CHAPTER 17

DISPUTE SETTLEMENT PROCEDURES UNDER WTO

As mentioned in the "Preface," this Report aims to present specific measures for resolving issues related to trade policies and measures, and attaches special importance to the use of the WTO dispute settlement mechanism as a means of that resolution. This is because the WTO dispute settlement procedures effectively function as a mechanism for reaching objective resolutions based on internationally agreed rules, avoiding economic disputes between countries from taking longer than necessary or turning into a political issue.

The WTO Agreement provides for the discipline applicable to all dispute settlement procedures is the "Understanding on Rules and Procedures Governing the Settlement of Disputes" or Dispute Settlement Understanding (DSU). The WTO dispute settlement mechanism also contains provisions for special or extra procedures under agreements such as Articles XXII and XXIII of GATS (General Agreement on Trade in Services) as well as the procedures and rules of the Appellate Body. The mechanism covers the procedures for mediation, conciliation, good offices and arbitration, and the core part of those procedures includes "consultation" and "panel procedures" and a series of other procedures relevant to them.

This section begins with an introduction of a series of dispute settlement procedures including "consultation" and "panel procedures" as provided for by DSU, and then gives an explanation about the ongoing DSU review negotiations in the WTO Doha Round. Finally, actual dispute cases that Japan is involved in are explained.

A. OUTLINE OF THE WTO DISPUTE SETTLEMENT MECHANISM

1. TYPE OF DISPUTES SUBJECT TO THE MECHANISM

Paragraph 1, Article 1 of the DSU provides that the rules and procedures of the DSU shall apply to the following.

1) Disputes brought pursuant to the consultation and dispute settlement provisions of the Agreements listed in Appendix 1 to the DSU; and,
2) Consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (WTO Agreement).

Based on the above, the DSU rules and procedures apply to the following specific agreements:

- WTO Agreement
- General Agreement on Tariffs and Trade (GATT)
- Agreement on Agriculture

- Agreement on Sanitary and Phytosanitary Measures (SPS)
- Agreement on Technical Barriers to Trade (TBT)
- Agreement on Trade-Related Investment Measures (TRIMs)
- Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping measures)
- Agreement on Subsidies and Countervailing Measures (SCM)
- Agreement on Safeguards (SG)
- General Agreement on Trade in Services (GATS)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- Government Procurement Agreement (GPA)

2. *CONSULTATION*

Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner. GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2 (specifying that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations), as well as in the "1960 GATT decision on arrangements for consultations on restrictive business practices" (specifying that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation). However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that "formal" consultation to take place prior to panel procedures.

1) CONSULTATION UNDER ARTICLE XXII AND ARTICLE XXIII, RESPECTIVELY

Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters. Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

(a) the failure of another contracting party to carry out its obligations under GATT, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or

(c) the existence of any other situation.

Thus, disputes over "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII. Another point of difference between the two concepts of consultation is the participation of a third country; it is permitted only with respect to consultations under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of GATS.

2) CONSULTATION UNDER ARTICLE 4 OF DSU

The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT (paragraph 1, Article 3 of DSU). Article 4 of DSU provides for consultation procedures and rules and specifies that each party should give sympathetic

consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.

According to the DSU (paragraph 4, Article 4), a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB (Dispute Settlement Body of WTO). It provides that the party to which a request is made shall reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution (paragraph 3, Article 4 of DSU).

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded" (paragraph 11, Article 4 of DSU).

3. PANEL PROCEDURES

1) ESTABLISHING A PANEL

Paragraph 2, Article XXIII of GATT provides that if no satisfactory adjustment is effected through consultations between the contracting parties concerned, the dispute concerned may be referred to the DSB (Dispute Settlement Body, or "Contracting Parties" under the former GATT) with respect to alleged "nullification or impairment of any benefit otherwise to accrue under GATT" as mentioned above.

