ISSUE FOCUS

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

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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

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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*

which the author adopts in this paper. First-order compliance is compliance with substantive rules, often stipulated in treaties. Second-order compliance refers to compliance with the authoritative decisions of a third party such as a treaty body or a dispute settlement body. The implementation of R&R is a typical example of a second-order compliance mechanism.

The main purpose of this research is to analyze the R&R implementation system of the WTO dispute settlement procedure in comparison with other systems of second-order compliance in international law. This paper is composed of four parts, including Introduction and Conclusion. Part two will compare the WTO implementation system with the second-order compliance systems of various other organizations. Part three will explore the legal nature of WTO retaliation. It will be compared with countermeasures under the law of State responsibility.[11] There are two types of the WTO retaliation: (1) suspension of concessions or other obligations under DSU; and (2) countermeasures under the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement). The special implementation system under the SCM Agreement, unlike DSU, uses the term 'countermeasure' which is identical to the term used in the International Law Commission ("ILC")'s Articles on State Responsibility.[12]

II. The WTO Implementation System and General Second-Order Compliance Systems

A. The WTO Implementation System and the ICJ's Compliance System

Although the Statute of the International Court of Justice ("ICJ") (hereinafter the Statute) makes it clear that the decisions of the Court have binding force between the

with International Agreements, 1 Ann. Rev. Political Science 78 (1988).

11 P. Mavroidis, *Remedies in WTO Legal System: Between a Rock and Hard Place*, 11 Eur. J. Int'l L. 800 (2000). *See also* J. Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules - Toward a More Collective Approach*, 94 Am. J. Int'l L. 335-347 (2000); S. Shadikhodjaev, Retaliation in the WTO Dispute Settlement System 26-47 (2009).

12 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its Fifty-Third Session in 2001 [hereinafter ILC's Articles], *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited on Apr. 17, 2013).

disputing parties,[13] it does not lay down any procedure to ensure the implementation of such judgments. In this respect, Article 94(2) of the Charter of the United Nations (hereinafter the Charter) provides that: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Thus, the Security Council has discretion to act to enforce the judgment of the Court.[14] However, recourse to the Security Council under Article 94(2) has been taken only once, in the *Nicaragua* case.[15] On that occasion, a draft resolution introduced by some non-permanent members of the Security Council called for full and immediate compliance with the judgment, but the United States vetoed it.[16] To date, the Security Council has never passed any recommendation or decision on the execution of the ICJ's judgments. The implementation mechanism under Article 94(2) of the Charter has its limitations, especially in the cases where a respondent is a permanent member of the Security Council.

Apart from judgments, the problems of Security Council enforcement of the Court's orders prescribing provisional measures can be seen in two cases. In the *Anglo-Iranian Oil Co.* case, the United Kingdom referred the matter to the Security Council and insisted that the Security Council was competent to implement the ICJ's order on a provisional measure in accordance with Article 94(2) of the Charter and Article 41 of the Statute.[17] The Security Council, however, adjourned the discussion of the problem until ICJ had delivered judgment on the issue of its jurisdiction. Because ICJ eventually decided that it had no jurisdiction over the case, the problem was never taken up in the Security Council.[18] In the *Bosnia* case, Bosnia and Herzegovina, pursuant to Article 94(2), also requested the Security Council to enforce an order of ICJ prescribing a provisional measure against the Federal Republic of Yugoslavia.[19] The Security Council adopted a resolution in which it merely

13 The Statute art. 59.

14 K. Oellers-Frahm, *Article 94*, *in* 2 The Charter of the United Nations: A Commentary 1966-1971 (B. Simma et al. eds., 3rd ed. 2012).

15 *Id*. at 1970.

16 *Id*. at 1970-1971.

17 *See* Draft Resolution Submitted by the United Kingdom Delegation, U.N. Doc. S/2358 (Sep. 29, 1951), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N51/190/10/PDF/N5119010.pdf?OpenElement (last visited on Apr. 17, 2013).

18 A. Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 Eur. J. Int'l L. 564-565 (1995).

19 *See* Letter Dated 16 April 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/25616 (Apr. 16, 1993), *available at* http://daccess-

'took note' of the ICJ's order in the preamble. No mention of Article 94(2) was made.[20] As with the case of the ICJ judgments, the Security Council has never played an active role in enforcement of the ICJ orders concerning provisional measures.

The ICJ's compliance system, the purpose of which is to ensure the implementation of the ICJ judgments or orders on provisional measures, is a second-order compliance system similar to the WTO implementation scheme. However, there have been few instances where disputing parties have actually made recourse to the ICJ's compliance system, unlike the WTO equivalent. Furthermore, whether the ICJ's enforcement system works effectively depends on decision-making in the Security Council. In particular, the veto of the permanent members can be a serious obstacle to the effectiveness of the enforcement system. The process of the WTO implementation scheme, on the other hand, works automatically because DSB decides to establish compliance panels and authorizes retaliation by negative-consensus. Namely, no member has a veto power over the DSB's decisions. Thus, there are substantial differences between the two systems.

