Enforcing compliance with WTO dispute settlement rulings

LLM Paper
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List of abbreviations

WTO – World Trade Organization
DSB – Dispute Settlement Body
DSM – Dispute Settlement Mechanism
DSU – Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT – General Agreement on Tariffs and Trade
GATS – General Agreement on Trade in Services
SCM – Agreement on Subsidies and Countervailing Measures
TRIPS – The Agreement on Trade-Related Aspects of Intellectual Property Rights
EC – The European Communities
US – The United States of America
Introduction

WTO is the global international institution which governs global trade between nations. It is hard to overestimate the importance of this body. One of the greatest achievements of the WTO is a decrease in tariffs for industrial products from 40% to an average of 6.3% to 3.8%. This is a result of WTO trading rounds. Ministerial conference in Doha, Qatar opened the last trade round, with a very ambitious agenda in November 2001. However, due to various reasons including a great increase of members of the WTO, Doha trade round lead to a deadlock in trade negotiations. To the contrary, there is a sphere, where WTO remains immensely actual and vital — dispute settlement mechanism. The WTO Dispute settlement system was introduced during Uruguay Round by the adoption of the DSU, which constitutes Annex 2 of the WTO Agreement. The rationale of this system is obvious — it provides an instrument to enforce trade concessions agreed upon by the members of the WTO. The WTO has one of the most active international dispute settlement mechanisms in the world. Since 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued.

WTO dispute settlement mechanism is not only the most frequently used but also one of the most effective international adjudication body. In general, it is considered that about half of the brought complaints never moved to an actual panel, and thus, were settled by means of consultations. The problem, however, may arise if a party to a dispute is not willing to comply with a decision. The most vital element of implementation mechanism of DSB is prompt compliance with recommendations and rulings. Mr William J. Davey, the former Director of Legal Affair Division of WTO Secretariat, says that “while the dispute settlement system’s record for dispute resolution is quite good, its performance in terms of promptness is not so impressive”.

The high overall level of compliance could be explained by the willingness of the members to implement the recommendations and rulings. For instance, the US Government has always announced an intention to bring the WTO-inconsistent measure into conformity, either immediately or within the reasonable period of time. But, recently the US President Donald Trump administration announced that they are not going to comply with all the rulings imposed by the WTO on the US, as it can restrict the US sovereignty: “Even if a WTO dispute settlement panel — or the WTO Appellate Body — rules against the United States, such a ruling does not automatically lead to a change in U.S. law or practice”. Another big issue regarding compliance may arise when developing country tries to enforce a WTO ruling against the developed country. Available remedies might not be of much

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5 J. Magnus, Compliance with WTO dispute settlement decisions: is there a crisis? (Key issues in WTO dispute Settlement. The first ten years, Cambridge University Press 2005) 242.
assistance in such situation. Even if the withdrawal of concessions by developing member will have an effect on the economy of a developed country, such effect will be of relatively little significance. Moreover, economists often mention that withdrawing concessions is the oddest sort of sanction because it frequently hurts the country enforcing the sanction almost as much as it hurts the country against which the sanction is imposed.\(^7\)

There is a number of proposed reforms of the DSU in order to increase compliance and make a system more equal for developing states, like a direct effect of the rulings, monetary compensation, collective retaliation and many others. On the other hand, there is a number of defenders of the existing system, stating that existing retaliation remedy promotes the implementation of free trade policy that benefits a nation’s economy as a whole.\(^8\) Therefore, this paper will try to address the issue of the necessity of reforms in current dispute settlement system of the WTO.

\(^7\) M. K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats* (29 International Law 1994) 408.

\(^8\) P. B. Stephan, *Sheriff or Prisoner? The United States and the World Trade organisation.* (Vol 1: No 1, Art 7., Chicago Journal of International Law 2000) 66.
Chapter 1. General overview of the WTO dispute settlement

The aim of this chapter is to provide a general overview of the WTO dispute settlement, including an introduction to the basic elements, procedural steps and options of enforcement of the recommendations and rulings.

1.1. Basic concepts of the dispute settlement mechanism of the WTO

Dispute settlement is one of the core activities of the WTO. The General Council calls together as the Dispute Settlement Body to deal with the disputes between the WTO members. The dispute settlement procedure is based on clearly-defined transparent rules. Although it was introduced during Uruguay round, the system of dispute settlement has already existed during the GATT period. However, current DSU is much more efficient that its predecessor. One of the key improvements introduced in the DSU is a limited time-frame for completing a case. Another revolutionary renovation concerns the so-called ‘negative’ consensus rule as opposed to ‘positive’ consensus during the GATT period. Under Article 6.1 and 16.4 of the DSU, the decision by the DSB is taken, unless there is a consensus against it. This rule diminishes a possibility for the unsatisfied party to block the adoption of the ruling by the DSB. Hence, all procedural stages take place automatically and without delays.

One of the main objectives of the DSU is to provide security and predictability to the multilateral trading system. Predictable legal framework increases the trust of economic operators in the system of international trade. WTO dispute settlement provides the mechanism which is equally available and binding for all fellow-members of the WTO. So that, every Member can be sure that there is a comprehensive mechanism to enforce its rights under WTO agreements. One of the features of the WTO agreements is that they are the result of multilateral trade negotiations, consequently, they are compromises, which are often drafted to be as general as possible to cover a bunch of feasible cases. Which leads to another function of the DSB — clarification of the WTO agreements through interpretation.

A WTO dispute arises when one or several Members complain that regulations or policies of another Member do not comply with WTO law. There are three types of complaints under the DSU: “violation” complaint, “non-violation” complaint and “situation” complaint. When the WTO member failed to carry out its obligation under WTO law, another member may file a “violation” complaint. This is the most common and widespread type of complaints so far. To the contrary, “non-violation” complaint may be lodged even when the measure is still consistent with WTO agreements, however, it frustrates the benefit which complaining member legitimately expect. There were a few cases on the ground of “non-violation” complain. “Situation” complaint covers all situations, that does not fall within the two previous types. No “situation” complaint was lodged to the DSB so far.

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9 The Dispute Settlement Understanding, Article 3.2.
10 Ibid.
With regards to participants of the dispute, it is crucial to stress that only governments which represent members of the WTO may become a party to a dispute or participate as a third party. Nor citizens, nor business enterprises may take part in the WTO dispute settlement. However, there is *amicus curiae* practice, which allows sending submissions to the DSB from non-state actors. Most panels and the Appellate Body decide that they cannot take into account information from such submissions for consideration of the case, though this issue remains at their discretion.

The preferred function of the DSB is closely connected to its name — solving disputes has a priority over delivering judgements.\(^\text{12}\) Mutually agreed solution reached by parties has a number of advantages. Firstly, there is no ‘losing’ party. Nothing will be imposed on a member of the WTO by the DSB so, there is no external intervention to the national governmental policy. Secondly, costs are much lower for the parties in comparison to the panel procedure. Thirdly, it is much faster than going through the panel procedure. Once a mutually agreed solution is reached, there are fewer problems with enforcement as responding member has already agreed to a particular outcome and, therefore, will not try to shirk enforcement. Time is always of crucial importance for a complaining member, especially when it comes to enforcement.

So, the first step for a complaining party is always to request for consultations with a member which is considered to be in breach of its WTO obligations. The ‘request for consultations’ plays an extremely crucial role in the whole DSB procedure. Firstly, this step is mandatory, a party cannot ask for establishment of a panel until the term of 20 days after the date of receipt of the request terminates.\(^\text{13}\) Secondly, the ‘request for consultation’ is a starting point for a countdown of the whole DSB procedure. Therefore, sending a ‘request for consultations’ secures the complaining party from being involved in lengthy negotiation with a member concerned without further opportunity to require the establishment of panel.

In any case, mutually agreed solutions may be reached during any stage of the WTO dispute settlement process. Sometimes a party is not willing to seriously consider settlement out of the DSB unless they hear all the arguments of the other party during the panel process. For instance, in the *EC – Butter* dispute, the parties reached mutually agreed solution after the panel submitted its final report.\(^\text{14}\)

1.2 The Panel and the Appeal process

Although the main priority of the WTO dispute settlement is achievement of mutually agreed solutions by means of consultations, disputes often pursue to the panel stage. The complaining member may ask a DSB to establish a panel to make compulsory recommendations for resolution of the dispute. Due to a negative consensus rule, the DSB authorises the establishment of a panel in almost all the cases. However, the request must be duly lodged. There is a set of requirements for the request stipulated in Article 2.6 of the DSU. Such requirements were sometimes used as a ground for

\(^{12}\) The Dispute Settlement Understanding, Article 3.7.
\(^{13}\) The Dispute Settlement Understanding, Article 4.7.
‘procedural’ defence of the respondent. According to the reports of the Appellate Body, the DSU requires only minimum reference to provisions of violated agreements in the request, without setting out detailed arguments. The minimum level of information in the request means that there shall be enough data to indicate a claim and to prepare the defence for the respondent.

The panel consists of three individuals and is formed for each dispute. Well-qualified governmental and non-governmental individuals, taught or published on international trade law or policy may serve on a panel. The WTO Secretariat proposes nominations to the parties to the dispute, but parties may oppose to these nominations if they have compelling reasons to do so. The Secretariat will then propose new nominees, which could be still opposed, but in such case, the WTO Director-General will determine the composition of the panel. This procedure creates an equal balance between the right of the party to object to the panel composition and prevents a respondent from the delaying proceedings by continuously opposing to proposed panellists.

The panel procedure is strictly confidential. Panel meetings are closed to the public and conducted exclusively with delegations of the parties. The panel proceedings start with written submissions from the parties, which contain a presentation of the facts and the legal argumentation relating to specific trade rules at issue. At the first meeting, the complainant presents the case and the respondent its defence. Sometimes expert opinion can be advised to clarify scientific or technical data. After the first meeting, the panel submits descriptive sections of its reports to the parties, stating how the panel understands the facts and argumentation, giving parties two weeks for a comment. Once the comments were received and revised, the interim report containing findings and conclusions is issued to the parties. Parties then have one week to request a review. The instrument of the interim report provides an outstanding cooperation between the panel and the parties which lead to minimisation of uncertainties and misunderstanding. The final report is submitted to the parties and in three weeks becomes available for all members of the WTO.

Starting from the date of composition of the panel the procedure shall not last more than 6 months until the final report is issued. The panel report is adopted by the DSB within 60 days unless one of the parties appeals to it. Again in most cases, the panel report will be adopted by the DSB thanks to the ‘negative’ consensus voting.

There is a possibility to appeal to the panel report in DSM of the WTO. This mechanism is quite innovative, as nor it existed in the dispute settlement system under the GATT, nor it exists in the most of the international adjudicative bodies. An appeal is limited to assessment of issues of law and legal interpretation applied by the panel. Both the ‘winning’ and the ‘losing’ party have a right to appeal. One can easily imagine grounds for appeal for ‘losing’, but there can also be several reasons

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16 Dispute Settlement Understanding, Article 8.1.
17 Dispute Settlement Understanding, Article 8.6.
18 Dispute Settlement Understanding, Article 12.7.
19 Dispute Settlement Understanding, Article 17.6.
for a ‘winning’ party to challenge the panel’s report. For instance, not all of the claims of the ‘winning’ party were successful or it might be interested in challenging particular findings of the panel (e.g. legal interpretation was challenged by the US (‘winning party’)). Therefore it is possible that both of the claimant and respondent will become appellant and appellee at the same time, whereas the Appellate Body will deal with various appeals jointly.

