



UNIL | Université de Lausanne
Andreas R. Ziegler
professeur ordinaire, directeur programme LLM
bâtiment Internef bureau 301
1015 Lausanne

The Use of Retaliatory or Compensation Measures in Specific International Economic Agreements

Table of Contents

1	Executive Summary	2
2	Introduction	3
2.1	The Legal Problem	3
2.2	General International Law and the Law of Treaties	3
2.3	International Economic Law	4
2.4	Terminology	5
2.5	Objective of Retaliatory Measures in Economic Agreements	7
3	How are retaliatory measures regulated in specific international agreements relevant for the relations between Switzerland and the EU (including procedural issues)?	8
3.1	WTO Law (1995)	8
3.1.1	Historic Development	8
3.1.2	Procedural Aspects	8
3.1.3	Form of Suspension	9
3.1.4	Cross-Retaliation	10
3.1.5	Temporary Character	13
3.1.6	Level of Suspension	13
3.1.7	Justiciability of the Suspension	14
3.1.8	Calculation of the Suspension	15
3.2	Investment Agreements (BITs) (21 st century)	15
3.3	EFTA Convention (1960/2000)	16
3.4	EEA Agreement (1992)	18
3.5	Withdrawal Agreement UK-EU (2019)	22
3.6	EU-UK Trade and Cooperation Agreement (2020)	26
3.7	Association Agreement EU-Ukraine (2014)	31
3.8	Switzerland-EU Bilateral Draft Framework Agreements (2018)	33
4	The Use of Retaliatory Measures in View of the Nature of an Agreement	35
5	Means to Limit Retaliatory Measures	36
6	Proportionality as a Specific Tool to Limit Retaliatory Measures	38
7	Conclusion: Recommendations regarding the Inclusion of Retaliatory Measures in the Relations between Switzerland and the European Union	38

Centre de droit comparé, européen et international (CDCEI)
Chaire de droit international public / Direction du programme LLM (MAS)

|||||

1 Executive Summary

As of today, international agreements normally include some form of dispute settlement (nowadays most often arbitration, exceptionally a court-like structure) and in the field of international economic law they are often accompanied with the availability of retaliatory measures (safeguard measures, compensation measures) in case of non-compliance with the resulting decision (normally arbitral awards). This has historically been seen as tool to avoid trade wars and an escalation of economic tensions between the parties to such an agreement. The use of such measures in the area of international economic relations can be seen as a specific type of countermeasures under general international law. The terminology used for such retaliatory measures and their characteristics are often not very coherent and can be confusing.

It is usually considered that while these retaliatory measures may maintain the balance of the original agreement in place, the objective of such measures is to induce compliance with the award and thus to avoid violations of the underlying agreement(s). As of today, the predominant view is that such measures must be commensurate with the original violation and should not have a punitive character. The basic tool used in international economic agreements has been the suspension of specific parts of an agreement. In particular in market access agreements this suspension concerns often the specific concessions that were made that can more easily be valued at a specific economic level. At the same time, most agreements contain specific rules to limit the scope and effects of such measures. This is sometimes expressed through very basic concepts like "proportionality" but more recently has often given rise to specific technical rules (including the obligations or parts of an agreement that can be suspended, the availability of so-called cross-retaliation, the exact sequencing of measures following consultations and arbitral decisions and awards, the calculation of the level of suspension etc.). Not all agreements do explicitly refer to the proportionality of retaliatory measures, but the general discussion in the literature and in dispute settlement practice (in particular in the World Trade Organization [WTO]) has led to a general consensus that the objective and character of these measures require an interpretation of these measures in a way that they must always be proportionate.

In many modern agreements (in particular also concluded by the European Union [EU]) these rules are based on the language of the rules governing the dispute settlement in the WTO (DSU). As this agreement dates from 1994/5 and has, like other WTO Agreements, not been updated since, the case law developed by WTO panels, the Appellate Body and arbitrators has produced important concretisations of many of the terms used in the agreement and filled certain gaps. Although not all of these developments are necessarily accepted by all WTO parties, some of these findings (also in the area of retaliatory measures) have been (partly) incorporated into some of the modern bilateral and regional agreements. This is also true for the specific language used. The degree of detailedness differs and depends certainly also on the political consensus found between the parties to such negotiations and the character of the agreements. Where an agreement containing provision on retaliatory measures for non-compliance with an arbitral award is very comprehensive (i.e. covers various subject areas) or must be read in conjunction with other agreements the question of which obligations can be suspended in response to the violation or breach of which treaty obligations can become more complicated. This can be solved through the exclusion of specific sectors from suspension or the limitation of so-called cross-retaliation. A good example are the recent agreements concluded between the EU and the United Kingdom (UK) although it is uncertain at this time whether the structure of these agreements will be similar to the result of the negotiations between Switzerland and the European Union for a Framework Agreement.

2 Introduction

2.1 The Legal Problem

The question of specific measures to be taken if an agreement is violated constitutes a basic and therefore traditional problem in law. This is also true at the international level, where the avoidance of violations of international agreements is of high relevance (*pacta sunt servanda*).¹

Sometimes this question is extended to the situation where an agreement is not violated as such but where the specific behaviour of one party leads to a situation that interferes with the proper functioning of the agreement or is considered to hamper the achievement of the proper balance of interests found initially between the parties of the agreement (i.e. good faith or non-violation claims). In the WTO, for example, disputes normally involve allegations that a member has violated an agreement or broken a commitment. But in some situations a member can request a dispute settlement procedure even when an agreement has not been violated. This is called a “non-violation complaint”. It is allowed if one government can show that it has been deprived of an expected benefit because of another government’s action, or because of any other situation that exists. The aim is to help preserve the balance of benefits struck during multilateral negotiations. It is conceivable to include such provisions also in an agreement between the EU and Switzerland if a fear persisted that general measures outside the coverage of the concluded agreements could lead to a situation where the interests of one party are affected in an unacceptable way.²

2.2 General International Law and the Law of Treaties

In general international law, the violation of international rules is normally assessed in view of the general principles that have evolved under international customary law and led, among other things, to specific language included in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* by the International Law Commission and acknowledged in Resolution 56/83 of 12 December 2001 by the United Nations General Assembly.³ Here in particular, the sections on countermeasures are of relevance for the present overview.⁴

¹ See Andreas R. Ziegler, *Introduction au droit international public* (Berne 4th edn. 2020) 227 and 264.

² See, however, Ernst-Ulrich Petersmann. *Violation-Complaints and Non-Violation Complaints in Public International Trade Law*, German Yearbook of International Law, Bd. 34, 1991, 175.

³ Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected. To a large extent considered customary international law, also by the Swiss authorities and courts. See Andreas R. Ziegler, *Introduction au droit international public* (Berne 4th edn. 2020) 118 ff.

⁴ In particular Articles 22 (First Part - Chapter V), and Articles 49 - 54 (Third Part - Chapter II)

In the field of international treaties, the respective questions have also been at the centre of attention of state practice and legal writings. In this case the specific sections of the Vienna Convention on the Law of Treaties of 23 May 1969 are most relevant.⁵ In particular Article 60 addresses the *Termination or suspension of the operation of a treaty as a consequence of its breach*. Article 72 contains more detailed provisions on the *Consequences of the suspension of the operation of a treaty*.

2.3 International Economic Law

While these rules of general international (treaty) law have an impact on State practice in international economic law, there exist more specific traditions to deal with the mentioned questions in international economic agreements. This is particularly true for trade agreements (traditionally limited to goods). In more comprehensive modern (deep) economic agreements, the same remains true for specific chapters or parts of such agreement dealing with trade issues and, more generally, market access. In particular, this can be said for the multilateral trading regime today in place and the many agreements based on its basic features (though sometimes with considerably extended coverage and degree of details regarding the included rules). As of today, the general principles followed in trade law⁶ with regard to the dispute settlement as such are often relatively close to those in other fields of international dispute settlement, in particular since the creation of the WTO in 1994/5.

When it comes to the specific measures or remedies available to the parties of an agreement, it remains relatively common - and often is the measure of choice - to authorize parties to such a trade agreement to suspend specific provisions of the agreement (suspension of concessions, suspension of benefits) in reaction to the behaviour of another party that is considered acting in violation of the agreement as such or disturb the balance of interests (legitimately expected) by the other Party. It can (as in other areas) be seen a proportionate and politically acceptable reaction or countermeasure⁷ in order to avoid an escalation, and in particular a "trade war".⁸ This does not mean that it cannot in itself lead to economic tensions of political pressure but this is in itself often sought

⁵ For Switzerland part of its body of applicable treaties, see: SR 0.111. See also See Andreas R. Ziegler, *Introduction au droit international public* (Berne 4th edn. 2020) 96 ff.

⁶ This is less true regarding the specific patterns still in place in international investment agreements, where the availability of the so called-investor-state dispute settlement mechanisms leads to a rare use of the state-to-state mechanisms and thus triggers another dynamic. See, e.g. Andreas R. Ziegler, *Switzerland and International Investment Law: Why it matters*, in: *Swiss Review of International and European Law (SRIEL)*, 31/2, 2021, ISSN: 10190406, 179-193, online: https://serval.unil.ch/preview/serval:BIB_7E3E8E41C337.P001.

⁷ See the relevance of these aspects with regard to the generally applicable principles and rules mentioned in the previous section.

⁸ This can historically also be seen in the context of the use of force to achieve specific economic outcomes, see e.g. Ka Zeng Liang and Liang (eds.), *Research Handbook on Trade Wars*, Edward Elgar Publishing, 2022. This historically interesting aspect shall not be deepened in the specific context and contemporary practice by the States concerned, however.

in order to lead to a mutually acceptable solution until the breach comes to an end and full respect of the agreement can be achieved.

2.4 Terminology

The terminology used for this last category of “measures in order to react to an alleged treaty breach” in international trade agreements is not very coherent and often misleading or at least confusing.

While in Switzerland and the EU the term “safeguards” (*mesures de sauvegarde*) or “safeguard measures” remains very common, this has led to some confusion in view of the terminology used in multilateral negotiations (ITO, GATT, WTO etc.) and the terminology used outside Europe, in particular by the United States and its partners.