In the past, such disputes referred to the Contracting Parties were brought to a working group consisting of the disputing parties and neutral parties. The working group was supposed to confirm claims of the respective disputing parties and discuss them, but was not required to make a legal judgment. The function of the working groups was limited to the facilitation of negotiations and dispute settlement. Even at that time, however, the "panel" procedure also existed. A panel was composed of panelists (see Note) who do not represent a government or any organization, but are supposed to serve in their individual capacities. A panel was principally to make a legal judgment regarding the matters in dispute. Later, this panel procedure became the regular practice.

GATT provides that consultations pursuant to paragraph 1 of its Article XXIII should precede the establishment of a panel in accordance with paragraph 2 of Article XXIII, but it was generally accepted that a panel could be established after consultations under Article XXII even if there had been no consultation under Article XXIII. The WTO dispute settlement mechanism does not differentiate consultations under Article XXII from those under Article XXIII of GATT. If consultations fail to settle a dispute within 60 days after the date of receipt of a request for consultations, the complaining party may submit a written request to the DSB for the establishment of a panel (paragraph 7, Article 4 of DSU). It is provided that such written request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present clearly the problem of inconsistency with trade agreements in question (paragraph 2, Article 6 of DSU). The contents of the written request for the establishment of a panel are extremely important because they have the effect of determining the panel's terms of reference.

As a rule, decisions of the DSB are made by consensus, but the so-called "negative consensus method" is applied to the issues of "establishment of panels" (paragraph 1 of Article 6), "adoption of reports of a panel or Appellate Body" (paragraph 4 of Article 16 and paragraph 14 of Article 17) and "compensation and the suspension of concessions" (paragraph 6 of Article 22), the requested action is approved unless all participating Member countries present at the DSB meeting unanimously object. As far as the DSB's establishment of a panel is concerned, paragraph 2, Article 6 of DSU specifies that "a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."

Parties other than the complaining party which requested the establishment of a panel are entitled to block the panel establishment but only once (paragraph 1, Article 6 of DSU). This veto is most frequently employed by the respondent. Therefore, in most cases, a panel is established at the second DSB meeting at which the request appears as an item on the DSB's agenda. Any Member that desires to be joined in the panel procedure as a third party because of having a substantial interest in the matter concerned is required to express such desire at the time of the establishment of a panel or within 10 days after the date of the panel establishment.

2) Composition of Panels

Once a panel is established, the next step is to select panelists. Selection of panelists is conducted through proposals by the WTO Secretariat on panelists (paragraph 6, Article 8 of DSU). Generally, the Secretariat summons the disputing parties and hears their opinions concerning desirable criteria for selecting panelists, such as home country, work experience and expertise.

Then, the Secretariat prepares a list of nominees (generally six persons) providing their names and brief personal record, and show the list to both parties. It is provided that citizens of the disputing parties or third parties joined in the panel procedure may not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise (paragraph 3, Article 8 of DSU).

It is also provided that either disputing party "shall not oppose nominations except for compelling reasons" (paragraph 7, Article 8 of DSU). However, since the definition of a compelling reason is not very strict, frequently nominations made by the WTO Secretariat are not accepted by either party, and sometimes this happens several times. Also, it is provided that if there is no agreement on the panelists within 20 days after the date of the establishment of a panel, the Director-General, upon request of either party, shall determine the composition of the panel after consulting with the parties to the dispute (paragraph 7, Article 8 of DSU).

3) Making Written Submissions

After the composition of a panel is determined, the panel meets to determine the timetable for the panel process and the working procedures it will follow throughout the dispute. Then, after three to six weeks from the establishment of the panel, the complainant provides the panel a written submission containing all facts relating to the issue concerned and its claims. The respondent also provides a written submission to the panel in two to three weeks after the receipt of the complainant's written submission (paragraph 12 of Appendix 3 of DSU). Although there is no rule specifying the composition of a written submission, in many cases they are composed of five parts: 1) introduction; 2) facts behind the complaint; 3) procedural points at issue; 4) claims based on legal grounds; and 5) conclusion.

Regarding the disclosure of the written submissions, it is provided (in paragraph 3, Appendix 3 of DSU) that "deliberations of a panel and documents submitted to it shall be kept confidential.

Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public." Thus, disputing parties may disclose their own written submissions to the public. Actually, the United States and EU disclose many of their written submissions to the public, and Japan also releases some of its written submissions to the public on websites.

