Forum of International Development Studies. 41 (Mar. 2012)

Improving the Implementation System in the WTO Dispute Settlement Mechanism**

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Abstract

This paper, by examining the implementation system in the WTO Dispute Settlement Mechanism (hereinafter "DSM"), concludes that it is characterized both as a legal system to enforce the rulings of the Dispute Settlement Body (hereinafter "DSB") and a scheme to seek a resolution of disputes by rebalancing Member interests through the remedies provided. The implementation system, built on the General Agreement on Tariffs and Trade (hereinafter "GATT") dispute settlement system and reformed in the Uruguay Roundnegotiations, addresses the compliance with DSB decisions as well as the WTO rules. However, at the same time, the DSM maintains the original remedies set out in the GATT — the instruments provided in the last stage to seek a solution by recovering the distorted interest balance. The two characteristics are contradictory and trigger problems in practice. Through analyzing the problems, this paper will demonstrate that the implementation system is a hybrid without explicit identification of the final goals that the system is supposed to achieve. Besides discussing the problems, the paper will also suggest possible changes to improve the implementation system. It proposes to grant third parties rights to request authorization of retaliation if they can present evidence to demonstrate injury as a result of inconsistent measures of the respondent. Given the fact that small developing countries are less capable of dealing with the complicated dispute settlement procedures, a collective approach — by selecting a representative from third parties to act on behalf of the whole group — and the proposal to provide special professional assistance in their decision of retaliation will be also discussed.

1. Introduction: From GATT to WTO in the Dispute Settlement System

The implementation system[1] of the DSM is the last stage of the dispute settlement procedures where through adoption of the reports, a respondent complies with rulings of the DSB by removing or correcting inconsistent measures. However, if there is no compliance or if respondent's action fails to bring the inconsistent measure into compliance, the Members involved may seek compensation or resort to suspension of concessions or obligations (hereinafter "retaliation") under the surveillance of the DSB.

The implementation system of the WTO, despite including the intervention of the DSB in implementation, maintains the original form of the GATT. Under the GATT, the dispute settlement

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** I would like to express my sincere gratitude to Professor Fujio Kawashima, Professor David A. Gantz and two anonymous referees for their valuable comments and efforts to improve this paper.

consisted of procedures to deal with disputes between Contracting Parties. With panel's review of measures allegedly inconsistent with the GATT, Contracting Parties sought to achieve a satisfactory resolution. This resolution — wrapped in a report — was adopted only with the consensus of all the Contracting Parties. Furthermore, even if the report was adopted, when the losing party refused to comply with a report, remedies were provided. The remedies were designed to rebalance the distorted interest balance of the two Contracting Parties resulting from the inconsistent measure. The rebalancing purpose reflected the context in which the GATT was born: after WWII, on one hand, leaders of the US and European countries saw the desirability of promoting free trade after reflection upon the factors that had led to war. But, at the same time, they were suspicious of the negative impact that free trade might have on their domestic markets, economies and societies. Therefore, a concept of interest balancing, based on reciprocity, was created. This concept justifies the market concessions and curbs free trade to a reasonable extent by allowing members to seek resolution through compensation or retaliation when dispute arise.

When the respondent blocked consensus, GATT panel reports could not be adopted. In the history of the GATT, many cases ended with the failure of the report to be adopted. The US was a major victim of delay and failure in report adoption. This history motivated the US to promote the reforms of the DSM during the Uruguay Round. The DSM introduced more legal elements into the implementation system. Substituting for "consensus" a "reverse consensus" principle, in the DSM the "report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report . . ."[2] This "reverse consensus" removed the blockages in adoption of panel reports in the GATT. In addition to the reverse consensus, the power to supervise implementation was given to the DSB by "Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter "DSU"). In Article 22, the DSU authorizes the DSB to supervise the implementation in the event that full compliance by the respondent fails. This shift in the function of the implementation system is intended to promote the DSM's role to provide "the security and the predictability for the multilateral trading system." The implementation system in the WTO, therefore, functions as an enforcement organ for the first time in the international arena. Meanwhile, in this system, the remedies provided are almost the same as those of the GATT — to address the distortions in the balance of interests between complainants and respondents where compliance does not take place. Therefore, the implementation system is a dichotomy between enforcement of the compliance with the DSB reports and the WTO agreements and to rebalancing the interests of the disputing parties.

This paper explores the nature of a two faceted implementation system which enforces the rulings of the DSB by addressing compliance and rebalances the interests of parties involved to promote resolution in Section 2 and Section 3 respectively. It goes further to discuss whether the coexistence of the two purposes triggers conflicts in Section 4, and the nature of the conflicts, in

Section 5. Also in Section 5, the paper will propose a solution to deal with the problems and to highlight the characteristics of the implementation system as a legal enforcement agency.

2. Compliance Purpose in the WTO

After the Uruguay Round, one of the remarkable changes in the dispute settlement was the "reverse consensus." It addressed the necessity and significance of compliance with the reports of a panel or the Appellate Body. In Article 22.1 of the DSU, the purpose of the implementation system was explicit that "Compensation and the suspension of concessions or other obligations are *temporary* measures . . . neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity . . ." (emphasis added). That is to say, in light of the cases where violations are found, while losing parties are usually not advised of concrete ways to comply, compliance with the panel or the Appellate Body's decision is "preferred". Consistent with the theme, Article 3.7 also provides that "[t]he first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This language implies that ensuring Members' compliance with the DSB rulings is the ultimate purpose. In addition, to achieve the purpose, the DSB is granted the right to intervene when a respondent fails to comply, such as to arbitrate a reasonable period of time for prompt compliance (Article 21.3) and to supervise of the progress of compliance in DSB meetings (Article 21.6). Also, the DSB exercises surveillance over implementation (Articles 22.6 and 22.8).

