Supervision of Implementation:
Dispute settlement of the World Trade Organization (WTO)

Christian Tietje* & Kevin Crow**

A. Introduction

This entry provides an analysis of the rules governing the supervision of implementation of Dispute Settlement Body (“DSB”) reports based on the World Trade Organization’s (“WTO”) Dispute Settlement Understanding (“DSU”) (World Trade Organization, Enforcement system [MPEPIL]; Supervision of enforcement of judgments). Specifically, it focuses on the precise functions of the DSB’s implementation surveillance after an Appellate Body (“AB”) or Panel Report has been issued. As such, this entry does not analyze procedures developed under Article 21:5 DSU (Compliance proceedings pursuant to Article 21:5 DSU: Dispute settlement of the World Trade Organization (WTO)) nor procedures developed under Article 22:6 DSU (Arbitration on the level of retaliation: Dispute settlement of the World Trade Organization (WTO)), because those provisions concern interactions with Members prior to implementation and other elements of WTO law. Rather, this entry analyzes the rules and procedures that govern the DSB’s follow-up on whether its reports have been implemented and situations where retaliation measures are implemented.

B. WTO Rules on Implementation

1. ‘Reasonable Period of Time’
2. DSB Supervision of (Non)Implementation
3. Compliance v. Enforcement: What is the Nature of WTO Dispute Settlement and How Does the DSB’s Implementation Surveillance Fit In?

C. Dimensions of (Non)Implementation

1. Sources of Domestic Law
2. Nature of the Measure
3. Spheres of Influence

D. Proposals for Reform

1. Enforcement at Initial Stage of Implementation
2. Modifications to Starting Point and Time Frame
3. Intensifying Special and Differential Treatment for Developing Countries

E. Conclusion
B. WTO Rules on Implementation

At the WTO, after disputes are resolved based on the recommendations of a Panel or the Appellate Body, the DSU accords to the DSB certain ‘supervision’ responsibilities with respect to the implementation of the DSB’s dispute resolution recommendations. This section will attempt to elucidate three aspects of the DSU’s provisions that are particularly ambiguous. First, while stressing the necessity of “prompt compliance” with DSB recommendations, Article 21 of the DSU requires Members to report implementation plans within 30 days of Panel or AB reports, but allows for actual implementation to take place within a “reasonable period of time” where immediate implementation is “impracticable” (a). Second, although Article 22 provides that, where a Member fails to implement DSB recommendations within a “reasonable period of time”, the affected party may request permission to suspend concessions to the Member concerned, but the economic and social scope of such suspensions are imprecise, although curtailed by the subparagraphs of Article 22:3 (b). Finally, there is some ambiguity as to the nature of the DSB’s ‘supervision’ responsibilities; while the language of WTO agreements consistently refer to ‘compliance’, some critics suggest that legalities (or at least vocabularies) of ‘enforcement’ would better produce results (c). The sections that follow will address each of these ambiguities in turn.

1. ‘Reasonable Period of Time’

Article 21 DSU’s “reasonable period of time” is at times a source of tension and controversy amongst Members and DSU reform advocates, but it does not apply in all cases. Indeed, the language of Article 21 itself exhibits some ambiguity as to whether the reasonable period must first be ‘necessary’ to be legitimate, and in the event of prohibited subsidies, a Panel must “recommend that the subsidizing Member withdraw the subsidy without delay” and must specify the time-period for this withdrawal.¹ Nevertheless, in cases in which the reasonable period does apply, the main controversy centers on how to (or who should) assess ‘reasonableness’, and how to monitor whether compliance within the period is progressing in good faith, for such assessments will bear on whether later retaliation requests should be granted. To be sure, a ‘reasonable period’ to achieve implementation should not be understood as a time during which the WTO Member concerned is acting in accordance with its obligations under the WTO Agreement, but rather, a grace period granted to the Member concerned, during which it continues to apply WTO-inconsistent measures for bringing its measures into compliance. During that period, the affected Member does not suffer the consequences of non-implementation; that is, the Member is not yet required to offer compensation or face retaliation from

---

¹ See SCM Agreement art. 4.7. Moreover, according to DSU art. 26.2, DSU art. 21.3 also would not apply to a situation complaint. Moreover, some Members and trade law experts have opined that Articles 8.2 and 8.3 of the Agreement on Safeguards also provide for a procedure partially departing from DSU art. 21.3, which would allow Members to bypass the DSU’s ‘reasonable period of time’.
the complaining party. When it comes to determining the precise period which can be considered ‘reasonable’ before implementation, Article 21.3 DSU sets out three different avenues through which Members can proceed: the time-period can be (i) proposed by the Member concerned and approved by consensus by the DSB; (ii) mutually agreed by the parties to the dispute within 45 days after adoption of the report(s); or (iii) determined by an arbitrator.

