Conundrum

On 12 January 1999, EC requested the DSB to establish a Panel under Article 21.5 with a mandate to find that the EC measures “must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures.”

Ecuador also requested for the 21.5 Panel to determine the WTO consistency of the modified EC banana regime. Both the panels were established by the DSB. The US on the other hand, requested the DSB for authorization of suspension of tariff concessions worth US$ 520 million, against the EC and its Member states. This move of the US met with stern opposition from the EC, which lead to the suspension of the DSB meeting without an agenda having been adopted. This crisis in the WTO came to rest after weeks of negotiation between the US and the EC, which led to the EC request for Arbitration under Article 22.6 for determining the level of suspension.

Thus, by the end of January, 1999 two concurrent and parallel procedure were underway. One under Article 22.6 arbitration to determine the level of suspension of concession and whether the principles set out in Article 22.3 had been followed, which was scheduled to report with 90 days. The other, an Article 21.5 panel, established to determine the WTO consistency of the new banana regime, which was to submit a report in 60 days. All the three proceedings (two 21.5 panels and one 22.6 arbitration) were conducted by the same three persons, who were the panelists in the original panel on EC – Bananas. This gave rise to an anomalous situation where the decision on the quantum of retaliation was scheduled to be released before the determination of the WTO-consistency of the implementing measures (Valles and McGivern 2000: 75). The Chairman of the DSB while stating that these proceedings would be occurring simultaneously observed:

“There remains the problem of how the panel and the arbitrators would co-ordinate their work, but as they will be the same individuals, the reality is they

276 WT/DS27/40.
277 WT/DS27/41.
278 WT/DS27/43.
279 Both Article 21.5 and 22.6 of the DSU mandates the “recourse to original were ever possible”.
will find a logical way forward in consultation with the parties."\textsuperscript{280} (emphasis added)

The panel and arbitrators issued the reports by merging the deadlines for the Article 21.5 and 22.6 proceedings. This was achieved by issuing an "initial decision" under Article 22.6 arbitration stating that there was need for more information before they were able to release their final report. No provision for "initial decision" was contemplated under the DSU. Thus a procedural set back was averted by the timely reaction of the panel and arbitrators.

6.5.3 The Panel/Arbitration findings

The 22.6 Arbitrator came to the conclusion that authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in Panel and/or Appellate Body reports as adopted by the DSB. The arbitrator observed:

"it is our opinion that the concept of equivalence between the two levels (i.e. of the proposed suspension and the nullification or impairment) remains a concept devoid of any meaning if either of the two variables in our comparison between the proposed suspension and the nullification or impairment would remain unknown. In essence, we would be left with the option to declare the level of nullification or impairment to be tantamount to the proposed level of suspension, i.e. to equate one variable in the equation with the other. To do that would mean that any proposed level of suspension would necessarily be deemed equivalent to the level of nullification or impairment so equated. Or, we could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.

Consequently, we cannot fulfil our task to assess the equivalence between the two levels before we have reached a view on whether the revised EC regime is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States."\textsuperscript{281}

\textsuperscript{280} Statement of the DSB Chair on EC- Bananas, DSB meeting of 29 January 1999, in Valles and McGivern (2000: 75).
\textsuperscript{281} WT/DS27/ARB, paras. 4.7-4.8
Further, the Arbitrator while rejecting the EC argument that by considering the WTO consistency of its banana regime in an arbitration proceeding under Article 22, it will deprive Article 21.5 of its raison d'etre. The Arbitrator held that “for those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures.” Thus, the arbitrators found a “logical way forward” in deciding the dispute by extending the time limit of 22.6 arbitration in such a way that it falls after the 21.5 determination of the consistency of the measure taken by the EC with the WTO Agreement.

In the US – Certain Measures,282 direct fallout of the EC – Bananas case, the Panel attempted to solve the problem of “sequencing.” The Panel observed that retaliation could not be authorized by the DSB until the WTO has been able to assess whether retaliation was justified by the continuing nullification of benefits caused by the incompatible measures. The Panel further held that the determination of compatibility of the implementation measures could be performed by any of the WTO adjudicating bodies, including the Article 22.6 arbitration Panel:

“We note that both Article 22.6 and the first sentence of Article 21.5 refer to the possibility of recourse to the original panel; there is only one original panel for each dispute. It is, therefore, not unreasonable to consider that the same original panel, through its arbitration procedure would, first, assess the WTO compatibility of the new measures, secondly, assess the impact, if any, of such WTO incompatible measure, and thirdly determine the equivalent level of suspension of concessions or other obligations. We understand that such is the present practice of the DSB as it has developed under the DSU: the members of the original panel are mandated to act pursuant to Article 21.5 and/or 22.6-22.7 of the DSU. It is therefore reasonable to interpret the DSU so as to allow a single WTO adjudication body to perform both the WTO compatibility determination of the implementing measure (Article 21.5 and 23.2 (a)) and the assessment of the appropriate level of suspension (pursuant to Article 22.6-227).”283

Thus, the panel concluded that nothing in the DSU prevents parties from agreeing that the Article 22.6 arbitration panel, prior to the assessment of the level of nullification and impairment, first assess the WTO compatibility of the implementation measures.

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283 Ibid, paras. 6.122-6.123
On appeal, the Appellate Body rejected the "solution"\textsuperscript{284} of the Panel as unwarranted. It concluded that:

"...it is certainly not the task of either the panel or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article XI:2 of the \textit{WTO Agreement}. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to \textit{clarify the existing provisions} of those agreements in accordance with customary rules of interpretation of public international law." (emphasis added). Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility of the Members of the WTO."\textsuperscript{285}

\textbf{6.5.4 Bilateral understanding: The Ad hoc solution}

In the subsequent cases, starting from \textit{Australia – Salmon}\textsuperscript{286} the parties to the dispute either agreed to initiate concurrent procedures under Article 21.5 and Article 22.6 or agreed to undertake an Article 21.5 review prior to initiating procedures to suspend concessions, thereby waiving the Article 22 timetable for negative-consensus approval. In \textit{Canada – Milk}\textsuperscript{287} and \textit{US – FSC},\textsuperscript{288} the parties to the dispute concluded bilateral agreements on how to deal with the sequence of procedures.