The Appellate Body is a standing body, which comprises seven persons. Its members are appointed by the DSB for a four-year term. Scholars, judges and officials with expertise in trade, law and economics are capable of becoming a member of the Appellate Body. Three out of seven members of the Appellate Body serve to resolve a case on the basis of rotation rule, and such body is called the ‘division’. They elect a presiding member among themselves to chair the oral hearing and meetings and coordinate the drafting of the Appellate Body report.

The appeal process starts once one of the parties to a dispute sends a notice of appeal to the DSB. A notice of appeal shall include a brief statement on the grounds of an appeal including the error of the panel in the application of the law or developed legal interpretation. The appellant shall file its written submissions not later than 10 days after a notice of appeal. This might seem as an incredibly short period which will not allow sufficient preparation of the appeal but, the appellant may already start preparation of his appeal after the interim report was issued by the panel. Within 25 days from the notice of an appeal, the appellee has to lodge its written submissions.

The first oral meeting with participants is held by the Appellate Body division within 30 to 45 days from the notice. The Appellate Body can uphold, modify or reverse the legal findings of the panel. The decision of the Appellate Body is final, there is no further appeal option. Overall, the appeal stage lasts from 60 to 90 days and DSB has to accept or reject it in 30 days. The rule of ‘negative consensus’ is again applied for rejection of the Appellate Body report.

1.3 The implementation of recommendation and rulings

If a Panel or the Appellate Body of the WTO found a measure inconsistent with the WTO agreements, it suggests to bring that measure into conformity with the WTO requirements. The most appropriate way to implement recommendations and rulings is to bring the WTO-inconsistent measure into conformity. This may be achieved through a withdrawal or modification of inconsistent measure. Within 30 days after adoption of the report, the responding member shall disclose the information on the way it is going to implement the decision. The implementation must be done promptly, hence, in Australia – Salmon the Appellate Body is stated:

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22 Working procedures, Rule 7.2.
“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.”

However, immediate compliance rarely happens as the implementation of the recommendation and rulings frequently involves legislative amendments in a member state. Therefore, the reasonable period of time for implementation is frequently asked. The time for implementation depends on the measures at issue and degree of complexity of the legislative mechanism. It is important to stress that reasonable period of time is not invoked automatically, there is a burden of proof on a member concerned to pursue DSB in the necessity of such a period. The Arbitrator in Canada – Pharmaceutical mentions:

“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. 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…”

There are three approaches to establish a reasonable period of time:

(i) A reasonable period of time proposed by the member concerned and approved by the DSB. The deadline for this option is within 30 days of adoption of the panel or Appellate Body report;

(ii) Parties to the dispute may agree among themselves on a reasonable period of time for implementation within 45 days of adoption of a report. In such case, the DSB approval is not needed.

(iii) If there is no agreement on the reasonable period of time, the parties may refer to a binding WTO arbitration.

In general, the DSU establishes that the reasonable period of time should not exceed 15 months from the date of adoption of the report. However, it is not a strict rule and the period may be extended or shorten, depending on the particular circumstances.

1.4 Compliance and enforcement

The requirement of prompt implementation of the WTO rulings may be enforced if the member concerned is failing to comply. The instruments of the DSB to ensure prompt implementation are surveillance of implementation and authorisation of compensation or retaliation.

According to Article 21.6 of the DSU, “[t]he issue of implementation of the recommendations and rulings must be placed on the agenda of the DSB meeting after six months

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following the date of establishment of the reasonable period of time”. A member concerned must regularly provide status reports with the steps undertaken in compliance. It is argued that surveillance during the reasonable period of time lacks instruments in order to effectively observe steps of implementation. The member concerned is only obliged to provide reports to the DSB and there is no requirement to show any progress in the status report. The vague requirements for the status reports allow the offending party to provide very abstract information without stating precise steps that it has made or it is going to make to implement the recommendation or ruling.

Although the absolute priority of the DSB is full implementation of the recommendations and rulings within a reasonable period of time, the DSB provides two potential remedies, which are considered as temporarily tools to improve the trade positions of the member which suffers from the breach of the WTO agreements. As provided in Article 22.1 of the DSU, if the member concerned fails to bring measures that are contrary to the WTO agreements into conformity with a recommendation or ruling, the complaining member may seek compensation or obtain authorisation of the DSB to suspend concessions to the member concerned.

Compensation does not normally mean monetary remuneration for the harm caused by the WTO-inconsistent measure, instead, it means that the member concerned shall provide more trade opportunities to the complaining member. An example of ‘trade compensation’ in the context of the DSU is a reduction of tariffs or provision of more opportunities for market access. Traditionally it is understood that compensation under the DSU is not retrospective, meaning it does not compensate for the past harm, but rather prospective, particularly aiming to maintain the stability of the multilateral trading system. Although it is true that ‘trade compensation’ is presumed under the DSU, there is a practice of application of financial compensation. For example, in the US-Copyright dispute there was a mutually satisfactory agreement to grant monetary compensation as a temporary measure.

Compensation is not used often by the participants of the WTO dispute settlement arguably because of its voluntary nature. As William J. Davey accurately indicates, the political problems that preclude voluntary implementation will probably also prevent reasonable voluntary compensation. It is highly problematic to force member to compensate when it is already in breach of the WTO obligations. A scarce example of usage of voluntary compensation could be Japan- Alcoholic Beverages. In this dispute, the DSB concluded that Japan was in violation of national treatment principle, as domestically produced shochu was taxed on a lower tax than the duties imposed on imported whisky, brandy, and wine. According to the Arbitrator’s report establishing a reasonable period of time for implementation, Japan had to implement the ruling of the Appellate Body in 15

27 Ibid, 255.
months from the date of adoption.\textsuperscript{30} Japan was seeking prolongation of such period, therefore it reached an agreement with all complaining members that, the period for implementation will be extended, however in exchange Japan would lower the tariffs on imported brandy, whisky, vodka, and other products.\textsuperscript{31}

J. Pauwelyn concludes that one of the main reasons for ineffectiveness and infrequent use of compensation is that prevailing member shall agree to the specific amount to be compensated.\textsuperscript{32} DSU is silent regarding any procedures establishing a level of compensation, so parties may find it immensely difficult to reach a compromise. J. Trachtman suggests that another explanation of the rare application of cimpensation is that any compensatory concession has to be provided by the respondent on the MFN basis, whilst suspension of concessions by the complainant under the Article 22.6 is authorised only for the complaining state.\textsuperscript{33} This will be described in details in the subsection 2.3 of this paper.

Suspension of concessions or simply called retaliation is a basic remedy for non-implementation of the WTO rulings and recommendations. The concept of suspension of concessions in the WTO is following: if the member concerned failed to implement recommendation or ruling of the DSB within a reasonable period of time, then the complaining member may ask authorisation of the DSB to ‘retaliate’ by suspending concessions. The typical example of suspension of concession is an increase of tariff on a certain product from the member concerned. Again as in the case of compensation, there is no aim of reimbursement of the past harm caused by the member concerned, but to improve trade positions of the ‘winning’ party to a dispute under DSU. In practice, that means that even in situations of authorised suspension of concessions, exporters of certain goods in a complaining member that suffer from the WTO-inconsistent measure imposed by the member concerned, do not get any form of compensation out of the suspension of concessions. The major aim of suspension of concessions is to involve other interest groups from the member concerned to force that member to comply.\textsuperscript{34}

The scope of suspension of concessions is limited. Article 22.4 of the DSU provides that “[t]he level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment”. If the complaining member requests the DSB to suspend concessions and the responding member does not agree with the amount of retaliation the matter will be referred to the arbitration. DSU provides that where possible the original panel that decided on the inconsistency of the measure to the WTO law shall also decide whether the amount of retaliation requested by complaining state is equivalent to the amount of damage. Such decision,

\textsuperscript{30} Decision of the Arbitrators Japan – Alcoholic Beverages (n 20) para 27
\textsuperscript{31} Mutually Acceptable Solution on Modalities for Implementation, Japan Taxes on Alcoholic Beverages, WT/DS10/20 (Jan. 12, 1998) 1.
\textsuperscript{33} J. Trachtman, Building The WTO Cathedral (43, Stanford Journal of International Law 2007) 161.
\textsuperscript{34} Y Guohua, B. Mercurio and L. Yongjie, WTO DSU: A Detailed Interpretation (n 26) 257.
either rendered by the original panel or the arbitrator is final, it shall be adopted by the DSB again with accordance of the negative consensus rule.

The effectiveness of suspension of concessions is argued to be questionable, as there are cases when it does not help complaining members to enforce compliance. It is also criticised to be of little help for the LDC trying to impose retaliation against the developed member because of the great dependency of developing members on big players in the world trade. In further chapters, some problematic disputes will be revealed together with some views on improvements of current remedies.

**Chapter 2. ‘Technical’ suggestions to improve implementation**

Amendments to the WTO Agreements require the consensus of all members of the WTO under Article 10 (1) of the Agreement establishing the WTO. The last trade round started in Doha in 2001 and its end is not quite feasible in the nearest future. Thus, instead of waiting another decade or more to implement amendments to the DSU it is more reasonable to properly develop the existing regulation. The Ministerial Conference and the General Council was granted a right of interpretation under Article 9 (2) of the Agreement establishing the WTO. Moreover, the Appellate Body forms a consistence practice interpreting vague norms of the DSU with respect to the general principles of fairness, promptness and effectiveness of interpretation. In this Chapter, possible improvements that could be solved by interpretation will be discussed.

**2.1 Legal certainty of ‘surveillance’ of the DSB**

The ultimate goal of the dispute settlement of the WTO is prompt compliance with the recommendations and rulings. In order to facilitate such compliance, the DSB keeps national implementation under ‘surveillance’, until the dispute is resolved.

The losing member must provide regular ‘status reports’ at all scheduled DSB meetings beginning six months into the reasonable period of time. Taking into the account the role of the DSB as a forum where issues relating to the implementation of the panel and Appellate Body reports may be raised, C. Mavrodis calls the instrument of ‘surveillance’ under Article 21.6 of the DSU “[c]ontinuous finger-pointing against recalcitrant WTO members”. As it was mentioned in subchapter 1.3, DSU gives no guidance on the content of the ‘status report’ and allows members to submit ‘blank’ reports just to fulfil its procedural obligation. For instance, in Japan – Varietals the same report was provided for months, containing a few paragraphs, stating that a mutually agreed solution is imminent. It is argued, that such reports are of little use as they could be very vague and contain no specific steps of implementation. The only thing the DSB can insist is that the report itself must be provided by the offending member. Such weak surveillance provides no facilitation of the implementation, and the member who is not interested in compliance would just use the reasonable period of time of implementation to delay compliance and evade its obligations.