The first option, approval by the DSB, has yet to occur. The DSB has, however, on a few occasions approved the implementing Member’s request to extend a reasonable period of time that had previously been awarded through arbitration. Perhaps this is just as well, as some critics have noted that WTO consensus provisions often mask rather than equalize voting power because, as Aaif Alqadhaiﬁ suggests, each member’s effective veto power is directly proportional to its weight in world trade.

Where the DSB has not approved a Member’s proposal and both parties cannot agree on the reasonable period of time, the parties may resort to arbitration under Article 21.3(c) of the DSU (à Determination of reasonable period of time: Dispute settlement of the World Trade Organization (WTO)). According to the WTO Secretariat’s Handbook on the WTO Dispute Settlement System:

This procedure is initiated by one party’s request for arbitration, which it communicates to the chairperson of the DSB. Although the arbitrator can be any individual or group of individuals, all arbitrators acting under Article 21.3(c) of the DSU so far have been current or former Appellate Body members. If the parties cannot agree on who should serve as the arbitrator(s) within ten days after referral of the matter to arbitration, the Director-General appoints the arbitrator within another ten days after consulting the parties.

Article 21.3(c) of the DSU sets out a ‘guideline period’ for the arbitrator in determining when a Member must implement DSB recommendations: the period should not exceed 15 months from the date of adoption of the DSB’s adoption of an AB or Panel Report. Some scholars have suggested that, although in theory the 15-month period is an ‘outer limit’, it tends to become a default period of ‘reasonability’. Nevertheless, technically speaking, the 15-month period is a “guideline”, and not an average or standard period. Indeed, the DSU expresses the timeframe as a maximum period subject to “particular circumstances” and several arbitrators have held that “the reasonable period of time,

---

2 DSU, art. 2.4.
5 Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat, A Handbook on the WTO Dispute Settlement System, 2nd Ed. (2017). See also, for example, Korea’s request for arbitration in US – Line Pipe, WT/DS202/14, 2 May 2002; see also DSU art. 21, fn. 13; DSU art. 21, fn. 12.
7 Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 45.
as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB”. The intention is not to favor Members with excessively bureaucratic or cumbersome internal processes of legal transformation, but “to give the implementing Member the time it truly needs under its normal procedures, making use of any available flexibility,” but “not having to utilize an extraordinary legislative procedure”.

For several reasons, the supervision of implementation can be thought of as ‘Respondent-driven’. First, during the arbitration stage, the Member who must implement the recommendations bears the burden of proof to show that the duration of any proposed period of implementation constitutes a reasonable period of time, and the longer the proposed period of implementation, the greater this burden. Second, arbitrators are not tasked with (and have avoided) the responsibility of suggesting ways and means of implementation or assessing individual steps as consistent with WTO law. And third, the implementing Member has the discretion to choose among whatever options may be available to bring domestic practice into conformity with WTO law. On this point, it has been suggested that DSB compliance monitoring could be made more effective by giving the DSB collectively (rather than individual adjudicators) the power to recommend specific ways that a member’s measure could be brought into compliance (Giorgio Sacredoti in Manfred Elsig et al (eds.), Assessing the World Trade Organization: Fit for Purpose?, pp. 171-72 (2017)). Whether the chosen option truly achieves full conformity is to be decided according to the procedure of Article 21.5 of the DSU, a provision which falls outside the scope of this entry. Accordingly, arbitrators must determine the “reasonable period of time” based on the Respondent’s legal characterizations and domestic policy decisions. And to this end, arbitrators have so far set the ‘reasonable period of time’ at periods ranging from six to fifteen months. In instances in which parties have agreed on other periods, pursuant to Article 21 of the DSU, these periods have ranged from four to eighteen months.

2. DSB Surveillance of (Non)Implementation

The DSB is charged with surveilling the implementation process of a Member to ensure that its

---

8 Award of the Arbitrator, EC – Hormones, par. 26; quoted with approval in Award of the Arbitrator, Indonesia – Autos, par. 22; Award of the Arbitrator, Korea – Alcoholic Beverages, par. 37; Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 47; Award of the Arbitrator, US – 1916 Act, par. 32.