Thus, the temporary solution found in the WTO for the problem of "sequencing" is to appoint the same original panel to act as the compliance review panel under Article 21.5 and as Article 22.6 Arbitrators. Both the adjudication procedures are triggered at the same time but pursued sequentially: the Article 22.6 arbitration process is suspended until the implementation review process has been completed (Marceau 2001: 8). Till now there is no clarification as to whether the term "these dispute settlement process" includes all the procedures of the original dispute settlement process like consultation, reasonable period of time etc. Though a number of suggestions have come up from the Member countries, especially from Japan, nothing concrete has emerged so far. The principle part of the Japanese proposal was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{284} The solution offered was that as the Panelist/Arbitrator dealing with Article 21.5 compliance review and Article 22.6 Arbitration being the same, both compliance review and determination of level of suspension of concession can be dealt with one after another by the same panel or arbitrator.
\item \textsuperscript{285} \textit{US – Certain Measures}, Appellate Body Report, para.92.
\item \textsuperscript{287} WT/DS113/14.
\item \textsuperscript{288} WT/DS108/12.
\end{itemize}
\end{footnotesize}
that "if a disagreement over compliance arises, the disagreement would be referred to a compliance panel (the Appellate Body, if the underlying panel report had been appealed, or the original panel, it had not been appealed). The compliance panel is to submit its report within 90 days of the referral and the report is to be adopted at a DSB meeting held 10 days thereafter, absent a consensus to the contrary. If the concerned Member is found not to have brought the measure into conformity, the prevailing party may request authorization to suspend concessions at that same meeting" (Davey 2000b: 6). Further, Article 22 would be revised to make it clear that a request to suspend concessions can be made only if a Member fails to indicate that it will comply with the DSB recommendations, fails to report that it has implemented or is found not to have complied by a compliance panel.

The EC and the US rejected the proposal submitted by the Japan, and stated so in the General Council meeting of 8-9 February 2001 (Davey 2000b: 6). Moreover, the attempt by the panel in US – Certain Measures case, to put an end to the sequencing problem, was rejected by the Appellate Body on the ground of over-activism by the Panel, though the panel was merely trying to highlight the existing practice in the WTO DSU. Moreover, one can argue that the Panel was acting on the implied consent of the DSB to find a "logical way forward". Furthermore, it may be added that if the panel's solution is accepted, it would not only settle the issue of "sequencing", but also save the time taken by the 21.5 compliance review panel.

During the DSU review some Members (Japan and EU) have suggested a new provision Article 21bis: Determination of Compliance.289 The new provision provides that in case of disagreement between the complaining party and the Member concerned as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB, such disagreement shall be resolved through recourse to the dispute settlement procedures provided for in this Article 21bis. If found inconsistent, the Member concerned shall not be entitled to any further period of time for implementation and the complainant could request for suspension of concessions.

289 WTO, Proposal of Japan, DSB Special Session, TN/DS/W/32; and WTO, Proposal of EU, DSB Special Session, TN/DS/W/1.
7 Compensation: Remedy for Non-Compliance

7.1 Remedies for Non-Compliance

If a Member fails to comply with an adverse DSB recommendations or ruling within the time granted for implementation or if the compliance review panel finds that the recommendations and rulings of the first level panel or Appellate Body is not complied with, the complaining member could seek two options to restore the negotiated rights and obligations and ultimately induce compliance. The first is the option for "compensation" by the respondent Member. The second is the possibility of countermeasures by the complaining Member to suspend WTO concessions or other obligations on a discriminatory basis, which is described as the "last resort" remedy. The DSU, however, gives primacy to full implementation of the recommendations than compensation or suspension of concession. This is evident from the DSU's emphasis on the temporary character of both compensation and suspension of concession, available only in the event of not fully complying with the DSB rulings.290 They are merely instruments to 'restore the balance of concessions' with compliance as the ultimate objective (Jackson 2004: 109; Jackson 1997: 60).291 If the complaining Member resort to any of these two options, the DSB shall keep under surveillance till full implementation of the recommendation is achieved.

This part would analysis the first option - compensation as a remedy for non-implementation of adverse WTO DSB rulings. Countermeasures or suspension of concession has been dealt extensively and exclusively in Chapter IV: "Enforcement of WTO Remedies".

7.2 Compensation as a Remedy

Compensation in international law is considered the 'second-best' form of reparation for violation of international obligation and is resorted to frequently (Trachtman 2007: 133-134). Compensation as a form of reparation usually denotes a pecuniary concept, which is close to damages, and may be understood as the payment of damages - voluntary or not. It is a well-established rule of international law that an injured State is entitled to obtain compensation from an offending State. In fact, the practice of not only the ICJ but also other international tribunals, such as the

290 Article 22.1, DSU.
291 However, some others argue that respondent Members have the option of non-compliance and can opt for payment of compensation or the endurance of suspension of obligations. See Bello (1996: 416); Sykes (2000: 347–57) in Bronckers and Quick (2000).
International Tribunal for the Law of the Sea, the Iran–United States Claims Tribunal, the International Centre for Settlement of Investment Disputes Tribunals, and human rights courts, have ordered compensation to be paid in a number of cases for injuries caused alongside the direction for cessation of the wrongful act (Crawford 2002: 302-305).

This practice was also endorsed in the ILC Articles on State Responsibility 2001 which provides for hierarchy of remedies obtainable for a State injured by a wrongful act.292 While the primary remedy is the ‘cessation’ of the wrongful act, the court or tribunal has the power to grant ‘reparation’, unless otherwise agreed between the parties. The object of reparation is to wipe out, as far as possible, all consequence of the illegal act.293 If ‘reparation’ in the form of restitution in gento is not possible, the second best option usually opted by courts is restitution by equivalence (compensation). Compensation, in other words, should be favored where re-establishment of the status quo ante is excessively onerous. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. Compensation is defined to cover “any financially assessable damage including loss of profit insofar as it is established.”294

Under the WTO, as noted above, compensation is not a form of reparation, but is a temporary measure available in the event of non-compliance with the recommendations and rulings of the DSB within a reasonable period of time. Article 22.2 of the DSU states:

“If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation (emphasis added).

