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DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.4 Implementation and Enforcement

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NOTE

The **Course on Dispute Settlement in International Trade, Investment and Intellectual Property** consists of forty modules.

This Module has been prepared by Mr. Edwini Kessie at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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WHAT YOU WILL LEARN

One of the distinguishing features of the WTO dispute settlement mechanism when compared with other dispute settlement mechanisms administered by other international organizations is the relatively high rate of compliance by WTO Members with the recommendations and rulings of panels and the Appellate Body as adopted by the Dispute Settlement Body. This relatively high rate of compliance has increased confidence in the dispute settlement mechanism and encouraged its use by a significant number of WTO Members including developing countries.

This Module provides a detailed overview of the implementation process under the Dispute Settlement Understanding from the moment the DSB adopts a panel report and/or an Appellate Body report until the time the responding Member brings its measures into conformity with WTO law.

The first Section of this Module recalls that it is a fundamental obligation of WTO Members to implement promptly the recommendations and rulings of the DSB. However, where it is not possible for the concerned Member to implement promptly the recommendations and rulings of the DSB, it may be entitled to a reasonable period to do so. The first Section contains a detailed discussion of the procedure to be followed to determine the reasonable period of time for implementation and the factors taken into account in this determination.

The second Section of the Module deals with the procedure provided in Article 21.5 of the DSU to resolve disagreements on the existence or WTO consistency of measures taken to implement the recommendations and rulings of the DSB.

The third Section of the Module explains the circumstances under which the complaining Member could have recourse to the alternative remedies of compensation and suspension of concessions or other obligations towards the responding Member. It stresses that both compensation and suspension of concessions are temporary measures to promote full compliance. The third Section describes in detail the principles and procedures which have to be followed by a Member which wants to avail itself of the right to suspend concessions to the responding Member and reviews the emerging case law on this remedy.

1. THE IMPLEMENTATION OF RECOMMENDATIONS AND RULINGS

Objectives

On completion of this Section, the reader will be able:

- **to appreciate that prompt compliance with recommendations and rulings of the Dispute Settlement Body is required, but where it is impracticable to comply immediately, the Member concerned shall have a reasonable period in which to do so.**
- **to explain how the decision on this reasonable period of time for implementation is taken and which factors determine the length of that period for implementation.**

1.1 Prompt Compliance

Article 3.7 DSU

The credibility of the dispute settlement mechanism of the WTO depends to a large extent on the prompt implementation of the recommendations and rulings of the Dispute Settlement Body ("DSB"). In other words, for the proper functioning of the dispute settlement mechanism, it is necessary for Members whose measures have been found to be inconsistent with their obligations under the covered WTO Agreement to bring them into conformity. Article 3.7 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the DSU") provides that in the absence of a mutually satisfactory solution to a dispute, the preferred 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.*

Article 21.1 DSU

Article 21.1 of the DSU provides that:

> *...[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.*

The DSU makes it clear that the alternative remedy of compensation is temporary and should be resorted to only when it is not possible to withdraw the inconsistent measures.[1] It further provides that suspension of concessions or other obligations should be resorted to at the last instance.[2]

Article 21.3 DSU

To ensure prompt compliance with the recommendations and rulings of the DSB, the DSU provides that within thirty days after the adoption of the panel

[1] *Article 3.7 of the DSU.*
[2] Ibid.

and/or Appellate Body report by the DSB, the responding Member shall disclose at a meeting of the DSB how it intends to implement the recommendations and rulings of the DSB.[3] It is at this meeting of the DSB that the Member concerned may outline the difficulties it may have in promptly implementing the recommendations and rulings and indicate that it may need a reasonable period of time to fulfil its obligations. Contemplating such situations, the DSU provides that where it is impracticable for the Member concerned to comply immediately, it shall have a reasonable period to do so. Article 21.3 of the DSU provides:

> *At a DSB meeting held within 30 days[4] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period in which to do so.*

The scope of Article 21.3 of the DSU has been examined in a number of arbitration awards. Generally, the arbitrators have indicated that it is only in compelling cases that the Member concerned shall be excused from implementing promptly the recommendations and rulings of the DSB. In other words, Members do not have discretion to decide when they want to comply promptly with the recommendations and rulings of the DSB. In *Australia – Salmon*, the Arbitrator stated that the primary objective of the DSU is the immediate withdrawal of the measure which has been found to be inconsistent with a covered agreement. The Arbitrator held:

> *Taken together, these provisions clearly define the rights and obligations of the Member concerned with respect to the implementation of the recommendations and rulings of the DSB. In the absence of a mutually agreed solution, the first objective is usually the* immediate withdrawal *of the measure judged to be inconsistent with any of the covered agreements. Only if it is impracticable to do so, is the Member concerned entitled to a reasonable period of time for implementation.*[5]

Similarly in *Canada – Pharmaceutical Patents*, the Arbitrator underlined that the fact that it is not always so that a responding Member would be given a reasonable period of time to implement the recommendations and rulings of

[3] *It should be noted that Article 4.12 of the Agreement on Subsidies and Countervailing Measures provides that "…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". It is the view of some Members that in cases involving prohibited export subsidies, the responding Member has to inform the DSB within 15 days about how it intends to bring its measures into conformity with the recommendations and rulings of the DSB and the covered agreements. This view is not shared by some Members who argue that Article 4.12 is only applicable to the procedures before the implementation phase.*

[4] *If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.*

[5] *Award of the Arbitrator,* Australia – Measures Affecting Importation of Salmon ("Australia –Salmon"), *WT/DS18/9, para. 30.*

the DSB. Entitlement to a reasonable period of time would depend on the circumstances of each case. It was not an automatic right which could be invoked at will by responding Members. The Arbitrator in *Canada - Pharmaceutical Patents* stated:

> *Further, and significantly, a "reasonable period of time" is not available unconditionally. Article 21.3 makes it clear that a reasonable period of time is available for implementation only "[i]f it is impracticable to comply immediately with the recommendations and rulings" of the DSB. Implicit in the wording of Article 21.3 seems to me to be the assumption that, ordinarily, Members will comply with recommendations and rulings of the DSB "immediately". The "reasonable period of time" to which Article 21.3 refers is, thus, a period of time in what is implicitly not the ordinary circumstance, but a circumstance in which "it is impracticable to comply immediately ... "*[6]

1.2 Reasonable Period of Time for Implementation

Should the responding Member be able to establish that it cannot promptly implement the recommendations and rulings of the DSB, it may be entitled to a "reasonable period of time" to do so. To prevent inordinate delays, Article 21.3 of the DSU defines a "reasonable period of time" as follows:

> ***The reasonable period of time shall be:***
>
> *(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or in the absence of such approval,*
>
> *(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or in the absence of such agreement,*
>
> *(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.*[7] *In such arbitration, a guideline for the arbitrator*[8] *should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.*

1.2.1 Approved by the DSB

Article 21.3(a) DSU

No Member has yet had recourse to the first option. This is probably because it is necessary to obtain the consent of the prevailing Member given the fact that the DSB decides by consensus.[9] If the consent of the prevailing Member

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[6] *Award of the Arbitrator,* Canada – Patent Protection of Pharmaceutical Products *("*Canada – Pharmaceutical Patents*"), WT/DS114/13, para. 45.*

[7] *If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.*

[8] *The expression "arbitrator" shall be interpreted as referring either to an individual or a group.*

[9] *Article 2.4 of the DSU. Footnote 1 of the DSU provides that "[t]he DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision."*

is not obtained beforehand, it is likely that it would not join the consensus to approve the reasonable period of time requested by the responding Member, unless the time-period requested is indeed very "reasonable". In a few cases, however, the responding Member's proposal for an *extension* of the reasonable period of time decided through arbitration was accepted by the DSB.[10] It needs to be qualified, however, that in all these cases, the responding Member had outlined very persuasive reasons why it was impracticable for it to bring its measures into conformity with the covered agreements within the original time-frame envisaged, and had also indicated in its request that it had obtained the tacit approval of the prevailing Members.

1.2.2 Mutual Agreement Between the Parties

Article 21.3(b) DSU

The second option, which has been resorted to more frequently than the other options, is likely to be pursued by parties in relatively straightforward cases where compliance may be effected without necessarily going through a complicated legislative procedure. An agreement between the parties has to be reached within 45 days from the date of the adoption of the panel and /or Appellate Body report, although they can choose to extend the time and continue with their efforts to reach agreement. Where the parties fail to reach agreement, they can have recourse to the third option.

1.2.3 Arbitration

Article 21.3(c) DSU

The third option i.e., recourse to arbitration, has usually been resorted to in cases, where there are sharp differences between the parties on what steps are needed to be taken by the responding Member to comply with the recommendations and rulings of the DSB. The parties are usually likely to have recourse to arbitration when they fail to reach a mutual agreement under Article 21.3(b) of the DSU. As a general rule, the arbitrator should determine the reasonable period of time for the implementation of the recommendations and rulings of the DSB within 90 days from the date of adoption of the panel and/or Appellate Body by the DSB. Where the parties are in agreement, they can extend the deadline or request the arbitrator to suspend his/her work so as to afford them the opportunity to reach a mutually satisfactory agreement on a date for the implementation of the recommendations and rulings of the DSB.[11]

1.2.4 Appointment of an Arbitrator

Apart from indicating that an arbitrator can be an individual or a group of individuals, the DSU does not indicate who can serve as an arbitrator for the purposes of determining the reasonable period of time under Article 21.3(c). Since the DSU entered into force in 1995, the arbitrator has always been a

[10] *See, e.g.,* United States - Tax Treatment for "Foreign Sales Corporations*" ("*US – FSC*"), WT/DS108/11, dated 2 October 2000;* United States – Section 110(5) of the US Copyright Act *("*US – Section 110(5) Copyright Act*"), WT/DS160/14, dated 18 July 2001; and* United States – Anti-Dumping Act of 1916 *("*US – 1916 Act*"), WT/DS136/13, dated 18 July 2001.*

[11] *See, e.g.*, United States – Definitive Safeguard Measures on Imports of Circular Welded Quality Line Pipe from Korea *("*US – Line Pipe*"), WT/DS202/17.*

member of the Appellate Body. If the parties to the dispute cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General of the WTO within ten days after consulting with the parties.[12]