The implementation system, through enforcing Members' compliance, emphasizes going beyond removal of blockages in implementation, pays greater attention to correction of Members' conduct resulting in violation and ensures their commitments to the WTO agreements. The implementation system, by means of stressing compliance, performs its function as a legal system to enforce the rulings of the DSB as well as the WTO law. As former Appellate Body Member Professor Sacerdoti pointed out, "The aim [of the dispute settlement system] went beyond that of ensuring the resolution of a few occasional disputes; it became the goal of safeguarding 'a central element in providing security and predictability to the multilateral trading system' (Article 3.2 of the DSU)" (Sacerdoti 2006: 36). Combined with other institutional innovations in the Uruguay Round negotiations, the implementation system is regarded as one of the victories of international trade legalists over trade pragmatists (Shell 1995: 833). The conventional image of international trade law as "soft law" was replaced with a tougher one as the DSM begun to function as a "court" to enforce its decisions.

Years of practice have demonstrated that the emphasis on compliance, to a certain extent, changed the scenario where large developed countries had more leverage in enforcing the implementation than small countries. It thus contributes to the equality among the Members and the

security and predictability of the DSM and the WTO.

3. Not Compliance, but to Rebalance the Interests

(1) To Seek a Resolution by Rebalancing Interests

The DSU provides that "the aim of the dispute settlement mechanism is to *secure a positive solution* to a dispute (emphasis added)."[3] Furthermore, in Article 3.4, it is also pointed out that "[R]ecommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement* of the matter . . . (emphasis added)."[4] This indicates that there is another purpose of the DSM: to assist members in resolution of disputes.

Concerning the implementation of a specific case, where a respondent complies with a DSB ruling, parties to the case may easily achieve a "satisfactory settlement". Where compliance fails, case resolution falls into a crisis. For this situation, the DSU provides the remedies for parties to deal with non-compliance — compensation and retaliation. Compensation, relying on the mutual agreement between the complainant and the respondent, is the priority. An agreement on compensation may constitute a "satisfactory settlement," though this remedy is rarely utilized. The compensation is common when a respondent compensates the loss of a complainant by reducing tariffs on certain products, intellectual property or services. The idea is to restore the balance of interests between the two Members. When a satisfactory resolution through negotiated compensation fails, retaliation by the prevailing Member is permitted. The complainant is granted a right to request authorization of retaliation from the DSB. According to Article 22.4[5] of the DSU, the complainant may retaliate in the amount of the injuries caused by the inconsistent measures of the respondent by increasing its tariff on some products, intellectual property or services. The remedies, in fact, provide the last chance to promote a solution of a dispute by rebalancing the interests of both parties.

Behind rebalancing of interests between the complainant and the respondent is the notion of reciprocity. It is one of the fundamental principles in the international trading system. GATT Article XXVIII *bis* emphasized the importance of tariff "negotiations on *a reciprocal and mutually advantageous* basis" (emphasis added). Article XXVIII provides, "In such negotiation and agreement (Note: on modification of concessions), which may include provision for compensatory adjustment in respect to other products, the contracting parties concerned shall endeavor to maintain a general level of *reciprocal and mutually* advantageous concessions not less favorable to trade than that provided for in this Agreement prior to such negotiation" (emphasis added). The definition of reciprocity remains unclear even in the world trading system. Nevertheless, some scholars have attempted to define it as a kind of activity that takes place when two "specified partners exchange items of equivalent value in a strictly delimited sequence" (Keohane 1986: 4). It is fair to say that in general compliance with Members' commitments as well as in compliance in individual cases, reciprocity might be an effective

instrument to promote compliance by capturing economic hostages.[6]

It should be also noted that the reciprocity in the WTO is of a "bilateral" nature. It is understood that the relationship among Members in the WTO is a combination of bilateral interest balances based on reciprocity. Throughout a broad range of agreements, the GATT and WTO assumed at the outset that both rights and obligations of each Member are even and the interests among Members are balanced. Where a dispute arises, the interest balance between a complainant and a respondent is destroyed. Compliance with the DSB rulings and the remedies are the solutions provided in the implementation system. Where compliance fails, the complainant might turn to remedies for its loss, which is seen as an alternative — but not the preferred alternative — to compliance. This way of thinking is consistent with the GATT.

"The key value underlying this rather odd legal design [of the GATT] was reciprocity. The legal procedures were not there to enforce obligations for the sake of enforcement. They were there to correct imbalance that might arise in the benefits governments were actually receiving from the agreement. It was a diplomat's concept of legal order." (Hudec 1993: 7). This mindset was not radically transformed even after the establishment in the WTO.

Indeed, this scheme, from another perspective, offers sovereign states freedom to decide whether to comply or not by weighing the compliance costs. Provided that the compliance costs to comply are greater than that of non-compliance, they are allowed to escape from their commitments. This is called "efficient breach." Professors Schwartz and Sykes (Schwartz and Sykes 2002: 184) justify it as follows:

"[t]he parties to trade agreements, like the parties to private contracts, enter the bargain under conditions of uncertainty. Economic conditions may change, the strength of interest group organization may change, and so on. Accordingly, officials cannot be certain that the bargain they strike will benefit them in all of its details . . . For this reason, the drafters of trade agreements may be expected to include devices for adjusting the bargain when it proves mutually disadvantageous."

The following part will examine both remedies to investigate how the idea of interest balance works in the implementation system.