Further substantiating this point Article 3.7 DSU provides that

“... The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure

294 Article 36 (Compensation), ILC Articles on State Responsibility (2001). For further discussion see Chapter II.
pending the withdrawal of the measure which is inconsistent with a covered agreement...."

A close analysis of these provisions reveals the unique characters and function of compensation under the WTO. This uniqueness is more perceptible when a comparison is made with compensation under international law. Some of the distinctive features of WTO compensation are (i) unlike international law, compensation in WTO is an option in case of non-compliance with primary remedy of cessation; (ii) compensation is prospective in nature, that is to compensate future damages because of non-compliance; (iii) compensation is temporary option till full implementation of the DSB report; (iv) compensation is voluntary, that is the consent of the responding Member is a necessity; (v) compensation in WTO mostly take the form of trade compensation rather than money; and finally (vi) compensation when granted must be consistent with the WTO agreements ie, must fulfil the most favoured nation (MFN) requirement.

These unique features have made the WTO compensation an option not worth considering. While compensation is widely used as a remedy in general international law, it has rarely been utilized in the WTO as a remedial option. While compensation is a less trade-distortive measure and should be preferred to suspension, until the end of 2007, compensation was agreed upon in only three cases. This phenomenon could mainly be attributed to the voluntary character of this remedy. In two of these cases, the parties agreed on tariff reductions as compensation, while in the other case, monetary compensation was agreed upon.

7.3 Cases were Compensation was Opted as a Remedy

In the first case, Japan – Taxes on Alcoholic Beverages, Japan offered compensation for delayed implementation of the recommendations and the EC accepted the offer. In this case, compensation was granted by adhering to the 'most favored nation' principle. The compensation so offered and accepted in the case was not pecuniary in character, rather Japan agreed to reduce tariffs once the reasonable period of time set by the arbitrator expired (Marceau 2001: 8). Similar was the

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297 WT/DS8/20.
situation in the second case, *Turkey – Textiles*, where Turkey agreed to pay compensation to India in accordance with Article 22.1 and 22.2 of the DSU, pending compliance by Turkey with the recommendations and rulings of the DSI.298

The third and final in the series is the *US – Copyright* case decided in November 2001, was a turning point in nature of compensation as remedy under WTO law. For the first time in the practice of the GATT/WTO, the US and EC agreed on a monetary compensation, rather than trade compensation, as mutually agreed compensation. The facts of the case are: in July 2000, the WTO DSB adopted a Panel Report finding that Section 110(5)(b) of the US Copyright Act as inconsistent with the Berne Convention and Article 9.1 of the WTO Agreement on TRIPs.299 The DSB determined that the US had to amend its Copyright legislation in order to implement the findings of the Panel.300 In November 2001, the Arbitrator (Article 25) determined that the level of nullification or impairment of benefits to the EC amounted to €1,219,900 per year.301

As the US failed to implement the DSB ruling, the EC requested authorization from the DSB to suspend concessions or other obligations equal to the amount determined by the Arbitrators. However, in February 2002, the EC and the US jointly agreed to suspend the arbitration proceeding and reached a mutually satisfactory temporary arrangement, according to which the US was to make a lump-sum payment in the amount of $3,300,000 to a fund. The payment was made directly to a private fund established by the European Grouping of Societies of Authors and Composers (GESAC).302 The arrangement entered into by the EC and the US demonstrates that

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300 WT/DS160/12, Arbitration under Article 21.3(c) DSU, 15 January 2001. The time period was subsequently extended until 31 December 2001, WT/DSB/M/107, DSB Minutes of the meeting, 24 July 2001.
301 Article 25 Report, WTO Document WT/DS/160/ARB25/1 of 9 November 2001. The amount was calculated on the basis of the royalties that the EC right holders would have received from American Collective Management Organizations had the US not illegally exempted certain establishments from payment of royalties fees. The amount was, however, an estimate of the amount that these right holders would have received under the level of US enforcement of intellectual property rights at hand. It was, consequently, not an estimate of the amount that would have been collected in the event of full enforcement of these rights. Furthermore, the amount did not take into account either punitive compensation or, arguably, retroactive payments. See Grossman and Mavroidis (2003); Connor and Djordjevic (2005).
302 GESAC is a private entity created in 1990 in the form of an EEIG (European Economic Interest Grouping). GESAC groups 25 authors’ societies in the European Union, Norway and Switzerland.
‘mutually acceptable compensation’ in Article 22 of the DSU could include monetary compensation.\(^{303}\)

This case represents the first instance where monetary compensation was accepted as a WTO remedy. It may be noted that in the first two cases trade compensation was accepted by Japan/Turkey and was granted on a MFN basis, i.e., the tariff reduction as compensation was available to all WTO Membership. On the other hand, the monetary compensation in the Copyrights case was granted only to the EC, the complaining member and it was not granted on an MFN basis. In other words, while DSU require compensation if granted to be consistent with the WTO covered agreement, i.e., consistent with the MFN obligation, compensation in this case was only granted to the EC not to other WTO membership. While it might be perfectly consistent with the practice in international law, i.e., only the injured Member gets compensated, the WTO practice in this regard suggests an anomaly. This deviation from the GATT/WTO practice raises the question as to the validation of granting such compensation.

7.4 Problems with WTO Compensation

The current system of compensation in WTO suffers from significant flaws. Some of this limitation of compensation as a remedy under the WTO legal system is analysed below. Some of the foremost problems cited against ‘compensation’ as a remedy under the WTO DSU are its voluntary nature, non-monetary character and MFN application.

The first distinctive feature limiting the scope of the compensation in the WTO is that it is an option available to the injured Member only if there is non-compliance with the adverse DSB recommendations and ruling. Whereas, in general international law compensation is generally granted along with the primary remedy of ‘cessation’. As far as WTO is concerned compensation is an alternative remedy, a buy-out, for non-compliance with the primary remedy of cessation. In other words, court or tribunal have the power to grant both ‘cessation’ and ‘reparation’ as part of their decision, unless agreed otherwise by the parties. The DSU, on the other hand, restricts

\(^{303}\) Bronckers and van den Broek (2005) claim that the parties in the US – Copyright dispute did not pretend that they were negotiating ‘compensation’ in accordance with Article 22 of the DSU. However, regardless of the explicitly stated objective, the EC and the US did in fact agree on ‘mutually acceptable compensation’ to cover damage incurred from a WTO-illegal measure.
the power of the panel and Appellate Body to granting only primary remedies of
cessation, in this case ‘withdrawals of inconsistent measures’.

