

*Questions and Assignments 3.5*

Why is the panels' and Appellate Body's task to clarify existing provisions of the covered agreements an important task? Does the DSU allow for 'judicial activism'? How does Article 3.2 of the DSU try to ensure that panels and the Appellate Body remain within their 'clarification' mandate? Why are Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* relevant to the interpretation and clarification of the provisions of the covered agreements? How do panels and the Appellate Body have to interpret provisions of the covered agreements? Can panels or the Appellate Body base their interpretation of a provision of the covered agreements on the 'legitimate expectations' of one of the parties to the dispute? What does the 'principle of effectiveness' require panels and the Appellate Body to do when they interpret provisions of the covered agreements? Give an example of a 'subsequent agreement' within the meaning of Article 31.3(a) of the *Vienna Convention* which has been considered by the Appellate Body in interpreting a provision of the *TBT Agreement*. What is the relevance of non-WTO agreements and customary international law in the interpretation of provisions of the covered agreements? Can agreements to which not all WTO Members are a party be relevant in the interpretation of a provision of a covered agreement? What can panels and the Appellate Body use as supplementary means of interpretation and when can they do so?

#### 4.6 Remedies for Breach

The DSU provides for three types of remedy for breach of WTO law: one final remedy, namely, the withdrawal (or modification) of the WTO-inconsistent measure; and two temporary remedies which can be applied pending the withdrawal (or modification) of the WTO-inconsistent measure, namely, compensation *and* suspension of concessions or other obligations (commonly referred to as 'retaliation'). The DSU makes clear that compensation and/or the suspension of concessions or other obligations are *not* alternative remedies, which Members may want to apply *instead of* withdrawing (or modifying) the WTO-inconsistent measure.<sup>200</sup> Article 22.1 of the DSU explicitly states:

Compensation and the suspension of concessions or other obligations are *temporary measures* available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.<sup>201</sup>

This sub-section discusses in turn the final remedy and the two temporary remedies for breach of WTO law. It also briefly examines whether other types of remedy may be available.

200 Note that the 2004 Sutherland Report observed in this respect: 'It has even been argued by some that a WTO Member finding itself in a losing position in the WTO dispute settlement system has a free choice on whether or not to actually implement the obligations spelled out in the adopted Appellate Body or panel reports: the alternatives being simply to provide compensation or endure retaliation. This is an erroneous belief.' See Report by the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (the 'Sutherland Report') (WTO, 2004), para. 241.

201 Emphasis added.