1.2.5 Mandate of the Arbitrator

The issue has arisen as to the scope of the mandate of the arbitrator under Article 21.3 (c) of the DSU. Basically, the issue has revolved around whether it is within the mandate of the arbitrator to suggest ways and means through which the responding Member could bring its measures into conformity with the covered agreement. A number of arbitrators have indicated that they do not regard this issue as falling within their mandate, and that the only issue for them to determine is what will be the reasonable period of time for the Member concerned to bring its measures into conformity with a covered agreement taking into account all the relevant facts and the surrounding circumstances. *In EC – Hormones*, the Arbitrator made it clear that it was not the duty of arbitrators to suggest ways and means through which the responding Member could bring its measures into conformity with WTO law. Their task under Article 21.3(c) of the DSU was to determine what would be a reasonable period of time for the responding Member to bring its measures into conformity with WTO law taking into account the relevant facts and the surrounding circumstances. The Arbitrator stated:

> *It is not within my mandate under Article 21.3(c) of the DSU, to suggest ways or means to the European Communities to implement the recommendations and rulings of the Appellate Body Report and Panel Reports. My task is to determine the reasonable period of time within which implementation must be completed. Article 3.7 of the DSU provides, in relevant part, that "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". Although withdrawal of an inconsistent measure is the* preferred *means of complying with the recommendations and rulings of the DSB in a violation case, it is not necessarily the only means of implementation consistent with the covered agreements. An implementing Member, therefore, has a measure of discretion in choosing the* means *of implementation, as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements.*[13]

Similarly in *US – Hot Rolled Steel*, the Arbitrator stated that while the complexity of a proposed legislation may be relevant in the determination of the reasonable period of time to be granted to the responding Member, it was not the duty of the arbitrator to make a determination as to the proper scope and content of the proposed implementing legislation. The Arbitrator in this case held:

[12] *Footnote 12 of the DSU.*
[13] *Award of the Arbitrator,* EC - Measures Concerning Meat and Meat Products("EC – Hormones"), *WT/DS26/15, para. 38.*

> *I do not believe that an arbitrator acting under Article 21.3(c) of the DSU is vested with jurisdiction to make any determination of the proper scope and content of implementing legislation, and hence do not propose to deal with it. The degree of complexity bears upon the length of time that 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 Member to determine.* [14]

The possible reason why arbitrators have steadfastly refused to be drawn into making determinations about the adequacy of measures to be implemented by the responding Member to bring its measures into conformity is because of the procedure under Article 21.5 of the DSU, under which the adequacy of measures could be challenged.[15] As was pointed out by the Arbitrator in *Canada – Pharmaceutical Patents*, Article 21.5 of the DSU would become superfluous if arbitrators were to make determinations regarding the consistency of the proposed implementing measures with the covered agreements. The Arbitrator held:

> *As an arbitrator under Article 21.3(c), certainly my responsibility includes examining closely the relevance and duration of each of the necessary steps leading to implementation to determine when a "reasonable period of time" for implementation will end. My responsibility does not, however, include in any respect a determination of the consistency of the proposed implementing measure with the recommendations and rulings of the DSB. The proper concern of an arbitrator under Article 21.3(c) is with when, not what. What a Member must do to comply with the recommendations and rulings of the DSB in any particular case is addressed elsewhere in the DSU…If there is any question about whether what a Member chooses as a means of implementation is sufficient to comply with the recommendations and rulings of the DSB, as opposed to when that Member proposes to do it, then Article 21.5 applies, not Article 21.3. (italics in original)*[16]

In non-violation complaints, however, Article 26.1(c) provides that an arbitrator under Article 21.3(c) may:

> *[u]pon the request of either party, …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. …*

There is the further provision that "such suggestions shall not be binding upon the parties to the dispute".[17]

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[14] *Award of the Arbitrator,* United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan *("*US – Hot-Rolled Steel*"), WT/DS184/13, para. 30.*
[15] *See below, Section 2.2.*
[16] *Award of the Arbitrator,* Canada – Pharmaceutical Patents*, paras 41 and 42.*
[17] *Article 26.1(c) of the DSU.*

While arbitrators have not considered it their duty to suggest ways and means through which the responding Member could bring its measures into conformity with a covered agreement, the Arbitrator in *Argentina – Hides and Leather* indicated in general terms the sort of measures that a responding Member may need to take to bring the non-conforming measure into conformity with WTO law:

> *[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.*[18]

1.2.6 Burden of Proof

In *Canada – Pharmaceutical Patents*, the Arbitrator pointed out that the fundamental obligation of Members under the DSU was immediate compliance with the recommendations and rulings of the DSB, and that a Member wishing to have a reasonable period of time to do so must provide reasons. The Arbitrator stated:

> *...[A]s immediate compliance is clearly the preferred option under Article 21.3, it is, in my view, 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". And the longer the proposed period of implementation, the greater this burden will be.*[19]

Earlier, the Arbitration in *EC – Hormones* had ruled:

> *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.*[20]

[18] *Award of the Arbitrator,* Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather *("*Argentina – Hides and Leather*"), WT/DS155/10, paras. 40 and 41.*
[19] *Award of the Arbitrator,* Canada – Pharmaceutical Patents*, para. 47.*
[20] *Award of the Arbitrator,* EC – Hormones, *para. 27.*

In *Canada – Pharmaceutical Patents*, the Arbitrator rejected the argument of Canada, the responding Member in that case, that since it had undertaken to achieve compliance in significantly less time than is contemplated by the Article 21.3(c) guideline, the onus was "clearly" on the European Communities, as complaining Member , to establish that there were "particular circumstances" to justify an even shorter period".

1.3 Factors Determining the Reasonable Period of Time

1.3.1 Shortest Period Possible Within a Member's Legal System

It is well established under the jurisprudence that the responding Member would only be entitled to the shortest period possible within its legal system to implement the recommendations and rulings of the DSB. In other words, in deciding the reasonable period of time to be given to a Member to comply with the recommendations and rulings of the DSB, account will be taken of the legislative and administrative procedures which have to be fulfilled to bring the measures into conformity with the covered agreements. Thus, where a lengthy procedure has to be followed to amend the measure which has been found to be in conflict with WTO rules, the responding Member would be entitled to an extended period of time. On the other hand, if the recommendations and rulings of the DSB can be implemented within a specific time-frame consistently with the Member's domestic laws and regulations, then that fact would be taken into account in deciding on the reasonable period of time. In *EC – Hormones*, the Arbitrator in refusing the request by the European Communities that it be given 39 months to implement the recommendations and rulings of the DSB stated that a Member would only be entitled to the shortest period possible within its legal system. The Arbitrator ruled:

> *Article 21.3(c) also should be interpreted in its context and in light of the object and purpose of the DSU. Relevant considerations in this respect include other provisions of the DSU, including, in particular, Articles 21.1 and 3.3. ... Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. In the usual case, this should not be greater than 15 months, but could also be less.*[21]

While a Member is obliged to implement the recommendations and rulings of the DSB within the shortest possible time permissible under its legal system, it is not required to resort to extraordinary legislative procedures to bring its measures into conformity with the WTO law. Put in another way, the responding Member has to follow the normal procedures for amending its legislation to bring it into conformity with a covered agreement. In *Korea –*

[21] *Award of the Arbitrator,* EC - Hormones*, para. 26.*

Alcoholic Beverages, the United States and the European Communities argued that Korea could bring its measures into conformity within a shorter period of time, if it submitted the tax bill to an extraordinary session of the National Assembly. In rejecting this argument of the United States and the European Communities, the Arbitrator noted that it was not necessary for Korea to resort to an extraordinary legislative procedure to bring its measures into conformity with WTO law. The Arbitrator stated:

> *Although the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB, this does not require a Member, in my view, to utilize an extraordinary legislative procedure, rather than the normal legislative procedure, in every case. Taking into account all of the circumstances of the present case, I believe that it is reasonable to allow Korea to follow its normal legislative procedure for the consideration and adoption of a tax bill with budgetary implications.*[22]

1.3.2 Legal versus Other Factors

In deciding on whether there are particular circumstances justifying a period shorter or longer than the guideline of 15 months within the meaning of Article 21.3(c) of the DSU, a number of arbitrators have indicated that only relevant legal considerations would be taken into account. In other words, extraneous matters such as the likely impact of the proposed new legislation on an industry or political considerations will be ignored. In *Canada – Pharmaceutical Patents*, Canada argued that it would need 11 months to bring its measures into conformity with WTO law. It justified its request *inter alia* on the basis it would have to revoke the "Manufacturing and Storage of Patented Medicines Regulations", which was "a very sensitive political matter in Canada" and required extensive consultations with stakeholders, interest groups and the general public. In rejecting Canada's request and fixing the reasonable period of time at six months from the date of adoption of the Panel Report by the DSB, the Arbitrator underlined that only relevant legal considerations would be taken into account in deciding the length of the reasonable period of time. The Arbitrator in *Canada – Pharmaceutical Patents* found:

> *There may well be other "particular circumstances" that may be relevant to a particular case. However, in my view, the "particular circumstances" 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* →

[22] *Award of the Arbitrator,* Korea – Taxes on Alcoholic Beverages("Korea – Alcoholic Beverages"), *WT/DS75/16, para. 42.*

> *"reasonable period of time" must be a legal judgement based on an examination of relevant legal requirements*
> *...*
> *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. All WTO disputes are "contentious" domestically at least to some extent; if they were not, there would be no need for recourse by WTO Members to dispute settlement.*[23]

Similarly, in the *US – 1916 Act*, the Arbitrator dismissed the argument of the United States that recent political changes in Washington were relevant in determining the reasonable period of time within which it should bring its measures into conformity with the recommendations and rulings of the DSB. The Arbitrator noted:

> *In view of the fundamental obligations assumed by the Members of the WTO, factors such as the volume of legislation proposed, and the high percentage of bills that never become law, cannot be considered to extend the period of time for implementation. As for the argument that legislation passed by the United States Congress is usually passed at the end of the legislative session, this again may be the usual practice in the United States Congress, but it is not the outcome of a legal requirement*
> *...*
> *The United States also urges me to take account of the "additional special circumstances" involved in this case, that is, the need for a period of transition to a new President, a new Administration, and a new Congress, and the accompanying shifts in the balance of power between the two principal political parties in the United States. Even allowing for these unusual circumstances, I note that what is significant for the case at hand is that the first session of the 107th United States Congress has been in progress since 3 January 2001. It is, therefore, possible for the United States to introduce a legislative proposal and have it passed by the Congress as speedily as possible, using, as I have stated earlier, all the flexibility available within its normal legislative procedures.*[24]

1.3.3 Complexity of Implementing Measures and Process

In *Canada – Pharmaceutical Patents*, the Arbitrator indicated that one of the factors which may be taken into account in determining the reasonable period of time is the complexity of the proposed implementing measures. If extensive regulations have to be introduced which would affect many sectors of activity, then a compelling case could made for granting a longer time-period. On the other hand, if the recommendations and rulings of the DSB can be effected through a simple change in the law, then a shorter period may be apposite. The Arbitrator in the above dispute stated:

[23] *Award of the Arbitrator,* Canada – Pharmaceutical Patents*, paras. 52 and 60.*
[24] *Award of the Arbitrator,* United States – Anti-Dumping Act of 1916 (US – 1916 Act)*, WT/DS136/11, paras. 38-40.*

> *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. To be sure, complexity is not merely a matter of the number of pages in a proposed regulation; yet it seems reasonable to assume that, in most cases, the shorter a proposed regulation, the less its likely complexity.* [25]

In *EC – Bananas III*, the Arbitrator dismissed the argument of the complaining parties that a shorter time-period was required by the European Communities to bring their measures into conformity with WTO rules. He stated that he was satisfied that the complexity of the implementation process in the European Communities justified a longer time-period than the 15 month guideline provided under Article 21.3(c) of the DSU. The Arbitrator held:

> *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.*[26]

1.3.4 Means of Implementation

One of the factors which would be taken into account in deciding on the reasonable period of time is the means of implementation of the recommendations and rulings of the DSB. If they could be implemented through an administrative decision, then the reasonable period of time could be considerably shorter than the 15 month guideline. By contrast, if they could be implemented only through a cumbersome legislative procedure, then the reasonable period of time could be longer. The Arbitrator in *Canada – Pharmaceutical Patents* ruled:

> *[I]f 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. It seems reasonable to assume, unless proven otherwise due to unusual circumstances in a given case, that regulations can be changed more quickly than statutes. To be sure, the administrative process can sometimes be long; but the legislative process can oftentimes be longer*

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[25] *Award of the Arbitrator,* Canada – Pharmaceutical Patents, *para. 50.*
[26] *Award of the Arbitrator,* European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III"), *WT/DS27/15, para. 19.*

> ...
> *In addition, the* legally binding*, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account. If the law of a Member dictates a mandatory period of time for a mandatory part of the process needed to make a regulatory change, then that portion of a proposed period will, unless proven otherwise due to unusual circumstances in a given case, be reasonable. On the other hand, if there is no such mandate, then a Member asserting the need for a certain period of time must bear a much more imposing burden of proof.* [27]

1.3.5 Flexibility in the Legislative Process

If the legislative procedures in the responding Member are quite flexible in the sense that it can influence the time the implementing legislation could be passed so as to bring its measures into conformity with the covered agreements, it would be expected to do so considering that the primary responsibility of Members under the DSU is prompt compliance. In *Canada – Patent Term*, the arbitrator stated that flexibility in the legislative process is a factor which would be taken into account in deciding the reasonable period of time to be given to a responding Member to bring its measures into conformity. He declined in the instant case to accede to Canada's request of 14 months and two days and required it to bring its measures into conformity within 10 months from the date of the adoption of the Panel and Appellate Body reports by the DSB. The Arbitrator reasoned as follows:

> *The different steps in this [legislative] process and their sequence are clearly structured and defined. With respect to timing and scheduling, however, the process is flexible, as Canada acknowledged at the oral hearing. Use of this flexibility does not require recourse to extraordinary procedures. Following earlier arbitration awards, I consider this flexibility to be an important element in establishing the "reasonable period of time". Ultimately, the "reasonable period of time" appears to be a function of the priority which Canada attributes to the amendment of its Patent Act in order to bring it into conformity with its obligations under Article 33 of the TRIPS Agreement. ...[I]t seems to me that this is [a]... matter for which the Canadian Parliament should try to comply with the international obligations of Canada as soon as possible, taking advantage of the flexibility that it has in its normal legislative procedures.*[28]

1.3.6 Steps Taken to Comply with Rulings of the DSB

A number of arbitrators have indicated that one of the factors that would be taken into account in deciding the reasonable period of time to be granted to a responding Member is the steps taken by it after the adoption of a panel and/

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[27] *Award of the Arbitrator,* Canada – Pharmaceutical Patents*, paras. 49 and 51.*

[28] *Award of the Arbitrator,* Canada – Term of Patent Protection ("Canada – Patent Term"), *WT/DS170/10, paras. 63 and 64. See further, Award of the Arbitrator,* United States – Section 110 (5) Copyright Act*, and Award of the Arbitrator,* Canada – Certain Measures Affecting the Automotive Industry("Canada – Autos"), *WT/DS139/12.*

or Appellate Body report and before arbitration is resorted to, to ensure prompt compliance. In *US – Section110(5) Copyright Act*, the Arbitrator cautioned Members that the steps adopted by them in the aftermath of the adoption by the DSB of a panel and/or Appellate would be carefully scrutinized by arbitrators for the purpose of determining the reasonable period of time to be granted them. The Arbitrator in this case held:

> *...Article 21.1 establishes that "prompt compliance" is essential in order to ensure effective resolution of disputes to the benefit of all Members. Clearly, timeliness is of the essence. Thus, an implementing Member must use the time after adoption of a panel and/or Appellate Body report to begin to implement the recommendations and rulings of the DSB. Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time".*[29]

1.3.7 Developing Countries

If implementation is to be effected by a developing country, its particular circumstances may be taken into account in accordance with the provisions of Article 21.2 of the DSU. If the country is, for example, facing economic crisis and there is evidence that prompt implementation of the recommendations and rulings of the DSB could exacerbate the crisis, it could be given an extended period of time to comply. This was the reasoning of the Arbitrator in *Indonesia – Autos*, where he took account of the deteriorating economic conditions in Indonesia and granted it an additional six months to bring its measures into conformity with the covered agreements. The Arbitrator stated:

> *Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse". In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.*[30]

Where the matter was raised by a developing country Member, the DSU provides that the "DSB shall consider what further action it might take which

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[29] *Award of the Arbitrator,* US – Section 110(5) Copyright Act, *WT/DS160/12, para. 46. See further, Award of the Arbitrator,* Canada – Patent Term*, para. 62.*

[30] *Award of the Arbitrator,* Indonesia – Certain Measures Affecting the Automobile Industry *("*Indonesia – Autos*"), WT/DS54/15, para. 24.*

would be appropriate to the circumstances."[31] It shall consider in this context "not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."[32]

1.4 Test Your Understanding

1. **Are recommendations and rulings adopted by the DSB to be complied with immediately or within a reasonable period of time?**
2. **Who decides what the reasonable period of time for implementation in a particular dispute is?**
3. **Is it within the mandate of an arbitrator under Article 21.3 (c) of the DSU to determine whether the intended implementation of the recommendations and rulings is WTO-consistent?**
4. **Is the complexity of the implementing measure and of the amendment or withdrawal process relevant in the determination of the reasonable period of time for implementation? If so, how**
5. **Is political unrest or economic hardship that may result from the implementation of recommendations and rulings relevant in the determination of the reasonable period of time for implementation? Does it in this respect matter whether the responding Member is a developing country Member?**

[31] *Article 21.7 of the DSU.*
[32] *Article 21.8 of the DSU.*

2. RESOLVING DISPUTES REGARDING IMPLEMENTATION

Objectives

On completion of this Section, the reader will be able to discuss the procedure provided in Article 21.5 of the DSU to resolve disputes between parties regarding the existence of the WTO-consistency of implementing measures.

2.1 Status Reports

Article 21.6 DSU

To ensure that the responding Member complies with the recommendations and rulings of the DSB within the reasonable period established pursuant to the provisions of article 21.3(c), the DSU provides that [t]he DSB shall keep under surveillance the implementation of adopted recommendations or rulings. It further provides that any Member can raise the issue of implementation of recommendations or rulings at anytime following their adoption by the DSB. The mechanism for monitoring whether the responding Member is committed to implementing the recommendations or rulings of the DSB is established in Article 21.6 of the DSU. This Article provides:

> *Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.*

From a Member's status report, it should be possible to determine whether it would be able to comply with the recommendations and rulings of the DSB within the reasonable period of time. However, those that have been submitted by responding Members tend to be very bland and not very informative. Under normal circumstances, if the reports are lacking in detail and are imprecise as to the steps being taken to comply with the recommendations or rulings, the complaining Member or any other Member could make an observation in the DSB that the responding Member is not taking adequate steps to comply and that the DSB should request it to fulfil its obligations within the time foreseen. In practice, however, Members reserve their comments until after the lapse of the reasonable period of time, as it is possible for measures to be implemented on the last day of the reasonable period.

2.2 Recourse to Article 21.5 of the DSU

Article 21.5 DSU

If the responding Member adopts measures which are intended to implement the recommendations or rulings of the DSB within the reasonable period of

time, and there is a dispute concerning their consistency with a covered agreement, the complaining Member can request the establishment of a panel to determine whether the implementing measures are in conformity with WTO law. Also when there is disagreement concerning the existence of implementing measures, the complaining Member can request the establishment of a panel to settle this disagreement. Where such a request is made, the matter will be referred to the original panel if possible, which shall circulate its report within 90 days of the date of the referral of the matter to it. Where the panel cannot provide its report within the time-frame, it is expected to inform the DSB in writing of the reasons for the delay and indicate when it will be able to submit its report. Article 21.5 of the DSU provides:

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

2.3 Scope of Proceedings under Article 21.5 of the DSU

2.3.1 Consistency with WTO Law

The issue has arisen whether the focus of an Article 21.5 panel is limited only to examining if the measures implemented by the responding Member comply with the recommendations and rulings of the DSB in that particular case, or whether it extends to examining the conformity of the implementing measures with the relevant provisions of the covered agreement(s). In *Canada – Aircraft (Article 21.5 - Brazil),* the Appellate Body, in reversing the ruling of the Panel in the Article 21.5 proceedings, held that the proceedings under this article are not only meant to establish whether the adopted measures are consistent with the DSB recommendations and rulings, but also whether they are consistent with the relevant provisions of the covered agreement(s).[33] Under normal circumstances, if the measures adopted by a Member areonsistent with the recommendations and rulings of the DSB, they will usually also be consistent with the provisions of the covered agreements. The Appellate Body in *Canada – Aircraft (Article 21.5 - Brazil)* ruled:

> *We have already noted that these proceedings, under Article 21.5 of the DSU, concern the "consistency" of the revised TPC programme with Article 3.1(a) of the* SCM Agreement*. Therefore, we disagree with the Article 21.5 Panel that the scope of these Article 21.5 dispute settlement proceedings is limited* →

[33] *Appellate Body Report,* Canada – Measures Affecting the Export of Civilian Aircraft – *Recourse by Brazil to Article 21.5 of the DSU ("*Canada – Aircraft (Article 21.5 – Brazil)*"), WT/DS70/AB/RW, adopted 4 August 2000.*

> *to "the issue of whether or not Canada* has implemented the DSB 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.[34].