The more generally used terms for these retaliatory measures in the global context are “suspension of obligations”, “suspension of benefits” or “suspension of concessions”. This was, for example, already the case in the proposed International Trade Organization (ITO) of 1948⁹ and the General Agreement on Tariffs and Trade (GATT) of 1947. It was also true for the original EFTA Convention of 1960 (Stockholm Convention).¹⁰

As these terms (simply referring to suspension) seem neutral with regard to the justification and are difficult to understand, the term “retaliatory measures” is often used in legal writings, state practice and even in WTO practice (in particular in documents relating to the dispute settlement) (although it does not figure in the official legal texts).¹¹ The terms “retaliation” or “retaliatory measures” were not included in *Draft Articles on Responsibility of States for Internationally Wrongful Acts* of 2001 or the Vienna Convention on the Law of Treaties of 23 May 1969. In English (legal literature), however, the term has a long tradition and is generally understood to describe a non-amicable or unfriendly measure taken by a State against another State without violating its international obligations.¹² This is particularly the case, if a treaty provides explicitly for this opportunity as long as the specific conditions are fulfilled.

⁹ United Nations Conference on Trade and Employment Held at Havana, Cuba, From November 21, 1947, to March 24, 1948 - Final Act: Charter Article 13 Paragraph 4 Letter c.): it is recognized that the contractual relationships referred to in paragraph 3 involve reciprocal advantages, and therefore any Member which has a contractual right in respect of the product to which such action relates, and whose trade is materially affected by the action, may suspend the application to the trade of the applicant Member of substantially equivalent obligations or concessions under or pursuant to Chapter IV, provided that the Member concerned has consulted the Organization before taking such action and the Organization does not disapprove”.

¹⁰ See Convention establishing the European Free Trade Association (Stockholm Convention) of 4 January 1960 - Article 31 Paragraph 4: If a Member State does not or is unable to comply with a recommendation made in accordance with paragraph 3 of this Article and the Council finds, by majority vote, that an obligation under this Convention has not been fulfilled, the Council may, by majority decision, authorise any Member State to suspend to the Member State which has not complied with the recommendation the application of such obligations under this Convention as the Council considers appropriate.

¹¹ See for example: Appellate Body, Report, United States - Continued Suspension of Obligations in the EC - Hormones Dispute AB-2008-5, 16 October 2008. Paragraphs 46 and 149.

¹² See e.g. Evelyn Speyer Colbert, *Retaliation in International Law* (King's Crown Press, 1948 or Cornell Law School, Legal Information Institute, “retaliatory measures”, online at: https://www.law.cornell.edu/wex/retaliatory_measures).

Another term extensively used is "sanctions" though its use seems to have diminished since economic sanctions applied for security reasons in the UN, at regional and domestic level have multiplied.

The use of the terms "safeguard" and "safeguard measures" for retaliatory measures (as it is often the case in Switzerland, in particular with regard to the FTA of 1972 and subsequent bilateral agreements between Switzerland and the EU) leads to some confusion as it is also used for another category of trade measures that are of a different economic character and underly normally different conditions. This latter category of "safeguards" was historically - and is sometimes still today - referred to as "emergency actions" and justified in situations "[w]here an increase in imports of a given product is or is likely to be seriously detrimental to any production"¹³ resulting from the liberalization achieved through an agreement. In many trade agreements, a party may thus take a "safeguard" or "emergency" action (i.e., restrict imports of a product temporarily) to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry. The terminology (emergency action) was also originally used in the General Agreement on Tariffs and Trade (GATT) of 1947¹⁴ but when this policy area was further regulated, the name "safeguards" prevailed, in particular, in the name of the specific agreement under the WTO (Agreement on Safeguards)¹⁵.

As stated before, the European Union preferred to use the term safeguards (instead of the term "emergency action" used in the General Agreement on Tariffs and Trade [GATT] of 1947) already in the early 1970s in many of its bilateral agreements. Most of the time the technical aspects of the "suspension of benefits" as a reaction to an alleged treaty breach, i.e. retaliatory measures, were regulated simply by referring to the details regulating what the EU traditionally and the WTO now calls safeguards¹⁶. Therefore, in Switzerland and other states where such rules were applicable the term "safeguards" became widely used for the measures in reaction to (alleged) treaty breaches (i.e. retaliatory measures) as well.

¹³ See, for example, Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 - Article 24.

¹⁴ Article XIX - still in force today.

¹⁵ Annex - Article 1: "This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Under GATT 1947, safeguards were regulated only by Article XIX (emergency action), and it was the Uruguay Round that created the Agreement on Safeguards, which was intended to add clarity and introduce more specific details.

¹⁶ See, for example, Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 - Article 23.2.

As outlined before, the more generally used terms for such “retaliatory measures” are normally terms such as “suspension of obligations”, “suspension of benefits” or “suspension of concessions”. The distinction between a mathematical approach to the equivalent level of suspension of concessions or benefits in older agreement like the GATT 1947 or the original EFTA Convention of 1960 on one side and the suspension of obligations (leading potentially to the suspension of entire parts of an agreement or even the entire agreement) in comprehensive modern agreements can be seen as a reason to speak rather of the proportionality of such measures than of their equivalence (which is easier to determine for the suspension of specific trade concession or benefits).

Only recently, terms stressing the corrective or retaliatory character of such measures have found their way into the texts of trade agreements, such as the heading “Temporary remedies in case of non-compliance” in the Agreement between the EU and Ukraine of 2014 or the UK-EU Agreement of 2020¹⁷ contained in this overview.

The draft text of the Framework Agreement between the EU and Switzerland of 2018 speaks of compensation measures, i.e. *mesures de compensation* in the original French draft.

2.5 Objective of Retaliatory Measures in Economic Agreements

Some authors have argued that in international trade (and as a consequence any modern market-access) agreements, and in particular in the GATT and even the later WTO, the purpose of retaliatory measures “is not to induce compliance, but to maintain the balance of reciprocal trade concessions negotiated in the WTO agreements”.¹⁸

In contrast, most authors now agree that the suspension of concessions also in market access agreements (and in particular, in the WTO) “is conceived primarily as a sanction, while the rebalancing idea retains vestigial influence”.¹⁹ As a consequence, the suspension of concessions is intended to induce compliance as in the general international law regarding countermeasures (as stated in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* of 2001). At the same time, such measures shall not be disproportionate (and potentially punitive) in either field. As another author puts it “[i]n both cases, the purpose of the penalty is said to be to induce

¹⁷ See below Section 3.

¹⁸ See e.g. David Palmeter and Stanimir A. Alexandrov, “Inducing Compliance” in WTO Dispute Settlement, in: Daniel L.M. Kennedy and James D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (CUP 2002) 646-647.

¹⁹ See as a typical representative of this view: Steve Charnovitz, *Should the Teeth be Pulled? An Analysis of WTO Sanctions*, in: Daniel L.M. Kennedy and James D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (CUP 2002), at 602, 619-627. See also Jaime Tijmes, *Jurisprudential developments on the purpose of WTO suspension of obligations*, *World Trade Review*, vol. 13, no. 1 (2014) 1-38 and Joost Pauwelyn, *The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations?* in: Joost Pauwelyn and Chad P. Brown (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (CUP 2010) 34-72.

compliance, but the penalty itself must not be disproportionate to the harm caused, even if a greater penalty would be required to induce compliance. This contradiction seems no worse under WTO law than under international law, and it seems to flow from the WTO provisions themselves rather than any faulty interpretation in dispute settlement.”²⁰

3 How are retaliatory measures regulated in specific international agreements relevant for the relations between Switzerland and the EU (including procedural issues)?

3.1 WTO Law (1995)

3.1.1 Historic Development

The suspension of concessions in the World Trade Organization (WTO) is a mechanism that allows a member to temporarily withdraw some of the trade concessions or benefits it has previously granted to another member. This mechanism was originally authorized under Article XXIII:1(b) of the General Agreement on Tariffs and Trade of 1947 (GATT 1947). It should be noted that the use of such enforcement measures under the GATT 1947 was extremely rare.²¹

This changed with the introduction of a more sophisticated system for retaliations against non-compliance with treaty obligations under the WTO established in 1994/5. Under the WTO rules, members are obliged to respect all the covered agreements and, in particular, also the specific market access concessions they have made to all WTO members. However, a member may decide to suspend certain the concessions it has granted to another member in response to a breach of the WTO rules or other serious concerns.²²

3.1.2 Procedural Aspects

The process of suspending concessions typically involves several steps. First, the aggrieved member must request consultations with the other member to discuss the issue and attempt to resolve it. This process is governed by Article 4 of the Dispute Settlement Understanding (DSU).²³

²⁰ See Andrew D. Mitchell, Proportionality and Remedies in WTO Disputes, *European Journal of International Law*, vol. 17, no. 5 (1 November 2006) 985–1008, at Section 4 A (available at: <https://doi.org/10.1093/ejil/chl034>)

²¹ See William J. Davey, Dispute Settlement in GATT (1987) *Fordham International Law Journal*, Vol. 11, No. 51, 99-103 and Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015), 132.

²² The new system was based on the mechanism unilaterally introduced by the United States (Section 301 of the U.S. Trade Act of 1974 (Pub L. 93-618, 19 U.S.C. §2411). See Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP 3rd edn. 2015) 132.

²³ *Understanding on rules and procedures governing the settlement of disputes – Annex 2 of the WTO Agreement.*

Article 22.2 DSU foresees that if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21 DSU, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation.

If, however, no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements. If the consultations do not lead to a resolution, the aggrieved member may request the establishment of a WTO dispute settlement panel to adjudicate the matter. The panel's decision may authorize the aggrieved member to suspend some of its concessions to that member under Article 22 of the DSU. The level of the suspension of concessions or other obligations authorized by the DSB must be equivalent to the level of the nullification or impairment., as required by Article 22.4 of the DSU.

If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures (Article 24 DSU).

3.1.3 Form of Suspension

The suspended concessions may take many forms, such as increased tariffs on specific goods, reduced tariff quotas for imports, or the imposition of non-tariff barriers. The suspension of concessions is meant to put pressure on the other member to comply with the WTO rules and to incentivize it to resolve the dispute. Here the idea of countermeasures under general international law remains very clearly visible.²⁴ Hence, in the literature the suspension of concessions or other obligations under Article 22 DSU is generally also referred to as applying *countermeasures*; i.e. the same term as used in Article 49-54 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001.²⁵ This can be justified by the shared characteristics of the measures under Article 22.3 DSU and the measures under Article "designed to ensure the fulfilment of the obligations of the responsible State under these articles".²⁶ The term countermeasures is, however, not used in

²⁴ See, in particular Art. 49 Paragraph 3 of the Draft articles on Responsibility of States for Internationally Wrongful Acts (2001).