B. The WTO Implementation System and Individual Complaints under Human Rights Treaties

Several human rights treaties have created individual complaints procedures. For example, the First Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR") provides that the Human Rights Committee (hereinafter the Committee) has the competence to receive and consider individual communications from victims of a violation in the jurisdiction of the State Parties to both ICCPR and the Optional Protocol.[21] However, pertinent to mention here is that the Committee can exercise this power only if a State becomes a party to the treaty and recognize the competence of the Committee. The Committee, after examining the received communication, shall forward its views to the State party concerned and the individual.[22] The Committee's views have no legally binding force and the Optional Protocol does not provide any procedure following the adoption of those views. The absence of a follow-up mechanism proved to be a serious lacuna in the procedure. The Committee received letters from victims which argued that, despite the adoption by the Committee of views finding violations of ICCPR, no appropriate

dds-ny.un.org/doc/UNDOC/GEN/N93/221/72/IMG/N9322172.pdf?OpenElement (last visited on Apr. 17, 2013).

20 S.C. Res.819, U.N. Doc. S/RES/819 (Apr. 16, 1993).

21 Optional Protocol to the ICCPR art. 1.

22 *Id*. art. 5.

remedies had been provided by the State Parties concerned.[23] Thus, the Committee recognized the need to ensure effective remedies to the victims and established a follow-up procedure in 1990.[24]

According to the procedure, when the Committee finds a violation of ICCPR and recommends remedies, it also requests that the State Party concerned report on the measures taken to comply with the recommendations within six months. If no reply is received within that period, or if the reply shows that no remedy has been provided, this will be noted in the Committee's annual report.[25] The Committee will then appoint a Special Rapporteur for the purpose of ascertaining the compliance measures taken by the State Parties concerned, if any. The Special Rapporteur shall communicate with the State Parties and, if appropriate, with victims, seek information on any action taken by the State Parties in relation to views adopted by the Committee.[26] According to the current Rules for Procedure of the Committee, the Special Rapporteur may take such action as appropriate for the due performance of the follow-up mandate and shall regularly report to the Committee on follow-up activities.[27] The Committee can also organize a follow-up mission to a State Party that experiences particular difficulties with the implementation of the Committee's recommendation.[28] The Committee shall include information on follow-up activities in its annual report.[29] Similar follow-up mechanisms for individual complaints have been established under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[30] the Convention against Torture and Other

23 Report of the Human Rights Committee, U.N. GAOR, 46th Sess., Supp. No. 40(vol. 1), U.N. Doc. A/45/40 (vol. I), at 144-145 (Oct. 4, 1990).

24 *Id*. *See also* N. Ando, *The Follow-up Procedure of the Human Rights Committee's Views, in* 2 Liber Amicorum Judge Shigeru Oda 1442 (N. Ando et al. eds., 2002).

25 Report of the Human Rights Committee, U.N. GAOR, 46th Sess. Supp. No. 40 (vol.2), U.N. Doc. A/45/40 (vol. II), at 205 (Oct. 4, 1990).

26 *Id*. The Special Rapporteur may organize direct follow-up consultations with State Parties representatives in Geneva or New York to discuss possible avenues through which implementation of the views may be facilitated. *See* M. Schmidt, *Follow-up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council-Recent Developments, in* International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller 26 (G. Alfredsson et al. eds., 2009).

27 Rules of Procedure of the Human Rights Committee 101(2) & (3), U.N. Doc. CCPR/C/3/Rev.8 (2005).

28 Schmidt, *supra* note 26, at 27.

29 *Supra* note 27, Rule 101(4).

30 CERD art. 14. It reads: "The individual communications procedure and, pursuant to the Rule of Procedure of the Committee on the Elimination of Racial Discrimination, the State party concerned shall be invited to inform the Committee in due course of' the action it takes in conformity with the Committee's suggestions and recommendations." *See* Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35Rev.3 (1989) 95.5.

Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[31] and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").[32]

Like the WTO implementation scheme, the follow-up mechanism for ICCPR is a second-order compliance system. However, the former has been consistently successful, whereas the Human Rights Committee has received unsatisfactory or even no response from State parties in many cases.[33] The latter mechanism is mainly based on the information gathering by the Special Rapporteur and voluntary 'dialogue' with the States parties concerned. There is no procedure for the Committee to adopt additional views on whether or not the State parties concerned have taken appropriate measures in response to the Committee's original views. This means that the follow-up mechanism has no process equivalent to the compliance panel procedure in WTO. In addition, no enforcement action will be taken in the event of state parties' non-compliance with the recommendations of the Committee. This is another difference from the WTO implementation mechanism, which prescribes a system of countermeasures in response to non-compliance with R&R.

C. The WTO Implementation System and the International Labor Organization Complaints Procedure

In order to ensure compliance with labor standards, the International Labor Organization ("ILO") has established a supervisory system consisting of both regular and ad hoc procedures. The regular procedure relies on mandatory periodic reports by member States to the International Labor Office. These reports concern the States' measures to implement provisions of the treaties that they have ratified.[34] The ad hoc procedures consist of the ILO's representation and complaints procedures, respectively. The former is based on Article 24 of the ILO Constitution,[35] while

31 CAT art. 22. It reads that: "The Committee may designate one or more rapporteur(s) for follow-up on decisions adopted under article 22 of the Convention, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings." *See* Rules of Procedure, CAT/C/3/Rev.4 (2002) 114(1).

32 Optional Protocol of the CEDAW art. 7. It reads: "Outlines the process of complaint consideration. The Committee will examine and consider all information provided by a complaint in closed meetings. The Committee's views and recommendations will be transmitted to the parties concerned. The State Party has six months to consider the views of the Committee and provide a written response, including remedial steps taken. The Committee may request further information from the State Party, including in subsequent reports."

33 Report of the Human Rights Committee, Annex XI. *See* U.N. GAOR, 67th Sess., Supp. No. 40 (vol. 11), U.N. Doc. A/67/40 (vol. II), at 441-442.