2.3.2 Measures

Where a measure has been the subject of dispute settlement and found to be inconsistent with the provisions of a covered agreement, it follows that the measure which has been taken in compliance with the recommendations and rulings with the DSB has to be necessarily different, otherwise there is a strong probability that the adopted measure may also be inconsistent with WTO Law. In *Canada – Aircraft (Article 21.5 - Brazil)*, the Appellate Body stressed with regard to the measure at issue in proceedings under Article 21.5 of the DSU:

> *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, 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.*[35]

2.4 Repeated Recourse to Article 21.5 of the DSU

Although not explicitly provided in the DSU, some Members have had repeated recourse to Article 21.5 of the DSU to challenge the consistency with a covered agreement of measures that have been implemented by a responding Member following an Article 21.5 panel report, which had reached the conclusion that the measures implemented by that Member did not comply with the panel/ Appellate Body report as adopted by the DSB. In the dispute between Brazil and Canada over export subsidies for the regional aircraft industry, for example, the parties availed themselves of Article 21.5 procedures on several occasions. While recourse to Article 21.5 of the DSU serves the useful purpose of further clarifying Members' obligations under the *WTO Agreement* and settling definitively disputes between the parties, the view has been expressed in the

[34] *Appellate Body Report,* Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40 -41.*
[35] Ibid.*, para. 36.*

DSB that there is the risk that it could be abused by some Members who, instead of bringing their measures into full conformity with the recommendations and rulings of the DSB, may implement legislation which did not cure all the defects in their earlier legislation found to be inconsistent with their obligations under a covered agreement.

It seems that there is the general acceptance among WTO Members that insofar as a responding Member has adopted implementing legislation in response to an Article 21.5 report and, there is disagreement as to the consistency of the implemented measures with the recommendations and rulings of the DSB, it is always possible for recourse to Article 21.5 be made regardless of the previous number of times recourse had been made to this provision. In *Canada – Dairy*, New Zealand and the United States requested an Article 21.5 panel for the second time, as they thought that the Appellate Body had failed to settle definitively the dispute between them and Canada.[36] In a statement to the DSB, the representative of New Zealand noted that:

> *New Zealand continued to consider that Canada had failed to comply with the original DSB's recommendations and rulings. As highlighted previously – on more than one occasion – in substitution for the dairy export measures that had been ruled in contravention of Canada's WTO commitments, Canada had put in place "new measures" for the export of dairy products…The Appellate Body's Report in relation to the earlier Article 21.5 proceedings had reversed some of the Article 21.5 Panel's findings, but the Appellate Body had declined to rule on the consistency of the measure in question. Instead the Appellate Body had concluded that, in light of the factual findings made by the Panel and the uncontested facts in the Panel record, it was unable to complete the analysis of the claims made by New Zealand under Articles 9.1(c) and 10.1 of the Agreement on Agriculture. In its Report, the Appellate Body made it clear that its ruling "does not amount to a finding that the measure at issue is WTO-consistent, but simply that the Panel's findings were vitiated by error of law" (paragraph 104 of the AB Report). Accordingly, there continued to be "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between Canada and New Zealand, within the terms of Article 21.5 of the DSU. New Zealand therefore requested, pursuant to Article 21.5 of the DSU, that the matter be referred to the original Panel.*[37]

In response, the representative of Canada expressed disappointment with the decision by New Zealand and the United States to have second recourse to Article 21.5 of the DSU.[38]

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[36] *Appellate Body Report,* Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – *Recourse to Article 21.5 of the DSU by New Zealand and the United States ("*Canada – Dairy (Article 21.5 – New Zealand and US)*"), WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001.*

[37] *WT/DSB/M/116, 31 January 2002, paras. 52-53.*

[38] Ibid., *para. 56.*

2.5 Consultations Under Article 21.5 Proceedings

The DSU does not indicate whether consultations should be held by the parties before the request of an article 21.5 panel is made. Some Members of the WTO are of the view that consultations are *sine qua non* to the establishment of a panel, and that any request for an article 21.5 panel should be denied, unless the parties had held consultations which had failed to settle the dispute between them. Proponents of this view Point out that Article 21.5 provides that disputes on implementation "shall be decided through recourse to *these* dispute settlement procedures". *These* dispute settlement procedures are the procedures set out in the DSU. Under these procedures, and in particular, under Article 6.2 of the DSU, consultations are mandatory and should precede the panel request. Proponents of the view that consultations are mandatory in the context of Article 21.5 proceedings buttress their argument with the fact that the implemented measures at issue may not exactly be the same as the measures which were considered by the original panel and, as such, it is necessary for the parties to have an exchange of views on these measures before a request for the establishment of a panel is made.

This view is not shared by some Members who believe that Article 21.5 proceedings are different, and that if the parties are required to hold consultations before making a request for the establishment of an Article 21.5 panel, it would unnecessarily delay the dispute settlement process, especially considering that the parties would have held consultations before the initial request for the establishment of a panel and, would as such, be apprised of all the relevant facts of the case. In other words, the responding Member would not be prejudiced if consultations are not held since it would be aware of the legal basis of the complaint. In the absence of any definitive guidelines in the DSU, parties to Article 21.5 disputes have been agreeing on procedures to expedite such proceedings. In *US - FSC*, the parties agreed on, *inter alia*, holding consultations within 12 days of a request being made, and in the event of a deadlock in the consultations, agreeing to the establishment of an Article 21.5 panel immediately thereafter thus shortening the time periods under the relevant provisions of the DSU.[39]

2.6 Appellate Review in Article 21.5 Proceedings

Article 21.5 of the DSU does not explicitly provide for the possibility to appeal Article 21.5 panel reports. However, the jurisdiction of the Appellate Body in Article 21.5 proceedings could be based on Article 17.1 of the DSU, which provides that the "[t]he Appellate Body shall hear appeals from panel cases", and on Article 17.6 which provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." In some disputes, Members have concluded bilateral agreements to confer on each other the right to appeal an Article 21.5 panel report to the Appellate Body.

[39]United States – Tax Treatment for "Foreign Sales Corporations", *complaint by the European Communities* ("US – FSC"), *WT/DS108/12.*

2.7 Relationship Between Articles 21.5 and 22.2 of the DSU

The issue has arisen as to the relationship between Article 21.5 and Article 22.2 of the DSU. Under the former, if there is disagreement as to the existence of the WTO consistency of measures taken by the respondent Member to comply with the recommendations and rulings of the DSB, the complaining Member can request the establishment of an Article 21.5 panel to evaluate those measures. Under Article 22.2 of the DSU, if the responding Member fails to bring the non-conforming measure into compliance within the reasonable period of time and the parties to the dispute are unable to agree on compensation within 20 days after the date of the expiry of the reasonable period, the complaining Member can request authorization from the DSB to suspend the application to the responding Member of concessions or other obligations under the covered agreements. The issue is whether the complaining Member can request authorization from the DSB to suspend concessions towards the responding Member before it has been established through an Article 21.5 proceeding that there has either been no implementation at all or no WTO-consistent implementation of the recommendations and ruling of the DSB. The issue arises because under Article 22.6, the DSB has to grant authorization to suspend concessions within thirty days of the expiry of the reasonable period of time, unless it decides by consensus to reject the request for authorization In the meantime, if recourse had been made to Article 21.5, the proceedings would not have been completed by then to establish whether the proposed implementing measures correctly implement the recommendations and rulings of the DSB. A request for authorization at this stage would imply that the complaining Member had come to the conclusion that the proposed implementing measures are not WTO-consistent. However, pursuant to Article 23 of the DSU, WTO Members must have recourse to the rules and procedures of the DSU to determine whether a measure is WTO-inconsistent; Members may not decide unilaterally whether a measure is WTO-inconsistent.

In *EC – Bananas III*, the United States asserted that it had the right to request authorization from the DSB to suspend concessions and other obligations towards the EC, notwithstanding the European Communities new banana regime, adopted in response to the recommendations and rulings of the DSB. The European Communities strongly opposed the request by the United States on the ground that if the request was permitted, it would amount to sanctioning a unilateral determination by the United States that its new banana regime was not consistent with the recommendations and rulings of the DSB. The European Communities argued that the proper procedure was for the United States to request an Article 21.5 panel to determine whether its new banana regime was consistent with the recommendations and rulings of the DSB. According to the European Communities, it was only after the ruling by the Article 21.5 panel that the United States could have recourse to Article 22.2 of the DSU. The representative of the European Communities said in the DSB that:

> *...Members were at a critical juncture in this dispute and warned that the situation could become more critical. Either the DSB would decide to place this matter back on the correct multilateral track under the Article 21.5 procedure or it would face a highly political dispute in January 1999 if, and when, one of the parties sought authorization from the DSB to suspend concessions. It was the first time that recourse to Article 21 or 22 procedures was being considered by the DSB. In other cases, implementation of recommendations had not been challenged. In the context of this case, the DSU provisions and their interpretations were being carefully examined. This process had revealed that the DSU contained a number of ambiguities which had to be clarified. However, it was necessary to decide now on how to proceed in this case.*[40]

The European Communities and the United States eventually managed to reach agreement which allowed both requests under Articles 21.5 and 22.2 to proceed simultaneously.

After this case, it became customary for parties to a dispute to reach agreement on the sequencing of procedures under Articles 21 and 22. In some cases, the parties agreed to initiate the procedures under Articles 21.5 and 22 simultaneously and later suspend the retaliation procedures under Article 22 until after the completion of the Article 21.5 process, on the understanding that if the compliance panel confirmed that implementation of the recommendations and rulings of the DSB had not taken place, the complaining Member may re-activate the retaliation process under Article 22 of the DSU.[41] In other cases, the parties agreed to initiate the procedures under Article 21.5 before resorting to the retaliation procedures under Article 22, on condition that the responding Member would not object to a request for retaliation under Article 22, on the ground that the 30 day-period specified in Article 22.6 had elapsed. In the context of the DSU negotiations, a number of Members have stated that they attach priority to this issue and that the bilateral agreements that have been concluded between parties should be formalized, in the interest of certainty and predictability .[42]

2.8 Test Your Understanding

1. **When and why would a party have recourse to Article 21.5?**
2. **Does an Article 21.5 panel determine whether the responding Member has adopted an implementing measure that is consistent with the recommendations and rulings adopted by the DSB?**

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[40] *WT/DSB/M/51/Add.1, 26 February 1999, p 4. See also the request by the European Communities for arbitration under Article 22.6 of the DSU, WT/DS27/46; 3 February 1999.*

[41] *See, for example,* Canada – Dairy, *WT/DS103/14; and* US - FSC, *WT/DS108/12.*

[42] *See the following proposals: TN/DS/W/1 by the European Communities; TN/DS/W/8 by Australia; TN/DS/W/9 by Ecuador; TN/DS/W/11 by The Republic of Korea; and concept paper by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Japan, Republic of Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela on "Remedying the Dispute Settlement Understanding's Articles 21.5/22 'Sequencing Issue"; Job(02)/45, dated 27 May 2002.*

3. **Does referral to an Article 21.5 panel have to be preceded by consultations? Can parties appeal an Article 21.5 panel report?**
4. **Do you consider it necessary for an Article 21.5 panel to determine that the responding Member has not implemented the recommendations and rulings of the DSB in a WTO-consistent manner, *before* the complaining Member can request the DSB authorization to suspend concessions or other obligations under Article 22 of the DSU? Is your position consistent with Articles 21.5 and 22 as currently drafted?**

3. COMPENSATION AND SUSPENSION OF CONCESSIONS

3.1 Lack of Compliance

Articles 3.7 and 22.1 DSU

If the responding party does not bring its measures into conformity with a covered agreement within the reasonable period of time established pursuant to Article 21.3 of the DSU, the prevailing Member can either seek compensation or get authorization from the DSB to suspend equivalent concessions or other obligations to the responding Member.[43] The DSU stresses that neither compensation nor suspension of concessions is to be preferred to the full implementation of the recommendations and rulings of the DSB. It accordingly provides that they are temporary measures to be resorted to in the event of the impossibility to implement the recommendations and rulings of the DSB within the reasonable period of time decided pursuant to Article 21.3 of the DSU.