4) PANEL MEETING

A panel generally meets two times. Meetings of a panel are held in the WTO building, instead of a special facility such as a court. Traditionally, a panel meets in closed session, just like other meetings of WTO. Generally, panel meetings last one to three days.

The first meeting of a panel is supposed to be held in one to two weeks after the receipt of the written submission submitted by the respondent (paragraph 12, Appendix 3 of DSU). This first substantive meeting is to begin with a briefing made by the chairman of the panel on how to proceed with the meeting. Then, the complainant and the respondent, respectively, give oral statements regarding their own written submissions. This is followed by questioning by the panel and in some cases a question-and-answer session between the disputing parties. Next, a third party session is held, where oral statements and a question-and-answer session occurs. As a rule, the presence of third parties is permitted only at these third party sessions, and third parties may not be present at substantive meetings.

The second substantive meeting of a panel is supposed to be held after two to three months since the first substantive meeting. The second meeting focuses mainly on counter-arguments against claims of the other party made during the first substantive meeting. Unlike the first substantive meeting, third parties are not permitted to attend the second substantive meeting. Unless otherwise agreed between the disputing parties, third parties may not make written submissions or obtain written submissions submitted by the disputing parties.

5) INTERIM REPORT

Following the second substantive meeting, the panel issues an interim report to the disputing parties. The interim report describes the findings and conclusions of the panel. An interim report provides the first opportunity for disputing parties to tell whether their arguments are supported by the panel or not. Disputing parties are entitled to submit comments or submit a request for the panel to review and correct technical aspects of the interim report for correction.

6) FINAL PANEL REPORT

The DSU provides (in paragraph 9 of its Article 12) that the period in which the panel conducts its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the disputing parties, "shall not exceed six months as a general rule." When the panel considers that it cannot issue its report within six months, it is supposed to inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report (paragraph 9, Article 12 of DSU). The recent trend is that cases requiring an examination period exceeding six months are increasing because of the difficulty in confirming facts due to the existence of a highly technical matter or difficult interpretations of a legal matter at issue.

Generally, a final panel report is issued shortly after the disputing parties comment on the interim report, first to disputing parties and then to all Members in the three official languages of the WTO (English, French and Spanish).

A panel report contains, in its conclusion, the judgment reached by the panel as well as

recommendations regarding correction of the measures in question. This conclusion is referred to the DSB, where the "negative consensus method" is applied for the adoption of the panel report. The DSB adopts the "recommendation and rulings", which are legally binding the parties concerned. Adoption of a panel report is supposed to be completed between 21 and 60 days after the date the report has been circulated to the Members (paragraphs 1 and 4 of Article 16 of DSU).

4. APPEAL (REVIEW BY THE APPELLATE BODY)

If there is an objection to a panel report, disputing parties may request the Appellate Body to examine the appropriateness of the legal interpretations employed by the panel (paragraph 4, Article 17 of DSU). The Appellate Body is a standing group composed of seven persons of recognized authority with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally; the Appellate Body membership is broadly representative of membership in the WTO. Three persons out of the seven Appellate Body members are to serve on any one case. Persons serving on the Appellate Body are selected by a consensus of all Members at the DSB and serve for a four-year term. Each person may be reappointed once (paragraph 2, Article 17 of DSU).

A Notice of Appeal should be filed no later than the DSB meeting at which a panel report is scheduled to be adopted. Since it is provided that the adoption of a panel report should be completed within 60 days after the date of circulation of the panel report to the Members, an appeal is supposed to be made within 60 days after the date of circulation (paragraph 4, Article 16 of DSU).