(2) Compensation

DSU Article 22.2 states, "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 . . . such Member shall . . . enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation." It implies that the negotiation on the content and the amount of compensation is confined to the complainant and the respondent. The point is to achieve an agreement relating to the amount of compensation based on the loss caused by the inconsistent

measures. Members other than the complainant, *de jure*, are excluded from the decision on the nature and extent of the compensation. While the compensation shall be applicable to all Members based on Most Favored Nations (hereinafter "MFN"),[7] the complainant and the respondent, *de facto*, choose products mainly from the complainant to avoid free riders.[8]

(3) Retaliation

When the complainant and the respondent fail to agree on compensation, the DSM also allows retaliation. Article 22.3 of the DSU clarifies the principles upon which the complainant may seek to retaliate in the same sector(s), the same agreement in the other sectors, or another covered agreement *in seriatim*, with respect to the same sector(s) in which a panel or the Appellate Body has found a violation or other nullification or impairment. As to the amount of retaliation, Article 22.4 states, "[T]he level of the suspension of concessions or other obligations authorized by the DSB shall be *equivalent* to the level of the nullification or impairment (emphasis added)." The arbitrator, according to Article 22.7 of the DSU, has the authority to "determine whether the level of such suspension is equivalent to the level of nullification or impairment." The term "equivalent," in the view of arbitrators, "connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other."[9] It is quantitatively equivalent. What is noteworthy is that the amount of the nullification or impairment is calculated from date of authorization of retaliation.[10] To put it succinctly, when the retaliation is equivalent to the amount of the loss caused by respondent's inconsistent measures from the date of authorization, the balance of interests disturbed by the inconsistent measures is assumedly recovered.

Both the compensation and the retaliation justify themselves in the sense that they successfully adjust the interest balance between the complainant and the respondent. This recovery of interest balance is considered as a resolution to the dispute, persuading the two parties that both interests are protected. Furthermore, unlike the nature of enforcing the rules for the security and predictability of the system, it demonstrates that a satisfactory resolution through rebalancing interests is case-by-case and directly benefits the parties involved.

4. The Two Purposes at Conflict in the Implementation System

As discussed above, there are two purposes of the implementation system: enforcing compliance with the WTO agreements and facilitating resolution by rebalancing the interests. In this sense, the system is multipurpose. However, a question arises whether these two purposes are in a harmony with each other. If not, how do they conflict?

These two purposes were introduced in the different contexts of GATT/WTO's evolution. They

thus demonstrated different values and expectations on the international trading system. The satisfactory resolution through rebalancing interests was an innovation of the diplomats after the WWII. At that time, a dispute settlement system of international trade was regarded necessary to reduce the friction resulting from trade. At that time, sovereign states had an absolute power over their own domestic laws and practice. Even when this power was challenged by another country as a violation of an international agreement, the respondent had a right to refuse to comply, instead compensated the complainant for its loss. This "assumed" rebalancing of interest was regarded as the rationale for the sacrifice of countries' sovereign power to control domestic policy as well as for the intervention of an international institution into countries' internal affairs. However, over the next 40 years, from 1947 to the 1980s, the challenges to the international system changed: global issues exceeded the reach of a single government and this altered situation demanded a more stable and predictable multilateral trading system.

The stress on compliance in the implementation system highlights the needs to follow the decisions of a panel or the Appellate Body as well as the WTO laws. The reform, indeed, killed two birds with one stone. The other "bird" is that through compliance, not only complainants, but also other countries could be protected. Therefore, the DSM could protect the interests of multilateral Members in the close-knit interest network woven by globalizing activities. But this approach causes stress when the compliance fails. Under the DSM, more than two years are typically required for exhaustion of all the procedures — first there is struggle to comply, and when that fails, a shift to rebalancing the interests. This painful process may bring third parties — Members other than the complainant in the dispute — nothing if compliance fails' because the retaliation is "on a discriminatory basis *vis-a-vis* the other Member."[11] Therefore, although some cases have been subject to the procedures of Article 22.6 and a certain amount of retaliation is authorized, this result may cause additional, uncompensated pains for the other Members. This change of focus leads to a deficiency in implementation. In first instance, the objective is to enforce the rules for all the involved Members and the system, but subsequently the focus shifts to the interest balance between complainants and respondents — implying different standards for the implementation.

Furthermore, as far as compliance is concerned, the rule of reverse consensus on the adoption creates the almost binding force of the DSB reports, due to the fact that there has been no case exempted from adoption by consensus. This *de facto* binding force of a DSB report implies that the final legal findings in the report by judges prevail over either of the two parties' wills on the implementation, although the respondent has discretions to decide how to remove its inconsistent measures. It indicates that the implementation system acts like a legal enforcement agency. However, "'legalization' of disputes under the WTO stops, in effect, roughly where noncompliance starts" (Pauwelyn 2000: 338). In the interest of wrapping the case up in the final stages, the parties' wills are vital. To be specific, as to the compensation, mutual agreement is the single requirement.

The negotiated result by the parties is free from the judgment of the DSB and the parties are only required to report. If attempts to promote a mutually satisfactory agreement fail, retaliation is the last option. Since the establishment of the WTO, despite the intervention of the DSB in authorizing retaliation is required, the power of the arbitrators to intervene is limited. As indicated in Article 22.7, "The arbitrator . . . shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment." This language implies that the arbitrator may not exercise his authority over substantial retaliation issues, except those issues related to the principles and procedures on Article 22.4. Further, pursuant to Article 22.8, "The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." This language confirms that while retaliation is a failure of satisfactory resolution, as long as a mutual agreement is achieved, it could end the retaliation. Therefore, the implementation system suggests that at the early stage of implementation, the Members, particularly the respondent, are under the strict scrutiny of the DSB to comply rulings. The discretion of parties to negotiate is restricted. But when compliance fails and the implementation starts to founder in troubled water, the will of the respondent is highly respected and more discretion is granted for negotiation. In fact, it may trigger surprises in implementation: bad boys win.