²⁵ See Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015) 134.

²⁶ See International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries (2001), Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to

the DSU nor the other WTO Agreements. The same is true for the Term “retaliatory measures” or “retaliation”²⁷ thought they are very often used in the literature and State practices as well as by WTO organs.

3.1.4 Cross-Retaliation

Article 22.3 contains a number of principles and procedures that the complaining party shall apply when considering what concessions or other obligations to suspend:

- (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
- (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;
- (d) in applying the above principles, that party shall take into account:
 - (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;
 - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;
- (e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;
- (f) for purposes of this paragraph, “sector” means:

the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10), published in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

²⁷ See the explanations on the terminology, above, in the Introduction.

- (i) with respect to goods, all goods;
 - (ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;
 - (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;
- (g) for purposes of this paragraph, "agreement" means:
- (i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;
 - (ii) with respect to services, the GATS;
 - (iii) with respect to intellectual property rights, the Agreement on TRIPS.

The specific option under Article 22.3 (c) DSU to retaliate by suspending concessions or other obligations under another covered agreement instead of the same agreement as the one affected by the original non-compliance of defendant state is referred to as *cross-retaliation* in legal writings.²⁸

Under Article 22.3 (e) DSU, WTO members wishing to make use of the possibility to suspend concessions or other rights must justify their decision to do so. The respective proposal is subject to arbitration under Article 22.6 DSU if the WTO member being affected by these measures objects. From the practice of these arbitrations a certain concretization of the rules relating to the use of this instrument has resulted²⁹:

- Parties have a certain margin of appreciation in arriving at their conclusion in respect of the evaluation of certain factual elements, i.e. of the practicability and effectiveness of suspension within the same sector or under the same agreement and of the seriousness of circumstances;
- The margin of appreciation by the complaining party concerned is, however subject to review by the Arbitrators (under Article 22.6 DSU);
- The margin of review by the Arbitrators in these situations implies the authority to broadly judge whether the complaining party in question has considered the necessary facts

²⁸ See, for example, Licas Eduardo and F.A. Spadano, Cross-agreement retaliation in the WTO Dispute Settlement System: An important Enforcement Mechanism for Developing Countries? (1008) World Trade Review, vol. 7, 511-545 and Frederick M. Abbott, Cross-Retaliation in TRIPS: Options for Developing Countries (April 1, 2009). ICTSD Programme on Dispute Settlement and Legal Aspects of International Trade, Issue Paper No. 8, April 2009, FSU College of Law, Public Law Research Paper No. 374, Available at SSRN: <https://ssrn.com/abstract=1415802> or <http://dx.doi.org/10.2139/ssrn.1415802>.

²⁹ See in particular: Arbitrator (EC-Bananas III) (Ecuador) (Article 22.6-EC), para 52 (24 March 2000).

objectively and whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough;

- The practicability is interpreted in these cases as whether suspension in the same sector or agreement is available for application in practice, as well as suited for being used in a particular case³⁰;
- The essence of a consideration of "practicability" in this case is that it related to the actual availability and feasibility of the measure - the impracticability could be either a legal one (be it under its domestic law or resulting from other international obligations)³¹ or a factual one, such as might arise if the countermeasure exceeds the total amount of the trade available to be countered;
- The effectiveness of a measure must be considered on the basis that "the thrust of this criterion empowers the party seeking suspension to ensure that the impact of the suspension is strong and has the desired result, namely to induce compliance with DSB rulings within a reasonable period of time"³²;
- Some arbitrators under Article 22.6 have considered that "a consideration by the complaining party of the sector or agreement in which suspension would be "least harmful" to itself would necessarily be pertinent.³³ Other Arbitrators under Article 22.6 DSU, however, have considered that the rules do not necessarily entitle parties to cross-retaliate in the sectors or under the agreement where suspension of concessions would be least harmful to itself. Only where the party considers that suspension in that sector or agreement is not practicable or effective can a party exceptionally cross-retaliate. However, this consideration may affect the effectiveness of a measure as a party cannot be expected to resort to measures that "cause itself disproportionate harm, such that it would in fact be unable to use authorization, there would be a basis for concluding that such suspension would not be "effective"³⁴;
- In order to achieve the objective of inducing compliance, the complaining party must be in a position to actually have recourse to the authorized remedy, and thus that the chosen measure is able to contribute to inducing compliance, as is its legitimate purpose. What is at

³⁰ See, in particular, US-Upland Cotton (Article 22.6 – US I) (Arbitrator) paras. 5.51 and 5.67 (31 August 2009); see also US-Gambling (Article 22.6-US) (Arbitrator), para 4.18 (21 December 2007).

³¹ See in this respect EC-Bananas III (Ecuador) (Article 22.6-EC) Paragraph 5.

³² EC-Bananas III (Ecuador) (Article 22.6-EC) Paragraph 52.

³³ EC – Bananas III (Ecuador) (Article 22.6 – EC).

³⁴ US-Upland Cotton (Article 22.6 – US I) (Arbitrator) Paragraphs 5.70-5.79.

issue is the ability of the complaining party to make effective use of the awarded countermeasures in order to induce such compliance.³⁵

- Even where the suspension in the same sector or under the same agreement is both neither practicable nor effective there exist limits to the escalation of the measures chosen. According to the case law, the circumstances need to be serious enough for cross-retaliation. Such a limitation results from the language in Article 22.3 (d) DSU.³⁶

3.1.5 Temporary Character

It is worth noting that the suspension of concessions is a temporary measure, and the affected member countries are expected to negotiate a settlement to the dispute and restore the normal level of trade concessions as soon as possible. If the dispute is not resolved, the suspension of concessions may be prolonged or increased, which could have significant impacts on trade relations between the two countries. If the Member concerned returns to legality, i.e. compliance with its treaty obligations or otherwise terminates the dispute, the suspension of trade concessions must be stopped immediately (Article 22.8 DSU).

3.1.6 Level of Suspension

The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment (Article 22.4 DSU). In the eyes of the arbitrators in the case *EC – Bananas III (US) (Article 22.6-EC)* this meant: "In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for countermeasures of a punitive nature."³⁷

The term proportionate does not appear in the WTO Agreement or the DSU when the level of suspensions is described. Nevertheless the literature and some panellists and arbitrators³⁸ have referred to this wording when assessing the concrete measures proposed by plaintiffs.³⁹ For some authors the equivalence of the level of suspension of benefits to the nullification and impairment suffered equals proportionality. They go so far to claim that the terms "equivalent" in the WTO/DSU, "commensurate with the injury suffered" in Article 51 of the ILC *Draft Articles on Responsibility of*

³⁵ US-Upland Cotton (Article 22.6 – US I) (Arbitrator) Paragraphs 5.81.

³⁶ See Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015) 137 and the US – Gambling (Article 22.6 – US), Paragraph 4.108.

³⁷ WTO Arbitrators Decision, *EC – Bananas III (US) (Article 22.6-EC)* Paragraph 6.3.

³⁸ *EC – Bananas III (US) (Art. 22.6 – EC)* Paragraph 6.16.

³⁹ See the discussion by Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, *Harvard International Law Journal*, vol. 48, 2007, 337 ff.; Axel Desmedt, *Proportionality in WTO Law*, *Journal of International Economic Law*, vol. 4, no. 3 (1 September 2001), 441–480 (available at: <https://doi.org/10.1093/jiel/4.3.441>); Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, *European Journal of International Law*, vol. 17, no. 5 (1 November 2006) 985–1008 (available at: <https://doi.org/10.1093/ejil/chl034>).

States for Internationally Wrongful Acts of 2001 (regarding countermeasures)⁴⁰ and “proportionate” are expressions of the same concepts.⁴¹ According to one author “[i]t is therefore preferable to read the requirement of equivalence between suspension of concessions and nullification or impairment in a manner consistent with proportionality as a general principle of law and a principle of customary international law, such that culpability (the violation itself) should be considered in assessing the level of nullification or impairment.”⁴²

An exception exists under the specific rules for subsidy cases in the WTO where the suspension of obligations only needs to be “appropriate”.⁴³ This is sometimes interpreted as meaning that punitive measures are acceptable, and they have been permitted in specific WTO subsidy cases.⁴⁴

It should be noted that other (historic) agreements used the term “appropriate”. This was, for example, the case of the old EFTA Convention of 1960 (Stockholm Convention) where the Council authorized measures it considered appropriate in response to the non-fulfilment of an obligation.⁴⁵ To my knowledge, this rule has never led to any discussions of the definition of the term “appropriate” in practice and legal writings.

3.1.7 Justiciability of the Suspension

Specific aspects of the suspension of concessions (level of suspension, procedures) under Article 22 DSU are subject to review by an arbitral panel (Article 22 Paragraph 6 DSU). The nature of the concessions or other obligations to be suspended shall not be reviewed (Article 22 Paragraph 7 DSU). Through case law it has been established that the burden of proof lies with the party that alleges a

⁴⁰ The exact wording is: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

⁴¹ See Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU*, *The Law and Development Review*, vol. 6, no. 2, 2013, S47-66 (at <https://doi.org/10.1515/ldr-2013-0020>), Section 3. In his view “Proportionality in this context is treated differently from proportionality in other contexts, in which the reference point is the injury suffered rather than the purpose of the measure, which should be inducing compliance.” The latter could be described as “necessity” though in my view.

⁴² Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, *European Journal of International Law*, vol. 17, no. 5 (1 November 2006) 985–1008, at section 4 A (available at: <https://doi.org/10.1093/ejil/chl034>).

⁴³ Articles 4.10 and 4.11 of the Agreement on Subsidies and Countervailing Measures; although see also Article 9.4 of the same agreement, where in the case of certain now-expired non-actionable subsidies, in certain circumstances an affected WTO Member was able to impose “appropriate countermeasures commensurate with the nature and degree of the effects determined to exist”.

⁴⁴ Despite that footnote in the agreement explains with regard to the term appropriate: “This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.” See WTO Arbitrators Decision, *Brazil – Aircraft* (Article 22.6–Brazil), WT/DS46/ARB, 28 August 2000, paras 3.57–3.60. On this Lorand Bartels, “Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU” *The Law and Development Review*, vol. 6, no. 2, 2013, pp. S47–66. <https://doi.org/10.1515/ldr-2013-0020>, Section 3. See also Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015) 145–147.