9 See, Award of the Arbitrator, Canada – Autos, par. 47; Award of the Arbitrator, US – Section 110(5) Copyright Act, par. 39; Award of the Arbitrator, US – 1916 Act, par. 39; Award of the Arbitrator, Canada – Patent Term, par. 64; Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 63.

10 Award of the Arbitrator, Korea – Alcoholic Beverages, par. 42.

11 We are partly drawing this characterization from Peter-Tobias Stoll & Arthur Steinmann, WTO Dispute Settlement: The Implementation Stage, Max Planck UNYB 3 (1999).

12 Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 47; quoted with approval in Award of the Arbitrator, US – 1916 Act, par. 32.

13 Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 42.

14 Award of the Arbitrator, Canada – Pharmaceutical Patents, par. 43.

domestic practices reach conformity with DSB recommendations. Although any Member can raise the issue of implementation at any time in the DSB, the issue of implementation is placed by default on the agenda of the DSB six months following the date of establishment of the reasonable period of time. However, the DSB can decide on other times to review implementation. As the Secretariat’s Handbook on the WTO Dispute Settlement System instructs:

The item remains on the DSB’s agenda until the issue is resolved. At least ten days before each such DSB meeting, the Member concerned is required to provide the DSB with a written status report of its progress in the implementation. These status reports ensure transparency, and they may also give an incentive to advance implementation. When the implementing Member delivers these status reports in the DSB, it is common for other Members, particularly the complainant(s), to take the opportunity to demand full and expeditious implementation and to declare that they are following the matter with close attention.16

To this end, although the DSU stresses a preference for full implementation of DSB recommendations and rulings,17 “if the losing Member fails to bring its measure into conformity with its WTO obligations within the reasonable period of time, the prevailing complainant is entitled to resort to temporary measures, which can be either compensation or the suspension of WTO obligations”.18 However, even if a Member has provided compensation or concessions or other obligations have been suspended, so long as the DSB’s recommendations to bring a disputed measure into conformity with WTO law have not been implemented, the DSB is technically obliged to continue surveilling the concerned Member until the recommendations have been adopted.19

Despite the DSB’s ongoing surveillance obligations, and despite the matrix of rules governing surveillance, the DSU lacks specific rules to deal with ongoing non-implementation (see e.g. Russia – Pigs (EU) WT/DS475/22, ongoing as of 21 November 2018). Nevertheless, the case law indicates a broad deference to Member claims that implementation is impracticable, even after reasonable time frames have been established.20 Such an analysis reveals that, in conjunction with the initial procedures for ‘reasonable period’ determination, the DSB’s supervision of implementation is also largely Member-driven, if not predominantly Respondent-driven. More specifically, the rules could be understood as outsourcing compliance supervision to the Complaining party, as compliance appears to be generally assumed unless the affected Member presses for DSB supervision; moreover, the Respondent enjoys broad deference in the DSB’s assessment of whether implementation in

16 Legal Affairs Division and the Rules Division of the WTO Secretariat, and the Appellate Body Secretariat, A Handbook on the WTO Dispute Settlement System, 2 ed. (2017); see also, e.g., EC – Bananas III. This dispute was on the DSB agenda for years and opened every regular DSB meeting during that time. See also DSU, art. 21.6.
17 DSU, arts. 3.7 and 22.1.
19 DSU, art. 22.8.
20 See, e.g., e.g., EC – Bananas III.
practicable, even after time frames are set.\textsuperscript{21}

In this way, the DSB rules can allow for strategic delay or even bad faith delay, and they do not appear to have any effective means to curb such uses of the rules. The DSU does not require—and the DSB does not demand—that Respondent Status Reports actually show progress toward compliance.\textsuperscript{22} Although the DSB technically retains the obligation to surveil until the dispute is resolved, there is nothing in the DSU that empowers the DSB to furnish an adequate response if Members intentionally or benevolently drag their metaphorical feet. Moreover, although the WTO has for years acknowledged these weaknesses and noted that the surveillance system is flawed, it has done nothing to remedy the situation.\textsuperscript{23} Indeed, this lackadaisical response has led some scholars to call for more ‘enforcement’-oriented reforms to the DSU as opposed to those that emphasize ‘compliance’.\textsuperscript{24}

3. Compliance v. Enforcement: What is the Nature of WTO Dispute Settlement and How Does the DSB’s Implementation Surveillance Fit In?