3.2 Compensation

Article 22.2 DSU

Under Article 22.2 of the DSU, the responding Member is obliged to enter into negotiations with the complaining Member if the latter requests compensation following the lack of implementation of the recommendations and rulings within the reasonable period of time. While the request for compensation is expected to be made by the complaining Member, the responding Member could, on its own volition, offer compensation as a means of temporarily resolving the dispute, provided that it is acceptable to the complaining Member.

Non-Discrimination

If the parties are able to reach agreement on compensation, the agreed concessions must be consistent with the covered agreements. This means, *inter alia,* that they must be extended on an MFN basis to other Members of the WTO. In other words, compensation should not be discriminatory in the sense of benefiting only the complaining Member. The requirement that compensation has to be accorded on an MFN basis was recognized in a different context by the Appellate Body in *European Communities – Poultry*, where it noted that:

> *We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994.*[44]

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[43] *Article 22.9 of the DSU provides that where it is not possible for a regional or local government of a responding Member to comply promptly with the recommendations and rulings of the DSB, the Member may negotiate compensation with the complaining Member if requested, or alternatively the complaining Member may suspend concessions or other obligations towards that Member.*

[44] *Appellate Body Report* European Communities – Measures Affecting Importation of Certain Poultry Products ("EC – Poultry"), *WT/DS69/ABR, adopted 23 July 1998, para. 100.*

Concerns have been expressed in the DSB that compensation arrangements being entered into by some Members may be in breach of the non-discrimination principle. At the DSB meeting of 18 January 2002, the representative of Australia expressed concern about the proposed compensatory arrangement between the United States and the European Communities. He noted that it was imperative that any compensation agreed between the parties be consistent with the relevant rules of the WTO including the non-discrimination principle. The representative of Australia stated:

> *Australia wished to register its strong concerns about the compensation arrangements that it understood had been agreed between the United States and the EC. [It was its understanding] that those compensation arrangements might infringe WTO obligations on non-discrimination. They also appeared to anticipate a delay in the United States' implementation by up to three years. Australia was particularly concerned by the apparent discriminatory nature of the proposed compensation arrangements. In this regard, Australia noted that no compensation had been offered to other Members whose interests were being nullified and impaired by continued violation by the United States of its WTO obligations.*[45]

3.3 Suspension of Concessions

Articles 22.2 and 22.6 DSU

Where the parties are unable to agree on compensation within 20 days after the date of expiry of the reasonable period of time, the complaining Member may request authorization from the DSB to suspend the application to the responding Member of concessions or other obligations under the covered agreements.[46] Where such a request is made, the DSB shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request.[47] In effect, if the parties are unable to agree on compensation within twenty days after the expiry of the reasonable period of time, authorization could be given within 10 days after that date by the DSB to the complaining Member to suspend concessions or other obligations on a discriminatory basis towards the responding Member. The suspension of concessions or other obligations is commonly also referred to as "retaliation".

Article 3.7 DSU

With respect to the suspension of concessions, Article 3.7 of the DSU provides:

> *The* last resort *which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a* discriminatory *basis vis-à-vis the other Member, subject to authorization by the DSB of such measures. (Emphasis added)*

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[45] *WT/DSB/M/117. 15 February 2002, para. 32.*
[46] *Article 22.2 of the DSU.*
[47] *Article 22.6 of the DSU.*

A party would be considered to be in breach of its obligations under the DSU if it were to proceed unilaterally to suspend concessions or other obligations towards the responding Member without the authorization of the DSB. In *US – Certain EC Products*, the Appellate Body affirmed the necessity of Members to seek the prior approval of the DSB before suspending concessions or other obligations. The Appellate Body held in that case:

> *The* obligation *of WTO Members not to suspend concessions or other obligations* without *prior DSB authorization is explicitly set out in Articles 22.6 and 23.2(c), not in Article 3.7 of the DSU. ... We consider, however, that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision.*[48]

3.4 Principles and Procedures Governing Suspension

WTO Members wishing to avail themselves of this remedy have to observe a number of elaborate conditions. The whole purpose seems to prevent Members from abusing this remedy to erect barriers to trade which may ordinarily be prohibited under the covered agreements.

3.4.1 Suspension in the Same Sector Under the Same Agreement

Article 22.3(a) DSU

As a general rule, the complaining party is required first to seek suspension of concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment. According to the Article 22.3(f) of the DSU, "sector" means:

> *(i) with respect to goods, all goods;*
>
> *(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;*
>
> *(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS.*

Thus if the dispute relates to discriminatory treatment in respect of market access for a particular agricultural product, the complaining party may seek to suspend concessions or other obligations with respect to another agricultural product. In *EC– Bananas III*, the Arbitrators noted that if a panel or Appellate Body report contains findings of WTO-inconsistencies in only one and the same sector within the meaning of Article 22.3(f) of the DSU, proposed

[48] *Appellate Body Report,* United States – Import Measures on Certain Products from the European Communities ("US – Certain EC Products"), *WT/DS165/ABR., adopted 10 January 2001, para. 120.*

suspension of equivalent concessions by the complaining Member in that sector was less likely to be controversial than if under different sectors and agreements. The Arbitrators ruled:

> *If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement, outside the scope of the sectors or agreements to which a panel's findings relate, paragraphs (b)-(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective.*[49]

The Arbitrators in the same case, however, underlined that the fact that a request to suspend concessions in the same sector as that in which a violation has been found, is made under Article 22.3(a), is no reason why arbitrators should not carry out an examination to determine if the relevant principles established in the Article have been complied with. The Arbitrators reasoned that if they were prevented from carrying out this exercise, it would be relatively easy for Members to circumvent their obligations, a result not intended by the drafters of the DSU. The Arbitrators held:

> *In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of subparagraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made – in full or in part – under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether.* [50]

3.4.2 Suspension in Another Sector Under the Same Agreement

Article 22.3(b) DSU

If the complaining party considers that it is not practical or effective to suspend

[49] *Decision by the Arbitrators,* European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT7DS27/ARB, para. 3.6.*

[50] Ibid., *para. 3.7.*

concessions in respect of another financial service, for example, it can seek to suspend concessions or other obligations in other sectors under the same agreement. According to the article 22.3(g) of the DSU, "agreement" means:

> *(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;*
>
> *(ii) with respect to services, the GATS;*
>
> *(iii) with respect to intellectual property rights, the Agreement on TRIPS.*

Thus, where the complaining Member believes that it is not practical or effective for it to suspend concessions or other obligations with respect to another financial service, it may seek to suspend concessions on transport service.

3.4.3 Suspension Under Another WTO Agreement

Article 22.3(c) DSU

If the complaining party considers that it is not practical or effective for it to suspend concessions or other obligations in a different sector under the same agreement, it may seek to suspend concessions or other obligations under a different agreement. Thus, if the dispute concerns goods, it may seek to suspend concessions or other obligations under the GATS or TRIPS.

3.5 General Conditions to Be Fulfilled

Article 22.3(d) DSU

Since suspension of concessions is generally considered to be an extraordinary step, the DSU further provides in Article 22.3(d) that the Member seeking to have recourse to this remedy must take into account the following:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that Member;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations.

If the party is seeking authorization to suspend concessions and other obligations in a different sector under the same agreement or under another WTO agreement as specified in Articles 22.3 (b) and (c), respectively, it is obliged to provide reasons for its request to the DSB. The reasoned request shall at the same time be forwarded to the relevant WTO Council or sectoral body for its consideration, as the case may be.[51]

[51] *Article 22.3(e) of the DSU.*

3.5.1 Scope of Article 22.3(a) of the DSU

In *EC – Bananas III*, the issue arose as to the proper scope of Article 22.3(a) of the DSU. The European Communities had argued that the United States was not entitled to request authorization to suspend concessions in trade in goods, as it did not have any interest in this sector. According to the European Communities the United States, according to it, should have requested authorization to suspend concessions in the distribution service sector or any other service sector given the finding of GATS violation by the panel and the Appellate Body, assuming that such violations would still continue under its revised banana regime. The Arbitrators rejected the EC's argument and stated that it was a misreading of the relevant provisions of the DSU:

> *We recall that subparagraph (a) of Article 22.3 of the DSU refers to the suspension of "concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment." We note that the words "same sector(s)" include both the singular and the plural. The concept of "sector(s)" is defined in subparagraph (f)(i) with respect to goods as* all goods*, and in subparagraph (f)(ii) with respect to services as a* principal sector *identified in the "Services Sectoral Classification List". We, therefore, conclude that the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC's obligations under the GATT and the GATS found in the original dispute have not been removed fully in the EC's revision of its regime. In this case the "same sector(s)" would be "all goods" and the sector of "distribution services", respectively. Our conclusion, based on the ordinary meaning of Article 22.3(a), is also consistent with the fact that the findings of violations under the GATT and the GATS in the original dispute were closely related and all concerned a single Import regime in respect of one product, i.e. bananas.*[52]