⁴⁵ See Convention establishing the European Free Trade Association (Stockholm Convention) of 4 January 1960 – Article 31 Paragraph 4, quoted above.

violation by another WTO member, i.e., the Party challenging the level of suspension, or the violation of procedural requirements must prove them.⁴⁶

3.1.8 Calculation of the Suspension

In the WTO dispute settlement system, the calculation of the equivalent level of the suspension of concessions or other benefits is normally undertaken by relying on the institutional economic expertise within the WTO Secretariat. Arbitrators rely on the expertise of the Economics Division of the WTO to determine the exact level admissible under the general rule of equivalency.⁴⁷ In certain cases, the parties submitted divergent complicated econometric models which led to the reliance by the arbitrators on a modified version of the latter, still underlining that the evaluation of trade effects of the scheme could not be accomplished with mathematical precision.⁴⁸

3.2 Investment Agreements (BITs) (21st century)

Historically the economic agreements of the 19th century and the early 20th century contained no specific differences with regard to the dispute settlement that would differ between investment and trade disciplines. When the first such agreements were negotiated the only incidentally contained specific rules allowing for the peaceful dispute settlement between the states party to the agreement.⁴⁹

With the promotion of the peaceful settlement of disputes in the early 20th century, arbitration between State parties became more regularly available either based on a specific provision in a treaty or on the availability of specific treaties providing for the submission of all disputes between these parties to available mechanisms of peaceful settlement of disputes, including arbitration.⁵⁰ Specific violations of the investment provisions of such agreements led regularly to arbitrations in various available fora in the first half of the 20th century and normally were the result of diplomatic protection of investors by their home states.⁵¹

When a new wave of investment treaty negotiations started in 1960 and led to the currently relevant model of bilateral investment treaties (BITs), this was still the prevailing model. Quickly, however, the use of diplomatic protection and state-to-state arbitration became less relevant as

⁴⁶ For details see Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015) 142 and EC-Hormones (US) (Article 22.6-EC) (Arbitrator) Paragraphs 9-11, US-Gambling (Article 22.6) (Arbitrator) Paragraphs 2.21-2.23 and US-Upland Cotton (Article 22.6-US I) (Arbitrator) Paragraphs 4.21-4.23 as well as US-Upland Cotton (Article 22.6-US II) (Arbitrator) Paragraphs 4 and 12-14.

⁴⁷ See Mitsuo Matsushita et al., *The World Trade Organization – Law Practice and Policy* (OUP, 3rd edn. 2015) 143 for details.

⁴⁸ See US-Offset Act (Byrd Amendment) (EC) (Article 22.6 DSU-US) (Arbitrator) Paragraphs 3.105-3.151 and 5.1-5.4.

⁴⁹ A historically important exception is The Jay Treaty. Treaty of Amity, Commerce, and Navigation, signed at London November 19, 1794 (Article VI and VII) leading to the Arbitrations under the Jay Treaty of November 19, 1794; see for details e.g. Georg Schwarzenberger, *Present-Day Relevance of the Jay Treaty Arbitrations*, *Notre Dame L. Rev.* Bd. 53, 1978, 715 ff., available at: <http://scholarship.law.nd.edu/ndlr/vol53/iss4/3>.

⁵⁰ See Andreas R. Ziegler, *Introduction au droit international public* (Berne 4th edn. 2020), 134 ff.

⁵¹ See Andreas R. Ziegler, *Droit international économique* (Berne, 2017) 290 and 755.

specific dispute settlement mechanisms for the investors were created normally referred to nowadays as ISDS (Investor-State Dispute Settlement). Such legal provisions can be found in contracts between investors and State, domestic investment codes and, in particular, in bilateral or regional investment treaties.⁵² While they are today more controversial, the question of the use of retaliatory measures between State parties under such agreement has become less relevant. While most investment agreements still contain provision on State-to-State dispute settlement (including the exercise of diplomatic protection) they normally do not talk about specific retaliatory measures but are subject to the general rules on treaty violations and countermeasures in general international law.⁵³

In modern comprehensive agreements, where common dispute settlement provisions exist for all or various chapters (i.e. including investment besides trade etc.) it is possible that the general procedures lead to the applicability of retaliatory measures also in the field of investment but this needs no specific treatment at this place.⁵⁴

3.3 EFTA Convention (1960/2000)

The original EFTA Convention of 1960 (Stockholm Convention) was very much inspired by negotiations of the ITO at the end of World War II and, in particular, the GATT (1947). This was also due to the prominent role played by the United Kingdom in creating EFTA and its experience in international trade negotiations.

The Original EFTA Convention of 1960 contained a specific rule on the suspension of benefits, discussed above, which in a modernized form survives in the currently applicable version of the treaty (Vaduz Convention of 2002) though a bit hidden in a specific Annex T to Article 48 of the Convention (Chapter XVII).⁵⁵

⁵² See Andreas R. Ziegler, *Droit international économique* (Berne, 2017) 253 ff.

⁵³ See e.g. Articles 26 and 32-36 of the most recent agreement in this field negotiated by Switzerland: Accord entre la Suisse et l'Indonésie concernant la promotion et la protection des investissements, see: Message relatif à l'approbation de l'accord entre la Suisse et l'Indonésie concernant la promotion et la protection des investissements, FF 2019 8255 or the proposed draft text of Article 27 of the Agreement in principle on the modernisation of the Energy Charter Treaty of 24 June 2022.

⁵⁴ See e.g. the Chapter 11 of the Comprehensive Economic Partnership Agreement Between the Republic of Indonesia and the EFTA States [including Switzerland] of 16 December 2018, available at: <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/indonesia/fta-indonesia-main-agreement.pdf>.

⁵⁵ Convention Establishing the European Free Trade Association, 4 January 1960 / 21 June 2002, Consolidated version, last amended on 1 November 2021, available in English on the EFTA Webpage: <https://www.efta.int/Legal-Text/EFTA-Convention-1152>.

ANNEX T
Arbitration (Art. 48)

...

ARTICLE 3

Non-implementation - suspension of benefits

1. If the arbitral tribunal, in accordance with paragraph 3 of Article 48, has determined that a measure is inconsistent with the obligations of this Convention, and the Member State complained against has not reached agreement with any complaining Member State on a mutually satisfactory resolution within 30 days of receiving the arbitral award, or if no implementing measures have been taken, such complaining Member State or Member States may:

- (a) seek compensation through an agreement with the Member State complained against; or
- (b) suspend the application to the Member State complained against of benefits of equivalent effect until such time as the disputing Member States have reached agreement on a resolution of the dispute.

2. Upon written request of any party to the dispute delivered to the other Member State or Member States, the same arbitral tribunal shall be reconvened to determine whether the level of benefits suspended by a Member State pursuant to paragraph 1 is of equivalent effect.

3. The proceedings of the arbitral tribunal shall be conducted in accordance with paragraph 2 of Article 1 above. The arbitral tribunal shall present its determination within 60 days after the date of the request referred to in paragraph 2 or such other period as the parties to the dispute may agree.

The EFTA Convention allows Parties to a dispute to suspend benefits with regard to another Party when an arbitration panel has decided that the other Party to the dispute is still in breach of the agreement.

As in the GATT, the suspension under the EFTA Convention may not exceed what is considered equivalent of the violation caused by the other Party.

Upon written request of any party to the dispute delivered to the other Member State or Member States, the same arbitral tribunal shall be reconvened to determine whether the level of benefits suspended by a Member State pursuant to paragraph 1 is of equivalent effect.

The solution currently contained in the EFTA Convention (Vaduz Convention) thus is broadly based on the solution introduced in 1995 in the WTO through the respective provisions of the DSU.

3.4 EEA Agreement (1992)

In the negotiations of the Agreement on the European Economic Area (EEA Agreement) of 1992⁵⁶, a dispute settlement provision was included that foresees not traditional arbitration but relies on one side on the traditional approach in the Free Trade Agreements concluded earlier between the EU (at the time still the EEC) and its EFTA partners and on the other side foresees a specific role for the European Court of Justice for the interpretations of EU law.

Part VIII INSTITUTIONAL PROVISIONS

...

CHAPTER 3 HOMOGENEITY, SURVEILLANCE PROCEDURE AND SETTLEMENT OF DISPUTES

...

Section 3 Settlement of disputes

...

Article 111

...

3. If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.

If the EEA Joint Committee in such a dispute has not reached an agreement on a solution within six months from the date on which this procedure was initiated or if, by then, the Contracting Parties to the dispute have not decided to ask for a ruling by the Court of Justice of the European Communities, a Contracting Party may, in order to remedy possible imbalances,

- either take a safeguard measure in accordance with Article 112(2) and following the procedure of Article 113;
- or apply Article 102 mutatis mutandis.

⁵⁶ Agreement on the European Economic Area, English version as originally published in OJ No L 1, 3.1.1994, p. 3, updated 1.8.2016, available on the EFTA Webpage: <https://www.efta.int/>.

4. If a dispute concerns the scope or duration of safeguard measures taken in accordance with Article 111(3) or Article 112, or the proportionality of rebalancing measures taken in accordance with Article 114, and if the EEA Joint Committee after three months from the date when the matter has been brought before it has not succeeded to resolve the dispute, any Contracting Party may refer the dispute to arbitration under the procedures laid down in Protocol 33. No question of interpretation of the provisions of this Agreement referred to in paragraph 3 may be dealt with in such procedures. The arbitration award shall be binding on the parties to the dispute.

CHAPTER 4 SAFEGUARD MEASURES

Article 112

1. *If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Contracting Party may unilaterally take appropriate measures under the conditions and procedures laid down in Article 113.*
2. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement.
3. The safeguard measures shall apply with regard to all Contracting Parties.