With respect to the structure of the implementation, remedies are considered alternatives to deal with the unsatisfactory result caused by non-compliance. However, it is doubtful whether remedies could actually be efficient and substitutable alternatives to compliance. As mentioned above, the retaliation remedy is proactive and the complainant can only retaliate in the amount that is equivalent to the losses caused by the respondent's inconsistency with the WTO rules from the date on which the panel or the Appellate Body report is adopted by the DSB. The losses caused by inconsistent measures before or during the proceeding are ignored — even though they may be tremendous in a typical situation where the dispute settlement procedure drags on for several years. These lenient remedies, which might be designed intentionally or be a result of contentious debate, aim at promoting a resolution between parties to the dispute. Therefore, when faced with a controversial, complicated and seemingly lengthy dispute, Members feel less motivated to bring a case to the DSB even though they might obtain the right to eventually retaliate.

As Professor Petersmann (Petersmann 2007: 42) pointed out, "There is also broad agreement that the WTO dispute settlement procedures remain confronted with many weaknesses that may not be remedied in the Doha Round negotiation, for example because WTO Members are not ready to transform the WTO dispute settlement procedures into a more effective judicial system with effective legal remedies . . ." The conflicts in the implementation system indicate that it is a hybrid with the

innovations of the Uruguay Round negotiations designed to increase the legal nature of the system by enforcing the rulings made by the "court," balanced by the diplomatic vestiges from the GATT times, that is, trying to seek a resolution through rebalancing the interests.

5. The Problems of the Implementation System

Conflicts between the compliance and the rebalance trigger problems in the implementation process. The following part will discuss these problems and offer a solution to deal with them.

(1) Third Parties

The WTO has evolved into a multilateral trading system with 153 Members and covers a broad range of issues. More and more cases brought to the DSB involve the multilateral faceted interests, not only with parties to the dispute but also third parties. Responding to this change, the DSM provides a more sophisticated scheme to protect Members' interest. Article 3.5 of the DSU states this idea in general. "All solutions to matters . . . shall not nullify or impair benefits accruing to *any* Member under those agreements, nor impede the attainment of any objective of those agreements (emphasis added)." More specifically, Article 10.1 states, "The interest of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process." When other Members have a "substantial interest" in a case, they can participate as third parties.

With respect to implementation procedures, the remedies focus on protecting the interests of the parties to the dispute. Regarding the compensation remedy, as discussed above, while it is consistent with the MFN, the content and amount of compensation are determined by the mutual agreements of the complainant and the respondent. Third parties, indeed, may be excluded from the compensation. The case of *US — Section 110(5) Copyright Act*[12] demonstrated the tension. The US failed to comply with the DSB's rulings. After negotiation, the US agreed with the EC on monetary compensation in the amount of 3.3 million dollars.[13] However, Australia, as a third party, "had registered its concerns about the apparent discriminatory nature of proposed compensation arrangements that it understood had been agreed between the United States and the EC."[14] As to the retaliation, third parties are *de jure* excluded. This exposes third parties to a danger that when the case ends with retaliation. For example, in the case of *EC — Bananas III* (WT/DS27), since the EC failed to comply, the two complainants, Ecuador and the US, pursuant to the DSU, had the rights to request retaliation against the EC. However, 23 third party countries could not enjoy similar rights as the complainant, even though they may be indeed nullified or impaired by the EC's violation.

Also, in case of *United States — Subsidies on Upland Cotton*,[15] having exhausted all the lengthy procedures, complainant Brazil and all the third parties could not expect US' compliance. To the

matter submitted according to the procedures required under Article 22.6, Brazil was authorized to retaliate at a level not to exceed the value of more than $800 million annually. One year later, "Brazil and the United States informed the DSB that they had concluded a Framework for a Mutually Agreed Solution to the Cotton Dispute in the World Trade Organization ("Framework"). The Framework sets out parameters for discussion on a solution with respect to domestic support programmes for upland cotton in the United States, as well as a process of joint operation reviews as regards export credit guarantees under the GSM-102 programme."[16] In this program, it obligated the US to set up a "technical assistance fund" of $147.3 million a year to support the Brazilian farmers. While the dispute between Brazil and the US was resolved through a bilateral agreement in the end, third parties who suffered injuries as a result of the US cotton subsidies are still bleeding.[17] This discrimination against third parties, *de jure*, conflicts with the MFN basic principle of the WTO. Also, sadly, it harms the efficiency of DSM to protect various Members, particularly the small developing countries who face economic and other constraints to filing cases as complainants.[18]

(2) Developing Countries

Developing countries, which comprise more than 80 percent of Members in the WTO, have actively participated in the DSM since the inception of the WTO. The developing countries have been empowered and integrated into the system that provides a fair and accessible system for them to contest the measures of large developed countries (Matsushita 2005: 2),

Meanwhile, in the implementation system, the developing countries are confronted with several dilemmas. Superficially, the implementation system provides remedies to all the Members who wish to pursue them. However, there are many *de facto* barriers confronted by developing countries when they desire to use the dispute settlement system to protect their national interests. When developing countries are respondents, due to political and economic concerns, they may not enjoy the freedom to weigh the cost of compliance against the cost of remedies — or the opportunity to utilize an "efficient breach." Usually, they choose to comply regardless how painful it may be. In the non-compliance cases so far, the respondents are almost always developed countries.[19] When developing countries are complainants, even though the authorization to retaliate against the developed countries is allowed, they may feel reluctant to retaliate due to the reality that they may be difficult to find an appropriate area to retaliate, particularly in the case of the small developing countries. This is because the retaliation would injure the imports and consumers of some products in the retaliating countries. The *EC —Bananas III* case is a typical example. Ecuador was authorized to retaliate against the EC at the amount of 201.6 million dollars annually under the TRIPS, GATS and GATT 1947.[20] But Ecuador did not exercise this right because it was afraid that such retaliation would hurt its importers and consumers. On the other hand, it is doubtful that remedies can properly induce the respondent to comply, particularly in the case of a developing country acting as complainant against a developed

country. The developing country Member has less leverage to "induce" the removal of inconsistent measures since their imports are too small to constitute an economic threat against the developed country respondent. Retaliation, for developing countries, especially small one, is a "hot potato".