34 ILO Constitution art. 22.

35 It reads: "In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance

the latter is contained in Article 26 of the ILO Constitution, which provides that a complaint may be filed against a member State for non-compliance with a ratified Convention. Such a complaint may be filed by another member State which has ratified the same Convention, a delegate to the International Labor Conference, or the ILO's Governing Body in its own capacity.[36]

The ILO complaints procedure is similar to the WTO implementation system. In the ILO system, first, the Governing Body may appoint a Commission of Inquiry (hereinafter the Commission) to consider complaints. The Commission shall prepare a report embodying its findings on all questions of fact relevant to determining the issue and containing recommendations as to the steps which should be taken to meet the complaint and the time within which they should be taken.[37] Second, any ILO Member concerned in the complaint may refer the complaint to ICJ if they reject the Commission's recommendations, and ICJ may affirm, vary or reverse any of the findings or recommendations of the Commission.[38] In the event of failure to implement the recommendations of the Commission or decision of ICJ, the Governing Body may recommend to the ILO's General Conference appropriate actions to secure compliance therewith.[39] Third, the defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission or the decision of ICJ and may request that the Governing Body constitute a Commission of Inquiry to verify its contention. If the implementation of the recommendations or decision is confirmed, the Governing Body shall recommend the discontinuance of any action taken to secure compliance.[40]

The ILO complaints procedure resembles the compliance panel procedure in the WTO system because a Commission of Inquiry constituted for the purpose of verifying compliance considers whether the recommendations of the 'original' Commission of Inquiry have been implemented. Also, in cases of non-compliance with the Commission's recommendations or the ICJ's decision, the Governing Body

within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit."

36 ILO Constitution art. 26, ¶¶ 1-4. For details, *see* C. Romano, The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements 4-16 (1996), *available at* http://webarchive.iiasa.ac.at/Admin/PUB/Documents/ER-96-001.pdf (last visited on Apr. 17, 2013); F. Maupain, *The Settlement of Disputes within the International Labour Office*, 2 J. Int'l Econ. L. 278-279 (1999).

37 ILO Constitution arts. 26 & 28.

38 *Id.* arts. 29 & 32.

39 *Id.* art. 33.

40 *Id*. art. 34.

can recommend enforcement measures which may include economic sanctions.[41] This unique system, however, has been used in few cases.[42] In particular, the Governing Body has proposed measures to secure compliance with a Commission of Inquiry's recommendations only in one case in its history.[43] Unlike the WTO's DSU, the ILO Constitution only stipulates that the Governing Body may recommend "such action as it may deem wise and expedient to secure compliance"[44] and provides no concrete conditions or guidelines on the actions that may be taken. It is therefore uncertain whether economic sanctions could be justified as a form of enforcement action under the ILO Constitution even if those measures would be inconsistent with the affected member State's obligations under the WTO agreements. Furthermore, a majority vote would be required in both the Governing Body and the ILO's General Conference to take a decision on actions to secure compliance.[45] This decision-making process in the ILO system is therefore significantly different from that of the WTO implementation system, where retaliation is authorized by negative-consensus in DSB.

D. The WTO Implementation System and the International Center for the Settlement of Investment Dispute Awards Enforcement System

Article 53 of the International Center for the Settlement of Investment Dispute ("ICSID") Convention stipulates the finality and binding force of awards arising from the ICSID arbitration. As for enforcement of awards, Article 54(1) provides that each Contracting State shall "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Article 54(3) makes it clear that awards shall be executed in accordance with the domestic law of the State in whose territories such execution is sought. Furthermore, Article 64 provides that: "Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party

41 Maupain, *supra* note 36, at 283-285.

42 S. Charnovitz, *Rethinking WTO Trade Sanctions*, Am. J. Int'l L. 799 (2001). To date, 11 Commissions of Inquiry have been established. *See* ILO, Complaints, *available at* http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm (last visited on Apr. 17, 2013).

43 *See* Report of the Commission of Inquiry to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), *available at* http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm (last visited on Apr. 17, 2013).

44 ILO Constitution art. 33.

45 Maupain, *supra* note 36, at 285.

to such dispute." Thus, an investor's home State may bring a claim before ICJ if the host State has failed to comply with the ICSID award, because it can be said that a dispute as to non-compliance with the award has arisen between the home and the host State.[46]

Unlike the other systems mentioned above, this enforcement mechanism basically relies on the domestic legal systems of the ICSID Contracting States. Under the enforcement procedure of the ICSID awards, two problems have arisen in practice. First, if an investor attempts to enforce an ICSID award in the host State, the domestic courts in that State may reject enforcement of the award. Some States, in fact, have refused to comply with the ICSID awards.[47] In these cases, the difficulty lies in the fact that the host States themselves govern the enforcement procedure. When host States strongly oppose the results of the ICSID arbitration, the enforcement procedures in those States would not work effectively. Second, if an investor tries to execute an ICSID award in his/her home State or a third State, immunity from execution may present difficulties for the investor. Article 55 of the ICSID Convention provides that: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." In some cases, execution of the ICSID awards was in fact denied on the ground of State immunity.[48]

As indicated above, pursuant to Article 64, an investor's home State may submit a claim to ICJ when the host State refuses to enforce an ICSID award in its territory. However, as discussed above, the ICJ judgments themselves suffer from weak implementation mechanisms. Therefore, the ICSID enforcement system has its limitation because of its dependence on domestic procedures, though in the majority of investment disputes the parties voluntarily comply with arbitration awards.[49]

E. Evaluation

As shown in the comparisons above, the implementation system of the WTO dispute settlement procedure is unique. Although decisions of ICJ may be enforced

46 J. Hunter & J. Olmedo, *"Enforcement/Execution" of ICSID Awards against Reluctant States*, 12 J. World Investment & Trade 319 (2011).