It is provided (in paragraph 6 of Article 17 of DSU) that an appeal should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In principle, factual findings of a panel may not be challenged. Regarding legal interpretations and findings, there is a precedent that mentions: "To determine whether a certain incident occurred at a certain place/time is a matter of fact typically. However, to determine whether a certain fact or a series of facts complies with any given rule of a certain convention is a matter of law and requires legal interpretation." (*EC-Hormone-Treated Beef* Case (DS26))

After the filing of a Notice of Appeal, the Appellate Body shows the timetable for set out in its working procedures. The three major steps in the procedures are: (1) filing of a written submission by the appellant; (2) filing of written submissions by the appellee and third participants, respectively; and (3) meeting of the Appellate Body with the parties (oral hearing). It is provided that the appellant's filing of its written submission ((1) above) should shall be made within 7 days after the filing of a Notice of Appeal, that the appellee's filing of its written submission ((2) above) should be made within 25 days after the date of the filing of a Notice of Appeal, and that the meeting of the Appellate Body (oral hearing) ((3) above) is supposed to be held between 35 and 45 days after the date of the filing of a Notice of Appeal (paragraphs 21, 22, 24 and 27 of Working Procedures for Appellate Review "WT/AB/WP/5" issued on January 4, 2005). It is also provided that the participation of a third party in appellate review procedures may be accepted only if such party was joined in the panel procedure (paragraph 4, Article 17 of DSU). Third party participants may file written submissions and also may be present at the meeting of the Appellate Body.

During a meeting of the Appellate Body (1) the appellant, (2) the appellee and (3) third participant(s), respectively, make oral arguments in the order mentioned. This is followed by questioning by the Appellate Body of the disputing parties as well as of third party participants; and each party is required to address the questions. The Appellate Body takes the initiative in

questioning, and either disputing party is generally not allowed to ask a question to the other party. In general, following the question-and-answer session, disputing parties and third party participants are provided with the opportunity to make oral statements again at the end of the meeting.

Following the meeting, the Appellate Body is to circulate its report to the Members within 60 days after the date of filing of a Notice of Appeal. The proceedings should not exceed 90 days in any case (paragraph 5, Article 17 of DSU). Unlike panel procedures, there is no rule concerning an interim report for appellate review procedures.

5. *ADOPTION OF REPORTS*

A report prepared by the panel or the Appellate Body following the review process becomes the formal written recommendations of the DSB when adopted by the DSB. Regarding the adoption of panel reports, the DSU provides (in paragraph 1, Article 16) that "In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date on which they have been circulated to the Members." It is also provided (in paragraph 4, Article 16 of DSU) that "within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting." Regarding the adoption of reports of the Appellate Body, the DSU provides (in paragraph 14, Article 17) that "a report shall be adopted within 30 days after the date of circulation of the report to the Members." Together with a panel report, a report of the Appellate Body becomes the official written recommendations and rulings of the DSB once it is adopted at a DSB meeting.

6. *IMPLEMENTATION OF RECOMMENDATIONS*

The DSU provides that at a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member to which the recommendations are directed is supposed to express its intentions with respect to implementation of the recommendations mentioned in the report. If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such reasonable period of time may be decided by mutual agreement between the disputing parties concerned. However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three Appellate Body members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the "reasonable period of time" within 90 days after the date of the adoption of report. It is provided (in paragraph 3, Article 21 of DSU) that the reasonable period of time to implement the recommendations mentioned in a panel or Appellate Body report should, as a general rule, not exceed 15 months from the date of adoption of the report. It is also provided that the DSB should keep under surveillance the implementation of adopted recommendations and that the Member concerned should provide, after a certain period of time following the date of establishment of the reasonable period of time, the DSB with a status report in writing of its progress in the implementation of the recommendations until the issue of implementation is resolved (paragraph 6, Article 21 of DSU).

In general, a panel or the Appellate Body recommends that the Member concerned bring a measure determined to be inconsistent with a covered agreement into conformity with that agreement. It does not usually give any specific instruction on how to implement the recommendations. Therefore, it is not unusual that disagreement arises between disputing parties as to the existence or consistency with the WTO Agreement of measures taken to comply with the recommendations. In this respect, the DSU provides (in paragraph 5, Article 21) that "such

disagreement as to the existence or consistency with a covered agreement of measures taken to comply with adopted recommendations or rulings" may be referred to a panel. Such panel established for the purpose of determining whether there has been implementation of adopted recommendations or rulings ("compliance panel") is supposed to be composed of those panelists who served on the original panel. The panel is required to issue a report within 90 days after the date when disagreement is referred to the panel. Unlike regular panel procedures, establishment of the compliance panel does not have to be preceded by consultations. Generally, such panels meet only once. When the complaining party doubts that there has been appropriate implementation of adopted recommendations or rulings, it may request review by a compliance panel repeatedly without limitation. In addition, there is a precedent that compliance panel decisions may be appealed to the Appellate Body for review, although DSU does not have any provision providing for such process.