Article 113

1. A Contracting Party which is considering taking safeguard measures under Article 112 shall, without delay, notify the other Contracting Parties through the EEA Joint Committee and shall provide all relevant information.
 2. The Contracting Parties shall immediately enter into consultations in the EEA Joint Committee with a view to finding a commonly acceptable solution.
 3. The Contracting Party concerned may not take safeguard measures until one month has elapsed after the date of notification under paragraph 1, unless the consultation procedure under paragraph 2 has been concluded before the expiration of the stated time limit. When exceptional circumstances requiring immediate action exclude prior examination, the Contracting Party concerned may apply forthwith the protective measures strictly necessary to remedy the situation. For the Community, the safeguard measures shall be taken by the EC Commission.
 4. The Contracting Party concerned shall, without delay, notify the measures taken to the EEA Joint Committee and shall provide all relevant information.
 5. The safeguard measures taken shall be the subject of consultations in the EEA Joint Committee every three months from the date of their adoption with a view to their abolition before the date of expiry envisaged, or to the limitation of their scope of application.
- Each Contracting Party may at any time request the EEA Joint Committee to review such measures.

Article 114

1. If a safeguard measure taken by a Contracting Party creates an imbalance between the rights and obligations under this Agreement, any other Contracting Party may towards that Contracting Party take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. Priority shall be given to such measures as will least disturb the functioning of the EEA.
2. The procedure under Article 113 shall apply.

Certain types of disputes (Article 109 Paragraph 5 and Article 111 EEA Agreement) may lead to the adoption of retaliatory measures as governed by Chapter 4 of Part VIII (Institutional Provisions) of the Agreement. Their justification is described as "to remedy possible imbalances" following from an unsettled dispute (Article 111 Paragraph 3 EEA Agreement).

The procedural aspects of such retaliatory measures are, at least partly, specifically outlined in Article 112 but to a large extent they are again governed by the general rules applicable to safeguard measures (Articles 113 and 114 EEA Agreement) as in the old agreement between the EFTA States and the EU of the early 1970s.⁵⁷ These measures of the EEA Agreement of 1992 were still recognizably based on the provisions of the Free Trade Agreements between the individual EFTA States with the European Economic Community (EEC).⁵⁸

The term "appropriate" is used in Article 112 Paragraph 1 with regard to safeguard measures taken for measures taken to react to serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist. According to Article 112 Paragraph 2 of the EEA Agreement "safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement." This is, nevertheless, usually interpreted as a proportionality requirement for these measures.⁵⁹ To what extent this requirement could influence the sectors or areas in which retaliatory measures are taken has so far not been discussed by the Parties and to my best knowledge has never been treated in the literature. As "cross-retaliation" is not specifically excluded one could reasonably argue that the parties to this agreement did conceive that in certain cases it should be available as long as it constitutes the measure that will least disturb the functioning of the Agreement.

⁵⁷ See above the explanations on the terminology in the Introduction.

⁵⁸ See also RO 1972 3184 to 3186 and Message of the Federal Council regarding the EEA Agreement of 18 May 1992, 487.

⁵⁹ Though the agreement uses the term "appropriate" in Article 112 Paragraph 1. See however, Sven Norberg et al (eds.), *The European Economic Area - EEA Law - A Commentary of the EEA Agreement* (CE Fritzes, 1993) 287 and 288.

With regard to the measures applied to rebalance the non-compliance with the result of safeguard measures (called “rebalancing measures”) the Agreement uses explicitly the term “proportionate” (Articles 111 Paragraph 4 and Article 114 Paragraph 1) and requires that they be “strictly necessary to remedy the imbalance” (Article 114 Paragraph 1), though this can seem a redundancy with regard to the generally accepted definition of proportionality in the Members States to the EEA. “Priority shall be given to such measures as will least disturb the functioning of the EEA” (Article 114 Paragraph 1). The term proportionality thus can be interpreted in this specific situation as meaning that the measures must be (a) suitable to induce the other Party to comply with the agreement again, that the measures must be those (b) that least disturb the functioning of the EEA, and that the measures are commensurate with the level of non-compliance by the other Party. The last part is slightly different from the reasoning applied, for example, in the field of human rights or the EU internal market. This is certainly also the way, how such measures are conceived in other trade agreements and, in particular, in the WTO.⁶⁰

If a dispute concerns the scope or duration of safeguard measures taken in accordance with Article 111(3) or Article 112, or the proportionality of rebalancing measures taken in accordance with Article 114 it can be settled through arbitration in accordance with the rules set out in Protocol 33 to the EEA Agreement.

We can thus see that the EEA Agreement includes still the idea of using retaliatory measures closely linked to safeguards measures. They are referred to as measures to remedy imbalances (Article 111 Paragraph 3 EEA Agreement) and rebalancing measures (Article 114 EEA Agreement). They are subject to certain limitations (necessity, limited in time, proportionality etc.) and the fulfilment of the conditions are subject to arbitration if a Party desire to do so.

A special type of measures in the EEA Agreement deserves at least a special mention here although they are usually not treated as falling into the same category as the other safeguard or retaliatory measures in trade agreements discussed in this overview. It is the procedure outlined in Article 102 Paragraph 5 of the EEA Agreement, which is referred to, nevertheless together with the safeguard and rebalancing measures already discussed, in Article 111 Paragraph 3. Here a lack of agreement regarding an amendment of an Annex to this Agreement to mirror the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement leads to the automatic suspension of the Agreement as a whole. This suspension measure can also be seen as a type of

⁶⁰ See also Lorand Bartels, Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU, *The Law and Development Review*, vol. 6, no. 2, 2013, 47-66 (at <https://doi.org/10.1515/ldr-2013-0020>), footnote 26.

retaliatory measure. As this type of measures is treated in a distinct way and no further procedural limitations are included in the agreement, it shall not be treated in more detail here. The measures under Article 102 Paragraph 5 are much closer to the rules in the Vienna Convention on the Law of Treaties of 1969 outlined in Section 2.2.

3.5 Withdrawal Agreement UK-EU (2019)

The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 2019⁶¹ contains provisions regarding retaliatory measures for breaches of the agreement resulting from the non-compliance with an arbitral award.

Here the term “Temporary remedies in case of non-compliance” is applied which indicates already the temporary character of such measures (as defined more in detail in Article 178 Paragraph 5) and the restricted availability to cases of non-compliance with an arbitral award. At the same time, this terminology avoids terms such as breach or violation of the obligations under the agreement which shall be at the origin of the arbitration procedure foreseen.

Article 178

Temporary remedies in case of non-compliance

1. If the arbitration panel rules in accordance with Article 177(2) that the respondent has failed to comply with the arbitration panel ruling referred to in Article 173, at the request of the complainant it may impose a lump sum or penalty payment to be paid to the complainant. In determining the lump sum or penalty payment, the arbitration panel shall take into account the seriousness of the non-compliance and underlying breach of obligation, the duration of the non-compliance and underlying breach of obligation.
2. If, 1 month after the arbitration panel ruling referred to in paragraph 1, the respondent has failed to pay any lump sum or penalty payment imposed on it, or if, 6 months after the arbitration panel ruling referred to in Article 177(2), the respondent persists in not complying with the arbitration panel ruling referred to in Article 173, the complainant shall be entitled, upon notification to the respondent, to suspend obligations arising from:
 - (a) any provision of this Agreement other than those contained in Part Two; or
 - (b) parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement.

⁶¹ 2019/C 384 I/01 – text available on the EU Webpage: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12019W/TXT\(02\)#d1e127-1-1](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12019W/TXT(02)#d1e127-1-1).

The notification shall specify the provisions which the complainant intends to suspend. Before deciding to suspend parts of an agreement referred to in point (b) the complainant shall first consider whether the suspension of the provision of this Agreement in accordance with point (a) would be an appropriate response to the breach. Any suspension shall be proportionate to the breach of obligation concerned, taking into account the gravity of the breach and the rights in question and, where the suspension is based on the fact that the respondent persists in not complying with the arbitration panel ruling referred to in Article 173, whether a penalty payment has been imposed on the respondent and has been paid or is still being paid by the latter.

The complainant may implement the suspension at any moment but not earlier than 10 days after the date of the notification, unless the respondent has requested arbitration under paragraph 3.

3. If the respondent considers that the extent of the suspension set out in the notification referred to in paragraph 2 is not proportionate, it may request the original arbitration panel in writing to rule on the matter. Such request shall be notified to the complainant before the expiry of the 10-day period referred to in paragraph 2. The arbitration panel shall notify its ruling to the Union and the United Kingdom within 60 days of the date of submission of the request. Obligations shall not be suspended until the arbitration panel has notified its ruling, and any suspension shall be consistent with the arbitration panel ruling.

4. In the event of the original arbitration panel, or some of its members, being unable to reconvene to consider a request under paragraph 2, a new arbitration panel shall be established as set out in Article 171. In such cases, the period for notifying the ruling shall be 90 days from the date of establishment of the new arbitration panel.

5. The suspension of obligations shall be temporary and shall be applied only until any measure found to be inconsistent with the provisions of this Agreement has been withdrawn or amended, so as to achieve conformity with the provisions of this Agreement, or until the Union and the United Kingdom have agreed to otherwise settle the dispute.

Article 179

Review of any measure taken after temporary remedies

1. Where the complainant has suspended obligations in accordance with Article 178 or where the arbitration panel has imposed a penalty payment on the respondent in accordance with Article 178(1), the respondent shall notify the complainant of any measure it has taken to comply with the

ruling of the arbitration panel and of its request for an end to the suspension of obligations applied by the complainant or to the penalty payment.

2. If the Union and the United Kingdom do not reach an agreement on whether the notified measure brings the respondent into conformity with the provisions of this Agreement within 45 days of the date of submission of the notification, either party may request the original arbitration panel in writing to rule on the matter. Such request shall be notified simultaneously to the other party. The arbitration panel ruling shall be notified to the Union and the United Kingdom and to the Joint Committee within 75 days of the date of submission of the request. If the arbitration panel rules that the respondent has brought itself into conformity with this Agreement, or if the complainant does not, within 45 days of the submission of the notification referred to in paragraph 1, request that the original arbitration panel rule on the matter:

- (a) the suspension of obligations shall be terminated within 15 days of either the ruling of the arbitration panel or the end of the 45-day period;
- (b) the penalty payment shall be terminated on the day after either the ruling of the arbitration panel or the end of the 45-day period.

3. In the event of the original arbitration panel, or some of its members, being unable to reconvene to consider a request under paragraph 2, a new arbitration panel shall be established as set out in Article 171. The period for notifying the ruling shall in that case be 90 days from the date of establishment of the new arbitration panel.

4. Where a case referred to the arbitration panel pursuant to paragraph 2 raises a question of interpretation of a concept of Union law or a question of interpretation of a provision of Union law referred to in this Agreement, Article 174 shall apply mutatis mutandis.