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36 E. Petersmann, Preparing the Doha development round: improvements and clarifications of the WTO dispute settlement understanding (Conference report, San Domenico di Fiesole (FI), 2002) 70.
37 Y Guohua, B. Mercurio and L. Yongjie, WTO DSU: A Detailed Interpretation (n 26) 246.
One may argue that the DSB can already require more specific steps from the offending member on the basis of good faith interpretation of the WTO agreements. M. Pannizzon observes that dispute settlement procedures should be carried with a due standard of ‘fair, prompt and effective’ dispute resolution. The Appellate Body in Mexico – HFCS found that the WTO member has to fulfil its procedural obligations in the good faith, which is an element of Article 3.10 of the DSU and also implied in Articles 3.2 and 3.3 of the DSU.\(^{38}\) What is more important for the interpretation of the Article 21.6 of the DSU in order to improve ‘status report’ is the element of ‘effectiveness’ of fair interpretation. It is argued that effectiveness of good faith interpretation means that the member shall “[e]ncompass the stability, predictability and foreseeability of treaty relations”.\(^{39}\) Thus, the DSB may require from the reporting member to provide the ‘status report’ which would be effective in monitoring compliance, e.g. containing specific measures taken and timetable of the remaining steps.

However, it would remain questionable how the members would respond to such ‘stricter’ requirements without their ‘explicit’ obligations in the DSU. The role of the DSB as a supervisor of the surveillance would be better enhanced by amending current DSU. The EC proposal suggests adding the word ‘detailed’ to ‘status report’ in article 21.6 of the DSU.\(^{40}\) This indeed could add more power for the DSB to require more specific achievements and further steps from responding member.

### 2.2 Monetary compensation as mutually satisfactory arrangement

As it was mentioned in paragraph 1.4, compensation has a priority over retaliation and traditionally, it takes the form of reduced tariffs or providing more market access for complaining member. The issue of including monetary compensation to the DSU was raised several times by the WTO members, however, it was never successful and failed to be introduced during the Uruguay round.\(^{41}\) Although there is no explicit basis in the current DSU for application of such a remedy, sometimes parties mutually agree to provide monetary compensation.

The first time it was invoked in the **US - Copyright** dispute. In this case, EC requested consultations with the US concerning the consistency of Section 110(5) of the United States Copyright Act with the TRIPS agreement. Under the challenged regulation, it was allowed to broadcast music in public places, such as bars, restaurants, shops, etc. without payment of a royalty to the holders of intellectual property rights. The issue was then referred to a panel, which found that “[s]ubparagraph (B) of Section 110 (5) of the United States Copyright Act is inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS agreement”.\(^{42}\) None of the parties challenged the substance of panel’s findings, but they did not agree on a reasonable period of time for implementation. The issue was referred to the binding arbitration. The US explained that there are sophisticated and long lasting approval procedures under the

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\(^{40}\) E. Petersmann, *Preparing the Doha development round* (n 36) 70.


\(^{42}\) Panel report *US – Copyright* (n 28) para 7.1 (a).
domestic rules to amend legislation, therefore it is impossible to comply with prescribed period of 15 months. The mutually agreed solution was reached that the US will pay USD 3.3 million to the fund set up within the European Community by the European Grouping of Societies of Authors and Composers. It was considered to be an interim compensation as well as support for the European Community’s efforts to protect authors’ rights during the time needed for US to amend the Copyright Act.\textsuperscript{43}

A critical view was expressed by B. Mercurio with regard to such application of monetary compensation. In his opinion, such mutually satisfactory agreement might fall under the definition of an illegal subsidy under the Agreement on Subsidies and Countervailing Measures.\textsuperscript{44} Indeed, in the \textit{US - Copyright} case the European ‘music industry’ was granted with a financial contribution from the government of the EU. B. Mercurio suggests that the direct payment from offending member to a harmed industry could in principle solve this problem as it will not be considered as a payment from the government of the state to its domestic industry. This approach would indeed eliminate any doubts with regard to the existence of an illegal subsidy, however, to my mind, it would be not natural to the existing WTO dispute settlement. In my opinion, without explicit notion in the text of the DSU, panels would feel reluctant to directly compensate economic actors as the general goal of the DSU is settling disputes between members, which are only states.

My answer to the vital issue raised by B. Mercurio would be that in a situation as such in the \textit{US - Copyright}, the financial contribution to European Grouping of Societies of Authors and Composers would not be considered as a subsidy, for the reason that compensation lacks an important element of benefit to the recipient. Compensation covers the level of nullification or impairment. The issue of calculation of the level of compensation will be discussed in subchapter 2.6.1 but it in no way exceeds the amount of nullification or impairment, therefore, I believe it is not a benefit for a suffered industry to receive (monetary) compensation.

In the more recent dispute, where parties agreed upon voluntary monetary compensation, it was again granted by the US. Hence, in the dispute \textit{US — Subsidies on Upland Cotton}, Brazil complained about prohibited and actionable subsidies provided to the US producers, users and/or exporters of upland cotton. The panel found that challenged domestic measures granted support to upland cotton and resulted in “[s]erious prejudice to Brazil’s interests in the form of price suppression in the world market”.\textsuperscript{45} The US appealed on the certain issues of law and interpretation developed by the panel. The Appellate Body upheld panel’s findings.\textsuperscript{46} The US again failed to comply within a reasonable period of time and paid USD 147.3 million per year to Brazil to provide technical assistance and capacity-building to Brazilian cotton producers until a mutually agreed solution is

\textsuperscript{43} Notification of a Mutually Satisfactory Temporary Arrangement, United States - Section 110(5) of the US Copyright Act, WT/DS160/23 (June 26, 2003).

\textsuperscript{44} B. Mercurio, \textit{Why Compensation Cannot Replace Trade Retaliation} (n 41) 324.

\textsuperscript{45} Report of the Panel, \textit{United States - Subsidies on Upland Cotton} WT/DS267/R (8 June 2004), para 8.1 (g) (i) (Report of the Panel \textit{US – Cotton}).

reached. On 16th of October 2014 parties notified the DSB that mutually agreed solution on implementation was reached and the US will transfer a lump sum payment of USD 300 million to a Brazilian cotton industry institute.47

As concluded by Y. Fukanaga, mutually agreed monetary compensation is a valid option under the current DSU and moreover, it facilitates interactions between the parties in enforcing compliance.48 In both described cases, the US voluntarily agreed upon monetary compensation. It is worth mentioning that such kind of remedy may be applied strictly temporarily and in order to compensate for the absence of prompt implementation of the ruling. Although it is not explicitly inserted into the text of the DSU, it seems that members implicitly agreed to the concept of voluntary monetary compensation as objections to the application of it, was never raised by any member of the WTO. It seems that this practice does not always appear to be the best solution for ensuring compliance. It provides some wide opportunities for the rich states in breaching the WTO Agreements and adds injury to the whole WTO dispute settlement. Specifically, it allows strong members just to pay for their violations and thus, to ‘buy’ a right to abuse the system and the rights of the developing members.

2.3 The MFN clause and compensation

There is a number of suggestions in the legal literature to provide collective character to the WTO remedies in the view of inducing compliance.49 While retaliation is provided exclusively to the complaining member, compensation already possesses collective character under the interpretation of the current DSU Article 22.1 developed by the panels and the Appellate Body of the WTO. Hence, the phrase “Compensation [...] shall be consistent with the covered WTO agreements” relates to, among others, the basic principle of non-discrimination enshrined in the most-favoured-nation clause (MFN). However, this collective approach to compensation, according to some, is one of the main reasons why it is not widely used by the members.50 The MFN clause is enshrined in a number of the WTO agreements e.g. Article 1 of the GATT, Article 12 of the GATS, Article 4 of the TRIPS. The MFN clause guarantees that “[a]ny advantage, favour, privilege or immunity granted by a member with regard to any products or services of any foreign country, shall be immediately and unconditionally accorded to the like products or like services of all other members of the WTO. This principle becomes an obstacle providing compensation for failure of prompt implementation, as such compensatory measures must be spread immediately and unconditionally to all other WTO members.

47 Notification of A Mutually Agreed Solution, United States – Subsidies on Upland Cotton, WT/DS267/46 (23 October 2014)
49 J. Pauwelyn, Enforcement and Countermeasures in the WTO (n 32) 343; H Jiaxiang, The WTO Dispute Settlement System at Twenty Years: from The Perspective of The WTO Compensation Mechanism (7, Yonsei Law Journal 2016) 17; Y. Fukanaga, Securing compliance (n 48) 388; J. Trachtman, Building The WTO Cathedral (n 33) 161; Special Session of the Dispute Settlement Body, Negotiations on the Dispute Settlement Understanding- Proposal by the LDC Group, TN/DS/W/17 (Oct. 9, 2002);
50 H Jiaxiang, The WTO Dispute settlement at Twenty Years (n 49) 12.
The fact that the MFN principle is applicable to the compensation was confirmed by the Appellate Body report in the EC - Poultry case. In this case, the Appellate Body concluded that notwithstanding the fact that the tariff-rate quotas resulted from the compensation negotiations between parties to a dispute, the non-discrimination principle is still applicable to it. Brazil’s argument regarding specificity of compensation which justifies derogation from the general principle of non-discrimination was rejected. It is expressed by B. Mercurio, that would the Appellate body have reached the conclusion that justified derogation from the MFN clause as proposed by Brazil, it will fundamentally alter the overall balance of strict adherence to the MFN principle. The same approach was illustrated in Japan - Alcoholic Beverages, where Japan provided additional tariff concessions on the basis of the MFN clause.

Still, there are examples of invoking compensation in a way that neglects the MFN principle. In particular, it happened in already discussed cases of monetary compensation as a mutually acceptable arrangement. Accordingly, Brazil and the EC enjoyed benefits of the monetary compensation exclusively in US - Subsidies on Upland Cotton and US - Copyright disputes respectively. Thus the following issue arises, is there a way of interpretation of existing provisions of the DSU which allows efficient compensation that will provide benefits exclusively to the complaining member and in the same time will not conflict with the MFN clause?

X. Li and Y. Chen proposed to technically narrow the scope of products or sectors eligible for compensation. According to them, the ideal way will be “[t]o limit additional trade concessions to those products or sectors that the complainant is the sole or major exporting country, thus to ensure the complainant get all or most of the compensation benefits”.53

The idea to technically narrowing the scope of products was used in the EC - Hormones case. The case concerned certain EC measures which prohibit the use and importation of hormone-treated meat products. These measures were challenged by the US and Canada as to their consistency with the GATT, the SPS Agreement and the Agreement on Technical Barriers to Trade. Both the panel and the Appellate Body found violations of the SPS agreement. The implementation stage was very problematic and long lasting, as European consumers’ organisation strongly opposed import of hormone-treated beef. The parties agreed that while the EU is allowed to keep an import ban on hormone-treated beef, it will introduce an expanded market access for beef produced without growth-promoting hormones — ‘High Quality Beef’ (HQB). In introducing the concept of the HQB the parties in fact technically narrowed the scope of goods falling within trade compensation. Let’s take a look at the specific requirements set out for the HQB. In the Memorandum of understanding delivered by the US and the EU in 2009 the HQB is defined as follows:

“Beef cuts obtained from carcases of heifers and steers less than 30 months of age which have only been fed a diet, for at least the last 100 days before slaughter;

52 B. Mercurio, Why Compensation Cannot Replace Trade Retaliation (n 41) 324.
containing not less than 62 percent of concentrates and/or feed grain co-products on a dietary dry matter basis”.  