3.5.2 Scope of Discretion of the Complaining Member

The issue has also arisen as to whether it is the sole prerogative of the complaining Member under Articles 22.3(b) and (c) to decide whether it is not practicable or effective for it to suspend concessions in the same sector or in different sectors under the same agreement. In *EC – Bananas III*, Ecuador argued that the language in these articles was permissive and that it was the prerogative of the complaining Member to decide whether or not it was practicable or effective for it to suspend concessions in the same sector or in different sectors under the same agreement. It therefore contested the argument by the European Communities that it had not followed the principles and procedures set forth in Article 22.3. and that it should be denied authorization to suspend concessions under a different agreement. The Arbitrators accepted the argument of Ecuador that the language in Articles 22.3(b) and (c) conferred

[52] *Decision by the Arbitrators,* EC – Bananas III*„ Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT7DS27/ARB, para. 3.10.*

some discretion on the complaining Member, but went on to hold that when read in its entirety, Article 22 envisaged review by arbitrators to establish whether the relevant principles and procedures had been complied with by the Member seeking suspension of concessions or other obligations under a different sector under the same agreement or under a different agreement. The Arbitrators in *EC – Bananas III* held:

> *It follows from the choice of the words "if that party* considers *" in subparagraphs (b) and (c) that these subparagraphs leave a certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances. However, it equally follows from the choice of the words "in considering what concessions or other obligations to suspend, the complaining party* shall *apply the following principles and procedures" in the chapeau of Article 22.3 that such margin of appreciation by the complaining party concerned is subject to review by the Arbitrators. In our view, the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough. The choice of the words "that party shall take into account" in subparagraph (d) makes clear that the Arbitrators have the authority to fully review whether the factors listed in subparagraphs (i)-(ii) of Article 22.3(d) have been taken into account by the complaining party in applying all the principles and procedures set forth in subparagraphs (a)-(c). By the same token, the choice of the words "it shall state the reasons therefore" in subparagraph (e) implies that the Arbitrators are to review the reasons stated therefore by a complaining party in making a request under subparagraphs (b) or (c).*[53]

3.5.3 Objective Assessment Under Article 22.3 (b) and (c)

In *EC – Bananas III*, the European Communities disputed the right of Ecuador to request authorization to suspend concessions and other obligations under the TRIPS Agreement, as no finding of inconsistency of its banana regime with this Agreement had been made by the Panel and the Appellate Body. Ecuador argued that its request was justified by Article 22.3 (c) of the DSU, as it was not practicable or effective for it to suspend concessions or other obligations in the areas where violations had been found by the Panel and the Appellate Body. The Arbitrators started their analyses by examining the ordinary meaning of the terms "practicable" and "effective" and went on to consider the substantive merits of the arguments of the parties. The Arbitrators held:

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[53] *Decision by the Arbitrators* ,EC – Bananas III, *Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT7DS27/ARB/ECU, paras. 52-53.*

> *[W]e note that the ordinary meaning of "practicable" is "available or useful in practice; able to be used" or "inclined or suited to action as opposed to speculation etc.".*[54] *In other words, an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case. In contrast, the term "effective" connotes "powerful in effect", "making a strong impression", "having an effect or result". Therefore, the thrust of this criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB rulings within a reasonable period of time. One may ask whether this objective may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law.* In such a case, and in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party seeking suspension than for the other party.[55] In these circumstances, a consideration by the complaining party in which sector or under which agreement suspension may be expected to be least harmful to itself would seem sufficient for us to find a consideration by the complaining party of the effectiveness criterion to be consistent with the requirement to follow the principles and procedures set forth in Article 22.3.[56] *(italics added)*

In further rejecting the argument of the European Communities that Ecuador had not followed the principles and procedures set forth in Article 22.3 of the DSU, the Arbitrators noted that contrary to the claim of the European Communities, Articles 22.3(b) and (c) do not require the complaining Member to establish that suspension of concessions or other obligations would be effective or practicable in the same sector and/or the same agreement. In other words, the Arbitrators pointed out that Articles 22.3(b) and (c) set out the relevant criteria in the negative. The Arbitrators in *EC – Bananas III* noted:

> *We emphasize that Article 22.3(b) and (c) does not require Ecuador, nor us, to establish that suspension of concessions or other obligations is practicable and/or effective under another agreement (i.e. the TRIPS Agreement) than those under which violations have been found (i.e. the GATT and the GATS). The burden is on the European Communities to establish that suspension within the same sector(s) and/or the same agreement(s) is effective and practicable. However, according to subparagraph (c) of Article 22.3, it is our task to review Ecuador's consideration that the "circumstances are serious enough" to warrant suspension across agreements.*[57]

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[54] *The New Shorter Oxford English Dictionary ("Oxford English Dictionary"), Oxford (1993), p. 2317.*

[55] *Of course, suspension of concessions or other obligations is always likely to be harmful to a certain, limited extent also for the complaining party requesting authorization by the DSB.*

[56] *Decision by the Arbitrators,* EC - Bananas III, *Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT7DS27/ARB/ECU, paras. 52-53.*

[57] Ibid., *para. 78.*

3.6 Scope of Article 22.3(d) of the DSU

Article 22.3(d) DSU

The Arbitrators in *EC – Bananas III* also examined the scope of Article 22.3(d). They were of the view that the Article cannot be read in isolation and due consideration should be given to other provisions of Article 22. In relation to sub-paragraph (i) of the Article 22.3(d), which provides that "in applying the above principles, …[the complaining Member] shall take into account…the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party", the European Communities had argued that the phrase "the importance of…trade" should be interpreted to mean trade in the relevant sector(s) and/or agreement(s) in their entirety. Ecuador disagreed and argued that it could only mean trade in goods and services in the bananas sector. The Arbitrators agreed with Ecuador on this point. They ruled:

> *We believe that the criteria of "such trade" and the "importance of such trade" to the complaining party relate primarily to trade nullified or impaired by the WTO-inconsistent measure at issue. In the light of this interpretation, we attribute particular significance to the factors listed in subparagraph (i) in the case before us, where the party seeking suspension is a developing country Member, where trade in bananas and wholesale service supply with respect to bananas are much more important for that developing country Member than for the Member with respect to which the requested suspension would apply*[58]

Distinction Article 22.3(d) (i) and (ii)

The Panel highlighted the different considerations that have to be taken into account under Article 22.3(d)(i) and (ii). It pointed out that whereas subparagraph (i) related primarily to the Member which had suffered nullification and impairment and was seeking suspension, subparagraph (ii) could relate to both parties, as suspension of concessions and other obligations could affect both the Member being "retaliated" against and the Member taking the action. The Arbitrators in *EC – Bananas III* stated in this respect:

> *[S]ubparagraph (ii) of Article 22.3(d) requires the complaining party to take into account in addition "broader economic elements" related to the nullification or impairment as well as "broader economic consequences" of the suspension of concessions or other obligations. The fact that the former criterion [subparagraph (i) relates to "nullification or impairment" indicates in our view that this factor primarily concerns "broader economic elements" relating to the Member suffering such nullification or impairment, i.e. in this case Ecuador. We believe, however, that the fact that the latter criterion relates to the suspension of concessions or other obligations is not necessarily an indication that "broader economic consequences" relate exclusively to the party which was found not to be in compliance with WTO law, i.e. in this case the European Communities. As noted above, the suspension of* →

[58] Ibid., *para. 84.*

> *concessions may not only affect the party retaliated against, it may also entail, at least to some extent, adverse effects for the complaining party seeking suspension, especially where a great imbalance in terms of trade volumes and economic power exists between the two parties such as in this case where the differences between Ecuador and the European Communities in regard to the size of their economies and the level of socio-economic development are substantial.*[59]

3.7 Equivalency

Article 22.4 DSU

To ensure that Members do not abuse this right to impose restrictions on the trade of the responding Member, Article 22.4 of the DSU provides that:

> *[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification and impairment.*

In *EC – Bananas III*, the Arbitrators stated that equivalence can only be established after comparing the monetary value of the proposed suspension of concessions with the level of nullification and impairment suffered by the complaining Member. The Arbitrators reasoned:

> *Obviously…[equivalence] connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other. The former level, i.e. the proposed suspension of concessions, is clearly discernible in respect of the overall amount (US$520 million) suggested by the United States as well as in terms of the product coverage envisaged.*[60] *However, the same degree of clarity is lacking with respect to the latter, i.e. the level of nullification or impairment suffered. It is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined. Therefore, as a prerequisite for ensuring equivalence between the two levels at issue we have to determine the level of nullification or impairment.*[61]

The Arbitrators went on to hold that before they could establish the level of nullification or impairment suffered by the United States, it was imperative for them to examine whether the European Communities' new regime for bananas was consistent with covered agreements. The Arbitrators held:

> *[W]e cannot fulfil our task to assess* equivalence *between the two levels before we have reached a view on whether the revised EC regime is, in light of our and Appellate Body's findings in the original dispute, fully WTO-consistent.* →

[59] Ibid., *paras 85-86.*
[60] *WT/DS27/43.*
[61] *Decision by the Arbitrators*, EC - Bananas III, *Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT7DS27/ARB, paras 4.1 and 4.2.*

> *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 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.*[62]

3.7.1 Disputes under the SCM

In *Brazil – Aircraft*, the issue arose as to whether the principle of equivalence has any relevance in disputes under the *Agreement on Subsidies and Countervailing Measures ("SCM Agreement")*. Brazil and Canada disagreed in this case whether countermeasures in the form of suspension of concessions or other obligations should be equivalent to the level of nullification or impairment suffered by the complaining Member. The Arbitrators decided against Brazil on this point noting that the concept of equivalence was not embedded in the *SCM Agreement*. The Arbitrators held:

> *[W]e recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment. [R]equiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case, other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance. We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complaints. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The "inducing" effect would most probably be very similar ... [W]hen dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is "appropriate".*[63]

Similarly in *US – FSC*, the Arbitrators rejected the argument of the United States that Article 4.10 of the *SCM Agreement* required countermeasures adopted not to be disproportionate to the trade impact of the violating measures on the complaining Member. The Arbitrators reasoned:

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[62] Ibid., *para. 4.8.*

[63] *Decision by the Arbitrators,* Brazil – Export Financing Programme for Aircraft, *Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS46/ARB, paras. 3.57-3.60.*

[A]s we interpret Article 4.10 of the SCM Agreement*, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. This cannot be reduced to a requirement that constrains countermeasures to trade effects ... At the same time, Article 4.10 of the* SCM Agreement *does not amount to a blank cheque. There is nothing in the text or in its context which suggests an entitlement to manifestly punitive measures. On the contrary, footnote 9 specifically guards us against such an unbounded interpretation by clarifying that the expression "appropriate" cannot be understood to allow "disproportionate" countermeasures. However, to read this indication as effectively reintroducing into that provision a quantitative limit equivalent to that found in other provisions of the* SCM Agreement *or Article 22.4 of the DSU would effectively read the specific language of Article 4.10 of the* SCM Agreement *out of the text. Countermeasures under Article 4.10 of the* SCM Agreement *are not even, strictly speaking, obliged to be "proportionate" but not to be " disproportionate". Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the "appropriateness" of such countermeasures – in light of the gravity of the breach –, a margin of appreciation is to be granted, due to the severity of that breach.*[64]