These measures are available following an award of an arbitration panel.

When a party does not comply with an arbitration panel report that finds a Party in violation of the underlying agreement, as a first step, the arbitration panel can itself upon request impose a lump sum or penalty payment to be paid (Article 178). In the calculation of this amount, the arbitral panel shall take into account the seriousness of the non-compliance and underlying breach of obligation, the duration of the non-compliance and underlying breach of obligation. This is a relatively innovative approach to make non-compliance with an arbitral award relevant through the award of monetary damages. It does not go far as to award damages for the original violation (retroactive or

retrospective remedies) as it has been discussed in the literature⁶² and is foreseen in investment arbitration or in a limited number of specific treaty regimes (like the ECHR). But it does introduce such a penalty only with regard to the non-compliance once an award has been rendered and thus partly modifies the traditional system. One can see it as a compromise between the traditional lack of reparations for damages in international trade agreements and the criticism that this works as an incentive to breach trade rules because of this.⁶³ Under the his new rule, no reparation is due for the first phase of the dispute but once the breach of a rules has been acknowledged by the competent organ, the non-compliance with the award and thus continued breach) shall not be to the benefit of the defendant,

As a next step, if the violations cannot be remedied through compliance or the payment of compensation, the complainant shall be entitled (following the more traditional model) "to suspend obligations" arising from certain parts of the agreements between the European Union and the United Kingdom under the conditions set out in the respective agreements. This element is closer to the traditional retaliatory measures in the traditional bilateral trade agreements under review in this analysis and the WTO. Here again certain limitations and conditions are introduced. In particular, the question of "cross-retaliation" is subject to certain limitations though they are not very detailed. Some of these obligations are rather hortatory like the obligation "to consider" whether the suspension of an obligation under the Withdrawal Agreement as such is more appropriate than suspending obligations in another agreement. Others relate to known elements to limit the effects of such a suspension, like the rules that any suspension shall be proportionate to the breach of obligation concerned. Specifically, Part Two of the Agreement is excluded and the conditions for suspension of obligations in other agreements are governed by the specific rules in those agreements.

On the other side, Article 178 Paragraph clearly requires that "[a]ny suspension shall be proportionate to the breach of obligation concerned". The establishment of the proportionate character of such a measure shall take "into account the gravity of the breach and the rights in question and, where the suspension is based on the fact that the respondent persists in not complying with the arbitration panel ruling referred to in Article 173, whether a penalty payment has been imposed on the respondent and has been paid or is still being paid by the latter" (Article 178 Paragraph 2). The proportionality of this suspension of measures is again subject to review by the original arbitration panel (Article 178 Paragraph 3).

⁶² See, e.g. Andreas R Ziegler and Gavin Goh, Retrospective Remedies in the WTO: After Automotive Leather, in: Journal of International Economic Law, vol. 6, no. 3, 2003, 545-564 available at: http://www3.oup.co.uk/jielaw/hdb/Volume_06/Issue_03/060545.sgm.abs.html or Mitsuo Matsushita et al., The World Trade Organization – Law Practice and Policy (OUP, 3rd edn. 2015) 140.

⁶³ Ibid.

3.6 EU-UK Trade and Cooperation Agreement (2020)

The EU-UK Trade and Cooperation Agreement⁶⁴ concluded between the EU and the UK sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes.

It is underpinned by provisions ensuring a level playing field and respect for fundamental rights. While it will by no means match the level of economic integration that existed while the UK was an EU Member State, the Trade and Cooperation Agreement goes beyond traditional free trade agreements. The Trade and Cooperation Agreement was signed on 30 December 2020, applied provisionally as of 1 January 2021 and entered into force on 1 May 2021.

PART SIX
DISPUTE SETTLEMENT AND HORIZONTAL PROVISIONS

TITLE I
DISPUTE SETTLEMENT

...
CHAPTER 3
COMPLIANCE

...

Article 749

Temporary Remedies

1. The respondent Party shall, at the request of and after consultations with the complaining Party, present an offer for temporary compensation if:
 - (a) the respondent Party delivers a notification to the complaining Party that it is not possible to comply with the ruling referred to in Article 745(4); or
 - (b) the respondent Party fails to deliver a notification of any measure taken to comply within the deadline referred to in Article 746 or before the date of expiry of the reasonable period of time; or
 - (c) the arbitration tribunal finds that no measure taken to comply exists or that the measure taken to comply is inconsistent with the covered provisions.

⁶⁴ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30.4.2021, p. 10-2539. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22021A0430\(01\)#d1e31732-10-1](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22021A0430(01)#d1e31732-10-1).

2. In any of the conditions referred to in points (a), (b) and (c) of paragraph 1, the complaining Party may deliver a written notification to the respondent Party that it intends to suspend the application of obligations under the covered provisions if:

- (a) the complaining Party decides not to make a request under paragraph 1; or
- (b) the Parties do not agree on the temporary compensation within 20 days after the expiry of the reasonable period of time or the delivery of the arbitration tribunal decision under Article 748 if a request under paragraph 1 of this Article is made.

The notification shall specify the level of intended suspension of obligations.

3. Suspension of obligations shall be subject to the following conditions:

- (a) obligations under Heading Four of Part Two, the Protocol on Social Security Coordination or its annexes or Part Five may not be suspended under this Article;
- (b) by way of derogation from point (a), obligations under Part Five may be suspended only where the ruling referred to in Article 745(4) concerns the interpretation and implementation of Part Five;
- (c) obligations outside Part Five may not be suspended where the ruling referred to in Article 745(4) concerns the interpretation and implementation of Part Five; and
- (d) obligations under Title II of Heading One of Part Two in respect of financial services may not be suspended under this Article, unless the ruling referred to in Article 745(4) concerns the interpretation and application of obligations under Title II of Heading One of Part two in respect of financial services.

4. Where a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions referred to in Article 735. With the exception of the rule in point (a) of paragraph 3 of this Article, all rules relating to temporary remedies in case of non-compliance and to review of any such measures shall be governed by the earlier agreement.

5. The suspension of obligations shall not exceed the level equivalent to the nullification or impairment caused by the violation.

6. If the arbitration tribunal has found the violation in Heading One or Heading Three of Part Two, the suspension may be applied in another Title of the same Heading as that in which the tribunal has found the violation, in particular if the complaining party is of the view that such suspension is effective in inducing compliance.

7. If the arbitration tribunal has found the violation in Heading Two of Part Two:

(a) the complaining party should first seek to suspend obligations in the same Title as that in which the arbitration tribunal has found the violation;

(b) if the complaining party considers that it is not practicable or effective to suspend obligations with respect to the same Title as that in which the tribunal has found the violation, it may seek to suspend obligations in the other Title under the same Heading.

8. If the arbitration tribunal has found the violation in Heading One, Heading Two, Heading Three or Heading Five of Part Two, and if the complaining party considers that it is not practicable or effective to suspend obligations within the same Heading as that in which the arbitration tribunal has found the violation, and that the circumstances are serious enough, it may seek to suspend obligations under other covered provisions.

9. In the case of point (b) of paragraph 7 and paragraph 8, the complaining Party shall state the reasons for its decision.

10. The complaining Party may suspend the obligations 10 days after the date of delivery of the notification referred to in paragraph 2 unless the respondent Party made a request under paragraph 11.

11. If the respondent Party considers that the notified level of suspension of obligations exceeds the level equivalent to the nullification or impairment caused by the violation or that the principles and procedures set forth in point (b) of paragraph 7, paragraph 8 or paragraph 9 have not been followed, it may deliver a written request to the original arbitration tribunal before the expiry of the 10 day period set out in paragraph 10 to decide on the matter. The arbitration tribunal shall deliver its decision on the level of the suspension of obligations to the Parties within 30 days of the date of the request. Obligations shall not be suspended until the arbitration tribunal has delivered its decision. The suspension of obligations shall be consistent with that decision.

12. The arbitration tribunal acting pursuant to paragraph 11 shall not examine the nature of the obligations to be suspended but shall determine whether the level of such suspension exceeds the level equivalent to the nullification or impairment caused by the violation. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in point (b) of paragraph 7, paragraph 8 or paragraph 9 have not been followed, the arbitration tribunal shall examine that claim. In the event the arbitration tribunal determines that those principles and procedures have not been followed, the complaining party shall apply them consistently with point (b) of paragraph 7, paragraph 8 and paragraph 9. The parties shall accept the arbitration tribunal's decision as final and shall not seek a second arbitration procedure. This paragraph shall under no circumstances delay the date as of which the complaining Party is entitled to suspend obligations under this Article.

13. The suspension of obligations or the compensation referred to in this Article shall be temporary and shall not be applied after:

- (a) the Parties have reached a mutually agreed solution pursuant to Article 756;
- (b) the Parties have agreed that the measure taken to comply brings the respondent Party into compliance with the covered provisions; or
- (c) any measure taken to comply which the arbitration tribunal has found to be inconsistent with the covered provisions has been withdrawn or amended so as to bring the respondent Party into compliance with those covered provisions.

Article 750

Review of any measure taken to comply after the adoption of temporary remedies

1. The respondent Party shall deliver a notification to the complaining Party of any measure it has taken to comply following the suspension of obligations or following the application of temporary compensation, as the case may be. With the exception of cases under paragraph 2, the complaining Party shall terminate the suspension of obligations within 30 days from the delivery of the notification. In cases where compensation has been applied, with the exception of cases under paragraph 2, the respondent Party may terminate the application of such compensation within 30 days from the delivery of its notification that it has complied.

2. If the Parties do not reach an agreement on whether the notified measure brings the respondent Party into compliance with the covered provisions within 30 days of the date of delivery of the notification, the complaining Party shall deliver a written request to the original arbitration tribunal to decide on the matter. The arbitration tribunal shall deliver its decision to the Parties within 46 days of the date of the delivery of the request. If the arbitration tribunal finds that the measure taken to comply is in conformity with the covered provisions, the suspension of obligations or compensation, as the case may be, shall be terminated. When relevant, the level of suspension of obligations or of compensation shall be adjusted in light of the arbitration tribunal decision.

Similar provisions “on the suspension of obligations” to those contained in the UK-EU Withdrawal Agreement can be found in this text under the title “Temporary Remedies” (Part six, Title I, Chapter 3). In comparison to other agreements under review in this overview the conditions governing these measures are very detailed.