As a consequence of such definition, the grain-fed beef would qualify for the new import quota, while the grass-fed beef would not. It is worth mentioning that cattle in the US and Canada is grain-fed, whilst in other members of the WTO it is grass-fed. Therefore, de facto, only the US and Canada are allowed to import beef to the EU with the benefit of the new import quota. The subsequent question is whether de facto discrimination is if covered by the MFN?

In Canada-Autos dispute, an import duty exemption was granted for motor vehicle imports by manufacturers which met the Canadian Value Added requirements. Other manufacturers were subject to a 6.1 percent import duty. Canada argued that “[t]he motor vehicles imported duty-free into Canada come from the numerous countries, and the conditions for receiving the import duty exemption have nothing to do with the origin of those vehicles”.  

Nevertheless, it was ruled by the panel and confirmed by the Appellate Body that de facto discrimination is also covered and Canada breached its obligations under the WTO Agreements. It seems that the situation in Canada - Auto is quite similar to the situation in the EC - Hormones. However, there is still one element needed to constitute a de facto discrimination in the EC - Hormones — it must be proven that the grain-fed beef and the grass-fed beef are ‘like products’. Criteria determining ‘likeness’ of the products were developed by the WTO jurisprudence. There are at least four criteria applicable to the MFN clause:

(i) the product’s end uses;
(ii) consumers’ tastes and habits;
(iii) the product’s nature, properties and quality (physical characteristics);
(iv) the customs classification of the products.

In the EC – Asbestos, however, the Appellate Body stated that these four criteria do not constitute a closed list. They are just the tools that panellists and members of the Appellate Body may use in assessing the relevant evidence. Of course, it is quite hard to predict the ‘likeness’ of these two types of beef, but it is at least doubtful that the panel will not find ‘likeness’ of product’s end use and customs classification in EC - Hormones. Products nature is not identical of course but it seems that the sole fact of the difference in the feeding of cattle will not constitute a difference in nature of the beef. Consumers’ perception, however, may be considered to be different, because there was an immense pressure of consumers’ not to import hormone-treated beef.

This brings me to the conclusion that technically narrowing the scope of products or sectors eligible for the compensation appears to be a complicated exercise, which can be challenged as to its compatibility with the MFN clause. Nevertheless, it was used by the members of the WTO in order

54 Joint Communication from the European Communities and the United States European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/28 (September 30, 2009).
to find a solution in the case where implementation was blocked and lasted for more than 15 years. The more important issue of the necessity of applicability of the MFN clause to compensation remains open. Both types of cases that support it or derogate from it were described above. It appears that it is not reasonable to impart the general MFN clause to the compensation while retaliation remains exclusive. They are both remedies for the winning party to enforce compliance, but clearly, compensation is used extremely rarely and the application of the MFN principle seems to be one of the main reasons of that. I am tending to agree with a view described by Robert E. Hudec, that the MFN clause shall apply to all WTO permanent measures, while the ones that applied temporarily may be discriminatory.\footnote{R. E. Hudec, Broadening the Scope of Remedies in WTO Dispute Settlement, in Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals (Friedl Weiss ed., Cameron May 2000) 391.}

Why retaliation is considered to be outside of the scope of the MFN clause but compensation is not?

\subsection{2.4 ‘Sequencing’ issue between Article 21.5 and Article 22.2}

Under Article 21.5 of the DSU, in the case of disagreement as to the WTO consistency of measures taken by the member concerned to comply with the recommendations and rulings of the DSB, the complaining Member can request the establishment of a panel to assess 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 failed to agree on compensation within 20 days after termination of the reasonable period, the complaining member can request authorization from the DSB to suspend concessions or other obligations under the covered agreements. The question is whether Article 21.5 of the DSU precludes complaining member from requesting authorization to suspend concessions before he referred to the (original) panel under the Article 21.5 to establish that the measures taken by the responding member are not consistent with the DSU recommendations?

This issue was raised and solved in the \textit{EC – Banana III}. The case was initiated by Ecuador, Guatemala, Honduras, Mexico and the US with regard to the regime of importation, sale and distribution of the bananas established by the EC. The panel found violations of the GATT, GATS and import licensing rules. The Appellate body upheld most of the panel’s findings.

Ecuador first requested the original panel to examine whether the EC’s implementing measure was consistent with WTO Agreements.\footnote{S. Shadikhodajaev Retaliation in the WTO Dispute Settlement System (1st edn, Wolters Kluwer Law & Business 2009) 120.} However, the US asserted that it had the right to request authorization from the DSB to suspend concessions towards the EC under the Article 22.2, regardless of the fact that the new banana regime adopted by the EC was not assessed as to its consistency with the WTO. EC objected, insisting that the US was ignoring the explicit mandate of the Article 21.5, according to which any disagreement over compliance “[s]hall be decided through recourse to this dispute settlement procedures” and added that the rights under Article 22 are
conditioned upon this requirement. From the other hand, US argued that the only legal basis to suspend concessions is to lodge a request to the DSB within 20 days following termination of the reasonable period of time. Following the EC’s interpretation, the new reasonable period of time will be granted after the first review, followed by additional minor changes, and another period for compliance and so on, ad infinitum. The US continued its reasoning by saying that the WTO could not intend for such lengthy legal proceedings, and it should not wait any longer to exercise its rights.

Arbitrators under the Article 22 (being the same persons as panellists under the Article 21.5) decided that while calculating the level of nullification or impairment under Article 22 it is necessary to involve an examination of the consistency of the implementing measure at issue. Therefore the arbitrators found a solution of ‘sequencing’ issue by the issuance of a tandem decisions under Article 22 and Article 21.5. As there is no binding precedential power of the decision of the arbitrators, a few more options were invented in order to overcome this conflict of norms. In Australia – Salmon parties managed to reach an agreement to initiate both procedures at a time, but the procedure under Article 22 will be suspended until the panellists under the Article 21.5 will render the decision. Another method was used in Canada – Aircraft, where parties agreed that they initiate only Article 21.5 procedure, while they wave the timetable of the Article 22.

To sum up, members overcame the ‘sequencing’ issue of Articles 21.5 and 22.2 of the DSU by establishing ad hoc arrangements. To exclude the sequence problem, the DSB might provide authoritative interpretation for clarifying such controversial problem, however, the Appellate Body expressed its concern that this will be not enough and amendments to the DSU are needed. In the US – Import Measures on Certain Products from the EC. Hence, they addressed the importance of the sequencing issue by saying that “[t]he terms of Articles 21.5 and Article 22 are not a ‘model of clarity’ and relationship between this two provisions has been a subject of an intensive and extensive discussion [...] eleven members of the WTO presented a proposal in the General Council to amend, inter alia, Articles 21 and 22 of the DSU”. Then they concluded that it is up to the WTO members to resolve unclear situation regarding the relationships between Articles 21.5 and 22 of the DSU: “[d]etermining what the rules and procedure is ought to be is not our responsibility and not the responsibility of the panels; it is clearly the responsibility of the members of the WTO”.

Most proposals expressed by the members were aimed to amend the DSU in a way that in the case of disagreement between the parties as to the consistency of implemented measure with the

59 Y Guohua, B. Mercurio and L. Yongjie, WTO DSU: A Detailed Interpretation (n 26)) 276
60 Ibid.
61 Decision of the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU, WT/DS27/ARB (19 April 1999), para 4.1-4.8.
62 Communication from the Chairman of the Panel, Australia – Measures Affecting the Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada, WT/DS18/17 (13 December 1999).
63 Decision of the Arbitrators, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse to Article 21.5 of the DSU by Brazil, WT/DS/141 (29 November 2002).
65 Ibid para 92.
WTO agreements, the compliance panel should first resolve this issue and only then the authorisation for retaliation may be requested. The panel report, in this case, will be final and not a subject to the appeal.  

2.5 Interpretation of Article 22.6 of the DSU

There are two main claims raised by the participants of the dispute settlement system regarding Article 22.6 of the DSU, namely calculation of the level of retaliation and application of cross-retaliation. These two issues will be examined further.

2.5.1 Calculation of the level of countermeasures authorised by the DSB

When the DSB adopted the final report and the responding party does not implement the decision in a reasonable period of time, the complaining party may request authorisation to suspend concessions. The responding party often does not agree to the level of claimed retaliation, thus they refer to the arbitration under Article 22.6. Current DSU does not provide much assistance for the arbitrators in determining the level of suspension of concessions or other obligations authorised by the DSB. In Article 22.4 it is only stated that such level shall be equivalent to the level of nullification or impairment. Thus, the arbitrators shall first establish the level of nullification or impairment.

One of the approaches that the arbitrators used for calculation of the level of nullification or impairment is comparing the value of the complaining party’s exports in an ‘actual’ WTO-inconsistent situation with the hypothetical value in a ‘counterfactual’ WTO-consistent situation (in case the responding member will comply within the reasonable period of time). It was applied by the Arbitrators in the EC – Bananas III, the EC – Hormones, and the US – Gambling disputes. The problem may occur when the arbitrators determine what is actually the WTO-consistent situation. EC – Hormones is the good case to illustrate it. The Arbitrators started calculation from determining the total annual value of exports of beef (hormone treated or not) by the US and Canada to the EC, in the situation if the EC would have withdrawn its ban on the date of expiry of the reasonable period of time. The level of nullification or impairment will thus be the difference between this (‘counterfactual’) value and (‘actual’) value of the exported beef which was treated without hormones (‘current exports’). Thereby, the Arbitrators considered ‘counterfactual’ situation as if the EC would withdraw its measure, however, it was not the sole manner to comply as the Appellate Body did not prescribed a particular way of implementation. There was another counterfactual, if the EC would not withdraw the measure, but remained it on the proper risk assessment as required by the SPS Agreement. They indeed chose this latter way of implementation, that was described in their mutual

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66 E. Petersmann, Preparing the Doha development round (n 40) 90; M. Miyagawa, Japan’s perspectives on the present Dispute Settlement Understanding negotiations (The WTO in the Twenty-first Century, Cambridge University Press 2007) 270.

67 Decision of the Arbitrators, EC – Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States - Recourse to Arbitration by the EC under Article 22.6 DSU WT/DS26/ARB (12 July 1999) para 34.

68 Ibid para 42.

acceptable agreement of 2009. According to Shadikhodajaev’s conclusion, this would result to ‘zeroing’ of nullification or impairment. But such calculation would conflict with the conclusions of the panellists who already found the existence of nullification or impairment. Therefore, arbitrators will always avoid the method of calculation leading to the effect of ‘zeroing’ of the level of nullification or impairment.

Another dispute where arbitrators made a choice between the different modes of implementation in order to make calculations is the EC – Bananas III. They first asked the US to provide calculations with respect to four possible ‘counterfactuals’ and then chose one that they considered to be reasonable. There is a lot of criticism in the literature regarding the absence of clear criteria on the basis of which arbitrators chose four possible ‘counterfactuals’ and how did they pick the most reasonable among them. Moreover, it is argued, that the arbitrators were incorrect to base the counterfactual on a mere assumption that the EC would comply in a way to provide tariff preference to the African Caribbean and Pacific group.