47 *Id*. at 312-314.

48 The English High Court of Justice held that the National Bank of Kazakhstan's assets, *e.g.*, were immune from execution under the English State Immunity Act. *See AIG Capital Partners, Inc v. Kazakhstan*, [2005] EWHC 2239 (Comm.). *See also* A. Reinisch, *Enforcement of Investment Awards, in* Arbitration under International Investment Agreements: A Guide to the Key Issues 693-695 (K. Yannaca-Small ed., 2010); Hunter & Olmedo, *supra* note 46, at 316-317.

49 Reinisch, *supra* note 48, at 671.

by the Security Council under Article 94(2) of the UN Charter, this system has a structural weakness due to the veto power of the permanent members of the Security Council. Follow-up mechanisms for individual complaints in human rights treaties exist, but the enforcement measures available to the relevant Committees and Special Rapporteurs are limited. While the ILO's complaints procedure involves mechanisms similar to the WTO implementation system, they have not often been used to date. The ICSID mechanism for enforcement of its awards is dependent on the domestic legal systems of the Contracting States, unlike the implementation mechanism of WTO.

In general, the WTO dispute settlement system has a very good compliance record.[50] Since 1995, compliance panel reports have been issued in 25 cases. Among these, the disputes were settled in 20 cases (80%) as follows: in two cases, the compliance panels found that R&R was implemented by the respondents;[51] in nine cases, the disputing parties reached mutually satisfactory solutions;[52] in six cases, the respondents notified that they had implemented or intended to implement R&R;[53] and in three cases, the disputing parties reached mutually satisfactory tentative

50 W. Davey, *Compliance Problems in WTO Dispute Settlement,* 42 Cornell Int'l L. J. 119 (2009).

51 *See* Appellate Body Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of DSU by Malaysia, ¶ 154, WT/DS58/AB/RW (Oct. 22, 2001); Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of DSU, ¶ 53, WT/DS70/AB/RW (Jul. 21, 2000).

52 *See* Notification of a Mutually Agreed Solution, European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS/27/98 (Nov. 12, 2012); Notification of a Mutually Agreed Solution, United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors ("DRAMS") of One Megabit or Above from Korea, WT/DS99/12 (Oct. 25, 2000); Notification of a Mutually Agreed Solution, Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/33 (May 15, 2003); Notification of a Mutually Agreed Solution, Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/11 (Jul. 31, 2000); Notification of a Mutually Agreed Solution, Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, WT/DS103/33, WT/DS113/33 (May 15, 2003); Notification of a Mutually Agreed Solution, Japan - Measures Affecting the Importation of Apples, WT/DS245/21 (Sep. 2, 2005); Notification of a Mutually Agreed Solution, United States - Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada, WT/DS257/26 (Nov. 16, 2006); Notification of a Mutually Agreed Solution, United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/29 (Nov. 16, 2006); and Notification of a Mutually Agreed Solution, United States - Investigation of the International Trade Commission in Softwood Lumber From Canada, WT/DS277/20 (Nov. 16, 2006).

53 *See* the DSB Minutes of Meeting, Australia - Measures Affecting Importation of Salmon, ¶ 68, WT/DSB/M/80 (Jun. 26, 2000); the DSB Minutes of Meeting, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, at 2-4, WT/DSB/M/60 (Jun. 21, 1999); the DSB Minutes of Meeting, United States - Tax Treatment for "Foreign Sales Corporations," ¶¶ 78-79, WT/DSB/M/212 (Jun. 20, 2006); the DSB Minutes of Meeting, European Communities - Anti-dumping duties on imports of cotton-type bed linen from India- Recourse to Article 21.5 of DSU by India, ¶ 5, WT/DSB/M/148 (Jul. 1, 2003); the DSB Minutes of Meeting, United States - Countervailing Measures Concerning Certain Products from the European Communities, ¶ 75, WT/DSB/M/215 (Jul. 25, 2006); the DSB Minutes of Meeting, Korea - Anti-dumping duties on imports of certain paper from Indonesia - Recourse to Article 21.5 of DSU by Indonesia, ¶¶ 58-59, WT/DSB/M/241 (Dec. 14, 2007).

solutions.[54] Thus, compliance panels and Appellate Body procedures appear to contribute to the resolution of these disputes. Retaliation has been authorized in nine cases. Among these, R&R was implemented in five cases[55] and in four cases the disputes have not yet been settled.[56] This record shows that retaliation is not necessarily effective in all cases. Having said that, overall, the WTO implementation system is efficient in solving disputes, though it is not perfect. In comparison with other second-order compliance procedures, it can be said that the implementation system of WTO is a unique mechanism which is functioning effectively in practice.

III. Retaliation in WTO and Countermeasures in General International Law

In practice, the retaliation mechanism is an important part of the WTO DSB's R&R implementation system. Some commentators argue that retaliation in the WTO dispute settlement system is equivalent to countermeasures in general international law.[57] In the following sections, the author will distinguish retaliation in the form of suspension of concessions and other obligations under DSU from the concept of countermeasures under the SCM Agreement. In this discussion, reference will be made to the concept of countermeasures in general international law.