- Only certain obligations are available for suspension (according to Article 749 Paragraphs 3 and 4 some parts are totally excluded and others are only available for suspension if specific conditions relating to the relevant parts are fulfilled with regard to the original non-compliance at stake).

- The suspension of obligations shall not exceed the level equivalent to the nullification or impairment caused by the violation (Article 740 Paragraphs 5 and 11). The terminology reminds heavily of the respective language used in the GATT 1947 (Article XXIII) and since 1995 in the DSU/WTO. Neither the term “appropriate” nor “proportionate” is introduced but simply the term “equivalent” as in the WTO Agreements. Though this seems a deliberate choice it is not clear as to whether this wording will lead to a different appreciation of the acceptable level of suspension of benefits. Neither does the agreement state that the measures chosen must be those that affect the functioning of the agreement the least (as in the EEA Agreement) nor is reference made to specific factors to be taken into account (as in the Withdrawal Agreement UK-EU).
- Cross-retaliation is specifically allowed under certain conditions but limited to specific sectors (Article 749 Paragraph 6: “If the arbitration tribunal has found the violation in Heading One or Heading Three of Part Two, the suspension may be applied in another Title of the same Heading as that in which the tribunal has found the violation, in particular if the complaining party is of the view that such suspension is effective in inducing compliance”). Many of the steps to be followed are directly inspired by WTO case law and consultations and discussion in legal writings (Article 749 Paragraphs 7 to 10). With regard to certain violations, the complaining party should first seek to suspend obligations in the same Title as that in which the arbitration tribunal has found the violation. Only if the complaining party considers that it is not practicable or effective to suspend obligations with respect to the same Title as that in which the tribunal has found the violation, it may seek to suspend obligations in the other Title under the same Heading. The complaining Party shall state the reasons for its decision to retaliate in another area.
- The suspension of obligations is itself again subject to arbitration (Article 749 Paragraphs 11 and 12).
- The suspension of obligations or the compensation referred to in this Article shall be temporary as explained in detail in the Agreement (Article 749 Paragraph 13). The suspension of obligations or the compensation referred to in this Article shall not be applied after (a) the Parties have reached a mutually agreed solution pursuant to Article 756, (b) the Parties have agreed that the measure taken to comply brings the respondent Party into compliance with the covered provisions; or (c) any measure taken to comply which the arbitration tribunal has found to be inconsistent with the covered provisions has been withdrawn or amended so as to bring the respondent Party into compliance with those covered provisions.

3.7 Association Agreement EU-Ukraine (2014)

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part of 2014⁶⁵ contains equally provisions on the possibility to take "Temporary remedies in case of non-compliance" in Article 315 of the Agreement. (The agreement also provides for a special procedure to suspend obligations in so-called "urgent energy disputes" which shall not be annualized in detail for the current review as they seem less relevant for the specific context of this study.)

Chapter 14
Dispute Settlement

...

Section 2
Compliance

...

Article 314
Remedies for urgent energy disputes

1. In respect of a dispute concerning Chapter 11 (Trade-related Energy) of Title IV of this Agreement which one Party considers to be urgent because of an interruption, in full or in part, of any transport of natural gas, oil, or electricity or a threat thereof, between Ukraine and the EU Party the following specific provisions on remedies shall apply.
2. By way of derogation from Articles 311, 312 and 313 of this Agreement, the complaining Party may suspend obligations arising under this Agreement to a level equivalent to the nullification or impairment caused by a Party failing to bring itself into compliance with the Panel's findings within 15 days of their release. This suspension may take effect immediately. Such suspension may be maintained for no longer than three months, unless the Party complained against has not complied with the panel's report.
3. Should the Party complained against dispute the existence of a failure to comply or the level of suspension due to the failure to comply, it may initiate proceedings under Articles 315 or 316 of this Agreement which shall be examined on an expeditious basis. The complaining party shall be required to remove or adjust the suspension only once the Panel has ruled on the matter, and may maintain the suspension pending the proceedings.

⁶⁵ Published in: OJ L 161, 29.5.2014, p. 3–2137, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>.

Article 315

Temporary remedies in case of non-compliance

1. If the Party complained against fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that any measure notified under Article 313(1) of this Agreement is inconsistent with that Party's obligations under the provisions of the Agreement referred to in Article 304, the Party complained against shall, if so requested by the complaining Party, present an offer for temporary compensation.
2. If no agreement on compensation is reached within 30 days of the end of the reasonable period of time or of the arbitration panel ruling under Article 313 of this Agreement that a measure taken to comply is inconsistent with the provisions of this Agreement referred to in Article 304, the complaining Party shall be entitled, upon notification to the Party complained against and to the Trade Committee, to suspend obligations arising from any provision contained in the Chapter on the free-trade area at a level equivalent to the nullification or impairment caused by the violation. The complaining Party may implement the suspension at any moment after the expiry of 10 days after the date of the notification, unless the Party complained against has requested arbitration under paragraph 4 of this Article.
3. In suspending obligations, the complaining Party may choose to increase its tariff rates to the level applied to other WTO Members on a volume of trade to be determined in such a way that the volume of trade multiplied by the increase of the tariff rates equals the value of the nullification or impairment caused by the violation.
4. If the Party complained against considers that the level of suspension is not equivalent to the nullification or impairment caused by the violation, it may request in writing the original arbitration panel to rule on the matter. Such request shall be notified to the complaining Party and to the Trade Committee before the expiry of the 10-day period referred to in paragraph 2 of this Article. The arbitration panel shall notify its ruling on the level of the suspension of obligations to the Parties and to the Trade Committee within 30 days of the date of submission of the request. Obligations shall not be suspended until the arbitration panel has notified its ruling, and any suspension shall be consistent with the arbitration panel ruling.
5. In the event of the original arbitration panel, or some of its members, being unable to reconvene, the procedures laid down in Article 307 of this Agreement shall apply. In such cases,

the period for notifying the ruling shall be 45 days from the date of the submission of the request referred to in paragraph 4 of this Article.

6. The suspension of obligations shall be temporary and shall be applied only until any measure found to be inconsistent with the provisions of the Agreement referred to in Article 304 has been withdrawn or amended, so as to achieve conformity with the provisions of the Agreement referred to in Article 304, as established under Article 316, or until the Parties have agreed to settle the dispute.

The provisions in this agreement are partially inspired by the WTO practice but differ to a certain extent from the most recent developments in WTO case law and treaty practice when it comes to specific aspects like the authorisation to take measures (sequencing) and the options of cross-retaliation (which is also due to the more limited scope of this agreement). The fact that it was already negotiated ten years ago may also play a role.

As a consequence of the more limited scope of the agreement, a strong focus with regard to the suspension of obligations lies on the increase of tariff rates. The increase is, however, limited to the level applied to other WTO Members. However, the volume of trade "can be determined in such a way that the volume of trade multiplied by the increase of the tariff rates equals the value of the nullification or impairment caused by the violation". This is a further limitation of the normally found condition that the measures must be equivalent to the nullification or impairment caused by the violation or appropriate or proportionate. The terms proportionate or appropriate do not appear in the relevant provisions of the Agreement. Neither is there a request that such measures should be chosen that least disturb the Agreement.

Here again, the equivalence of the suspension of obligations is subject to arbitral review (Article 315 Paragraph 4) and the measures must be temporary (Article 315 Paragraph 6).

3.8 Switzerland-EU Bilateral Draft Framework Agreements (2018)

In the negotiations of a Framework Agreement between Switzerland and the EU a draft text of 23 November 2018 was published that contains language regarding the measures available in case of non-compliance with an arbitral award rendered under the agreement. The draft of the institutional agreement is not available in English but only in French.⁶⁶

⁶⁶ Accord facilitant les relations bilatérales entre l'Union européenne et la Confédération suisse dans les parties du marché intérieur auxquelles la Suisse participe (version 23 November 2018). The draft of the institutional agreement

CHAPITRE 3 CONTRÔLE DE LÉGALITÉ ET PROCÉDURE EN CAS DE DIFFICULTÉ
D'INTERPRÉTATION OU D'APPLICATION

...

Article 10 Procédure en cas de difficulté d'interprétation ou d'application

...

5. Chaque partie prend toutes les mesures nécessaires pour se conformer de bonne foi à la décision du tribunal arbitral. La partie dont le tribunal arbitral a constaté qu'elle n'a pas respecté le présent accord ou un accord concerné fait connaître à l'autre partie et au comité sectoriel les mesures qu'elle a prises pour se conformer à la décision du tribunal arbitral.

6. Si la partie dont le tribunal arbitral a constaté qu'elle n'a pas respecté le présent accord ou un accord concerné ne fait pas connaître, avant l'expiration d'un délai raisonnable [au sens de l'Article X du Protocole sur le tribunal arbitral], les mesures qu'elle a prises pour se conformer à la décision du tribunal arbitral ou si l'autre partie estime que les mesures communiquées ne sont pas conformes à la décision du tribunal arbitral, cette autre partie peut prendre des mesures de compensation allant jusqu'à la suspension de tout ou partie d'un ou des accords concernés afin de remédier à un déséquilibre éventuel.

7. La Partie affectée par les mesures visées au paragraphe 5 peut soumettre au comité sectoriel ses observations afin qu'il statue sur la proportionnalité de ces mesures. Si le comité sectoriel n'est pas parvenu à prendre une décision dans un délai de 6 mois après avoir été saisi, chaque Partie peut soumettre à l'arbitrage la question relative à la proportionnalité des mesures de compensation, conformément au Protocole sur le tribunal arbitral.

8. Lorsque l'application de tout ou partie d'un ou des accords concernés est suspendue, les droits et obligations que les particuliers et opérateurs économiques ont déjà acquis sont préservés.

The basic structure of Article 10 Paragraph 6 takes up the idea of retaliatory measures (*mesures de compensation*) as remedies for non-compliance to achieve a rebalancing of the agreement (*afin de remédier à un déséquilibre éventuel*).

The level of the compensation measures must be proportionate. No reference is made to the equivalent level of such measures with the nullification and impairment of the Agreement nor is the term "appropriate" used anywhere in the relevant provisions. The proportionality of the measures is subject to discussion in a joint organ and - if no decision can be achieved - arbitration (Article 10 Paragraph 7). This can best be explained by the framework character of this agreement (i.e. that it does not govern market access as such) and the familiarity with (as well as the perceived desire of the of the Parties to not depart unnecessarily from) the Free Trade Agreements of 1972.