Furthermore, adherence to the equivalency principle in retaliation seems to be attributable to attempt to treat all Members fairly. However, it may sometimes result in *de facto* discrimination against developing countries. As discussed earlier, complainant countries could not be adequately compensated due to the proactive nature of the remedy. Therefore, indeed, the damage caused by the lengthy process may severely undermine the competitiveness of certain industries in developing countries. Even assuming that the equivalent retaliation might be sufficient to repair a distorted balance of interests, it may not be sufficient to rebuild the industries disrupted. In any case, balancing and rebalancing of interests are only theoretical concepts that neglect the differences among Members and what these differences mean to each country. In short, the retaliation remedy reveals that the discrimination and unfairness for the developing countries exist in the implementation system, particularly for small developing countries. This is a rather disappointing reality for the WTO since the vast majority of Members are developing countries that sometimes feel unprotected by the WTO rules.

(3) To Build a Better Implementation System

How to provide an accessible, fair and efficient dispute settlement system has attracted the attention of Members. Objectively speaking, the DSM has done well in motivating Members to participate in the system and providing an efficient system to resolve disputes. Nevertheless, the implementation system is far from perfect. It has some intrinsic deficiencies as discussed above. These deficiencies are derived from the ambiguous roles of the system: is it a legal organ to enforce the rulings of the DSB or a procedure to promote resolutions based on rebalancing the interests of the parties to the dispute?

a. Special Consideration for Third Parties

To improve the implementation system, Members need to start by deciding that its goal is to enforce the rulings of the DSB rather than to promote a resolution of the parties. Complete departure from the tradition inherited from the GATT completely is unrealistic and unfeasible, but the implementation system, to fulfill the functions of the DSM, should be reformed into a system that protects the interests of third parties rather than only the complainant and the respondent. The author believes that the system should grant third parties[21] the right to request authorization of retaliation if they can present evidence that their injuries were caused by inconsistent measures. Although according to the Article 3.8 of the DSU, "[I]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment," the system ought to require third parties to prove their injuries to

rule out other third parties claiming systemic concerns as their "substantial interests." The proposal suggests that only the third parties who can offer evidence should be authorized to retaliate in order to avoid overinflating the group qualified for retaliation as well as diminishing the motivation of the respondent to comply. Furthermore, third parties are granted freedom to request the DSB for authorization collectively. The group of third parties could elect a representative among themselves to represent the collective. The representative Member could request retaliation on behalf of the group would be obliged to work for its interests.[22] This change will benefit countries that have less legal capacity to deal with the complicated facts and legal issues and raise their participation level in the dispute settlement system. The arbitration on retaliation shall be based on injuries submitted by the third party group. As to the specific amount for each third party, arbitrators should decide based on the evidence provided. Each third party should be able to retaliate to the extent that it is authorized to do so.

This proposal could change the bilateral structure between the complainant and the respondent in the retaliation and extend to previously denied benefits to third parties. As discussed above, the implementation system converts a complicated relationship among members into a bilateral relationship between the parties to the dispute. The decision of the respondent on whether to comply, to a great extent, depends on political and economic power of the complainant. Even though the DSB intends to encourage the final removal of inconsistent measures through supervision, basically, it cannot change the scenario between the complainant and the respondent. However, granting third parties the right to request authorization of retaliation, in fact, might change the bilateral relationship into a fairer multilateral one. It is also meaningful in changing the disadvantaged status of relatively powerless complainants and helping the WTO to protect its Members' interests on a broader basis.

This proposal would also help to create pressure that is crucial to the compliance. It attempts to integrate third parties into a retaliator group in order to expand the scope of supporters of a complainant. This pressure affects respondent's decision to comply or to accept the possibility of retaliation. It is likely wiser and more effective to exert pressure to the respondent rather than to over-stress the respondent by using punitive features of remedies,[23] since remedies are double-edged swords — when retaliation punishes the respondent, it may also hurt the complainant itself.[24] Furthermore, in each case where the respondent fails to comply, this non-complying behavior affects not only the complainant but also the third parties that claimed their "substantial interest" based on the injuries caused by inconsistent measures. By inviting third parties to enjoy the remedy under some circumstances, it could increase the cost of the non-compliance of the respondent. This increased cost, compared to the cost calculated as the complainant's proactive loss, may change the respondent's fundamental considerations in deciding whether to comply. If the complainant is a small developing country, this increased cost could benefit it through exerting more pressure on the respondent. It is of significance especially when the respondent is a large developed country. To

conclude, this proposal, through creating pressure on the respondent, contributes to not only enforcing the compliance, but also motivating small developing countries to fight for their interests by means of dispute settlement.

Lastly, including third parties in the retaliation procedure, to a great extent, would increase the transparency of the implementation system. The issue of improving the WTO's transparency[25] has been a hot topic. The transparency issue in the DSM has attracted ever-increasing attention due to the extensive participation of Members. Here, to grant third parties rights equal to those of the complainant in requesting authorization to retaliate, would be a critical step for the system, revealing any under the table arrangements between the complainant and the respondent and allowing third parties access to full information on retaliation.

b. Special Assistance to Small Developing Countries

Improving the implementation system in the current context, to some extent, also means altering the disadvantaged statuses of developing countries, particularly small ones. There has been ongoing about improving the DSM in the Dispute Settlement Understanding Review (hereinafter "DSU Review"), although no progress has been made. The essence of these proposals is to afford developing countries appropriate additional rights[26] or to improve the procedures[27] of the implementation system. These proposals, although reflecting general concerns of developing countries in the implementation system, lacked common ground with developed countries and therefore there is little possibility for consensus in the near future.