The interpretation of Article 22.4 of the DSU developed by the Appellate Body in the US - 1916 Act dispute showed that the term ‘equivalent’ shall correspond to the quantitative amount and not to the qualitative nature of the countermeasure. It was the first case that invoked qualitatively equivalence of suspended obligation. The EC challenged the US Anti-Dumping Act of 1916, which prohibits unfair price discrimination arising out from dumping, and provides criminal responsibility and private motion right for injured parties before the court, to recover damages and litigations costs. What is interesting about this case, is that 1916 Act was applied very rarely and moreover, it was never invoked against the EC as of the date of their complaint to the DSB. Both the panel and the Appellate Body found that 1916 Act provides for additional anti-dumping remedies, which are not allowed under the WTO Agreements. The US did not comply with the recommendations and the EC requested retaliation in the form of ‘mirror’ legislation against the US imports. The US argued that defining qualitatively the level of suspended concessions, without monetary limit. the concept of ‘equivalency’ would be neglected, as there would be no limit to potential EC measure.

The Arbitrators rejected the EC’s proposal to impose measure similar to the one of the US, as it would create an unlimited potential to be applied to the US exports to the EU. In addition, the

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70 S. Shadikhodajaev Retaliation in the WTO Dispute Settlement System (n 58) 125.
71 Decision of 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, WT/DS24/ARB (19 April 1999) para 7.4 (Decision of the Arbitrators EC – Bananas Recourse to Arbitration by the EC).
73 S. Shadikhodajaev Retaliation in the WTO Dispute Settlement System (n 58) 121.
74 Ibid. 132.
75 Decision of the Arbitrators, United States - Anti-Dumping Act of 1916 - (Original Complaint by the European Communities) - Recourse to Arbitration by the United States under Article 22.6 DSU, WT/DS135/ARB (24 February 2004) para 2.1.
US argued that the level of nullification or impairment was ‘zero’.\(^{76}\) Arbitrators refused such approach saying that the Appellate Body already confirmed the existence of nullification or impairment of EC’s benefits, thus the level must be higher than ‘zero’.\(^{77}\) To calculate the level of nullification they suggested to cumulate monetary value of all final judgments or settlement awards entered into by the EC’s companies under the 1916 Act. This approach was highly criticised, as the arbitrators refused to include ‘chilling effect’ – arguably the most damaging effect of the 1916 Act to the calculation.\(^{78}\) Under the Arbitrators’ approach, countermeasures may be allowed only when the WTO-inconsistent measure was actually applied and caused a real economic loss to the complaining state. Y. Fukanaga is concerned that such approach “[m]ight negate the meaning of a panel report that finds a violation of a statute as such, instead of or in addition to a violation of the application of the statute.”\(^{79}\) S. Shadikhodjaev calls the approach of calculation used by the arbitrators in the *US – 1916 Act* a ‘Future Factors’ method and states that it is one of the most controversial ones, as arbitrators are only able to define parameters of the calculation contingent on certain factors which are due in the future.\(^{80}\)

The different approach for calculation of the level of nullification or impairment is used with regard to countermeasures to export subsidies. The standard under Article 4.10 of the SCM Agreement is ‘appropriateness’. According to Tratchman, it would be reasonable if ‘appropriateness’ under SCM would be assessed through the standard of ‘equivalence’ under Article 22.4 of the DSU.\(^{81}\) The first case involving countermeasures under the SCM Agreement was *Brazil – Aircraft*. In this case, Canada challenged Brazil’s export subsidy to foreign purchases of aircraft as to its consistency with the SCM Agreement. The panel found a violation which was upheld by the Appellate Body report. The requested amount of retaliation was challenged to the arbitration under Article 22.6 of the DSU. Canada proposed two levels of countermeasures based on (i) the amount of the contested subsidy (CAD 705.6 million per year) and on (ii) the harm suffered by the Canadian aircraft industry (CAD 4.7 billion).\(^{82}\) The Arbitrators followed the calculation based on the amount of prohibited subsidy and rejected counterfactual approach.\(^{83}\) Thus, the arbitrators created a new ground in resorting to the ‘violation value’ approach. Countermeasure corresponded to the full amount of the subsidy payment without prejudice to their effect on Canada. Such ‘violation value’ approach of

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\(^{76}\) They based it on the fact that “[t]he failure to bring the 1916 Act into conformity at the end of the reasonable period of time has not nullified or impaired any benefits to the EC under the GATT or AD Agreement. [...] No order was in place against EC products and no EC trade was being affected. Had the 1916 Act been brought into compliance as of that date, it would not have resulted in any increased trade for the EC. Accordingly, the level of nullification or impairment being suffered by the EC was zero”. *See Ibid.* para 5.45.

\(^{77}\) *Ibid.* 5.46

\(^{78}\) S. Shadikhodjaev *Retaliation in the WTO Dispute Settlement System* (n 58) 135.

\(^{79}\) Y. Fukanaga, *Securing compliance* (n 48) 424.

\(^{80}\) S. Shadikhodjaev *Retaliation in the WTO Dispute Settlement System* (n 58) 150.

\(^{81}\) J. Tratchman, *Building The WTO Cathedral* (n 33) 135.

\(^{82}\) Decision of 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 (28 July 2000) para 3.32.

calculation is available exclusively for countermeasures under Article 4.10 of the SCM Agreement and cannot be used in calculating retaliation under another WTO Agreements.

To sum up, approaches taken by the arbitrates to calculate the level of nullification or impairment differ largely depending on the nature of the case. It is always important which counterfactuals the complainant and the respondent have chosen when approaching the arbitration, as arbitrators in most cases assess the nullification or impairment on the counterfactuals which were accepted by the parties. A switch to another approach than the one proposed by the party is possible in the case when party failed to justify the countermeasure. The ‘violation value’ approach used in the cases of subsidies and countervailing measure, seems to be more precise, as the value of the countermeasure is not something abstract as an effect of the measure in ‘counterfactual’ approach, but the concrete value of subsidy. Thus, in the ‘counterfactual’ situation, it is highly vital that arbitrators will foresee all relevant side-factors which could occur in the counterfactual situation, and take them into account together with all the relevant existing factors. If it would be done clear and transparent, such approach will also lead to reasonable amount of nullification or impairment.

There is a criticism of existing equivalence concept as it fails to address the difference between blocked and affected trade. Moreover, it is even argued that the level of impairment calculated by the arbitrators was just an average of ‘ask’ and ‘offer’ at least in EC – Bananas III, EC – Hormones (US), US – Byrd and Brazil – Aircraft. What is proposed to arbitrators in order to deliver more reasonable amounts? It is hard to say, it is always easy to criticise but much harder to improve the system, especially taking into account diplomatic and politic agreements behind the decisions of the arbitrators which will never become public but significantly affect the decision-making. One of the proposals is an appointment of arbitrators with economic background and requiring higher context-specific operationalization. Another consideration is introducing more global changes such as the retrospective character of retaliation, which will allow calculating past harm caused by the measure. Others say that arbitrators should better take a step back and rely on the burden of proof of the parties. What is clear is that it is unacceptable that arbitrators deliver decisions without consistent and precise reasoning for the choice of the appropriate model among various options.

2.5.2 Cross-retaliation

WTO law covers a wide range of spheres of trade, such as trade in goods, services, intellectual property rights and others. Therefore, suspension of concessions is not limited to the one area of trade, but in order to obtain authorization to retaliate in a different sector than the one where the violation occurred, three main principles were established according to Article 22.3 of the DSU. Thus,

84 S.Shadikhodajaev Retaliation in the WTO Dispute Settlement System (n 58) 150.
85 Ibid.
86 J. Trachtman, Building The WTO Cathedral (n 33) 141; Holger Spamann, The Myth of Rebalancing Retaliation (n 72) 46.
87 Holger Spamann, The Myth of Rebalancing Retaliation (n 72) 75.
88 Ibid. 77.
89 J. Trachtman, Building The WTO Cathedral (n 33) 140.
complaining party should first seek retaliation in the same sector where nullification or impairment was found. Secondly, a party may seek to retaliate in another sector of the same agreement, if it is impracticable or ineffective to retaliate in the same sector. For instance, retaliation might be awarded in the area of patents, however, the violation was found in the area of trademarks. Lastly, if it is still impracticable or ineffective to retaliate in a different sector of the same agreement, and the circumstances are serious enough, retaliation may be awarded under another agreement. In short, these principles are referred as ‘same-sector’ retaliation, ‘cross-sector’ retaliation and ‘cross-agreement’ retaliation. Some argue that retaliation owes its popularity as a remedy specifically to the cross-retaliation possibility.

The first case where cross-retaliation was invoked was the EC – Bananas III. Arbitrators stated that their mandate is applicable to determining whether the principles or procedures concerning the suspension of concessions across sectors in the same agreement or concerning different agreements have been followed in accordance with Article 22.3 of the DSU. In this dispute the measure at issue violated provisions of the GATT, however, Ecuador requested retaliation with respect to trade in services and intellectual property rights. According to Ecuador, they will suffer loss if the restriction were imposed on trade in goods, as it is the main source of import from the EC to the Ecuador. They further stated, that the EC’s bananas importation regime greatly impacted Ecuador and “circumstances are serious enough” to provide cross-retaliation. The Arbitrator concluded that Ecuador’s request was well-grounded and relevant procedures were duly followed based on the following argumentation:

“We have addressed and accepted Ecuador’s arguments that it has taken account of this factor in considering whether to seek suspension under another agreement. We are thus satisfied that Ecuador has taken into account within the meaning of subparagraph (ii) of Article 22.3(d) "broader economic elements" and "broader economic consequences" in applying the principles and procedures set forth in Article 22.3".

Ecuador however, never used its right to suspend concessions as the EU was one of the main importers of the Ecuador and application of retaliation could cause more harm than benefit for their economy. They settled the case afterwards.

Another case of cross-retaliation was US – Gambling. Here again, the measure at issue was covered by the GATS and the complaining member decided to suspend their obligations covered by the TRIPS. Therefore, their claim fell under the third principle of Article 22.3 and they should prove

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90 M. Limenta, WTO Retaliation. Effectiveness and Purposes (1st edn, Bloomsbury Publishing PLC 2017) 32
93 Ibid, para 135.
94 H. Jiaxiang, The WTO Dispute settlement at Twenty Years (n 49) 12.
not only impracticability or ineffectiveness of retaliation in the same sector but also the seriousness of the circumstances, that justify retaliation under the different agreement.

First Antigua argued that it may not import services within the same sector to the same extent as the caused level of nullification or impairment.\textsuperscript{95} Then they noted that online gambling was the second largest source of income of Antigua, while on the other hand, ceasing all the trade in this sphere with the US (estimated around USD 180 million) will produce no consequences for the US economy (value of online gambling market in the US was around USD 15.5 billion).\textsuperscript{96} Lastly, they demonstrated that economy of Antigua would suffer largely if trade barriers under the GATS would be invoked. The idea of Antigua was that whereas a restriction covered by the GATS in the same sector as online gambling may not even get the attention of decision-makers in Washington, if the suspension of the US intellectual property rights would be allowed, then Hollywood and software companies may lobby politicians in Washington to make a change to the laws.\textsuperscript{97} Suspendi\ng obligations under the TRIPS Agreement is an example of how the developing country may overcome the problem of imposing trade barriers on the developed member. However, retaliation under TRIPS is still not a perfect solution as some drawbacks of retaliation remain, for instance the intellectual property rights-holders of a responding member may decide not to place their goods in the complaining member’s market and domestic consumers might lose access to such goods. Another example is retaliation in the field of trade marks which does not seem to be desirable as it will create confusion for the consumer’s in the complaining member. As it is wittily noted by Slater “Unlike nearly identical digital copies of music, a cheap red wine does not become a fine Bordeaux simply because a domestic producer slaps a Bordeaux label on the bottle”.\textsuperscript{98} But the suspension of copyrights in the entertainment industry or industrial patents would definitely create a strong pressure on non-complying developed state without harm to the domestic industry. It is proposed that the government of complaining member might issue licenses to the domestic producers to reproduce/broadcast a certain amount of films, music, computer software etc.\textsuperscript{99}

**Chapter 3. ‘Policy’ issues for increasing of compliance**

There are some proposals to enforce compliance with the WTO rulings that require amendments to the text of the DSU. If there is a real intention of the members to reconsider the implementation process of dispute settlement, such amendments are inevitably necessary to be implemented. In further subchapters a critical assessment of the most popular suggestions will be provided.