54 *See* Joint Communication from Brazil and the United States, United States - Subsidies on Upland Cotton, WT/DS267/45 (Aug. 31, 2010); Joint Communication from the European Union and the United States, United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/43 (Feb. 8 2012); Joint Communication from the United States and Japan, United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/44 (Feb. 8, 2012).

55 *See* Joint Communication from the European Communities and the United States, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/28 (Sept. 30, 2009); Joint Communication from the European Communities and Canada, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS48/26 (Mar. 22, 2011); Notification of a Mutually Agreed Solution, European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS/27/98 (Nov. 12, 2012); the DSB Minutes of Meeting, United States - Tax Treatment for "Foreign Sales Corporations," ¶¶ 78-79, WT/DSB/M/212 (Jun. 20, 2006); the DSB Minutes of Meeting, United States - Anti-Dumping Act of 1916, ¶¶ 59-60, WT/DSB/M/180 (Feb. 1, 2005); Joint Communication from Brazil and the United States, United States - Subsidies on Upland Cotton, WT/DS267/45 (Aug. 31, 2010).

56 To date, no solution has been reported in the following four cases: *Brazil - Export Financing Programme for Aircraft*, WT/DS46; *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217,234; *Canada - Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222; and *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285.

57 *See*, *e.g.*, Mavroidis, *supra* note 11, at 800; Pauwelyn, *supra* note 11, at 335-347.

A. Countermeasures in General International Law

It is well-established that a State injured by another State's internationally wrongful act may take countermeasures against that State if certain requirements are met.[58] This is stipulated in the ILC's Articles on State Responsibility.[59] Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two of the ILC's Articles.[60] They are adopted to cease the internationally wrongful conduct and, if it is continuing, to provide reparation to the injured State.[61] Reparation takes the form of restitution, compensation, and/or satisfaction.[62] Countermeasures must be temporary or provisional in nature. This is because they should be discontinued once they are effective in inducing the responsible State to comply with its obligations of cessation and reparation.[63] Thus, countermeasures in general international law are one of the circumstances precluding the wrongfulness of conduct (i.e. the conduct constituting the countermeasures) that would otherwise not be in conformity with the international obligations of the State concerned; they are intended as an instrument for achieving compliance with the obligations of the responsible State under the secondary rules prescribing the consequences of the breach of primary rules.[64]

Proportionality is a well-established requirement for taking countermeasures.[65] Article 51 of the ILC's Articles provides that: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." Although proportionality relates primarily to the injury suffered, the gravity of the internationally wrongful act and the rights in question are also taken into account. This means that, in determining the proportionality of countermeasures, not only the 'quantitative' element (relating to injury) but also 'qualitative' factors are to be considered. Disproportionate measures are not necessary to induce the responsible State to comply with its obligations.[66] Therefore, countermeasures in general international law are an enforcement mechanism in a decentralized system in accordance with the requirement of proportionality.

58 *See* Gabčíkovo–Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 55. (Sep. 25).

59 ILC's Articles art. 22.

60 *Id*. art. 49.

61 J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 284-285 (2002).

62 ILC's Articles art. 34.

63 *Id.* art. 49(2).

64 *Supra* note 61, at 284.

65 R. O'Keefe, *Proportionality*, *in* The Law of International Responsibility 1157 (J. Crawford et al. eds., 2010)

66 *Supra* note 61, at 296.

B. Suspension of Concessions and Other Obligations under DSU

Article 21.1 of DSU provides that: "The suspension of concessions or other obligations are temporary measures available in the event that recommendations and rulings are not implemented within a reasonable period of time."[67] The level of such suspension "shall be equivalent to the level of the nullification or impairment."[68] If the respondent party objects to the level of suspension proposed, the matter is referred to arbitration (hereinafter Article 22.6 arbitration).[69] In this section, the author will analyze decisions arising from Article 22.6 arbitration in relation to the purposes of suspension under Article 22 and the meaning of the 'equivalence' requirement.

1. The Purposes

There have been seven cases of Article 22.6 arbitration to date. In the *EC-Banana* (US) case, the arbitrators stated as follows:

> Accordingly, the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this temporary nature indicates that it is the purpose of countermeasures to *induce compliance*.[70]

The arbitrators clearly recognized that the purpose of the suspension of concessions and other obligations is to 'induce compliance.' This is indicated by the temporary nature of the suspension. Also, it is worth noting that the arbitrators described the suspension of concessions as 'countermeasures.' The arbitrators' views were accepted by the arbitrators in several later Article 22.6 arbitrations. The arbitrators in both *EC-Hormones (US)*[71] and *EC-Hormones (Canada)*,[72] citing the above statement in *EC-Banana (US)*, agreed that the purpose of the suspension was to induce

67 DSU art. 22.1.

68 *Id*. art. 22.4.

69 *Id*.

70 *See* Decision by the Arbitrator, European Communities - Regime for the Importation, Sale and Distribution of Bananas (Complaint by United States) - Recourse to Arbitration by the European Communities under Article 22.6 of DSU, ¶ 6.3, WT/DS27/ARB (Apr. 9, 1999)[hereinafter EC-Banana (US)]. [Emphasis added]

71 Decision by the Arbitrator, European Communities - Measures Concerning Meat and Meat Products (Complaint by United States) - Recourse to Arbitration by the European Communities under Article 22.6 of DSU, ¶ 40, WT/DS26/ARB (Jul. 12, 1999)

72 Decision by the Arbitrator, European Communities - Measures Concerning Meat and Meat Products (Complaint by Canada) - Recourse to Arbitration by the European Communities under Article 22.6 of DSU, ¶ 39, WT/DS48/ARB (Jul. 12, 1999).