7. COUNTERMEASURES

With the approval of the DSB, the complainant may take countermeasures, such as suspension of concessions, against the party who respondent's interests also in cases where it fails to implement the recommendations adopted by the DSB within a given reasonable period of time, provided that no agreement on compensation is reached between both parties. Specifically, it is provided that the complainant may request the DSB to suspend the application, to the Member concerned, of concessions or other obligations under covered agreements ("countermeasures") when such Member fails to bring the measures found to be inconsistent with a covered agreement into compliance therewith within the said "reasonable period of time" or that a panel or the Appellate Body confirms a failure of such member to fully implement adopted recommendations (paragraph 2, Article 22 of DSU).

There are rules as to the sectors and level of countermeasures to be taken. For instance, it is provided (by Article 22 of DSU) that the complainant, when taking countermeasures, should first seek to target sector(s) that are the same as that to which the dispute concerned is associated, and also that the level of countermeasures should be equivalent to the level of the "nullification or impairment" caused. If the complainant considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement (item (b), paragraph 3, Article 22 of DSU). In addition, if that party considers that it is not practical or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement (item (c), paragraph 3, Article 22 of DSU). The latter practice is called "cross retaliation," and it can be represented by a case where retaliation for a violation of TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) involves the suspension of customs-related concessions under GATT. Such cross retaliation is one of the unique measures employed in the WTO dispute settlement mechanism, and was introduced as a result of the coverage of the WTO Agreement over not only goods but also services and intellectual property rights (However, GPA sets special provisions on prohibition of "cross retaliation." Paragraph 7, Article 22 stipulates that "any dispute arising under any Agreement …other than this Agreement shall not result in the suspension of concessions or other obligations under this Agreement, and any dispute arising under this Agreement shall not result in the suspension of concessions or other obligations under any other Agreement.").

In the case that the respondent objects to the contents or level of the countermeasures for which

the complainant requested authorization, the matter may be referred to arbitration (paragraph 6, Article 22 of DSU). When arbitration is conducted, the resulting decision is taken into consideration for the authorization of countermeasures. The negative consensus method is applied to finalize the authorization of the DSB (paragraph 7, Article 22 of DSU).

B. DSU REVIEW NEGOTIATION

As mentioned above, the effectiveness of WTO dispute settlements has been greatly improved in comparison to that at the time of GATT. However, it is also true that problems that were not clear when the DSU was established have surfaced, including the increase in the burdens of panels and the Appellate Body due to the quantitative and qualitative increase in disputes and inadequacy of DSU procedures. In order to examine these problems, WTO Members agreed to initiate negotiations to improve and clarify the DSU (DSU Review Negotiation).

Based on the Marrakech Ministerial Declaration in 1994, the DSU review negotiation started in the special session of the WTO's Dispute Settlement Body (DSB), with an eye toward aim of completing the revision of DSU provisions from by the end of 1997. Especially in October 2001, which was immediately before the Doha Ministerial Conference, 14 countries, including Japan and Canada, submitted a joint proposal to the General Council Meeting about: (1) clarification of the sequencing of compliance panel and suspension of concession; (2) shortening the period of various dispute settlement procedures; and (3) strengthening the rights of third parties.