**3.1 Direct effect of WTO rulings**

\textsuperscript{95} Decision of the Arbitrators, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse by Antigua and Barbuda to Article 22.2 of the DSU, WT/DS285/22 (June 22, 2007) para 3.

\textsuperscript{96} Ibid.


\textsuperscript{99} K. W. Lee, Suspending Trips Obligations as a Viable Option for Developing Countries to Enforce WTO Rulings (9, Asian Journal WTO & International Health Law & Policy 2014) 226.
The direct effect of the rulings is one of the modifications that first arises in mind in the view of enforcing compliance with WTO dispute settlement. The direct effect would mean that individuals could base their claims in the national court directly on the basis of the WTO ruling. The direct effect is an immensely politically sensitive issue, as it provides supremacy of the WTO and may cause some threats of loss of sovereignty. It is especially important taking into account the concerns expressed by the President Trump administration.

Let’s first assess to which degree the rulings of the WTO are binding. WTO members are required to ensure compliance with its WTO obligations in national law under Article 16.4 of the Marrakesh Agreement. However, the legal status of the WTO agreements and dispute settlement rulings in national law is not specified. In academia, there are several views regarding the binding force of the WTO rulings. Thus Bello concludes that the WTO rulings are not binding in the general meaning of international law, as they lack an enforcement body and need a political will to voluntary comply.\textsuperscript{100} Jackson insisted that the rulings of the WTO are binding in the sense of traditional international law, as the losing party is under the obligation to implement the recommendation and rulings of the WTO by change or withdrawal of the inconsistent measure.\textsuperscript{101} Indeed, the rulings are binding upon members and must be implemented as prompt as possible according to Article 21 of the DSU. Fei suggests that the approach of Bello is based on the mistaken argument that there is a need of a special enforcement body in order to impart binding force to the WTO rulings.\textsuperscript{102} She then convincingly concludes that although WTO rulings differ from those of national courts in its binding degree, precedential effect and the form of enforcement, it does not mean that they are not binding, it just shows that they are different.\textsuperscript{103} Petersman suggests that the WTO rulings have the nature of secondary obligations compared to the obligations of the members to comply with the WTO agreements.\textsuperscript{104} It does not mean that they are less binding than the agreements, but it entails that they are binding only on the parties to the dispute, which in addition to their general WTO obligations, added obligations to comply with the rulings. Therefore, the overall conclusion is that rulings are binding upon parties to a WTO dispute.

The issue of the direct effect of the rulings was raised in the national courts of the WTO members and basically, it was denied by both the US and the EU. Fei concludes that the US explicitly deny the application of direct effect as “Section 102 of the domestic Uruguay Round Agreements Act provides that WTO rulings do not have binding effects under US law and individuals cannot challenge US law consistency with WTO law”.\textsuperscript{105} The EU courts attach lack of the direct effect of the WTO rulings to the absence of the direct effect of the WTO law.\textsuperscript{106} There are a lot of constraints that explain

\textsuperscript{101} J. Jackson, The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation (91(1) American Journal of International Law 1997) 60, 63.
\textsuperscript{103} Ibid, 495.
\textsuperscript{105} Ibid, 497.
\textsuperscript{106} Ibid.
the reluctance of states to impart direct effect to the WTO rulings. The first being democratic legitimacy. Panels and Appellate Body divisions are not controlled by the members and they were not attributed to direct effect during the Uruguay round. Second is that the character of the panel and Appellate Body proceedings were not designed to be a kind of supreme instance of trade disputes towards member’s national judicial system. Moreover, there is no check and balances towards WTO tribunals because of the negative consensus voting of the DSB. It is immensely hard, if not impossible, to block a particular panel or Appellate body decision. Based on this, one may understand why states do not accept the direct effect of the WTO rulings, however, it is not necessarily mean that there is no place for such modification.

Fei proposed a so-called ‘conditional direct effect’ of the WTO rulings. In her view, it is reasonable that private parties lodge a complaint to the national courts towards national authorities to if they are failed to comply within a reasonable period of time for implementation. The ‘conditional’ element means that a national court would have a wide discretion in applying proportionality test to grant an immune to a national authority by weighting and balancing several factors: “[s]uch as the complainants’ losses, causality between the losses and non-compliance with WTO rulings, public interests, allocation of the costs among economic actors, or the State’s budget”. There are three subsequent features regarding the scope of such conditional direct effect: (i) it applies only to the parties to a dispute, regarding the ruling in that dispute; (ii) there is no obligations of the full compensation to private parties, national court may award partial compensation taking into account circumstances of the case; (iii) if the immunity was granted to a national authority by the court it does not waive an obligation of the member to comply with WTO ruling in international context. This proposal increases the power of judicial branch to enforce the WTO decision, which seems appealing. Hence, there will be a system of double-checks of compliance and improvement of the balance of powers within a member of the WTO. It also provides a judicial remedy to private parties which are generally excepted from the whole WTO dispute settlement. This approach also solves the problem of differences in peculiarities of implementation procedure between members which might be far from understanding by the WTO tribunals.

However, a lot of constraints remain. For instance, such an approach might change the balance of powers within the WTO in benefit to adjudicatory bodies, which might be not the best consequence. It is also argued that the direct effect might make the losing state more demanding towards the other parties which will lead to more aggressive negotiations in the context of the WTO. To conclude, the proposal of conditional direct effect seems appealing as it will definitely strengthen the enforcement stage while waving drawbacks of the full direct effect. National courts will provide a sufficient counterbalance to executive branch which is failed to comply, while there will be an opportunity to provide immune when it is justifiable.

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107 X. Fei, Direct Effect of WTO Rulings (n 102) 509.
108 Ibid.
109 Ibid.
3.2 Mandatory monetary compensation

Monetary compensation was proposed during the Doha Round negotiations, by many WTO members as a new vital instrument to strengthen the existing WTO compensation mechanism, and gained support from both developed countries (the US and EU) and developing countries (China, Ecuador and Kenya). There are arguments for and against monetary as opposed to trade compensation and some opponents and supporters of the mandatory character of proposed compensation.

Monetary compensation indeed has a number of benefits. Firstly, one of the big constraints of trade compensation is a long process of decision making, especially when it comes to adoption of a legislative act and pass it through a national parliament. On the other hand, monetary compensation may be provided more promptly as it is often a simpler procedure for the government of the complaining member. Y. Fukanaga argues that the monetary compensation will be particularly interesting for the complaining member if it is a developing country, thereby the developed country would provide funding for developing programs in order to rebuild the injured industry or to distribute compensation to the economic actors that were harmed.

Secondly, the fact that monetary compensation will not fall within the MFN principle, as it was in the US – Copyright case, adds more value to such a remedy. It is true that the applicability of the MFN principle to compensation made it unattractive for complaining party. There are several views regarding the applicability of the MFN clause to the monetary compensation. According to the observation of O’Connor and Djordjevic “[c]ompensation, whether or not offered in money, must be administered in accordance with non-discriminatory principles of the WTO”. The position of A. Davies, who is of the opinion that the MFN shall not be applicable to the financial compensation, seems to be more well-grounded. Thus, Davies argues that Article 1 of the GATT covers “[c]ustoms duties and charges’, all ‘rules and formalities in connection with importation and exportation’ and ‘all matters referred to in paragraphs 2 and 4 of Article 3 ‘[i]nternal taxes or other internal charges and all laws regulations and requirements affecting internal sale, offering for sale, purchase, transportation or use]’. Hence, although the financial compensation confers an ‘advantage’ on a foreign product, it does not involve relaxing or removing of a previously imposed customs duty, rule or formality, or internal tax. Taking into account the previous constraints of the members regarding the MFN principle applicable to the compensation (trade or financial as a mutually acceptable solution), it would be reasonable to provide financial compensation to the complainant exclusively.

Thirdly, monetary compensation imposes a burden of compliance with the ruling on the government of the member concerned, while trade compensation affects the industry, which is not directly liable for the WTO-inconsistent measure of the member (of course if the lobbying issue is

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111 X. Li, Y. Chen, *Constraints of the WTO* (n 53) 650.
113 Ibid.
115 Ibid.
neglected). Moreover, a monetary compensation may solve the problem of lack of involvement of private parties in the disputes and lack of their protection by the DSU, as they would be direct beneficiaries of the financial contribution granted by the member concerned. This reasoning is developed on the existing practice of monetary compensation in the US – Copyright case and supported by J. Tratchman who suggests that injured export groups could be directly compensated with monetary damages for the harm caused by a trade-inconsistent measure. While it was argued in subchapter 2.3 that direct compensation of exporters is not likely to occur under the current DSU, the amendments might give an instrument to panellists to apply it. However, some authors suggest that monetary compensation, even voluntary should not be distributed to the injured economic actors. It is suggested that monetary compensation shall be paid to the government of complaining member and the government will then decide, under its own discretion, whether and how it will assist injured industries. The approach of direct compensation of industries is justified by the purpose of overcoming the possible problem with considering monetary compensation as a financial subsidy under the SCM Agreement.

Fourthly, the mandatory monetary compensation may increase the promptness of implementation. Not only it would impose additional pressure on the member concerned, but also provide timely compensation for the less powerful complaining member. From the other hand, the abuse of such system is possible if more powerful states would like to use mandatory monetary compensation against the LDC’s. H. Jiaxiang proposed to set an application threshold so that, the mandatory monetary compensation could be applied only if the level of economic development of the requesting party is lower than a threshold. Bronkers and Van den Broek suggest inserting a ‘ceiling’ of the amount payable by developing countries based on a ‘market size’ and ‘economic development’ to address the issue of abuse of the system by strong members.