compliance. The arbitrators in *EC-Banana (Ecuador)* explained that cross-retaliation may be necessary to induce compliance and make "the enforcement mechanism of the WTO dispute settlement system... function properly."[73]

In *US-1916 Act*, while the European Communities stressed that the basic purpose of the suspension of concessions is to induce compliance of another Member with their WTO obligations, the United States suggested other possible purposes, such as to restore the balance of benefits under the covered agreements between the parties to the dispute.[74] On this point, the arbitrators found:

> In our view, a key objective of the suspension of concessions or obligations – whatever other purposes may exist – is to seek to induce compliance by the other WTO Member with its WTO obligations.[75]

In *US-Offset Act*, however, the arbitrators took slightly different views on the purpose of suspension of concessions. They stated:

> However, it is not expressly referred to in any part of DSU and we are not persuaded that the object and purpose of DSU – or of the WTO Agreement – would support an approach where the purpose of suspension of concessions or other obligations pursuant to Article 22 would be exclusively to induce compliance.[76]

Although the arbitrators noted that inducing compliance may be only one of the purposes in authorizing the suspension of concessions or other obligations, they did not specify any other possible purposes.[77] In any event, the arbitrators found that "suspension of concessions or other obligations is intended to induce compliance, as has been acknowledged by previous arbitrators."[78] In *US-Gambling*, the arbitrators also mentioned that the purpose of suspension of concessions was to induce

73 Decision by the Arbitrator, European Communities - Regime for the Importation, Sale and Distribution of Bananas -Recourse to Arbitration by the European Communities under Article 22.6 of DSU, ¶ 76, WT/DS27/ARB/ECU (Mar. 24, 2000).

74 Decision by the Arbitrator, United States - Anti-Dumping Act of 1916 -Recourse to Arbitration by the United States under the DSU Article 22.6, ¶¶ 5.4-5.5, WT/DS136/ARB (Feb. 24, 2004).

75 *Id*.

76 Decision by the Arbitrator, United States - Continued Dumping and Subsidy Offset Act of 2000 (Complaint by Japan)-Recourse to Arbitration by the United States under the DSU Article 22.6, ¶ 3.74, WT/DS217/ARB/JPN (Aug. 31, 2004) [hereinafter US-Offset Act]. The decisions by the arbitrators on the complaints by other complaining parties include findings identical to this.

77 *Id*.

78 *Id*. ¶ 6.2.

compliance.[79]

As the DSB's R&R require respondent parties to bring their measures into conformity with the WTO agreements, 'inducing compliance' equals to inducing implementation of R&R. This implementation involves respondent parties complying with the obligations under the WTO agreements in respect of the measures found by panels and/or the Appellate Body to be inconsistent with the covered agreements. The suspension of concessions under DSU is similar to countermeasures in general international law in the sense that both of them are intended to cease internationally wrongful acts. In fact, the arbitrators in *EC-Banana (US)* and *US-Offset Act* described suspension of concessions as 'countermeasures.'[80] In the other cases, however, the arbitrators did not use the term 'countermeasures'; it is not clear whether the arbitrators considered that suspension of concessions corresponded to countermeasures in general international law.

2. The Equivalence Requirement

In relation to the equivalence requirement, the arbitrators in *EC-Banana (US)* noted that while Article XXIII:2 of General Agreement on Tariffs and Trade ("GATT") 1994 provided that the benchmark for authorization of the suspension of concessions was the standard of 'appropriateness,' Article 22 of DSU explicitly referred to a standard of 'equivalence.' On this issue, the arbitrators found as follows:

> The ordinary meaning of "*equivalent*" implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment. Therefore, we conclude that the benchmark of *equivalence* reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the WTO's DSU than the degree of scrutiny that the standard of *appropriateness*, as applied under GATT of 1947 would have suggested.[81]

The importance of the limitations set by the 'equivalence' requirement was also emphasized in the arbitral decision in *US-Offset Act*. The arbitrators stated:

> By relying on 'inducing compliance' as the benchmark for the selection of the most appropriate approach we also run the risk of losing sight of the requirement

79 Decision by the Arbitrator, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services -Recourse to Arbitration by the United States under the DSU Article 22.6, ¶ 2.7, WT/DS285/ARB (Dec. 21, 2007) [hereinafter US-Gambling].

80 US-Offset Act, *supra* note 76, ¶¶ 4.23 & 4.25.

81 EC-Banana (US), *supra* note 70, ¶ 6.5. [Emphasis added].

> of Article 22.4 that the level of suspension be *equivalent* to the level of nullification or impairment.[82]

Furthermore, the arbitrators in *US-Gambling* confirmed that, relying on the arbitral decision in *EC-Banana (US)*, the equivalence requirement demanded a degree of correspondence or identity between the level of the suspension and the level of nullification or impairment of benefits.[83] Thus, it can be said that the equivalence requirement in Article 22.4 of DSU is stricter than the proportionality requirement for countermeasures in general international law. As has been discussed, under the latter standard, not only quantitative commensurateness with the injury suffered, but also the qualitative gravity of the internationally wrongful act and the rights in question are taken into account.