Closely connected to the above is the second feature of compensation that – it
is limited to have only prospective application. Thus, there is no compensation for loss
of profit or the illegal duties collected by the respondent member, thereby severely
limiting the scope of compensation. While compensation under general international
law is generally retrospective in nature, whereas the compensation under the WTO is a
prospective measure since it offers relief only for the harm that the complainant will
presumably suffer due to lack of implementation of the adopted recommendations by
the respondent (Mavroidis 2000: 762). This has made compensation unattractive as a
remedial option.

The third limitation of WTO compensation is voluntary. As per Article 22.2
“Member shall, if so requested…enter into negotiations with any party having invoked
the dispute settlement procedures, with a view to developing mutually acceptable
compensation”. While the article suggests compulsory negotiation to reach a mutually
agreeable compensation, its outcome is of voluntary nature. It is left to the discretion
of the respondent to offer compensation and for the complainant to accept it. Because
of its voluntary nature, compensation is only possible when the non-complying
country offers it and the parties to the dispute agree on its scope and implementation.
In reality, this rarely happens and as noted above, only happened in three cases. While
the objective of compensation in public international law is to compensate financially
assessable damage including loss of profit, the WTO compensation does not appear to
be so. On the other hand, in international law compensation provides for past damages
along with cessation of the illegality. During the Uruguay Round Negotiations,
developing countries like Korea and Nicaragua stressed the need for compulsory
compensation as an alternative remedy for suspension of concession. It has been
argued that compensation will enhance the developing countries confidence in the
international trading system, but by making it voluntary its usefulness is taken away
(Kufuor 1997: 139).

Fourthly, in GATT/WTO practice, compensation was usually not understood in
the international law sense of monetary (money) compensation. The DSU Article 22
does not define ‘compensation’; however, neither provides for nor prohibits monetary
compensation (South Centre 2005: 17). Compensation usually takes the form of trade
concessions i.e., an agreement by the defending government to lower its trade barriers in exchange for willingness by the complaining government to forgo raising its trade barriers (Reitz 1996: 590-91). It entails the respondent party to reducing tariffs on products of export interest to the complaining party or offering concessions in either service or intellectual property in equal value to the level of nullification and impairment of benefits (Kessie 2000: 6). This means that under the WTO system compensation may not benefit the sector or industry, which has suffered damage as a result of the implementation of WTO-consistent measures of the respondent party. This is because, compensation in the form of trade concessions are given to some other trade sector and not the sector or industry which was actually affected. Rather, the compensation benefits a sector or industry that has nothing to do with the particular dispute (Bronckers and Broek 2005: 110). The recent experience in the US – Copyrights case discussed above, however, demonstrates the WTO consistency of monetary compensation. Such monetary compensation could be used for compensating the injured industry.

Finally, another reason for the infrequent use of compensation as a remedy is that the nature of trade compensation would require it to be provided by the respondent on a MFN basis (Trachtman 2007: 134). This means that the compensation usually are trade concessions, once granted, is not only available to the member whose right and obligations are violated, but also to all other WTO Members. The negotiating history of the DSU confirms this practice. If compensation is offered as a temporary lowering of the respondent’s import barriers on some other products, the changes must be consistent with existing agreements, in particular, they must be offered on an MFN basis. In pure economic terms, the intention of compensation in this form is simply trade liberalization. That boosts economic welfare in the respondent country, in the complainant country, and even in third countries that export the products whose import barriers have been lowered. However, this type of compensation may not necessarily benefit the complaining Member itself. Thus, if a complaining member accepts compensation, it does not necessarily mean that it would increase its market share in

304 See also Pauwelyn (2000).
305 During the Uruguay Round negotiations, it was widely recognized that, in contrast to the right to suspend concessions, compensation, where applied, was to be offered on an MFN basis and was to be ‘aimed at the restoration of the proper balance between the rights and obligations of all Contracting Parties’. GATT (1988) and GATT (1989) in O’Connor and Djordjevic (2005).
the respondent country. It depends on the relative strength of its competitors (Bronckers and Broek 2005: 115).

However, a departure from the practice of WTO consistence of compensation was made in the US – Copyrights case. One systemic question that arose in the context of the case was whether monetary compensation granted in this specific disputes, must be consistent with the WTO agreements and, in particular, with the WTO’s MFN principle. In the EC – Poultry dispute, the WTO Appellate Body found that a new benefit or concession resulting from compensation granted in accordance with GATT Article XXVIII (modification of schedules) is subject to the non-discrimination rules of the GATT.306 Hudec (2000a: 391, fn. 39) argues that GATT/WTO rules should be interpreted to require that all permanent trade measures, such as settlements under Article XXVIII GATT, with some exceptions, be made on an MFN basis, while nonpermanent measures should be allowed to be discriminatory. Accordingly, since compensation in Article 22 of the DSU is to be offered on a temporary basis, it could be argued that such compensation may be granted in a discriminatory manner. Indeed, the text of DSU Article 22(2): ‘any party having invoked the dispute settlement procedures may request authorization from the DSU to suspend the application to the Member concerned of concessions or other obligations under the covered agreements’, indicates that this could be the case with regard to the right to temporarily suspend concessions. But this argument may lead to another problem. Any two members intending to have a concessional bilateral arrangement could ‘pretext’ a dispute settlement process and agree on compensation with the exclusion of other Members.

On the contrary, O’Connor and Djordjevic (2005) observe that the negotiating history, the relevant DSU provision itself and the Appellate Body’s interpretation of corresponding provisions in the GATT, suggests that compensation, whether or not offered in money, must be administered in accordance with non-discriminatory principles of the WTO. This has not happened in the US – Copyright case and by temporarily suspending the MFN obligation of the TRIPs Agreement, the EC–US

306 The Appellate Body stressed that nothing in Article XXVIII suggests that compensation negotiated may be exempt from compliance with the non-discrimination principle and that if ‘preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext of “compensatory adjustment” under Article XXVIII(2), it would create a serious loophole in the multilateral trading system’. EC – Poultry Products, Appellate Body Report, WTO Document WT/DS69/AB/R, of 13 July 1998, paras 100–02.
arrangement is altering the terms of the WTO agreements as between the parties to this arrangement.

