Chapter Ten

Implementation of Recommendations and Rulings in the WTO System

Gabrielle Marceau and Jennifer A. Hamaoui

I. Introduction: Countermeasures in WTO Law and Rulings in the WTO System

The WTO dispute settlement system is often described as a unique system of resolving international trade disputes among governments. The WTO adjudication system has particular specificities that distinguish it from other adjudication procedures in international law. For instance, in the event that a panel or the Appellate Body concludes that a WTO Member is in breach of one of its obligations under the covered agreements the losing party is requested “to bring its measure into conformity with the relevant WTO agreements”. Therefore there is only a single conclusion and a single permanent remedy: full compliance with WTO law. Moreover, the implementation of WTO rulings is unique insofar as it has put in place a multilateral surveillance system of “post-judgment procedures” for the supervision of implementation of the conclusions of its adjudication bodies and the articulation of remedies. In this sense, the WTO dispute settlement system includes some lex specialis provisions within the meaning of Article 55 of the International Law Commission’s Articles on State Responsibility (‘ASR’).

---

1 Terminology used by John H. Jackson, Sovereignty, the WTO, and Changing Fundamentals of International Law (Cambridge University Press, 2006).

2 Unlike in general international law where a unilateral measure constituting a violation of international law may be justified as a countermeasure so long as it is intended as a proportionate response to another violation of international law attributable to another State and it meets certain substantive and procedural pre-conditions, in WTO law Members are precluded from taking unilateral retaliatory actions. In addition, a WTO law violation taken as a unilateral action in response to another violation does not constitute a circumstance precluding wrongfulness (Article 22 ILC ASR) and therefore cannot be invoked as
But at the same time, the WTO dispute settlement proceedings share a common feature with other interstate dispute settlement proceedings, which flows from the sovereignty of the parties to the dispute: the involvement of diplomacy and negotiations throughout the judicial proceedings.

Whilst it is true that the diplomatic dispute settlement procedures of the GATT’s early years have made way to a more judicial dispute settlement mechanism with the creation of the WTO, the Dispute Settlement Understanding (‘DSU’) still embodies multiple provisions that afford a privileged position to diplomacy and negotiated settlements and foresee negotiations on different subject matters. Far from being a relic of the GATT era, diplomacy and negotiations continue to be at the centre of the dispute settlement mechanism (‘DSM’), which aims at securing a positive solution to a dispute preferably through a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements.

Should we define diplomacy in broad terms as a tool of foreign policy for the management of international relations, it appears to play an important role in public international law at the different stages of conflict resolution. In WTO proceedings, from the initiation of a dispute settlement procedure to the stage of the implementation of rulings, diplomacy comes into play either as a means to trigger the application of judicial proceedings or as a means of enforcement of the ruling.

This short article aims to explain the lex specialis system of retaliation in the context of the WTO, focusing on the diplomatic features of the dispute

---

3 Major changes such as the introduction of the negative consensus in the WTO political body (the Dispute Settlement Body (‘DSB’)) to refer a case to adjudication, to afford binding force to dispute settlement rulings and to authorize countermeasures, as well as the introduction of a stage of appeal, have contributed to a greater judicialization of the WTO dispute settlement system vis-à-vis the GATT system, affording the procedure a court-like character.

4 Article 3.7 of the DSU.

5 In a narrower sense, diplomacy refers to the practices of professional diplomats (Harold Nicolson). Whereas, according to a broader definition, diplomacy covers broad themes of statecraft and international relations (Henry Kissinger). See Christer Jönsson, “Diplomacy, Bargaining and Negotiation” in eds. Walter Carlsnaes and Beth A. Simmons, Handbook of International Relations (SAGE Publications, 2002), at 213.