3.7.2 Calculation of Nullification and Impairment

In *EC – Hormones*, the Arbitrators were of the view that the relevant date to be taken into consideration when calculating nullification and impairment of benefits is the date on which the reasonable period of time expired. The Arbitrators ruled:

Upon careful consideration of the claims and arguments set forth by the parties, we consider that our starting-point is as follows: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999*? 13 May 1999 is the date of expiration of the reasonable period of time granted to the EC to implement the panel and Appellate Body reports. In accordance with DSU provisions, it was by 13 May 1999 that the EC had to bring its beef import regime into conformity with the SPS Agreement. We cannot assume that the EC from 1989 onwards, i.e. from the time it imposed the ban, was under a legal obligation to withdraw the ban. We note, in this respect, that the violations found were violations of the SPS Agreement, an agreement only in existence from 1 January 1995 onwards.*[65] *(Emphasis in original)*

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[64] *Decision of the Arbitrator,* US – FSC*, Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS108/ARB, paras 5.60 – 5.62.*

[65] *Decision by the Arbitrators,* EC - Hormones*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, para. 38. See also Decision of the Arbitrator,* US – FSC*, para. 2.15, where the Arbitrator held that the relevant date for assessing the proposed suspension of concessions was the time when the United States should have withdrawn its prohibited subsidy: In* Brazil – Export Financing Programme for Aircraft, *Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, the Arbitrators based thier calculations on the number of deliveries and sales that took place between the end of the period of implementation and the latest period for which figures were available (18 November 1999 – 30 June 2000).*

In *United States – Section 110(5) Copyright Act*, the Arbitrators, however, chose a different benchmark owing to the particular circumstances of the case. They were of the view that it was not be possible to rely on the date the reasonable period of time expired and that it was appropriate to rely on the date on which the matter was referred to them. The Arbitrators ruled:

> *In the present case, the reasonable period of time was supposed to lapse on 27 July 2001. However, on 24 July 2001, the DSB agreed to an extension until 31 December 2001 or the date on which the current session of the US Congress adjourns, whichever is earlier. In those circumstances, ...[we] believe that using the date of the end of the reasonable period of time as cut-off date is not feasible, lest they will add uncertainty to ...[our] estimate by making additional assumptions as to the situation at the end of a period which, itself, is not known for sure.*
> ...
> *[We] deem it appropriate to calculate the level of EC benefits nullified or impaired by the continuing operation of Section 110(5) (B) on a date as close as possible to the date on which the matter was referred to them. In this case, because of the statistical information available, [our] estimate will be based on the situation on 30 June 2001.*[66]

3.7.3 Burden of Proof

It is well established in WTO jurisprudence that a Member which claims that another Member has acted inconsistently with the WTO rules has the burden of proof. Thus, in the context of arbitration proceedings under Article 22 of the DSU, if the responding Member claims that the proposed suspension of concessions and other obligations is not equivalent to the level of nullification or impairment, then it would have the burden of proof. In *EC – Hormones*, the Arbitrators stated that WTO Members as sovereign states would be presumed to have complied with their obligations and that it was up to a Member who alleges otherwise to adduce evidence to that effect. The moment it satisfies this condition, it would be up to the other party to submit arguments and evidence sufficient to rebut that presumption. The Arbitrators in *EC – Hormones* reasoned as follows:

> *WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations. A party claiming that a Member has acted inconsistently with WTO rules bears the burden of proving that inconsistency... The act at issue here is the US proposal to suspend concessions. The WTO rule in question is Article 22.4 prescribing that the level of suspension be equivalent to the level of nullification and impairment. The EC challenges the conformity of the US proposal with the said WTO rule. It is thus for the EC to prove that the US proposal is inconsistent with Article 22.4. Following well-established jurisprudence, this means that it is for the EC to submit arguments and evidence sufficient to establish a* prima facie *case or* →

[66] United States – Section 110(5) of the US Copyright Act , *Recourse to Arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, paras. 4.20 and 4.25.*

> *presumption that the level of suspension proposed by the US is* not *equivalent to the level of nullification or impairment caused by the EC hormone ban. Once the EC has done so, however, it is for the US to submit arguments and evidence sufficient to rebut that presumption. Should all arguments and evidence remain in equipoise, the EC, as the party bearing the original burden of proof, would lose. The same rules apply where the existence of a specific* fact *is alleged; in this case, for example, where a party relies on a decrease of beef consumption in the EC or the use of edible beef offal as pet food. It is for the party alleging the fact to prove its existence. The duty that rests on* all *parties to produce evidence to the arbitrators – an issue to be distinguished from the question of who bears the burden of proof – is crucial in Article 22 arbitration proceedings. The EC is required to submit evidence showing that the proposal is* not *equivalent. However, at the same time and as soon as it can, the US is required to come forward with evidence explaining how it arrived at its proposal and showing why its proposal* is *equivalent to the trade impairment it has suffered. Some of the evidence – such as data on trade with third countries, export capabilities and affected exporters – may, indeed, be in the sole possession of the US, being the party that suffered the trade impairment. This explains why we requested the US to submit a so-called methodology paper.*[67]

In *US – FSC*, the Arbitrators affirmed the decision of the Appellate Body in *US – Wool Shirts and Blouses* and said that as the Member challenging the consistency of the proposed amount of suspension of concessions, the United States had the burden of proof[68]:

> *We recall that the general principles applicable to burden of proof, as stated by the Appellate Body, require that a party claiming a violation of a provision of the* WTO Agreement *by another Member must assert and prove its claim. We find these principles to be also of relevance to arbitration proceedings under Article 22.6 of the DSU and Article 4.10 of the* SCM Agreement. *In this procedure, we thus agree that it is for the United States, which has challenged the consistency of the European Communities proposed amount of suspension of concessions under Articles 4.10 of the* SCM Agreement *and 22.4 of the* DSU*, to bear the burden of proving that the proposed amount is not consistent with these provisions. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for the European Communities to provide evidence for the facts which it asserts. In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.*

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[67] *Decision by the Arbitrators*, EC - Hormones*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, paras 9-11.*

[68] *Decision of the Arbitrator,* US – FSC*, Recourse to Arbitration by the United States under Article 22.6 of the DSU, paras. 2.10-2.11.*

3.7.4 Suspension Consistent With the Covered Agreements

The complaining Member cannot suspend concessions or other obligations if a covered agreement prohibits such suspension. In other words, the fact that the responding party has adopted an inconsistent measure does not authorize the complaining Member to adopt the same measure. In their request for suspension of concessions in *US – 1916 Act*, the European Communities and Japan proposed to adopt "mirror" legislation to the United States' Anti-dumping Act of 1916 which had been found by both the Panel and the Appellate Body to be inconsistent with the WTO Agreement on Anti-Dumping. A number of Members expressed concern about the request of the European Communities and Japan. Brazil noted that:

> *...[I]n addressing the remedies available in the dispute settlement mechanism, the DSU drafters had not intended to allow open-ended solutions that would enable a Member to go as far as enacting "mirror" legislation, which had been declared to be WTO-inconsistent. Therefore the question was, if the 1916 Act was WTO inconsistent because it contained specific actions against dumping not provided for in the Agreement, how could the WTO endorse a solution for non-compliance which was not compatible with the same Agreement. This mirror solution would have deleterious effect on the system and would distort the fundamental principles of good faith and the abidance by the rules.*[69]

3.8 Arbitration

Article 22.6 DSU

According to Article 22.6 of the DSU, where there is a dispute between the parties as to the level of suspension proposed, or where there are claims that the party seeking suspension has not followed the principles and procedures established in Article 22.3(b) and (c), the matter can be referred to arbitration. The arbitration proceedings must be completed within 60 days after the date of the expiry of the reasonable period of time.[70] Concessions or other obligations can only be suspended after the arbitration proceedings have been completed. In other words, concessions or other obligations cannot be suspended in the course of the arbitration proceedings.[71]

3.8.1 Arbitration Request

Like a panel request under Article 6.2 of the DSU, a request for arbitration under Article 22 of the DSU has to meet certain minimum requirements. As has been stated by a number of panels and the Appellate Body in the context of Article 6.2 of the DSU, these requirements have been imposed as a result of considerations relating to the due process of law. A long line of cases has established in that context that the responding Member should be apprised of

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[69] *WT/DSB/M/117; 15 February 2002, para. 21 t p5.*
[70] *Article 22.6 of the DSU.*
[71] Ibid.

all the relevant facts at the appropriate time to enable it to defend itself against the charges levelled by the complaining Member. Timeliness is essential as surprise should not be sprung upon responding Members. In *EC – Bananas III*, the Arbitrators stated that the requirements under Article 6.2 of the DSU applied *mutatis mutandis* to requests under Articles 22.2 and 22.6 of the DSU:

> *The DSU does not explicitly provide that the specificity requirements, which are stipulated in Article 6.2 for panel requests, apply* mutatis mutandis *to arbitration proceedings under Article 22. However, we believe that requests for suspension under Article 22.2, as well as requests for a referral to arbitration under Article 22.6, serve similar due process objectives as requests under Article 6.2. First, they give notice to the other party and enable it to respond to the request for suspension or the request for arbitration, respectively. Second, a request under Article 22.2 by a complaining party defines the jurisdiction of the DSB in authorizing suspension by the complaining party. Likewise, a request for arbitration under Article 22.6 defines the terms of reference of the Arbitrators. Accordingly, we consider that the specificity standards, which are well-established in WTO jurisprudence under Article 6.2, are relevant for requests for authorization of suspension under Article 22.2, and for requests for referral of such matter to arbitration under Article 22.6, as the case may be. They do, however, not apply to the document submitted during an arbitration proceeding, setting out the methodology used for the calculation of the level of nullification or impairment.*[72]

In the same case, the Arbitrators endorsed the statement made by the Arbitrators in *EC – Hormones*, that a request under Article 22 has to satisfy at least two basic requirements:

> *(1) the request must set out a specific level of suspension, i.e. a level equivalent to the nullification and impairment caused by the WTO-inconsistent measure, pursuant to Article 22.4; and (2) the request must specify the agreement and sector(s) under which concessions or other obligations would be suspended, pursuant to Article 22.3.*[73]

3.8.2 Appointment of Arbitrators

The DSU provides that the arbitration between the parties shall be carried out by the original panel, if the members are available, or by an arbitrator appointed by the Director-General of the WTO. Where a member of the original panel is

[72] *Decision by the Arbitrators,* EC – Bananas III, *Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/ARB/ECU, para. 20.*

[73] *Decision by the Arbitrators*, E - Hormones*, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS26/ARB, para. 16. The Arbitrators noted that "[t]he more precise a request for suspension is in terms of product coverage, type and degree of suspension, etc…., the better. Such precision can only be encouraged in pursuit of the DSU objectives of 'providing security and predictability to the multilateral trading system' (Article 3.2) and seeking prompt and positive solutions to disputes (Articles 3.3 and 3.7). It would also be welcome in light of the statement in Article 3.10 that 'all Members will engage in DSU procedures in good faith and in an effort to resolve the dispute".*

not available, another person can be appointed as a replacement. It should be noted that the term arbitrator is used to refer to both the original panel and an individual who may be appointed by the Director-General of the WTO for the purposes of Article 22.6 of the DSU.