Even beyond surveillance, DSU reforms have been the subject of ongoing discussion amongst practitioners and academics almost since the WTO was established in 1995.\textsuperscript{25} Many of the divisions amongst contemporary suggestions for reform center on different understandings of the nature of the WTO system itself: Is the DSB issuing legally binding statements rooted in a shared constitutional understanding of the WTO system and international law more generally, or is the DSB resolving disputes for individual grievances regarding interpretations of contractual terms? On the one hand, a compliance theory of DSB supervision would suggest a contractual nature to the WTO system, and would therefore legitimate ‘efficient breach’ theories on whether compliance was always necessary in the first place—i.e., if it is more efficient to breach a contract than to perform it, the law should allow the breach so long as the affected Member is compensated (see e.g. Alan O. Sykes & Eric A. Posner, Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues (John M. Olin Program in Law and Economics Working Paper No. 546, 2011)). On the other hand, an enforcement supervision more closely aligns with claims that the WTO system gleans legitimacy from the shared interests of all of its Members, and therefore, DSB recommendations

\textsuperscript{21} See generally DSU, arts. 21 and 22.\textsuperscript{22} See Yang Guohua, Bryan Mercurio and Li Yongjie, WTO DISPUTE SETTLEMENT UNDERSTANDING: A DETAILED INTERPRETATION 242, 245 (2005) ("[N]othing more than status reports are required from respondents at the DSB meetings during the compliance period and that “no progress need be shown in the reports”).\textsuperscript{23} Fernando De Mateo, WTO Dispute Settlement Body – Developments in 2014, WTO (Mar. 24, 2014).\textsuperscript{24} See e.g. Cherie O’Neil Taylor, Beyond Retaliation, 38 NW. J. INT’L. L. & BUS. 63 (2017).\textsuperscript{25} Gregory Shaffer, Manfred Elsig & Sergio Puig, The Law and Politics of the WTO Dispute Settlement System, in Wayne Sandholtz & Christopher Whytock (eds), THE POLITICS OF INTERNATIONAL LAW (2017).\textsuperscript{26} The Ministerial Decision on the Application and Review of the Understanding on the Rules and Procedures Governing the Settlement of Disputes requires the Ministerial Conference to complete a full review of the DSU within four years of the entry into force of the WTO Agreement and to make a decision on the occasion of its first meeting after the completion of the review whether to continue, modify or terminate such dispute settlement rules and procedures. Accordingly, the DSB has so far discussed the matter in 14 formal meetings (WT/DSB/M39, 42, 44, 45, 46, 47, 48, 52, 67, 70, 72, 116). However, so far none of these have produced results. WTO, The Consultative Board, The Future of the WTO: Addressing Institutional Challenges in the New Millennium, 56 (2004); and most recently, see WTO, MC11 In Brief, ‘Dispute Settlement’, available at https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm (2018).
should be implemented as an expression of collective interest, regardless of whether a breach is more efficient for specific Members in a given case.

Some scholars view the ambiguities of the DSU as contributing to a double standard for Members depending on economic clout. More specifically, these scholars suggest that it is typically only the most economically powerful countries that can ‘retaliate’ or view non-implementation as an efficient breach, and thus, a compliance theory appears to be dominant amongst those countries. Conversely, other scholars argue that cross-retaliation provisions should curb such power asymmetries by allowing Members to mitigate overzealous retaliation from economically powerful states (→ Cross-retaliation: Dispute settlement of the World Trade Organization (WTO)). However, the data indicates that this is unlikely to be the case. Indeed, to date, not a single developing country has initiated retaliation proceedings, and it is unclear whether developing countries that cross-retaliated incurred any benefit as a result. Indeed, as early as 2007, studies showed on-time implementation amongst developed countries to be at 50%, whereas developing countries implemented recommendations on time 80% of the time. Still another view is that, in assessing justifications for DSU reform from an international constitutional public choice perspective, empirical analyses of cases in which non-compliance led to a suspension of concessions reveals that economic externalities are the twin of non-compliance, and as such, the basic problem toward which reform should geared is how to domestically internalize those externalities. These perspectives can, of course, indicate different things in different places and can be interpreted in different ways. Nevertheless, the across-the-board inconsistency in implementation is one of many indicators that the WTO’s decisions with respect to developed countries involves more options than standard implementation.