Finally, the fact that monetary compensation will have mandatory character will change the essence of existing compensation and guarantee that the complaining party will receive compensation for non-implementation from the member concerned. It is suggested that mandatory financial compensation would not substitute the existing compensation, but would be an additional instrument for the developing members, as they do not have strong bargaining position in the negotiations on voluntary compensation. Pei-Kan Yang proposed, that the mandatory character of monetary compensation shall mean that the complaining member, after 30 days of the expiration of the reasonable period of time, may request mandatory compensation from the DSB which will decide

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116 B. Mercurio, *Why Compensation Cannot Replace Trade Retaliation* (n 41) 321.
117 J. Tratchman, *Building The WTO Cathedral* (n 33) 165.
118 H. Jiaxiang, *The WTO Dispute settlement at Twenty Years* (n 49) 23.
119 Ibid.
120 Ibid 21.
122 H. Jiaxiang, *The WTO Dispute settlement at Twenty Years* (n 49) 21.
according to the reverse consensus rule.\textsuperscript{123} When it is explicitly prescribed in the report adopted by the DSB, the offending party has an obligation, not an option to pay the compensation.\textsuperscript{124} To the contrary, Y. Fukunaga concludes that the monetary compensation shall remain voluntary as mutually satisfactory agreement, however, he advises to explicitly provide several options for compensation (including monetary) to the text of the DSU.\textsuperscript{125} In his view, monetary compensation cannot be granted from a developed legal interpretation of the current DSU.\textsuperscript{126} H. Jiaxiang suggests that the mandatory monetary compensation shall be added to the current DSU as an exceptional solution in the arbitration process: “Specifically, when the losing party can neither terminate the measures that have been ruled as inconsistent with the WTO rules nor meet the winning party’s tariff concession or market access expansion demands, the two parties can negotiate on compensation methods, including monetary compensation”. Pei-Kan Yang proposes, even more engagement of the mandatory character of the monetary compensation in the arbitration, in his view, when a member concerned wants to challenge the calculation in arbitration, it shall pay a certain percentage of the alleged level of the damages to the WTO in advance.\textsuperscript{127}

There is a strong concern that rich members could ‘buy’ time for non-implementation and violation of the WTO Agreements. There is a suggestion to add an institutional approval of the mandatory compensation so as it may be imposed only by the request of the complaining party and authorisation of the DSB.\textsuperscript{128} This of course, may be helpful, but considering the ‘negative’ consensus decision-making of the DSB, it is likely that such compensation will always be approved by the DSB.

There is also a concern of excessive litigation caused by the including mandatory monetary compensation into the remedies under the DSU.\textsuperscript{129} It is based on the fact that the compensation is provided to the governments of the members, who may be politically interested in obtaining a monetary remuneration, therefore such governments would overload the DSB with the cases that are not of the highest trade importance and are not aimed at improvement to the world trade. J. Nzelihe compares developing states with minority shareholders in a company, who “[b]ecause of their small stake in the venture, has very little incentive to consider the effect of the action on other shareholders, the supposed beneficiaries, who ultimately bear the costs”.\textsuperscript{130} So there is a risk that developing states would lodge world trade in constant litigation.

Taking into account arguments described in the literature, it could be observed that although mandatory compensation may add some value to the complaining state, while the responding state eludes implementation, it is hard to imagine this type of remedy in the practice of the WTO. Firstly, the very nature of the compensation under the DSB is voluntary, and it is done with purpose. WTO

\textsuperscript{123} P. Yang, \textit{Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in The WTO Dispute Settlement} (3, Asian Journal WTO & International Health Law & Policy 2008) 450.
\textsuperscript{124} H. Jiaxiang, \textit{The WTO Dispute settlement at Twenty Years} (n 49) 21.
\textsuperscript{125} Y. Fukunaga, \textit{Securing Compliance Through The WTO DSS} (n 48) 413.
\textsuperscript{126} Ibid.
\textsuperscript{127} Pei-Kan Yang, \textit{Some Thoughts on a Feasible Operation of Monetary Compensation} (n 123) 455.
\textsuperscript{128} H. Jiaxiang, \textit{The WTO Dispute settlement at Twenty Years} (n 49) 23.
\textsuperscript{129} J. Nzelihe, \textit{The Case Against Reforming the WTO Enforcement Mechanism} (University of Illinois Law Review 2008) 347.
\textsuperscript{130} Ibid.
was created as an organisation which promotes international trade, specifically by providing benefits to its members, and the imposition of remedies such as monetary compensation creates a high risk of loss of trust in the system. The WTO does not impose a direct decision on a member, it recommends the way of implementation which will lead to the free trade. If the member does not follow this way, there is a little chance that the WTO, with its ruling, will be capable of obliging the offending member to enforce the decision. The WTO member may still refuse to pay this mandatory compensation. What would be the next step of the DSB to enforce such a remedy? Some suggest that such a member would be deprived of an opportunity to use the dispute settlement system unless the compensation is fully paid. 131 This does not look as the best solution, as in fact it will just increase a political tension between the members and may provoke a WTO member, who refused to comply, to turn back to protectionist measures. The effective remedy should better show the member the consequences of the loss of benefit which was already provided by the WTO in the case of non-compliance, such as reduced tariffs.

Overall, it may be concluded that while monetary compensation, applied temporarily, may overcome some problems of current compensation, such as application of the MFN principle, increasing promptness of implementation and imposing consequences of non-implementation not on the industry but on the government of offending member, the mandatory character of compensation will bring more harm than benefits. Moreover, it does not seem to be possible to introduce mandatory monetary compensation, as the consensus of the General Council is needed for this. Although, current compensation mechanism is still in need of reform. The proposal of X. Li and Y. Chen suggests introducing appropriate rules and procedures to facilitate members to reach the compensation agreements. 132 This approach will not be contrary to the will of the member concerned as the agreement shall be reached, but it would open benefits of voluntary monetary compensation to both parties.

3.3 Retrospective remedies

The retrospective character of the remedies follows the proposal of monetary compensation. It should first be recalled that the general scope of the remedies under the current DSU is much narrower than it is usually applied in the international law. The General Assembly of the UN adopted the Resolution on Responsibility of States for Internationally Wrongful Acts in 2001 which contains following obligations: (i) cessation; (ii) reparation; (iii) restitution; (iv) compensation. 133

The concept of compensation and retaliation under the DSU is considered to be prospective, as opposed to the retrospective obligations under the UN approach. The prospective approach was for instance, applied in the famous EC – Bananas III dispute. In this dispute, arbitrators considered the prospective gross value of lost exports from the US to the EC as the basis for calculation of nullification or impairment. 134 In the EC – Hormones the retaliation was based on ongoing loss of the

131 Pei-Kan Yang, Some Thoughts on a Feasible Operation of Monetary Compensation (n 123) 455.
132 X. Li, Y. Chen, Constraints of the WTO Compensation (n 53) 662.
134 Decision of the Arbitrators EC – Bananas Recourse to Arbitration by the EC (n 71) para 7.1.
trade on the annual basis. In the *US – Cotton* the Appellate Body stated that “[r]emedies in WTO law are generally understood to be prospective in nature”. However, there is an opposite view. The WTO dispute settlement is a form of international adjudicatory body and rules that applied to it, should take into account general international law principles. Moreover, it is considered, that “[t]he power of a tribunal to award remedies, including reparation, is part of the implied or incidental jurisdiction of panels”.

Some countries proposed to introduce retrospective remedies in the DSU. The argument for the retrospective remedies expressed by these countries is that they do not have competitive industries, sometimes all exports of the developing countries are in one trade sector, therefore, the mere imposition of trade-restrictive measures might be destructive for the industry. Thus, the withdrawal of the measures could not be enough to rebalance trade. Mexico argued that the prospective character of remedies provide a ‘cost-free’ period for an offending member not to comply with the rulings.

The proposal of retrospective remedies is also supported in academia. J. Pauwelyn notes that the current WTO legal system provides prospective remedies only, and suggests to add an obvious, for international law, remedy – reparation for past damage. P. Yang observes that the retroactivity would induce compliance in case of introduction of the monetary compensation. In his view, large amounts of the remedies will not only relieve the desire of the responding party to drag out compliance but also have a persuasive effect on potential violators. S. Charnovitz notes, that the prospective character of retaliation creates a problem of incommensurability of the WTO countermeasures with the suffered injury. J. Trachtman concludes, that even current DSU does not forbid the application of retrospective remedies, as the sole guidance provided for the arbitrators in the current DSU is that the level of suspension of concession shall be equivalent to the level of nullification or impairment. To support his view, Trachtman recalls *Australia – Leather* case, where the arbitrators “[r]ejected arguments that an arcane reading of Article 19 of the DSU permitted only remedies that involved prospective action”. In this case, the Australian measure was found to be an export subsidy inconsistent with the SCM agreement and the measure should be withdrawn. The US then referred to Article 21.5 of the DSU to challenge the consistency of implementing measures of Australian. The panel in its decision mentioned that the retrospective remedies can exist in the


139 P. Yang, *Some Thoughts on a Feasible Operation of Monetary Compensation* (n 123) 429.


141 P. Yang, *Some Thoughts on a Feasible Operation of Monetary Compensation* (n 123) 440.

142 S. Charnovitz, *Rethinking WTO Trade Sanctions* (95 American Journal of International Law 2001) 812

143 J. Trachtman, *Building The WTO Cathedral* (n 33) 140-141.
system of WTO dispute settlement. The panel report was not supported by the members of the WTO and came as a shock for developed countries who expressed their angry concerns with the inconsistency of such finding with WTO dispute settlement practice. Y. Fukanaga does not exclude the possibility of application of retrospective retaliation under current DSU but suggests to explicitly acknowledge it to facilitate the agreement of the parties to wipe out all past harm caused by the WTO-inconsistent measure.

With regard to calculation of retrospective remedies, Kenya and the LDC group proposed that the calculation should be performed from the day when the WTO-inconsistent measure entered into force. There is a concern that such an approach would lead to the huge amounts of monetary compensation, thus members can lose interest in the whole WTO benefits in fear of possible outweighing sanctions. To solve this issue J. Pauwelyn proposed to require a strict causal link between the WTO-inconsistent measure and caused harm. Others proposed that DSU will announce a certain cap for each case of retrospective remedy.

To sum up, it should first be stated that amendments of the DSU would be necessary in order to apply retrospective remedies. There were several arguments for retrospective remedies being applicable under the current DSU as a result of interpretation through the prism of the general international law, but as it was concluded by G. Vidigal, the WTO remedies are different in nature from the other international adjudicatory bodies’ remedies. It could be concluded that by not including explicit reparation or any other retrospective remedy, WTO members have ‘contracted-out’ from the application of general principles.

Regarding the feasibility of introducing of retrospective remedies, it shall be noted that there were a lot of unsatisfied members with the panel decision in *Australia – Automotive Leather*. It could be predicted that members of the WTO, at least the one who has the greater amount of non-compliance cases (the US and the EU), would not accept the concept of retrospective remedies and thus the probability of such amendments are quite low. The more theoretic issue is whether ‘retroactivity’ could in principle increase enforcement of the recommendations and rulings, or should the character of WTO dispute settlement be changed in order to compensate for past harm? It seems that there is a potential of such retrospective remedy to induce compliance by threat of huge amounts of compensation that the responding member would have to provide in case of WTO-inconsistent measure. However, the probability of enforcement of such remedy appears to be quite low. What

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148 M. Bronckers, *Financial Compensation In The WTO* (n 121) 123.
150 M. Bronckers, *Financial Compensation In The WTO* (n 121) 122.
151 G. Vidigal, *Re-Assessing WTO remedies* (n 136); 518.
would be the instrument to compel violating member to pay such large amounts remains an open question.