Apart from these limitations, the DSU has failed to provide rules or procedures governing the issue of compensation. Though the DSU states that the compensation is of temporary nature, there is no clarity as to how long this temporary option could be perpetrated. This seems to provide the losing party (for those Member which can afford to do so) an option to defy full implementation of DSB recommendations, by deciding to compensate the complainant ad infinitum. This would de facto become ‘buy out’ option, available for ricer Members. For example, in the US – Copyright case, the compensation granted in the EC-US arrangement is stated to be a temporary measure that will lead to full compliance with the WTO Panel ruling at the time when the mutually satisfactory temporary arrangement expires on 20 December 2004 (O’Connor and Djordjevic 2005). However, for the time being, there are no legislative initiatives in the US Congress to bring the Copyright Act into compliance with the TRIPs Agreement. This raises the question as to what happens if the arrangement continues. When does it go beyond the requirement in DSU Article 22 that compensation be ‘temporary’ and allowable only for a reasonable period of time?

7.5 Proposals for Improving Compensation as a Remedy

As has been noted earlier, since its early days there has been several instances where the GATT/WTO membership, particularly the developing countries among them, have mooted the idea of a strong compensation as a remedy in international trade regime. However, the developed countries have not yet heeded to this demand. More concerted effort has been made currently in the Special Session of the DSB which is entrusted with the task of Review of the DSU and in the Special Sessions of the Committee on Trade and Development in the context of special and differential treatment for developing countries. Most of these proposals have revolved around two major demands – compulsory compensation and money compensation and the combination of both. We would consider these two and some other proposals here.307

7.5.1 Compulsory/mandatory compensation

The first proposal is for compulsory or mandatory compensation. Compensation in the classic WTO sense denotes that the non-complying country will

307 The discussion on proposals on compensation as an alternative to countermeasures is undertaken in Chapter V, p. 388.
offer additional trade concessions (e.g., a tariff reduction), normally in another product category, for as long as it fails to bring the WTO-illegal measure into compliance.\textsuperscript{308} The advantage of trade compensation, as opposed to retaliation, is that compensation does not restrict trade but actually opens up trade, albeit temporarily, for as long as the non-complying measure remains in place. Once it is made compulsory, it would achieve an overall benefit for the WTO members and would be fully consistent with the ultimate objective of trade liberalization. Thus, it would be advantageous if compensation is offered in a compulsory manner, before the option of suspension of concessions is used.\textsuperscript{309}

However, it was also viewed that compulsory compensation is not a viable option and should not be introduced in the WTO DSS. Fukunaga (2006), for example, underscores that it may not be possible for a Member to comply with an order of compensation, because if compensation is ordered in the form of tariff reductions in certain sectors, the domestic producers in these sectors who are likely to be affected would strongly oppose the tariff reductions. The Member might find it almost impossible to obtain an agreement on compensation from these producers (Fukunaga 2006: 412). Further, if the Member does not comply with the compensation order, the complaining party has no means to force the Member to pay the compensation. Ultimately, the effectiveness of compensation depends on voluntary payment by the Member concerned.

Fukunaga (2006: 413) notes that the current non-compulsory compensation should be made a feasible option by introducing arbitral procedures similar to those of Article 22.6 in order to determine the amount of nullification or impairment of benefits incurred by the complaining party. An award by arbitrators would provide guidance for the parties to arrive at an agreement on the appropriate level of compensation.

7.5.2 \textit{Financial/money compensation}

Compensation as a WTO remedy was generally understood not to refer to financial or money compensation. Along with the proposal for compulsory compensation, another proposal submitted by the developing countries to strengthen the system is the introduction of financial or money compensation in response to a}


breach of WTO law. This is not a novel idea: reparation by governments of injury for which they can be held responsible is part of the tradition of public international law.\textsuperscript{310} The developing countries have been arguing for compulsory money compensation right from the 1960’s.\textsuperscript{311} A group of developing countries have again mooted this argument for financial compensation as an alternative remedy and it is part of the many proposals submitted in connection with the DSU review.\textsuperscript{312} However, the recent arrangement between the US and the EU in \textit{US- Copyrights} case has resolved the question as to the permissibility of monetary compensation.

The advantage of money compensation is that it may not evoke deep resentment from the domestic producers of the Member concerned, while these producers are likely to object to any tariff reductions in their industry in compensation for violations in an unrelated industry (O’Connor and Djordjevic 2005). Thus, the government of the Member concerned may find it relatively easier to agree on ‘monetary’ compensation than on tariff reductions. In addition, the complaining party would enjoy more flexibility when availing of monetary compensation than when availing of compensation in the form of tariff reductions. Monetary compensation also seems to add ‘fairness’ to the WTO legal system, and is particularly preferable for the developing country complainants (Bronckers and Broek 2005: 120). Other compelling advantages of financial compensation are that it induces compliance; helps to redress the injury of the country and/or the private interests who actually suffer from the WTO-illegal measure; does not lead to a disproportionate burden on innocent bystanders; and is in line with general public international law (Bronckers and Broek 2005: 120).

Barfield (2001: 131) proposes that the WTO could impose monetary fine on the losing defendant (for distribution to the injured domestic industry) or require the defendant government to institute trade liberalization of value to the complaining country. She explains that “either method is feasible and would be superior to the use

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\item ILC Articles on States Responsibility (2001).
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of trade sanctions”. The monetary fine could either be paid to the WTO or to the complaining government. In principle, the payment of a fine could be enforced through a domestic court under longstanding treaties dealing with the collection of arbitral awards. However, it is doubtful that governments are willing to agree to such a process (Charnovitz 2001: 430).

However, if this proposal is accepted, then the developing countries may also be asked to pay monetary compensation, which would be an additional burden on them. Furthermore, if the compensation is monetary in nature, questions will rise as to whether it should be paid on a most-favored-nation basis or would it represent an exception to this principle. For any attempt to make financial compensation on an MFN basis would result in overload of complaints from all the members having ‘substantial trade interest’ to determine the level of compensation owed to them. This issue was however settled by the US – Copyright case where compensation paid by US to EC without extending the same to other members on a non-discriminatory basis.