The inconsistency in approaches to implementation for developing vis-à-vis developed countries is perhaps reinforced by the Member-driven nature of the DSU procedural rules, which lack clear guidelines on what ‘compliance’ is, especially in instances where domestic law must be revised. The dimensions of these instances are the focus of the following section.

C. Domestic Dimensions of (Non)Implementation

---

Supervision of implementation by the DSB involves many variables related to the nature of the specificities of the domestic legal systems and political dynamics of the Members involved in a given dispute. To be sure, the complexity of implementation increases alongside the complexity of the relationships between domestic legislative and political powers of the affected Member. Accordingly, the following sections will briefly discuss three domestic dimensions of DSB implementation supervision: (a) domestic legal structures, (b) the nature of the disputed measure, and (c) spheres of political and strategic influence involved circumventing the process of (non)implementation of DSB recommendations.

1. Domestic Legal Structures

Measures in violation of multilateral rules may emanate from any branch of government — executive, legislative, or judicial — and therefore, it is “reasonable to assume that the implementation may require measures of all these powers.”33 According to Camila Capucio, the “simplest” mode of compliance usually occurs when implementation requires an action of the executive branch, in the exercise of its function of management and definition of policies based on its weighting on the situation and state interests. William Davey adds that, as a rule, implementation measures involving the legislative branch are more complex and time consuming, as these are actions in which legislation in its strictest sense is required; legislative difficulties can arise from all sorts of factors, almost as varied as the WTO’s Members. Moreover, in addition to procedures and deadlines regularly required for legislative process, political compositions of legislative bodies may not necessarily align with the executive branch, which may be responsible for foreign policy (see e.g. Rachel Brewster and Adam Chilton, ‘Supplying Compliance: Why and When the United States Complies with WTO Rulings’ (2014) 39 YJIL 201). And indeed, political complications are manifold; for example, there may be a perception amongst legislators that the modification required by the DSB’s recommendation is not appropriate.34

Implementing measures with the participation of the judiciary are not common, but nevertheless compound complications in DSB recommendation implementation. As Capucio and Davey point out:

In the case Brasil — Measures Affecting Imports of Retreaded Tyres […] the use of a Arguição de descumprimento de preceito fundamental – ADPF (literally translated as “Allegation of breach of [Argumentation] of a fundamental precept), a kind of judicial review of constitutionality action, was essential to enable compliance without revoking the measure, which in substance was legitimate.35

---

As this brief example suggests, implementation may involve domestic and international measures together or separately. Moreover, each measure may arise from judicial, legislative, or executive action, and the remedy for each measure may be judicial, legislative or executive in nature.

2. Nature of the Measure

Regarding the criteria of the extent of inconsistent measure, they can be classified as single or specific measures (e.g., measures concerning a specific act or an identifiable and distinguishable product or products) or measures of general applicability (e.g., measures concerning procedures, methodologies, or broader policy concerns, such as social or environmental measures). To this end, some scholars have noted a correlation between the complexity of a WTO-inconsistent measure and the difficulty of implementation: compliance measures tend to mirror the amplitude and scope of the inconsistent measure, as they are quite often related to the multilateral obligation and its Agreement in a given case.36 Thus, the greater the degree of generality, often the greater difficulty in correlating all of the elements necessary to implement a DSB recommendation while maintaining a commitment to domestic interests.

3. Spheres of Influence

Other variables can also contribute to the design of the implementation measure, most predominantly the legal and political aspects of the power structure within the State, the polarization of interests involved in disputes, and the ability of different groups to influence implementation. As briefly discussed above, the WTO Secretariat tends to consider that a case removed from the DSB record of ongoing disputes indicates compliance.37 This can be problematic because, as Shaffer and his collaborators have argued,38 the removal of a case from the record only indicates settlement, and the settlement often only reflects partial compliance:

In practice, the parties to a dispute negotiate how the respondent’s policy must be adjusted in response to a WTO panel or Appellate Body ruling, involving degrees of policy adjustment. The high number of WTO cases settled through the instrument of a “Mutually Agreed Solution” illustrates that compliance is far from perfect when a matter is formally settled.39

36 Id.
39 Id. at 22. See also see eg Ruiz Fabri, The Relationship Between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC-Bananas Dispute, in Laurence Boisson de Chazournes et al (eds), Diplomatic and Judicial Means of Dispute Settlement, pp. 87-118 (2013).
Indeed, around one-third of WTO complaints that result in a panel ruling end up reaching their ultimate resolution through the Mutually Agreed Solution mechanism in DSU Article 3.7 (Friendly settlement: Dispute settlement of the World Trade Organization (WTO)). After reaching such a solution, parties formally notify their negotiated settlement to the WTO, and the disagreement goes away.