Among the proposals, Ecuador addressed its concerns on the economic aspect of the case. "[I]f the complaining party is a developing country and the Member concerned is a developed country, the complaining party may request that the arbitrator, in addition to determining the level of nullification or impairment on the basis of the trade affected by the challenged measures, make an estimate of the impact of those measures on its economy."[28] This proposal did not attract the widespread attention of Members because it seemed difficult for arbitrators, who were usually legal experts with no discretion according to the DSU or capabilities to estimate the impact of the alleged measures, to assume these tasks. However, the Ecuador's proposal revealed the fact that small developing countries are incapable of managing the economic uncertainty of disputes.[29] As far as implementation procedure, although Article 22.3 provides the sequences of the sectors for retaliation, the complainant still has room to argue the cross-sectors. Questions about which sector to choose to benefit the country and the likely impact of the retaliation on its industries and customers, are critical to the decision of a developing country about whether to retaliate eventually.

While the Advisory Center of WTO Law (hereinafter ACWL)[30] provides legal assistance for developing country Memberships, it seems that legal assistance alone may not be sufficient to help small developing countries benefit from the DSM in post-judicial procedures. In fact, there has been no professional economic assistance for developing countries in their decision-making. Without the

support of adequate economic analysis, the decisions made by small developing countries might be either too bold or cowardly. The author believes, despite no consensus on the systematic reform of the DSM, it is necessary to provide external professional economic assistance. Assistance in a form of providing economic analysis or data may provide small developing countries with clearer pictures about the kind of decision that they are making and the possible impacts thereof. This kind of economic advice could take the form of scholarly research or commitment of some institutes. In practice, one possibility is to expand the scope of ACWL activities and provide both legal and economic assistance, although this could burden already its limited budget. Or independent from the ACWL, a new agency could be established to provide economic consultation for small developing countries.

In sum, the proposal to grant third parties the right to request authorization of retaliation when they have evidence of injury would further improve the accessibility and efficiency of the implementation system for Members. Although large and economically powerful Members of the WTO who enjoy multiple options may object to this idea at present, the increasing importance of the developing countries in the DSU Review has been recognized. This change may encourage and nurture systemic changes in future. In addition, under the current circumstances, there are no prominent signs of the systematic changes of the DSM. The external efforts addressing the deficiencies of the system still could be achieved. In additional to the legal assistance provided by the ACWL, an institute providing economic assistance for small developing countries could be desirable way to help them.

6. Conclusion

The implementation system of the DSM, based on the GATT and extensively reformed in the Uruguay Round negotiations, is a hybrid system characterized by a focus on enforcing WTO rules as well as promoting resolutions by rebalancing the interests between a complainant and respondent. In the view of the GATT and even today's politicians, the dispute settlement system is still primarily considered to be a mechanism to facilitate a resolution of disputes. In the implementation stage, when the hope of compliance is faint, a reasonable approach to dispute resolution is to balance parties' interests through remedies. The facilitation of such resolutions is considered to be the primary task of the implementation system.

Meanwhile, in the globalization context, more significant roles of the DSM have been recognized. In a single dispute, the question of whether the respondent could eventually comply with the rulings of the DSB is important to all parties involved, particularly when they address and interpret provisions of key WTO agreements. The most significant innovations in the implementation system in the Uruguay Round negotiations were the significant attempts to "legalize" that system into an

enforcement organ of the DSM. Thus, to stress compliance is another prominent purpose of the implementation system. The coexistence of the two purposes means the system bears the characteristics of both a legal enforcement mechanism and a political instrument for resolution of individual cases.

In practice, this dichotomy of implementation triggers unfairness among countries. First, it undermines the efficiency of the system because it results in different standards for implementation: to comply with the rulings unconditionally or when compliance fails, to pay compensation or risk retaliation choose to try to get off the hook. Because compensation and retaliation cover only portions of the real injuries, it seems that violators staying until the last stage, *ipso facto*, are "rewarded." Furthermore, this approach triggers delays and "tricks" in the implementation. Some Members, usually the developed countries, delay compliance in order to adopt a temporary protection or "buy off" their violations through negotiation and settlement with the complainant. But the system has nothing to do with this process[31] except that it exerts pressure through regular DSB meetings.

What is worse, the remedies available in the implementation system are effectively inaccessible to developing Members, particularly small developing countries. For a developing country complainant in a case of non-compliance, the retaliation provided in the implementation likely unusable because of the subtle relationship between the two countries, the damaging effects of remedies on domestic industries of developing countries or other factors. Even though some developing countries retaliate, it is difficult to have desirable "retaliation effects" against the developed countries. The retaliation provided will not constitute an inducement to compliance by developed countries. Furthermore, this system also discriminates against third parties participating in the case. They cannot demand any compensation or share in the compensation paid to the complainant, *de facto*. The retaliation, *de jure*, is exclusive to third parties, although like the complainant they have suffered from the injuries and participated in the dispute settlement procedures. The unfairness in the implementation system undermines the efficiency of the system and further discourages Members, especially developing countries, from participating in the DSM.

To reform the implementation system into a more efficient and fairer one, the author thinks, it should grant third parties rights to request retaliation if they can present evidence that they are injured by the inconsistent measures of the respondent. These third parties could claim the rights collectively and choose a representative to defend the group's interests. This proposal is not only beneficial to third parties but also contributes to systemic change of the system in improving the transparency of the DSM. In addition, in light of small developing countries' disadvantaged status in the implementation system, special economic assistance is necessary to enable them to be more informed when making decision about retaliation. Despite the stagnancy of the DSU Review negotiation, it might be efficient to have external efforts to the systematic reform to help small developing countries fully make use of the DSM.