7.5.3 Retrospective compensation

Another desirable improvement for strengthening the effectiveness of compensation may be the explicit adoption of retrospective compensation that wipes out past damage caused by the violation. It is understood that the purpose of compensation is to ‘wipe out all the consequences of the illegal act’ suffered by an injured State or its nationals. Although the current DSU is not clear about the permissibility of a retrospective remedy, an explicit acknowledgment of retrospective compensation facilitates an agreement on it (Goh and Ziegler 2003: 545).

8 Remedies for Non-violation and Situation Claims

DSU provisions allow WTO Members different types of legal actions that they may initiate to safeguard their rights. The legal actions predominately constitute violation complaints (claims of violation of WTO rules). However, the DSU also allows two other claims usually not allowed in other dispute settlement systems – claim against ‘non-violation’ and ‘situation’ nullification and impairment of benefits. Non-violation complaints are those complaints where the complaining party essentially aims at re-establishing a playing field which corresponds to its legitimate expectations. A Member could approach the DSB even when an agreement has not been violated.
The concept of non-violation and situation claim is a unique aspect of the WTO DSU. The ILC Articles on State Responsibility also do not apply in case of non-violation and situation complaints as it deals only with remedies where an internationally wrongful act is committed. The ILC draft Articles on Injurious Acts not Prohibited by International Law would not be of relevance as there is no overlap with non-violation complaints in the WTO (Mavroidis 2000: 766). Thus, the non-violation and situation complaints could be said to be WTO specific. The admissibility of “non-violation” and “situation complaints” has made the scope of the WTO DSS broader than that of other comparable international adjudicatory systems the jurisdiction of which are confined to violations of agreements. The underlying logic of this remedy is that “although a WTO Member is doing everything it explicitly promised, it may be doing something else that undermines the benefits of its promises” (Durling & Lester 1999: 212).

In the GATT 1994, Article XXIII:1(b) dealt with ‘non-violation’ complaints and Article XXIII:1(c) "situation" complaints. According to Article XXIII:1(b) of the GATT 1994 a WTO Member can raise claims against measures by another member, if these measures nullify or impair any “benefit” of the Agreement. In the current GATT/WTO there exists inherent ambiguity and no definite criteria before the Panel attempting to resolve a dispute under non-violation claim (Cho 1998: 1). Over a period of time, however, the GATT Panels have established certain discipline in coping with non-violation cases. Measures that do not violate any GATT obligation but allegedly nullify or impair the benefits of other Contracting Parties may be challenged by other Contracting Parties if: (a) there is a prior consolidated tariff commitment; (b) there is a subsequent governmental action which; (c) negatively affects the reasonable expectations created by the consolidated tariff commitment (Horn and Mavroidis 1999: 11). The measure in question cannot reasonably have been anticipated and must damage the competitive position of the imported product concerned. Finally, the burden of proof is on the complaining party who brings a non-violation case to

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313 Payments and Subsidies Paid to Processors and Producers of Oilseeds Related Animal-Feed Proteins, January 25 1990, GATT BISD 37B Supp. (1991) at 86. In spite of the efforts by most GATT panels to establish discipline in coping with non-violation cases, there are non-violation cases that do not meet the above-mentioned criteria.

314 EEC--Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, L/5778, C/W/476.
submit a 'detailed justification' supporting its case.\textsuperscript{315} The Kodak/Fuji case\textsuperscript{316} added one more condition in this field: non-violation complaints can only involve measures that have a continuing effect, and not measures the effects of which have ceased to exist.

The panel in the Kodak/Fuji case further illustrated the stringent requirements for a non-violation complaint. The Panel stated that:

"...both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement....The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules".\textsuperscript{317}

During the Uruguay Round of negotiations, there was an attempt to specify the possible scope of application on non-violation complaints. Initially, negotiators considered clarifying the requirements for invoking a non-violation complaint in the DSU, including an explanation of reasonable expectation. Finally, the non-violation clause, which was originally in the GATT 1947, has now been directly applied in GATT 1994 and other new sectors, such as trade in services and intellectual property. However, for the time being, Members have agreed not to use them under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Under Article 64.2 of TRIPS this "moratorium" (i.e. the agreement not to use TRIPS non-violation

\textsuperscript{315} See Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement, 5, which is an Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT BISD 26\textsuperscript{th} Supp. (1979) at 210. This practice is also reflected in the current WTO system. "Justification" must also be tangible and concrete, going beyond a mere description of the measure at issue. See Japan--Trade in Semi-Conductors, May 4 1988, GATT BISD 35th Supp. (1989) at 116. The Fuji-Kodak panel also ruled that the United States bore the burden of proving a "detailed justification" for its non-violation claim. See Fuji-Kodak, Panel Report, para. 10.32.


8.1 Remedies for Non-violation Claims

The remedy for non-violation claims conceived under the Charter of the proposed International Trade Organization (ITO) was much more effective than found in the existing provisions in the GATT/WTO. The ITO Charter first attempts to promote a "mutually satisfactory" solution to the dispute. If this attempt fails, the ITO could investigate the dispute on its own and make recommendations (Durling & Lester 1999: 252). Article 30 of the Charter states:

"Either Member shall be free to refer the matter to the Organization, which shall investigate the matter and make appropriate recommendations to the members concerned. The Organization, if it considers the case serious enough to justify such action, may determine that the complaining Member is entitled to suspend the application to the other Member of specified obligations or concessions under this Chapter." 320

The GATT however diluted considerably the remedies in non-violation claims, which found its way into the DSU. During the Uruguay Round of negotiations, many countries were skeptical of the existence of non-violation claims and wanted to further limit its use. Nevertheless, the GATT provision on non-violation remained substantially unchanged when incorporated into the DSU. Article 26 of the DSU deals with non-violation complaints of the type described in Paragraph 1(b) of Article XXIII of GATT 1994. It states that

"a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement." 321

318 In May 2003, the TRIPS Council chairperson listed four possibilities for a recommendation: (1) banning non-violation complaints in TRIPS completely, (2) allowing the complaints to be handled under the WTO’s dispute settlement rules as applies to goods and services cases, (3) allowing non-violation complaints but subject to special “modalities” (i.e. ways of dealing with them), and (4) extending the moratorium. In response, most members favoured banning non-violation complaints completely (option 1), or extending the moratorium (option 4). See TRIPS: 'Non-Violation' Complaints (Article 64.2): Background and the current situation http://www.wto.org/english/tratop_e/trips_e/nonviolation_background_e.htm

319 See Art. 64.2, TRIPS Agreement. The 1 August 2004 General Council Decision (July 2004 package) extended the moratorium to the Hong Kong Ministerial Conference.