While critics have been quick to point out the ‘coercive back door’ opened through DSU Article 3.7, such understandings are incomplete at best because they assume less powerful states would favor DSB surveillance. Indeed, parties do not necessarily negotiate deals that result in less than full compliance due to economic or political weakness; parties may negotiate such deals because the WTO’s remedies are weak. As Shaffer et al put it:

> Where the respondent fails to comply or offer compensation, the complainant can only seek authorization to withdraw trade concessions affecting an equivalent amount of the respondent’s trade. Thus the challenged market barrier would remain. Moreover, this remedy is only prospective, so that the withdrawal of trade concessions can only occur after the case is concluded, which is years after it was commenced. These weak remedies reduce the complainants’ leverage in negotiating a final settlement.

Moreover, a Respondent may pursue a legal strategy of deliberate noncompliance, either by deliberately slowing proceedings while following formal rules (as discussed above), or by complying with the black letter requirements of the ruling but “finding other means to deny market access to the other parties.” In such an event, a Respondent’s actions may be entirely consistent with WTO law, but the DSB’s recommendations would have a net effect of economic uselessness. In instances where the Respondent is creative about denying market access, the Complainant would need to start the WTO legal process afresh at great economic and linear expense.

**D. Proposals for Reform**

Although DSU reform has long remained on the agenda for the WTO, negotiations have so far failed to produce outcomes for adoption.

---

41 For an example of how asymmetries of power sneak into formally neutral procedural requirements, see e.g. Richard Steinberg, In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO, 56 INTERNATIONAL ORGANIZATION 339 (2002).
Admittedly, however, these are politically difficult times for drastic reforms. Typically, reform negotiations occur in special sessions of the DSB devoted solely to reform issues (“Special Session”), kept separate from the more mundane tasks involved in surveilling existing disputes. So far, these negotiations procured more than a dozen major proposals from individual Members and groups of Members, such as the Least-Developed Countries and the African Group. These proposals suggest amendments to almost every phase of the WTO dispute settlement system, and accordingly, virtually every article of the DSU. The following sections detail the most prominent suggestions, namely (a) enforcement at the initial stage of implementation; (b) modifications to starting point and time frame; and (c) intensifying special and differential treatment for developing countries.

1. Enforcement at Initial Stage of Implementation

One prominent proposal is to amend the initial stage of implementation. This refers to the 30-day period between the DSB’s adoption of an AB or Panel Report and the initial meeting during which the implementing member is required to inform the DSB of its intention to implement the recommendations and to make its case, if necessary, for a ‘reasonable period of time’.

On 10 July 2002, Korea made a submission to the DSB Special Session which provided a statistical analysis on the number of days usually taken to fix the ‘reasonable period’ through Article 21.3(c) arbitration. The analysis suggested that a major cause for delay in determining ‘reasonable period’ was that, as a practice, no substantive efforts were made for implementation within the 30-day initiation stage. Accordingly, it proposed a ‘fast-track option’ under which the Complainant should be given the right to engage the Respondent in bilateral discussion on a ‘reasonable period’ immediately after the adoption of a Panel or AB Report. If the parties fail to agree on the reasonable period of time or an arbitrator before the DSB meeting held 30 days after adoption of the reports, the complaining party should be allowed at that DSB meeting to request the Director-General to appoint an arbitrator. In addition, given that there usually exists a certain time period from circulation to adoption of the reports (20–60 days for panel reports, and 30 days for Appellate Body reports), Korea’s submission suggested that Members “take advantage of these periods for conducting

44 See WTO, MC11 In Brief, ‘Dispute Settlement’, available at https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdisp_e.htm (2018). Current items on the DSB reform agenda include third party rights; panel composition; remand; mutually agreed solutions; strictly confidential information; sequencing; post-retaliation; transparency and amicus curiae briefs; timeframes; developing country interests, including special and differential treatment; flexibility and member control; and effective compliance.
45 Id. (“[M]embers have yet to agree on the initiation of a process to fill the two current and one impending vacancies on the Appellate Body. This means that the Appellate Body will operate with only four (out of seven) members by the end of 2017. The system is starting to see delays in appeals, and there will be more significant and inevitable delays in the coming months.”)
47 Id.
48 DSU, art. 21.3, fn. 11.
50 Id. Emphasis added.
preparatory studies for implementation”. Thus, according to the proposal, the ‘reasonable period’ could be determined by the first meeting between the DSB and the implementing Member, or at least it would already be known whether an arbitrator was required to make that determination.\(^5\)