3.8.3 Functions of the Arbitrator

Article 22.6 and 22.7 DSU

The issue has arisen as to the scope of the mandate of Arbitrators under Articles 22.6 and 22.7 of the DSU. In *EC – Bananas III*, the Arbitrators were of the view that their mandate under Article 22.7 was broader than that conferred on them under Article 22.6:

> *Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators in such examinations to cases where a request for authorization to suspend concessions is made under subparagraphs (b) and (c) of Article 22.3 of the DSU. However, we believe that there is no contradiction between paragraphs 6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.*[74]

It is not the function of the arbitrator to examine the nature of the concessions or other obligations proposed to be suspended by the prevailing Member, but rather to determine whether the level of suspension is equivalent to the level of nullification or impairment.[75] In *EC – Hormones*, the Arbitrators refused to accede to the request by the *European Communities* to request the United States "to submit a list of proposed suspension of concession equivalent to the level of nullification or impairment, once this level has been determined by the arbitrator." After noting that there was no textual basis for this request, the Arbitrators stated that:

> *Arbitrators are explicitly prohibited from "examin[ing] the nature of the concessions or other obligations to be suspended" (other than under Articles 22.3 and 22.5). On these grounds, we cannot require that the US further specify the nature of the proposed suspension. As agreed by all parties involved in this dispute, in a case a proposal for suspension were to target, for example, only biscuits with a 100 per cent* ad valorem*, it would not be for the arbitrators to decide that, for example, cheese and not biscuits should be targeted; that a 150 per cent tariff should be imposed instead of a 100 per cent tariff; or that tariff increases should be levied on a product weight basis, not* ad valorem*. All of these are* qualitative *aspects of the proposed suspension touching upon the "nature" of concessions to be withdrawn. They fall outside the arbitrators' jurisdiction. What we do have to determine, however, is whether the overall proposed level of suspension is* equivalent *to the level of nullification and impairment. This involves a quantitative not a qualitative – assessment of the proposed suspension.*[76]

[74] *Decision by the Arbitrators,* EC – Bananas III, ...
[75] *Article 22.7 of the DSU.*
[76] *Decision by the Arbitrators,* EC – Hormones, ...

Thus, if the prevailing Member has proposed to suspend concessions totalling $1billion, the arbitrator, at the request of the responding Member, can determine whether its inability to implement the recommendations and rulings of the DSB has impaired or nullified the complaining Member's benefit to the level of the proposed amount. It is not the duty of the arbitrator to determine which concessions have to be suspended by the prevailing Member. The arbitrator may also determine whether the proposed suspension is allowed under a covered agreement. When there is a claim that the principles and procedures set forth in Article 22.3 have not been followed, the arbitrator would be entitled to examine it, and in the event of reaching the conclusion that they have indeed not been followed, the complaining Member would be required to apply them consistently with the provisions of the paragraph.

3.8.4 Decision of the Arbitrator

Parties to arbitration under Article 22.6 of the DSU are obliged to accept the decision of the arbitrator as final in the sense that they cannot appeal it to the Appellate Body or seek a second arbitration. The decision of the arbitrator is expected to be communicated promptly to the DSB which shall, at the request of the prevailing party, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator. The DSB may decide, however, by consensus to reject the request of the prevailing Member.

3.9 Surveillance and Termination

Article 22.8 DSU

Article 22.8 of the DSU underscores the fact that the primary remedy of the WTO dispute settlement mechanism is implementation of the recommendations and rulings of the DSB as promptly as possible. It provides that suspension of concessions or other obligations is temporary and should be resorted to only when it is not possible to implement the recommendations and rulings of the DSB. To facilitate the implementation of adopted recommendations and rulings, it further provides that the DSB shall keep under surveillance such recommendations and rulings until such time that the measure which has been found to be inconsistent with a covered agreement is removed, or when the parties negotiate a mutually satisfactory solution to the problem. Article 22.8 of the DSU provides that:

> *The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring*

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a measure into conformity with the covered agreements have not been implemented.

3.10 Test Your Understanding

1. **Can mutually agreed compensation within the meaning of Article 22.2 of the DSU constitute a definitive settlement of a dispute**
2. **Can suspension of concessions or other obligations authorized by the DSB under Article 22.6 of the DSU constitute a definitive settlement of a dispute?**
3. **If a panel or Appellate Body report only contains findings of inconsistency with respect to trade in textiles, can the complaining Member then request the suspension of concessions with respect to trade in agricultural products? In which circumstances may the complaining Member seek compensation under the GATS or TRIPS Agreement?**
4. **How is the appropriate level of suspension of concessions or other obligations to be determined? By whom is the appropriate level to be determined in case of disagreement between the parties? Will the complaining Member have to show that the proposed level of suspension is appropriate?**

4. CASE STUDIES

1. At its meeting of last month, the DSB adopted the Appellate Body Report and the Panel Report as upheld by the Appellate Body Report in *Farland – Anti-Dumping Duties Imposed on Handheld Computers*, complaint by Richland. The Appellate Body and the Panel ruled that the anti-dumping duties imposed by Farland on handheld computers from Richland were inconsistent with the *Anti-Dumping Agreement*. Furthermore, they ruled also that also Farland's anti-dumping legislation itself, the *Trade Defence Act of 1994,* was inconsistent with the *Anti-Dumping Agreement*. The Appellate Body recommended that the DSB request that Farland bring its measures found in its Report, and upheld in the Panel Report, to be inconsistent with its obligations under the *Anti-Dumping Agreement.*

   Farland, a developing country with a struggling infant computer industry, is very disappointed with this outcome. At the DSB meeting of last week, Farland announced that it would comply with the recommendations and rulings adopted by the DSB but argued that it did not need to comply immediately. In its opinion, it was entitled to a reasonable period of time to withdraw the anti-dumping measures imposed on handheld computers and to amend its anti-dumping legislation. Farland argued that for the withdrawal of the anti-dumping measures it would need six months in order to allow its computer manufacturers to adapt to the new situation. For the amendment of the anti-dumping legislation, Farland claims that it will need at least 20 months. i.e., until after the next elections, because there is currently no majority in Parliament to change the anti-dumping legislation. According to Farland, it is entitled to a long reasonable period of time for implementation because it is a developing country in economic crisis. Farland and Richland are unable to reach an agreement on the reasonable period of time for implementation and Farland objects to the appointment of an arbitrator.

   What can Richland do? Which factors can and/or must be taken into account in determining the reasonable period of time for implementation?

2. The Panel in *Lowland – Measures Concerning the Safety of Bicycles*, complaint by Sealand,had found that the *Bicycle Safety Act* of Lowland was inconsistent with the *TBT Agreement*, and, in particular, Article 2.4 thereof. Some of the technical regulations set out in the *Bicycle Safety Act* were not based on the relevant international safety standard for bicycle seats. Lowland did not appeal the panel report and agreed with Sealand on a reasonable period of time for implementation of 15 months. A few days before the expiry of this reasonable period of time, Lowland modified the *Bicycle Safety Act* to comply with the recommendations and rulings of the DSB. Sealand, however, considered that Lowland's legislation as modified was still inconsistent with the *TBT Agreement* and it demanded that Lowland pay compensation for the continued WTO-inconsistency of the *Bicycle Safety Act*. Lowland refused to enter into negotiations on compensation because it is of the opinion that the amended

Bicycle Safety Act is no longer inconsistent with the *TBT Agreement.* On day 21 after the expiry of the reasonable period of time for implementation, Sealand requests authorization from the DSB to suspend the application to Lowland of concessions or other obligations for an amount of US$30 million per year. Sealand seeks to suspend concessions or other obligations relating to trade in agricultural products and financial services. Lowland objects to this suspension of concessions or other obligations not only because it considers that the *Bicycle Safety Act* is now WTO consistent, but also because the level of suspension proposed is excessive and the relevant rules on suspension have not been followed.

How should either Sealand or Lowland proceed?

5. FURTHER READING

5.1 Books and Articles

- **Anderson, K.**, "Peculiarities of Retaliation in WTO Dispute Settlement, Centre for International Economic Studies Discussion Paper No. 0207 (Adelaide University, 2002).
- **Charnovitz, S.**, "Rethinking WTO Trade Sanctions", *American Journal of International Law*, 2001, 792-832.
- **Hufbauer, G., Schott, J. and Elliott, K.**, *Economic Sanctions Reconsidered*, 2nd edition (Institute for International Economics, Washington, 1990).
- **Jackson, J.**, "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects", in Krueger, A. (ed.), *The WTO as an International Organization* (University of Chicago Press, 1998).
- **Komura, N.**, "The EC Banana Regime and Judicial Control", *Journal of World Trade*, 2000, 1-87.
- **Mavroidis, P.**, "Remedies in the WTO Legal System: Between a Rock and a Hard Place", *European Journal of International Law*, 2000, 763-813.
- **Monnier, P.**, "The Time to Comply with an Adverse WTO Ruling: promptness within Reason", *Journal of World Trade*, 2001, 825-845.
- **Reif, T. and Florestal, M.**, "Revenge of the Push-Me, Pull-In: The Implementation Process under the WTO Dispute Settlement Understanding", *The International Lawyer*, 1998, 755-793.
- **Salas, M. and Jackson, J.**, "Procedural Overview of the WTO EC-Banana Dispute", *Journal of International Economic Law*, 2000, 145-66.
- **Valles, C.M. and McGiven, B.**, "The Right to Retaliate under the WTO Agreement: The 'Sequencing' Problem", *Journal of World Trade*, 2000, 63-84.

5.2 Documents and Information

For information on WTO activities, see ***www.wto.org.*** Official WTO documents can be obtained by searching on the WTO's online document database, available at: hppt://docsonline.wto.org. A very useful website on WTO dispute settlement is ***www.worldtradelaw.net*** .