320 Article 30, ITO Charter.

321 Article 26 (1), DSU (Emphasis added).
Unlike under the DSU provision on violation claims, the situation is completely different for non-violation claims in the context of available remedies. In case where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives of a covered agreement, but does not conflict with the provisions of a covered Agreement, there is no obligation to withdraw the measure. In other words, the panel could not recommend ‘withdrawal of inconsistent measures’ as provided in the Article 19 (1) of the DSU. In such cases, the Panel could only recommend that the Member concerned make a ‘mutually satisfactory adjustment’ (Mavroidis 2000: 790).

In their attempt to find a ‘mutually satisfactory adjustment’, the parties could avail the arbitration procedure under Article 21(3) of the DSU. The provision states that “the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment”. However, such suggestions shall not be binding upon the parties to the dispute. The provision adds that “compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute. In other words, in the context of non-violation complaints, compensation would not be temporary remedy, but could be part of a final settlement. Finally, the remedy of countermeasures or suspension of concession is not available for non-violation claims.

There is only one instance of a non-violation complaint in WTO. In Fuji-Kodak, Japan argued that the single-brand distribution system has been followed by its film industry since 1960’s and it continued to exist even when the tariff concessions were negotiated in Uruguay Round. Given this very public process and the fact that single-brand distribution is the norm in virtually every film market worldwide, the United States simply could not have anticipated anything other than single-brand distribution in Japan. The Panel accepted this argument and ruled that since the Japanese measures technically existed before the United States negotiated tariff reductions on film and photographic papers, the United States would not have anticipated more market access as a result of the tariff concessions. It has been argued that this decision has broadened the scope of non-violation claims, by adopting a broad

322 Article 26.1(b), DSU.
323 Article 26.1(c), DSU.
324 Fujifilm, Comments by Fuji Photo Film concerning Government of Japan WTO Submission in the Film Case, URL: http://www.fujifilm.co.jp/eng/special/sp030.html.
definition of ‘measures, an expanded definition of ‘reasonable expectation’ and a loose standard of causation’. In addition, it tend to question the heightened evidentiary standard under the non-violation claims (Durling & Lester 1999: 213).

Thus one can conclude that when compared to violation complaint, identifying, pursuing and justifying a non-violation complaint is very difficult. Even when this option is utilized, it seems as if the “possibility of pursuing non-violation complaints is mainly open to countries with significant legal human capital” (Horn and Mavroidis 1999: 15), which means only developed countries.

8.2 Situation Complaints

DSU Article 26 (2) deals with ‘situation’ complaints. It provides that “a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreements is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. As this provision illustrates, ‘situation complaints’ are quite different in terms of remedies and the DSU apply only up to the point of the circulation of the panel report. In other words, the DSU procedures on the reasonable period of time to comply with the recommendations and rulings; on the compliance review in Article 21.5, provision for compensation and on the arbitration on the level of suspension of concessions do not automatically apply. Further, as regards adoption and surveillance and implementation of recommendations and rulings in situation complaints, the GATT dispute settlement rules and procedures contained in the

325 BISD 36S/61-67.
326 Article 26.2 DSU (emphasis added).
Decision of 12 April 1989 continue to apply. This means that the reverse consensus (negative consensus) rule does not apply to the adoption of the panel report. In other words, any Member, including the "losing" party, can block the adoption of these decisions in the DSB by opposing a consensus. Article 26.2 of the DSU also implicitly excludes the possibility of an appeal against a panel report based on a situation complaint.328

There are very few traces of 'situation' complaints in the GATT panel history (Petersmann 1991: 192), and no GATT panel decisions recognizing non-violation claims based on Article XXIII:1(c) (Cho 1998: 1). This is the case in the WTO also. Thus, it is difficult to understand what could come under this category, taking into account that in the WTO injured parties can attack both illegal as well as legal acts, to the extent that the latter cause damage.329

9 Preliminary Conclusions

From the above analysis, it is evident that the WTO DSU has made considerable improvements and revolutionized the international adjudicatory process, particularly by removing various constrains in public international law adjudication. Indeed, the DSU could be considered as the greatest achievement of the Uruguay Round text – "an achievement that may be the core 'linchpin' of the whole trading system and the effective implementation of the Uruguay Round text – is the development of the new dispute settlement understanding" (Jackson 1997: 124). Within this short period, the DSU was able attracted and settled large volume of cases brought in by both developed and developing countries, resulting in most scholars' conclusion that the DSU has performed better than expected.

The WTO DSU has made crucial advancements not only in comparison with the GATT dispute settlement, but also when compared with other dispute settlement systems in most international regimes. The DSU's greatest achievement has been its ability to provide a time-bound and highly detailed procedure for settlement of disputes. The addition of a standing appellate body to review all issues of law decided by the panels, found in very few other international dispute settlement regimes, considerably enhances its legitimacy. Even fewer regimes establish a mechanism for

328 Ibid.
329 Only once the EC threatened to submit such a case (the so-called "Japanese way of life" case), but the threat never materialized. See Horn and Mavroidis (1999: 11).
monitoring compliance with the decisions of panels and rules of implementation and enforcement. However, perhaps the greatest achievement of all has been firstly, the DSB's compulsory jurisdiction and secondly, the automaticity of WTO dispute settlement process achieved through negative consensus. The first improvement guaranteed all WTO members full access to the WTO system (without the 'consent' of the responding Member) and the second guaranteed the continuation of the dispute settlement process without any 'blockage' or delay till the implementation of the DSB recommendations and rulings. This has made important consequence on the performance and the success of the WTO DSS.