C. Countermeasures in the SCM Agreement

With regard to specific prohibited subsidies (export subsidies and local content subsidies), Article 4 of the SCM Agreement provides a special dispute settlement procedure. When a panel finds that a measure in question is a prohibited subsidy, it shall recommend that the subsidy be withdrawn without delay and specify the time period within which the subsidy must be withdrawn.[84] In the event that the DSB's R&R is not followed within the time period specified by the panel, DSB shall grant authorization to the complaining party to take 'appropriate countermeasures.'[85] If the respondent party objects to the 'appropriateness' of the countermeasures proposed by the complaining party, the procedure for arbitration under Article 22.6 of DSU applies.[86]

Article 7 of the SCM Agreement stipulates a specialized dispute settlement procedure in relation to subsidies generally where certain conditions are fulfilled (hereinafter actionable subsidies). When a panel report or an Appellate Body report has determined that any subsidy has resulted in adverse effects to the interests of the complaining party, the respondent party must take appropriate steps to remove the adverse effects or withdraw the subsidy.[87] In the event that the respondent party fails to implement R&R, DSB shall grant authorization to the complaining party to

82 US-Offset Act, *supra* note 76, ¶ 3.74. [Emphasis added].

83 US-Gambling, *supra* note 79, ¶ 2.7.

84 SCM Agreement art. 4.7

85 *Id*.

86 *Id*. art. 4.11.

87 *Id*. art 7.8.

take "countermeasures, commensurate with the degree and nature of the adverse effects."[88]

1. The Purpose of Countermeasures under the SCM Agreement

In *Brazil-Aircraft*, the arbitrators referred to the *Naulilaa* arbitral award and the ILC's Articles when they interpreted the term 'countermeasures' in Article 4.10 of the SCM Agreement. Noting that the ILC's Articles clarifies that countermeasures are meant to induce States to comply with their secondary obligations, they have concluded that a countermeasure under Article 4.10 of the SCM Agreement is appropriate if it effectively induces compliance, that is, the withdrawal of a prohibited subsidy.[89]

The arbitrators in *US-FSC* also took the view that the authorization of countermeasures by DSB was aimed at inducing or securing compliance with the DSB's R&R in the form of withdrawal of the prohibited subsidies.[90] Referring to the ILC's Articles, they found as follows:

> [Article 49.1 of the ILC text] defines the only object and purpose for which countermeasures can legitimately be imposed: i.e., to induce the State which has committed an internationally wrongful act to comply with its obligations. That is not incompatible, in our view, with the notion of countermeasures within the WTO dispute settlement system, where such measures are imposed as a temporary response to an absence of compliance.[91]

In *Canada-Aircraft II*, the arbitrators, relying on the arbitral decisions in *Brazil-Aircraft* and in *US-FSC*, stated that one of the recognized purposes of countermeasures is to induce the defaulting party to comply with the DSB's R&R.[92]

Furthermore, in *US-Cotton*, the arbitrators clearly found that the term 'countermeasures' in the SCM Agreement described measures that are in the nature

88 *Id*. art 7.9.

89 Decision by the Arbitrators, Brazil - Export Financing Programme for Aircraft Recourse to Arbitration by Brazil under the DSU Article 22.6 and the SCM Agreement Article 4.11, ¶ 3.44, WT/DS46/ARB (Aug. 28, 2000) [hereinafter Brazil-Aircraft].

90 Decision of the Arbitrator, United States - Tax Treatment for "Foreign Sales Corporations"-Recourse to Arbitration by the United States under the DSU Article 22.6 / SCM Agreement Article 4.11, ¶ 5.52, WT/DS108/ARB (Aug. 30, 2002) [hereinafter US-FSC].

91 *Id*. ¶ 5.60

92 Decision by the Arbitrator, Canada - Export Credits and Loan Guarantees for Regional Aircraft -Recourse to Arbitration by Canada under the DSU Article 22.6 and the SCM Agreement Article 4.11, ¶ 3.47, WT/DS222/ARB (Feb. 17, 2003).

of countermeasures as defined in the ILC's Articles.[93] They continued:

> We therefore find that the term "countermeasures" essentially characterizes the nature of the measures to be authorized, i.e. temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of an obligation under the SCM Agreement. This is also consistent with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility.[94]

Consequently, the arbitrators have consistently stated that the purpose of countermeasures under the SCM Agreement is to induce the implementation of R&R in the form of withdrawal of the prohibited or actionable subsidies. Moreover, it should be noted that the arbitrators considered that countermeasures under the SCM Agreement corresponded to countermeasures in general international law.

2. The Standard of Appropriateness or Commensurateness

As to the standard of appropriateness under Article 4.10 of the SCM Agreement, the arbitrators in *Brazil-Aircraft* found that, because the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement, there is no obligation that countermeasures be equivalent to the level of nullification or impairment.[95] They noted:

> Requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies.[96]

The arbitrators in *US-FSC* indicated that the standard of appropriateness involved "an element of flexibility."[97] Accordingly, 'appropriateness' does not require

93 Decision by the Arbitrator, United States - Subsidies on Upland Cotton -Recourse to Arbitration by the United States under the DSU Article 22.6 and the SCM Agreement Articles 4.11, ¶ 4.41, WT/DS267/ARB/1 (Aug. 31, 2009)[hereinafter US-Cotton (Art. 4.11)]; Decision by the Arbitrator, United States - Subsidies on Upland Cotton -Recourse to Arbitration by the United States under the DSU Article 22.6 and the SCM Agreement Articles 7.10, ¶ 4.31, WT/DS267/ARB/2 (Aug. 31, 2009) [hereinafter US-Cotton (Art. 7.10)].

94 *See* US-Cotton (Art. 4.11), *supra* note 93, ¶ 4.42; US-Cotton (Art. 7.10), *supra* note 93, ¶ 4.32.

95 Brazil-Aircraft, *supra* note 89, ¶ 3.57.

96 *Id*. ¶ 3.58.