3.4 Collective and punitive retaliation

Collective character of actions is not a new phenomenon for the DSU. In the EC – Bananas, the US used their right to claim violation by the EC, nonetheless the measure had no impact on the economy of the US to any extent. In doing so, the US proved the beneficial membership in WTO allows to challenge a trade restriction with no legal interest of a complaining member.152 The Appellate body found that “With the increased interdependency of the global economy [...] Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly”.153 There are members that have only one sector of international trade, therefore (unilateral) retaliation would be not the best solution for them.154 Some consider that such dependency creates a fear of developing state to generate an anger of developed state.155

Ecuador in EC- Bananas III, never used retaliation against the EC. It was noted that Ecuador’s dependency on the EC imports was so great that if the retaliation would be implemented, it would cause more harm than benefit for its economy.156 In the view of the LDC group, retaliation has to be massive and disproportional to the level of the nullification and impairment in order to increase compliance, which can be achieved by introducing a collective right of retaliation against a violating state.157 To provide an assessment of such proposal it is advised to examine it through the prism of international law principles. In the view of Shadikhodjaev, the proposal of the LDC group is based on Chapter VII of the UN Charter, not on the International Law Commission’s Articles on State responsibility, as collective remedies are excluded from the latter.158 The Chapter VII, however, deals with *jus cogens* breaches (prohibition of the use of force or acts of aggression).159 The WTO obligations are of another nature, so the proposal of the LDC looks unusual for the WTO law. But, one of the principles of the WTO is special and differential treatment which could be a proper basis for justification of collective retaliation.

One of the main drawbacks of the proposal is negligence of the principle of equivalence of the level of retaliation to nullification or impairment. E. Kessie argues that the equivalence is a cardinal principle of the suspension of concessions and thus, concludes, that this proposal is too revolutionary and impossible to achieve.160 S. Shadikhodjaev notes that collective retaliation may evolve into punitive remedy because of the negligence of the equivalence principle and thus

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153 AB Report EC – Banana (n 15) para 138.
154 H. Jiaxiang, *The WTO Dispute settlement at Twenty Years* (n 49) 12.
155 R. E. Hudec, *Broadening the Scope of Remedies in WTO* (n 57) 367.
156 S. Shadikhodjaev *Retaliation in the WTO Dispute Settlement System* (n 58) 122.
158 S. Shadikhodjaev *Retaliation in the WTO Dispute Settlement System* (n 58) 170.
contradict with vary nature of countermeasures under both WTO and international law.\textsuperscript{161} Punitive sanctions as such were also one of the proposals to reform the system, but it did not find a wide support. It is argued that international sanctions regime that provides remedies in excess for the damage of inconsistent measure, is likely to devolve into a trade war.\textsuperscript{162} Moreover, it is considered that international trade law is not yet developed enough to demand the punishment model.\textsuperscript{163}

Another constrain the collective retaliation is that it is contrary to the traditional bilateral character of the WTO dispute settlement.\textsuperscript{164} Y. Fukanaga is of the opinion that such proposal is unrealistic and legally unsound because participation of a member who is non-party to a dispute would lead to disruption and increased tension between parties and will not help to achieve implementation.\textsuperscript{165}

To sum up, the existing retaliation is indeed of little help for the developing state as the risk of ‘teasing the tiger’ is too high for them. Collective retaliation has a sound idea of unification of forces and resources of (developing) members to induce compliance, however, it has some conflicts with fundamental principles of the DSU. It seems that a suggestion of including some elements of collective retaliation to an amended DSU will have a positive effect. In theory, a bilateral enforcement may be inefficient. J. Pauwelyn provides an example of such a scenario: suppose in the \textit{US – FSC}, the EU would be authorised to suspend the SPS obligations towards the US, then the EC’s ban of hormone-treated beef in the \textit{EC – Hormones} would be a countermeasure against the US subsidy in the \textit{US – FSC}.\textsuperscript{166} In the result of such bilateral enforcement, one violation will compensate another violation, which is obviously not the aim of the WTO. So if enforcement of the remedies in the WTO dispute settlement would evolve to more global sense, the collective retaliation may be applied by any member, that suffered damage as a result of inconsistent measure of the member concerned in an amount equivalent to the caused damage.\textsuperscript{167}

\textbf{3.5. Negotiable retaliation}

The proposal of Mexico is to some extent a development of collective retaliation, in a sense that retaliatory rights are granted to a member other than complaining. Hence, the complaining member may ‘sell’ retaliation against the member in breach which will lead to a mutually agreed benefit. Take for instance Ecuador which could not invoke retaliation in the \textit{EC – Banana III} at all. If the Ecuador would have sold its right to retaliate it will benefit for obtaining remuneration from such a deal, even if it would have been lower than the possible level of suspension of concessions granted by the DSB. The ‘purchaser’ state would be able to obtain benefit from invoking full retaliation against the infringing state. It is suggested that this would be an advantage for least developed countries, as with

\begin{footnotesize}
\begin{enumerate}
\item S. Shadikhodjaev \textit{Retaliation in the WTO Dispute Settlement System} (n 58) 172.
\item J. Nzélibe, \textit{The Case Against Reforming the WTO Enforcement Mechanism} (n 129) 344.
\item R. E. Hudec, \textit{Broadening the Scope of Remedies in WTO} (n 59) 371.
\item Y. Fukanaga, \textit{Securing Compliance Through The WTO DSS} (n 48) 425.
\item J. Pauwelyn, \textit{Enforcement and Countermeasures in the WTO} (n 32) 344.
\item \textit{Ibid} 345.
\end{enumerate}
\end{footnotesize}
compensation for ‘sold’ retaliation they might finance private legal support for other WTO legal actions that it otherwise could not afford to initiate.\textsuperscript{168} Therefore, there would be a possibility to create a ‘market’ of retaliatory rights, where the willing members would have an opportunity to buy retaliatory rights against compensation to an injured state.\textsuperscript{169}

The possible ‘market’ of trade-restrictive measures concerned some members, as in their view there might be potential misuse and abuse.\textsuperscript{170} Others said that such modification will politicise WTO dispute settlement and result in discouraging parties form seeking mutually agreed solutions which is one of the core aims of the DSU.\textsuperscript{171}

To conclude, the negotiable retaliation might have some benefits in theory and is probably driven by blind willingness to do everything possible to protect LDC’s. However, it seems to be too radical to seriously consider it as possible amendment of the current DSU. As it is argued by several scholars, one of the main drawbacks is a problem to find possible ‘purchasers’ as ‘sold’ retaliation must be in the same amount, under the same agreement and targeted against the same member.\textsuperscript{172} Therefore it is quite doubtful that the suggestion of Mexico will find its application in amendment of the DSU.

Conclusions

The paper revealed some drawbacks of enforcement mechanism of the dispute settlement of the WTO. The retaliation remedy is criticised for being economically inefficient, harming the ‘innocent’ industry, and failing to induce compliance especially for the LDC’s. Compensation seems to be more in line with the idea of promotion of international trade, as instead of increasing barriers by the complaining member (as in retaliation) the offending member provides more trade possibilities. But this cause a possible problem of not-willingness of the complaining member to obtain trade compensation, as it is applied on the MFN basis to all the members of the WTO and if exporters from another member is more competitive, the complaining member will not benefit from such remedy. It is one of the main reasons why compensation is used so rarely.

Firstly, the paper provided some ‘technical’ solutions to increase compliance, which can be achieved through interpretation of the current DSU. However, it is noted that the ability of the Appellate Body to provide interpretation raised serious concerns amongst members.\textsuperscript{173} From the one hand, it is argued that ‘far-reaching’ interpretation of the text of the DSU by the Appellate Body, is done in excess of the power attributed to them.\textsuperscript{174} From the other hand, ‘policy’ decisions which bring


\textsuperscript{170} S. Shadikhodjaev Retaliation in the WTO Dispute Settlement System (n 58) 175.

\textsuperscript{171} Ibid.

\textsuperscript{172} Ibid.

\textsuperscript{173} Ibid.

amendments to the DSU to improve compliance, do not seem to be a solution either, as for the amendments a consensus is needed. Political tensions are quite high in the WTO and members are tending to negotiate in a ‘smaller club’ on the regional levels. However, it might be different with respect to the DSU, as dispute settlement remains popular among members. Moreover, the DSU was already amended during the Doha round negotiations in order to allow all governments of the members of the WTO to observe the oral hearings held by panels and the Appellate Body.\textsuperscript{175}

In the assessment of improvements of the compliance mechanism, it shall be kept in mind that the ultimate aim of the DSU is achieving compliance or a mutually agreed solution. DSU rules were designed to be flexible, taking into the account the global context of multinational trade covered by the WTO, therefore any punitive sanctions or mandatory remedies would not be in frames of the WTO dispute settlement. As it is mentioned by Bello, WTO lacks an enforcement ‘policeman’\textsuperscript{176}, therefore it is simply not feasible that introduction of such sanctions would affect compliance. And it seems that it would be impossible to introduce an enforcement body on such a global level. Therefore, it appears that the best way to induce compliance is to facilitate achievement of mutually agreed solutions. It seems that several amendments would give parties more instruments to promote mutually agreed solutions.

First, improvement of the role of compensation. While mandatory character of the compensation does not seem to be achievable and probably would be hardly enforceable, the voluntary compensation as a temporary arrangement might increase the benefits for the complaining party. It appears that the MFN clause applicable to compensation makes it unattractive, therefore the provision of compensation exclusively for complaining member might improve the economic situation of complaining member, while the responding member implements the ruling. However, this could be of little help for the LDCs who have a few areas of export and trade restrictive measure in one sector will harm economy without possibility from benefiting from compensation. Therefore, it is proposed to provide monetary compensation in such situations. The biggest concern with this regard was expressed by Mercurio, namely that rich states would buy-out rights to violate concessions.\textsuperscript{177} This is indeed a high risk, but it might be mitigated if there will be a strong power of the DSB to supervise the implementation, and block the monetary compensation, in case of abuse of the system by rich state, in favour of retaliation.

Secondly, current retaliation regime may also be improved. Cross-retaliation remedy appears to be a mechanism for developing members to enforce compliance against developed states with minimisation of the cost of retaliation. For instance, suspension of the TRIPS concessions is easily achievable. Collective retaliation may also be a good improvement to help developing state to enforce compliance. But it was criticised for being contrary to the principle of equivalence of the level of retaliation and the level of nullification or impairment caused by the measure. Therefore, it seems reasonable if collective retaliation will be applied by several developing states, who for instance


\textsuperscript{176} J. Bello, \textit{The WTO DSU: Less Is More} (n 100) 416-417.

\textsuperscript{177} B. Mercurio, \textit{Why Compensation Cannot Replace Trade Retaliation} (n 41) 322.
cannot benefit from unilateral retaliation because of the lack of variety of export sectors, but in a cumulative amount that would not be higher than the level of nullification or impairment of the WTO-inconsistent measure. Another desirable improvement of retaliation is retrospectivity as it appears to provide more incentives for the member to comply within the reasonable period of time for implementation.

Lastly, a conditional direct effect of the WTO rulings appears to be an efficient tool to use the check-and-balance system of the different branches of powers inside the national system of the member concerned. The conditional direct effect also benefits private parties, who are generally not able to induce compliance of the government of the member concerned.

Overall, WTO dispute settlement demonstrates a high record of cases and enforcement of rulings. However, in cases where the losing member is not willing to comply, WTO remedies do not provide much assistance to the complaining party. Therefore, there is still a long way for reconsideration of the remedies in order to build a stronger adjudication in frames of the global trade. However, the main issue remains, is there a political will of the members to promote WTO negotiations or current trend of regional trade agreements would overweight the development of WTO instruments?
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