However, the above analysis also reveals the highly restrictive nature of remedies and problems in implementation of adverse DSB recommendations and rulings. In other words, while considerable advancement were made by the DSU in the adjudication stages, when it came to remedies, it largely carried over the GATT 1947 practice, creating an anomaly in the implementation stage of the rulings. The primary concern is regarding the consequence for violation of WTO obligations. It seems that a member's responsibility for violation of WTO obligation is more limited under the DSU than under general international law. Under general international law, as enumerated in the ILC Articles on State Responsibility, if a State is in breach of an international obligation the consequence is not only to 'cease' the wrongful act, but also to restore the situation that existed before the violation and to compensate for any past injury caused by such violation.

Whereas, the WTO DSU provides only for the first level remedy of 'cessation'. Article 19.1 DSU provides that if a measure is found to be in violation of a WTO obligation, the panel/Appellate Body could only 'recommend' prospective compliance with their decisions. No compensation or penalty is provided for violations or damages caused before or during the adjudication of the dispute. Compensation is offered under the DSU for non-compliance with the report, as a 'buy out', not as reparation. Even after adjudication, the violating members are given the flexibility of reasonable period of time for implementation and a compliance review procedure, which further delays the implementation of remedy. This presents a serious limitation in the sense that if the remedy offered by a dispute settlement system is not worth the process, states would refrain from undertaking the process even when there is a clear violation, as the cost of the litigation process far outweigh the benefit of adjudging the illegality of the
measures. If the violating measure is not challenged, either because of the inability of the Member or the fruitlessness of the dispute settlement process, that would perpetrate a status quo situation where a WTO inconsistent measure is maintained and there being no cost effective remedy.

Another major drawback is that the remedy provided under the DSU does not seem to nullify the gains of violation. In other words, the violating Member seems to gain from the illegality it perpetrated. This goes against the basic tenets of law. The ability to retain ill-gotten money or benefiting from illegality from measures declared inconsistent by the DSB could have the effect of inducing member states to resort to trade protectionist measures, which not only provide them with monetary incentive, but at the same time destroys the export market of the complaining Member.

Apart from these substantive problems with remedies, practice has revealed many procedural problems because of lack of clarity or lack of rules in the DSU which has the effect of making remedies ineffective. Though the DSU preference prompt compliance with the DSB rulings, the Member concerned is entitled to a 'reasonable period of time' to bring itself into a state of conformity with its WTO obligations. While there is a trend towards making this period the 'shortest time possible' which is usually 6 months (3 months in case of subsidy cases) unless shown that the there is a particular circumstance for longer period, the fact remains that some losing members continue to use its reasonable period merely as a tool for buying several months of additional time to evade implementation and nothing in the DSU prevents this. In other words, there is nothing in the current text of the DSU which require the implementing Member to take concrete action for implementation and make them accountable at the DSB in case of inaction. The provision for surveillance that begins only after 6 months is of not much utility.

Another delaying tactics well employed by the Members for implementation of the adverse rulings is the frequent recourse to compliance review procedure. Connected to this procedure is the problem of sequencing which permit two permissible interpretations equally problematic – one interpretation would lead the WTO remedy circular and the second would permit unilateral determination of violation. Though, after EC - Banana case there where informal understanding through ad hoc engagements or bilateral agreements between disputing members to overcome this problem by accepting the compliance review as the first step, no concrete effort
has been made to resolve this problem even after 13 years. As there is no legal basis for these bilateral arrangements, Member could any time create problems for the smooth functioning of the system.

Thus it could very well be concluded that the material aspect of remedies in the WTO is highly restricted vis-à-vis both the GATT 1947 and the public international law. Added to this the procedural problems in the implementation stages of the DSB recommendations and ruling have made the remedies under WTO DSS unpredictable, costly, and ineffective.

If the WTO DSU remedies have so many problems, why has this problems not affected the success of the WTO DSS. In the last decade, the WTO DSS has the record of more than hundred cases of successful implementation which in itself should be a parameter for its success. How did the WTO DSU, with a problematic and restricted remedy achieve this unprecedented success? A good explanation could be found in the WTO procedure itself. When WTO Members agreed through the ‘single undertaking’ of the WTO Agreement that in case of any dispute with another Member over a matter under the covered agreements, such dispute shall be settled through recourse to the dispute settlement procedure established under the DSU, they accepted something unparalleled and unprecedented in international law adjudication. The WTO Members surmount one of the well established principle of international law that no state can, without its consent, be compelled to submit its dispute, i.e., by providing compulsory jurisdiction to the DSB, the WTO members removed one of international law fundamental flaws. Thus, any WTO Member, irrespective of its economic or political strength, could initiate the WTO DS process, without awaiting consent of the opposing party.

The second fundamental change relates to the liberal aspect of legal standing in WTO DSS. The DSU through practice has established a presumption of legal and economic interest in bringing proceedings which is an important and innovative feature of this system. In other words, each Member State can enforce WTO law whether or not it has a direct or personal interest. Finally and most important is the change brought about by automaticity guaranteed by negative consensus *inter alia* in the establishment of the Panel, adoption of the report, authorizing countermeasures. This automatic adoption by the DSB of the panel/Appellate Body report guarantee a certain and final outcome of the dispute which is legally binding on the Member.
Thus, by providing for a time bound and automatic process, a dispute once initiated would culminate in a legally binding decision automatically adopted by the DSB.

The DSU procedure with a compulsory jurisdiction, with liberal legal standing to file a dispute, with an automatic procedure ending in a legally binding decision would have considerable impact on the quantity and quality of the outcome of the dispute settlement. Quantitatively, the DSU by permitting almost any Member (made possible by compulsory jurisdiction and wider legal standing), big or small to initiate the dispute settlement process has opened the gates to challenge all violations against the WTO Agreements. This has naturally increased the number of complaints that have been brought before the DSB. A notice for consultation was given in more than 390 cases. Qualitatively, the procedure guarantees two levels of review of the inconsistency of the measure, at the panel and the Appellate Body stage. An additional level of review of the measure is provided in DSU Article 21.5. In other words, the Members are given two chances to defend their case, which adds to the legitimacy of the entire process and the final decision. Once adopted by the DSB, these reports generate considerable amount of pressure on the delinquent state to comply, and most states, most often, comply with this report. Additional incentives to comply with the report include reputation cost of non-compliance, loss of future benefits and negotiated concession etc. For developing countries there is also the fear of countermeasures. Only when the benefit of maintaining the illegal measures is very high will a member consider non-compliance.