The chosen wording takes up some of the basic concepts normally contained in the agreements analysed here without going into any detail. In reality this means that many specific aspects must be decided in interpreting the relatively vague terms of this agreement in view of the case law and the practice in other bodies such as the WTO where appropriate. This could also be done through more specific provision in the governed (market access) agreements themselves.

It is to be expected that when it comes to the procedural details of such measures, the EU will rely on its own views expressed in international trade disputes, in particular in the WTO, and rely on the more detailed language in other agreements (such as the agreement with the UK discussed in this overview) whenever the language requires further interpretation and does not preclude an interpretation in a specific sense. This seems particularly likely for the question of cross-retaliation as this makes the thread of the use of retaliatory measures much more important and allows, in particular, the Party with an important market power to use this thread in the area where the respective measures would have an important impact in the smaller (usually also less diversified) economy.

4 The Use of Retaliatory Measures in View of the Nature of an Agreement

I have been asked whether the nature of the agreement (whether or not there is a mechanism for the partner state to adopt EU law) and its institutional elements (whether or not there is a monitoring system, dispute settlement model, etc.) must be taken into account in the drafting of the provisions on retaliatory measures.

It seems from the analysis of the chosen agreements that this is generally not a relevant distinction as the basic ideas (temporary character, proportionality or equivalence with the nullification and

impairment, etc.) remain applicable in all types of economic agreements analysed. An exception seems to be the possibility to cross-retaliate where it is highly relevant what sector are covered by the specific rules and whether it is acceptable that no limitations should apply. This becomes particularly visible in the solution chosen in the analysed agreements between the EU and the United Kingdom where a lot of care has been applied as to the options for suspending obligations in other sectors than those in which the original breach of an obligation has taken place. One must, however, remember that these questions are particularly relevant for the suspension of (market access) concessions and may be less suitable for general legal obligations (not specifically guaranteeing the market access as such), for example under the Framework Agreement).

In view of the difficulties for smaller economies to retaliate against bigger trading partners, as known from the WTO, these questions deserve particular attention. Though this situation has been mostly discussed (and deplored)⁶⁷ with regard to developing countries it applies in all situations where the complainant is considerably weaker when it comes to retaliatory power than the defendant.

5 Means to Limit Retaliatory Measures

I have been asked to identify the limitations that can be imposed on retaliatory measures (e.g. taking into account subjective elements such as intention in the proportionality analysis, limiting measures only to certain sectors or to the same agreement that was the subject of the violation, etc.).

From the above analysis it can be said that there have evolved a number of possible conditions and/or limitations which have so far been discussed in the literature and resulted in specific outcomes in the reviewed agreements (and often through interpretation of that language in specific disputes, in particular in the WTO).

Arbitration as a prior step: In contrast to the FTA between Switzerland and the EU, most modern trade (or even market access) agreements provide for arbitration (at least for certain questions). In the context of this analysis we have seen that the violation of the agreements under review include arbitration and only once an arbitral tribunal is (allegedly) not respected (complied with) allow for the suspension of concessions or compensation measures. The exact sequencing of such measures can differ but is nowadays usually addressed in the text of the agreements.

⁶⁷ See Kil Won Lee, *Suspending Trips Obligations as a Viable Option for Developing Countries to Enforce WTO Rulings*, *Asian Journal of WTO and International Health Law and Policy*, vol. 9, 2014, 217 ff.; Daniel Damásio Borges, *Countermeasures in the WTO Law and the Principle of Proportionality: A Developing Country's Perspective*, in: Alberto do Amaral Júnior et al (eds.), *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* (Springer 2019), 177-190. or Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming the DSU*, *The Law and Development Review*, vol. 6, no. 2, 2013, 47-66 (at <https://doi.org/10.1515/ldr-2013-0020>).

Equivalence/Proportionality: The level of suspension of concessions is traditionally limited. The most traditional language in this respect speaks of “equivalence”. Other agreements speak explicitly of “proportionality”. In practice and in the legal literature the two concepts seem to converge or not really lead to different outcomes. Specific references on how the level of the nullification or impairment (or violation) of an agreement have to be assessed may provide some guidance to the arbitrators and the parties taking such measures, in particular when it comes to market access concessions. With regard to the suspension of other legal obligations or entire parts of an agreement this may be more difficult.

Cross-Retaliation: While traditional agreements for goods were less concerned with the issue (e.g. the *Free Trade Agreement between the EEC [EU] and the EFTA States of 1972*) modern comprehensive (market integration) agreements face questions as to which areas are subject to the suspension of benefits or other obligations. Some agreements have addressed this question in detail (sometimes also in the subsequent case law resulting from the dispute settlement procedures available). Others remain mostly silent on this issue. In any case, the requirement that measures be proportionate would normally not exclude the suspension of measures in another area (where the agreement does not specifically exclude or restrict it). The impact of the chosen measures (also in another area) must be evaluated on a case-by-case basis. Measures can be proportionate or disproportionate irrespective of whether taken in the same area or another area. It may simply be easier to compare the impact of the retaliatory measure to the impact of the original violation when taken in the same area; this is certainly one area while this should normally be the first choice (as it is specifically requested in certain agreements, including the WTO, but not in all texts analysed here). In particular, where obligations of very different nature (market access obligations, adoption of common rules, cooperation in specific areas other than market access etc.) are included in the same agreement specific rules on cross-retaliation may be useful or even necessary to avoid inappropriate outcomes. A clear description of which areas are not available for cross-retaliation or for which type of violations certain measures in specific other areas can be taken seems the most precise way to address this issue. The solution used by the United Kingdom and The EU in their Trade and Cooperation Agreement (in particular in Article 749) seems a good example for this approach.

Temporary Character: All agreements analysed in this survey limit the suspension of concessions or other obligations in time. The temporary character of such measures is justified with the objective to induce compliance and finds its correspondence in the general rule applicable to countermeasures (as portrayed in the ILC Draft Articles on State Responsibility for Wrongful Acts of 2001) that they be “limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State” (Article 49 Paragraph 2).

6 Proportionality as a Specific Tool to Limit Retaliatory Measures

As discussed in various parts of this report, only certain agreements refer to the proportionality of the retaliatory measures (or certain sub-categories thereof). The distinction between a mathematical approach to the equivalent level of suspension of (market access) concessions in older agreement like the GATT 1947 or the original EFTA Convention of 1960 on one side and the suspension of obligations (leading to the suspension of entire parts or even the entire agreement) in comprehensive modern agreements can be seen as a reason to speak rather of the proportionality of the measures taken than to try to establish equivalency.

Even when agreements explicitly refer to the proportionality of retaliatory measures, they normally do not contain detailed explanations what this means exactly in the given context. At the same time, legal writers and arbitrators have regularly come to the conclusion that the objective of the suspension of measures leads to a need to limit their scope and that therefore proportionality plays a role when assessing the equivalence of suspensions with regard to the nullification and impairment of the benefits concerned. The opinion prevails that this approach eliminates punitive remedies, i.e. going beyond the equivalent level of suspensions, except where specific rules provide for a specific authorisation to do so.

The most prominent case for the use of the term “appropriate” and a slightly distinct approach to the character of such measures is certainly the explicit language used in the areas of subsidies in the WTO (Articles 4.10 and 4.11 of the Agreement on Subsidies and Countervailing Measures (SCM)).⁶⁸ These rules are, however, considered as of a highly specific nature (*lex specialis*) and should not be used as guidance for the general understanding of retaliatory measures.

7 Conclusion: Recommendations regarding the Inclusion of Retaliatory Measures in the Relations between Switzerland and the European Union

What conclusions can be drawn from this overview on retaliatory measures for non-compliance with dispute settlement proceedings and their development over time for the negotiations between Switzerland and the EU?

- It seems clear that the nature of these measures also in such an agreement should be to induce compliance with the agreement.⁶⁹ Depending on the exact scope of the agreement

⁶⁸ see above.

⁶⁹ See above Section 2.5.

this can include the covered bilateral (existing and future agreements) which may however lead to specific rules needed to safeguard the balance between the various obligations that could be suspended.

- It is also clear that the temporary character of such measures has never been questioned. As soon as the other party complies again with the agreement the retaliatory measures must cease. At the same time, in cases where non-compliance continues for a long time (as it is known from certain recent trade disputes) this can lead to long periods where retaliatory measures remain in place.
- When it comes to the various conditions/limitations used to achieve a balanced outcome with regard to market access concessions it seems interesting to rely on the language used in the WTO such as it has been done in recent agreement of the EU with Ukraine and the UK. When doing so it is important to take into account the case law of the WTO as it has developed and concretized many of the provisions of the WTO Agreement, and in particular, the DSU that seem important in view of the problems encountered in practice. As these developments are not reflected in the language of the DSU (which stays basically as adopted in 1994/5) this can lead to very detailed provisions such as they can be found in the EU-UK Trade and Cooperation Agreement of 2020. Here the aspects of cross-retaliation, sequencing, the exclusion of specific obligations etc. could be discussed and introduced into the language of the respective provisions.
- Another approach could be to keep the respective procedural provision the text of the negotiated agreements relatively vague and to leave it to the arbitrators when applying the provision to interpret the respective provisions (e.g. in light of the practice developed in the WTO). The alternative would be to have very specific provisions in the various (market access) agreements that can be adjusted to the specific peculiarities for each agreement. This can partly be observed in the detailed rules of the Withdrawal Agreement UK-EU of 2019 and the EU-UK Trade and Cooperation Agreement of 2020.⁷⁰ In the literature on the state of the WTO rules and the language of the more recent regional trade agreements one can observe a certain convergence of the positions based on the discussions that have taken place with regard to the WTO rules in this field. This convergence of views, based on the experience in the WTO, could probably also be achieved in negotiations between the EU and Switzerland (and might lead to results for the procedural aspects similar to those contained in the agreements between the EU and the UK). When it comes to the suspension of market access concessions this approach would certainly be coherent and sophisticated. For the general balancing of the suspension of legal obligations in agreements that do not exclusively regulate

⁷⁰ See Sections 3.6 and 3.7 above.

market access to a specific sector such a detailed description of the technicalities of retaliatory measures (for example cross-retaliation) may be more difficult and result in the more general language as it was, for example, included in the Draft Framework Agreement between the EU and Switzerland.

Lausanne, 5 June 2023

Professor Andreas R. Ziegler