97 US-FSC, *supra* note 90, ¶ 5.12.

'equivalence.' Rather, the required relationship is that of 'proportion.'[98] They noted that the notion of appropriateness entails an avoidance of disproportion between the proposed countermeasures and either the actual violating measure itself, the effects thereof, or both.[99] Moreover, they found that, in determining the appropriateness of a countermeasure, "the gravity of the breach and the nature of the upset in the balance of rights and obligations in question" may be taken into account.[100]

The flexibility of the standard of appropriateness was also noted in the arbitral decision in *US-Cotton*. The arbitrators stated:

> The question is what countermeasures will be "appropriate" *for that complainant* in the specific dispute at hand. This implies that it is appropriate to take into account not only the existence of the violation in itself, but also the specific circumstances that arise from the breach for the complaining party seeking to apply countermeasures. This is consistent with the ordinary meaning of the term "appropriate", which implies a degree of variability in the level of countermeasures according to the circumstances, rather than a fixed quantum.[101]

The arbitrators also found it legitimate to give consideration to the prohibited nature of the subsidy. They recognized that an assessment of whether proposed countermeasures are appropriate could take into account a variety of factors other than the trade impact of the subsidy.[102]

With regard to the standard of commensurateness, the arbitrators in *US-Cotton* found that the term 'commensurate' did not suggest that exact equality was required between the countermeasures and the degree and nature of the adverse effects under Article 7.9 of the SCM Agreement. They noted that the term 'commensurate' connotes a less precise degree of equivalence than exact numerical correspondence.[103]

Accordingly, the arbitrators have characterized the standard of appropriateness or commensurateness under the SCM Agreement as more flexible than the equivalence requirement under DSU. It is also important that not only 'quantitative,' but also 'qualitative' factors such as the "gravity of breach" can be taken into consideration for determining the appropriateness of the countermeasures under

98 *Id.* ¶ 5.18.
99 *Id.* ¶ 5.19.
100 *Id.* ¶ 5.61
101 US-Cotton (Art. 4.11), *supra* note 93, ¶ 4.54.
102 *Id.* ¶ 4.94.
103 US-Cotton (Art. 7.10), *supra* note 93, ¶ 4.39.

Article 4.10 of the SCM Agreement.[104] In this respect, the countermeasures under the SCM Agreement resemble those in general international law, which "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[105]

The WTO retaliation is a special regime which is different from countermeasures under general international law. In this sense, the commentary to the ILC's Articles mentioned the WTO law as an example of *lex specialis*.[106] Nevertheless, the arbitrators have repeatedly referred to the ILC's Articles in respect of countermeasures in general international law and recognized their relevance in relation to countermeasures in the SCM Agreement. In this sense, general rules of State responsibility have a *de facto* impact on the WTO system of retaliation.

IV. Conclusion

The implementation system of the WTO DSB's R&R is a unique and relatively effective mechanism, in comparison with other second-order compliance regimes in general international law. Retaliation is one of the features of the R&R implementation system. Retaliation in the form of the suspension of concessions under DSU and countermeasures under the SCM Agreement have a common purpose, namely, inducing compliance with R&R. However, there are differences between the two. On the one hand, arbitrators have suggested that suspension of concessions under DSU might have purposes other than inducing compliance and that the equivalence requirement was rigid. On the other hand, they were clear on the point that the purpose of countermeasures under the SCM Agreement was inducing compliance and that the standard of appropriateness or commensurateness was more flexible than the equivalence requirement for retaliation under DSU. Thus, it can be said that the legal nature of retaliatory suspension of concessions under DSU is different from that of countermeasures under the SCM Agreement, and that the latter, in particular, are akin to countermeasures in general international law.

In terms of the nature of the WTO retaliation, there are two different views.[107]

104 Shadikhodjaev, *supra* note 11, at 105-106

105 ILC Articles art. 51.

106 Crawford, *supra* note 61, at 307. *See also* B. Simma & D. Pulkowski, *Leges Speciales and Self-contained Regimes, in* The Law of International Responsibility 1157 (J. Crawford et al. eds., 2010)

107 B. Mercurio, *Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding,* 8 World Trade Rev. 321-324 (2009); Babu, *supra* note 6, at 248-254.

On the one hand, some commentators argue that the aim of the WTO retaliation is to rebalance the tariff concessions and other obligations which the WTO members have agreed to the 'rebalancing' view.[108] According to this viewpoint, if one member breached its WTO obligations and thereby nullified or impaired benefits, the other member can also breach its WTO obligations in order to restore the original balance of benefit. On the other hand, some commentators insist that the objective of the WTO retaliation is to induce a violating member to comply with its obligations under the covered agreements (hereinafter the inducing compliance view).[109] Although it is beyond the scope of this paper to resolve the debate between them, it is important to distinguish these two types of the WTO retaliation measures, which have different legal natures. Whereas retaliation in the form of the suspension of concessions under DSU may be taken to rebalance the tariff concessions, it has been stressed that the purpose of countermeasures under the SCM Agreement was inducing compliance. This difference should be taken into consideration in debating the nature of the WTO retaliation.

[108] J. Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 Am. J. Int'l L. 417 (1996). *See also* D. Palmeter & S. Alexandrov, "*Inducing Compliance" in WTO Dispute Settlement, in* Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec 646-647 (D. Kennedy & J. Southwick eds., 2002).

[109] J. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out,"* 98 Am. J. Int'l L. 123 (2004). *See also* Charnovitz, *supra* note 42, at 808.