2. Modifications to Starting Point and Time Frame

The European Communities (now European Union) and Jordan each proposed a draft text for an amendment to Article 21.3(c) of the DSU, which sets out an often-exceeded limitation on arbitration to determine a reasonable period of time at 90 days.\(^5\) These two draft texts are more or less the same except for the starting point of the 15-month guideline.\(^\text{53}\) Apart from this technical caveat, there are two additional modifications worth noting. First, both proposals state that “[a]ny party may request such arbitration within 60 days after the date of the adoption of the recommendations and rulings by the DSB”. Second, both proposals state that, if the parties cannot agree on an arbitrator, the arbitrator shall be appointed by the Director-General from “the roster of panelists provided for in Article 8 [of the DSU]” or from ‘the Indicative List of Panelists’.\(^\text{54}\)

Thus, under the European Communities’ and Jordan’s proposals, there are about 60 days from the adoption of the report(s) to the request for arbitration, plus another 10 days (if the parties can agree on an arbitrator) or 20 days (if the Director-General were to appoint the arbitrator) for the appointment of an arbitrator, and 45 days for the arbitrator to finish the task, making the total time from DSB adoption of AB or Panel Reports to the issue of an award around 115 or 125 days. This figure is much closer to the average time taken by arbitrators in determining the ‘reasonable period of time’ alone—namely, 147 days.

3. Intensifying Special and Differential Treatment for Developing Countries

Some developing country members have proposed that the word ‘should’ in Article 4.10 of the DSU be replaced by ‘shall’ so as to make that special and differential treatment provision mandatory.\(^\text{55}\) These countries have also proposed that the phrase “matters affecting the interests of developing-country members” in Article 21.2 of the DSU be clarified so as to increase the utility of the provision, presumably by specifying types of ‘matters’ and ‘interests’. Moreover, these proposals hold that developing countries should be accorded longer reasonable periods of time—ranging from two to three years—if the defending party is a developing country Member and the complainant a developed country Member, and that the reasonable period of time should be no more than 15 months if the

\(^{51}\) Id.


\(^{53}\) TN/DS/W/43 at par. 26.

\(^{54}\) TN/DS/W/1 at par. 3; TN/DS/W/43 at par. 26.

\(^{55}\) DSU art. 4.10: “During consultations Members should give special attention to the particular problems and interests of developing country Members.” Emphasis added.
complaint is by a developing country member against a developed country Member.\textsuperscript{56}

In a similar vein, China submitted several amendment proposals to the DSB,\textsuperscript{57} most significantly proposing the establishment of explicit special and differential treatment provisions applicable to all developing-country members in the DSU.\textsuperscript{58} Additionally, the proposal supports shortening the timeframe for dispute settlement, but suggests that the shortened timeframe should not apply to the defending party if it is a developing country member.\textsuperscript{59}

\textbf{E. Conclusion}

While the DSU is often considered amongst the most successful dispute settlement mechanisms in international law, there are nevertheless at least two aspects of the surveillance mechanism which clearly require reform. First, the lack of specific evaluating provisions for Member implementation reports render the DSB’s oversight of implementation an ‘honor system’ vulnerable to intentional or ambivalent exploitation. And second, the lack of follow up and evaluation for Member retaliation renders economically weak Members more vulnerable to coercion than economically strong Members. Although the WTO has—in varying shades of tangibility—acknowledged these shortcomings and taken steps to address them, the DSB’s surveillance obligations under the DSU remain virtually unchanged.

\textsuperscript{56} See \textit{Negotiations on the Dispute Settlement Understanding: Special and Differential Treatment for Developing Countries – Proposals by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe}, TN/DS/W/19, 9 October 2002. See also \textit{DSU Proposals: Legal Text – Communication from India on behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia}, TN/DS/W/47, 11 February 2003.


\textsuperscript{58} See \textit{Communication from China}, TN/DS/W/29.

\textsuperscript{59} Id.