Note

1 The implementation system discussed in the paper means a series of procedures relevant to enforcing the compliance with the DSB reports and the measures and procedures dealing with the failure in compliance. They are the procedures distinguishing themselves from the parallel systems: the consultation procedures as well as panel and Appellate Body procedures. In detail, it includes the procedures principally regulated in Articles16, 19, 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU).

2 DSU, Article 17.14. *See also* Article 16.4.

3 DSU, Article 3.7.

4 *Ibid*., 3.4.

5 Article 22.4 of the DSU states, "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."

6 Professors Yarbrough argued, "if the agreement can be designed in a way that automatically imposes substantial costs (economic hostage — note by the author) on any party guilty of noncompliance, then the agreement may be feasible. Reciprocity can provide this automatic enforcement mechanism" (Yarbrough and Yarbrough 1986: 12–13). *See also* Rhodes (1989).

7 Article 22.1 of the DSU provides that "Compensation is voluntary and, if granted, shall be consistent with the covered agreements". The covered agreements, to be true, include the Annex I a of the GATT, in which the MFN is the basic principle

8 In the case of *Japan — Taxes on Alcoholic Beverages* (WT/DS8, WT/DS/10, WT/DS11), the complainants (EC, US and Canada) achieved agreements with the respondent (Japan) on the compensation which was to reduce tariff rates on brandy, bourbon whisky, rye whisky, other whisky, rum and tafia, gin and geneva, vodka, liqueurs and cordials, all of which were mainly imported from the former complainants. (WT/DSB/M/41, 22 January 1998.)

9 *European Communities — Regimes for the Importation, Sales and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, para.4.2.

10 It should be noted that both compensation and retaliation are proactive. The loss caused by inconsistent measures before the authorization is out of the scope of retaliation, although it might be calculated as millions of dollars at the end of the painful and lengthy implementation procedures. The "proactive" nature of the remedies actually causes the delays or tricks played in the implementation. Some scholars, therefore, proposed to entitle the remedies with "retroactive" force. For details, refer to Davey (2007: 131), Roessler (2007: 141–147) and Shoyer *et al*. (2005: 1367). So did some Members propose in the Dispute Settlement Understanding Review. The Mexico takes the same view by proposing an idea that the nullification or impairment should be calculated retroactively. (Mexico — Negotiation on Improvements and Clarifications of the Dispute Settlement Understanding (TN/DS/W/23, 4 November 2002)).

11 DSU, Article 3.7.

12 *United States — Section 110 (5) of the US Copyright Act*, WT/DS160/R, 27 July 2000.

13 *United States — Section 110(5) of the US Copyright Act — Notification of a Mutually Satisfactory Temporary Arrangement*, WT/DS160/23, 26 June 2003.

14 Minutes of Meeting on 24 June 2002, WT/DSB/M/128.

15 *United States — Subsidies on Upland Cotton* (WT/DS267).

16 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

17 In the first submission to the panel, Paraguay asserted that it had been damaged by the US' subsidies on the cotton and "the damage caused by the kinds of subsidies and support measures at issue in this case have caused an exodus of this rural population to urban areas with no relief or solution in sight, further aggravating the country's economic situation." Paraguay requested the US to remove the inconsistent measures, because "Paraguay has a supreme interest in ensuring the application of strict justice with respect to this complainant, since cotton production is the sustenance of the poorest segments of its population." (WT/DS267/R, Annex A, p. 28.) Not only Paraguay, but also countries, such as Argentina and Benin that were injured by the US' subsidies made similar

statements.

18 Despite that participating as complainant or third party is in theory a choice of Members, but for many developing country Members, it is not a free choice. They have constraints in choosing to file a case as complainant. In the paper of Professor Bown, he discusses the reasons that may determine Members to participate as third parties, rather than complainants. "[d]espite market access interests in a dispute, an exporting country is less likely to participate in WTO litigation if it has inadequate power for trade retaliation, if it is poor and does not have the capacity to absorb substantial legal costs, if it is particularly reliant on the respondent country for bilateral assistance, or is engaged with the respondent in a bilateral preferential trade agreement. These are the characteristics typically associated with the developing countries in the WTO Membership." (Bown 2005: 17)

19 There have been 14 cases that went into the procedure of Article 22 so of Jan. 2011. These cases are DS 26 (and 48), 27, 46, 108, 136, 162, 222, 217 (and 234), and 267, 268, 285, 291, 294, 322. Among them, DS268, DS 291 and DS 322 the arbitration is suspended by the request of both parties. Interestingly, except DS246, *Brazil — Export Financing Programme on Aircraft* (WT/DS46), all the non-complied parties have been developed countries.

20 *European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU — Decision by the Arbitrators*, WT/DS27/ARB/ECU, 24 March 2000, para. 170.

21 Proposals have been discussed in the Dispute Settlement Understanding Review. The essential need is to allow third parties able to fully participate into the dispute settlement procedures. For example, in the recent submission of Members, Cote d Ivoire representing African Group (African Group — Text for the African Group's proposal on Dispute Settlement Understanding Negotiation (TN/DS/W/92, 5 March 2008.)) expressed their ideas on enhancing the rights of third parties by revising Article 10 of the DSU. In the proposal, it argued, "third parties shall receive all the documentation relating to the dispute from the parties and other third parties. Third parties shall have a right to attend the proceedings and to be availed of the opportunity to put written and oral questions to the parties and other third parties during the proceedings." In the appealing procedure, although third parties have no rights to appeal, they "shall have a right to attend the proceedings and have an opportunity to be heard and to make written submissions to the Appellate Body. Their submissions shall also be given to the parties to the dispute and shall be reflected in the Appellate Body report." Similar ideas were advocated by Costa Rica (TN/DS/W/12), Jordan (TN/DS/W/42), Kenya (TN/DS/W/42), EU (TN/DS/W/38) and Japan (TN/DS/W/32).

