

ISSUE FOCUS

Implementation System of the WTO Dispute Settlement Body: A Comparative Approach

Yoshinori Abe*

The implementation system of the recommendations and rulings of the Dispute Settlement Body is an important component of the WTO dispute settlement procedure. Where there is any disagreement between disputing parties as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, a winning party may refer the matter to a compliance panel and the Appellate Body. If a losing party is found to have failed to comply with the recommendations and rulings, DSB may authorize the winning party to retaliate. This article analyzes the implementation system of the WTO dispute settlement procedure in comparison with other systems of 'second-order' compliance in international law. Also, attention will be directed to the relationship between the WTO retaliation and countermeasures in general international law. Countermeasures under the Agreement on Subsidies and Countervailing Measures, in particular, have a legal nature akin to that of countermeasures under the law of State responsibility.

Keywords

WTO Dispute Settlement, Second-Order Compliance, Compliance Panels, Retaliation, Countermeasures, ILC's Articles on State Responsibility

* Professor of International Law at Gakushuin University, Tokyo, Japan; B.A./M.A.(Tokyo), LL.M.(Cantab). This paper is a revised piece of the research project "Implementation Issues in the WTO Dispute Settlement Procedure" at the Research Institute of Economy, Trade & Industry. The author would like to thank Jeremy Yeo Shenglong for his useful comments. The author may be contacted at: yoshinori.abe@gakushuin.ac.jp / Address: 1-5-1 Mejiro, Toshima-ku, Tokyo 171-8588 Japan.

I. Introduction

One of the most important features of the World Trade Organization (“WTO”)’s dispute settlement procedure is its implementation system through the recommendations and rulings (“R&R”) of the Dispute Settlement Body (“DSB”). According to the WTO Dispute Settlement Understanding (“DSU”), DSB adopts panel and Appellate Body reports by negative consensus.¹ Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, DSB recommends that “the Member concerned bring the measure into conformity with that agreement.”² Thus, losing parties are obliged to comply with the R&R of DSB within a reasonable period of time.³ Furthermore, where there is any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with R&R, a winning party may refer the matter to a compliance panel and the Appellate Body.⁴ If the panel and the Appellate Body find that a losing party has failed to comply with R&R, DSB may authorize the winning party to suspend the application of concessions or other obligations under the covered agreements to the losing party (so-called retaliation).⁵ Despite some criticisms,⁶ it can be said, overall, that this system has worked efficiently.⁷ To date, 27 compliance panel reports and 18 compliance Appellate Body reports have been adopted; retaliation has been authorized by DSB in nine cases.⁸

This system ensures compliance with the DSB’s decisions, i.e., R&R. While compliance in international law usually means behavior or a situation in conformity with international obligations contained in treaties or customary international law, the implementation of R&R concerns compliance with ‘secondary norms’ promulgated by a dispute settlement body.⁹ In this regard, Fisher and Simmons indicated the distinction between ‘first-order’ and ‘second-order’ compliance,¹⁰

¹ DSU arts. 16.4 & 17.14.

² *Id.* art. 19.1.

³ *Id.* art. 21.3.

⁴ *Id.* art. 21.5.

⁵ *Id.* arts. 22.6 & 22.7.

⁶ R. BABU, *REMEDIES UNDER THE WTO LEGAL SYSTEM* 220 (2012).

⁷ B. Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 399 (2007).

⁸ See Overview of the State of Play of WTO Disputes, WT/DSB/58/Add.1, at 139-146 (Nov. 30, 2012).

⁹ M. Bothe, *Compliance*, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 530-531 (R. Wolfrum ed., 2012).

¹⁰ R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 28-29 (1981). See also B. Simmons, *Compliance*