22 This idea derives from the conception of "class actions" in the US Civil Procedure Law. It is a practice "to address situations in which it is not feasible for a plaintiff to sue individually or for all of those relevant to a dispute to be joined in a single action." (Freidenthal *et al*. 2009: 741) In the DSM, developing countries, act as the main part of third parties participating. According to the data given by Horn and Mavroidis (2008: 9), as of 2006, the developing countries had been the highest represented group as third parties. They account for up to 47.9% of the cases where third parties participated. Meanwhile, the dilemma faced by developing countries is that they cannot afford the expensive legal cost in the dispute and they do not have adequate human resources to deal with the complicated situation. To allow them request the authorization collectively may help developing countries to access the system more easily and efficiently.

23 There have been proposals arguing that the collective retaliation which intends to grant all other Members to the WTO (Pauwelyn 2000: 342–345) or all other developing countries with retaliation rights (African Group 2008 (TN/DS/W/92)). These proposals share the common character that would ensure compliance by sharpening the retaliation.

24 Professors Chayes argued the downside of the coercive countermeasure by stating that ". . . political leaders, academics, journalists, and ordinary citizens frequently seek treaties with 'teeth' — that is, coercive enforcement measures. In part this reflects an easy but incorrect analogy to domestic legal systems, where the application of the coercive power of the state is thought to play an essential role in enforcing legal rules. Our first proposition is that, as a practical matter, coercive economic — let alone military — measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in foreseeable future. The effort to devise and incorporate such sanctions in treaties is largely a waste of time.

(Chayes and Chayes, 1995: 2) In the international law, compliance of dispute is a difficult problem in the absence of a superanational power. While countermeasures, entitled with coercive forces, have improved the compliance, they also revealed the limits of such an approach.

25 Transparency under the WTO includes two aspects, "[T]he first is to make its internal negotiation, decision-making, and rule-making processes more open, transparent, and inclusive in order to give a real voice to the developing and least developed country Members, which now constitute an overwhelming majority of the Organization. This is the challenge of 'internal' transparency. The second is to respond to external critics — mainly non-governmental organizations (NGOs) and non-state actors — which maintain that the WTO is a closed, non-democratic, unaccountable, supranational entity. This is the issue of 'external' transparency". (Steger 2008: 709) To grant third parties rights to retaliate contributes to the internal transparency of the DSM by giving the voice of other Members in a non-compliant dispute.

26 Members argued that the DSU should allow the developing country to retaliate collectively if a developed country as the respondent fails to comply. This collective action should be adopted either with all the developing countries or the least-developed countries. (African Group — Test for the African Group Proposals on Dispute Settlement Understanding Negotiation, TN/DS/W/92, 5 March, 2008.) In addition, developing Members regard it necessary to incorporate the "Monetary Compensation" which grants the alternative remedy for Members to get their loss compensated given that the compliance does not take place. This is considerably significant for the developing countries and least-developed countries that have limited impacts on the respondent, especially which is a powerful developed country. (LDC Group — Negotiation on the Dispute Settlement Understanding, TN/DS/W/17, 9 October 2002. Kenya — Text for the African Group Proposals on Dispute Settlement Understanding, TN/DS/W/17, 24 January 2003. Mexico — Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/91, 16 July 2007.)

27 Ecuador, in its proposals, stressed the importance to prompt the arbitrators to give a "timely determination of the level of nullification or impairment". (Ecuador — Negotiation on Improvements and Clarifications of Dispute Settlement Understanding, TN/DS/W/26, 26 November 2002. See also TN/DS/W/9, 8 July 2002 and TN/DS/W/33, 23 January 2003.) As to the meaning of " "nullification or impairment" in Article 22, Members proposed that the calculation should take into account not only the "trade coverage of measures", but also the repercussions on the economy of the developing countries. (Jamaica — Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding, TN/DS/W/21, 10 October 2002.) And an additional change was to make the remedies retroactive. (Mexico — Negotiation on Improvements and Clarification on the Dispute Settlement Understanding TN/DS/W/23, 4 November 2002.

28 Supra. note 27, Ecuador, TN/DS/W/33, 23 January 2003.

29 In the case of the *United States — Subsidies on Upland Cotton* (WT/DS267), the Benin and reserved third party rights. The argument made by them on the serious prejudice caused by the US' subsidies on cotton was built on the research product of the Food Policy Research Institute. (As to the discussion on economic assistance in *US—Cotton*, details are found in Zunckel 2005: 1085).

30 It is an independent organization, providing the developing countries and least-developed countries legal capabilities to make full use of the dispute settlement system. Of course, there are standards for the "developing countries" that can resort it for help. Available at http://www.acwl.ch/e/about/about_us.html.

31 Although it is true that as Professor Jackson (Jackson 2004) argued that Members countries thought that it was their duty to comply. Nevertheless, to fully implement the ruling, *de jure*, is a "preference", rather than an "obligation". But the issue whether it is an obligation to comply still remains vague. As Professor Bello (Bello 1996: 417) pointed out, "The WTO substantively improved the GATT rules for settling disputes but did not alter the fundamental nature of the negotiated bargain among sovereign member states. Compliance with the WTO, as interpreted through dispute settlement panels, remains *elective*." (emphasis added).

WTO Cases and Proposal in DSU Review

European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ABR, 9 April 1999.

Japan — Taxes on Alcoholic Beverages, Minute, WT/DSB/M/41, 26 February 1998.

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