These discussions on DSU review, the DSU Review Negotiation was included in the Doha Ministerial Declaration although it was outside the framework of a single undertaking, and the deadline for concluding the negotiations was set for May 2003 (Paragraph 30 of the Doha Ministerial Declaration). After the Doha Ministerial Declaration, Members submitted various proposals and the negotiations could not be concluded by May 2003. In the framework agreement adopted in the General Council Meeting in July 2004, it was agreed to continue the DSU Review Negotiation. After this General Council Meeting, 7 countries, led by Canada and Norway, had discussions on the October 2001 submission, focusing on: (1) sequencing; and (2) procedures relating to termination of countermeasures. The Hong Kong Ministerial Declaration confirmed the policy to "continue to work towards a rapid conclusion of the negotiations" (Paragraph 34 of the Hong Kong Ministerial Declaration).

Currently, the DSU is functioning comparatively well, and discussions are continuing among the participating countries, based on the basic understanding that revisions should be limited to the minimum necessary. The proposals currently being discussed include a joint proposal by Japan and the European Communities on "post-retaliation" (procedure to lift countermeasures) and "sequencing (procedures for clarifying the order of "judging whether the losing country is implementing DSB recommendations or not" and "the winning country imposing sanctions on the losing country for not implementing the recommendations")"; "securing the transparency of dispute settlement procedures" (opening panel meetings with the parties to the public) by the United States; and a joint proposal by seven countries, including Mexico, Argentina and Brazil, on "augmentation of third parties' rights."

REFERENCE: STATUS OF DSU REVIEW NEGOTIATION

1) BACKGROUND OF DISCUSSION

The DSU review negotiation was commenced in 1997 based on a different negotiation mandate than the Doha Round, and negotiations occur at special meetings of the DSB.

Based on the decision made at the Marrakesh Ministerial meeting and adopted at the completion of the Uruguay Round negotiations in 1994, the review negotiation was scheduled to be completed during 1998. The review was then, extended to the end of July 1999 by a General Council decision of December 1998. However, the discussions did not come to a conclusion and the period passed. Since then, the review was continued by interested countries in the form of informal consultations, and a joint proposal for DSU review was submitted to the General Council in 2000. However, discussions did not progress because major countries such as the United States and the EU did not participate in the proposal. Furthermore, just before the Doha Ministerial meeting of 2001, 14 countries including Japan, Canada and Norway submitted a joint proposal incorporating the clarification of sequencing (procedures for clarifying the order of "judging whether the losing country is implementing DSB recommendations or not" and "the winning country imposing sanctions on the losing country for not implementing the recommendations") and the reduction of time frame (reduction of consultation periods, etc.), and aimed for the proposal to be adopted at the Doha Ministerial meeting. However, a new negotiation mandate for the “improvement and clarification” of DSU was given in paragraph 30 of the Ministerial Declaration in November 2001 and the due date for concluding the negotiation was set as May 2003, as an exception of a single undertaking.

As for negotiations after the Doha Ministerial meeting, monthly meetings were held since April 2002, and from 2003, detailed discussions based on revised provisions were held. A wide variety of ambitious proposals were presented by various the countries but an agreement was not achieved by May 2003, and so the negotiation period was extended for another year at the Cancun Ministerial Meeting in September 2003. Although discussions reopened in May 2004, when seven countries lead by Canada and Norway made a proposal with a focused argument (sequencing, post-retaliation (termination procedure of countermeasures), etc.) that could lead to a consensus relatively easily, an agreement on the negotiation was not achieved by the due date, and it continued with the framework adopted at the General Council in July.

After the above General Council meeting, discussions were held based on the papers of the above seven countries and discussions were invigorated by proposals from the EU, the United States and Japan. Aligned with the Round, in 2005, a draft text including the reviews gathered from each country after 2004 was to be summarized by the Ministerial meeting held in Hong Kong in December. However, the draft text could not be prepared by the Hong Kong Ministerial meeting in December 2005 as a result of stagnation due to the return of the chairman to his country (though still keeping his position as a chairman) in September 2005. The policy to "continue the discussions to achieve an agreement for the negotiation as soon as possible" was confirmed in paragraph 34 of the Hong Kong Ministerial Declaration.

2. Current Status

The negotiation was suspended due to the suspension of the Round in July 2006. After December, informal meetings were held by the major countries and DSB special meeting restarted in 2007. In July 2008, the progress of the review negotiation and a draft text of reviews summarized by the chairman were submitted to the Trade Negotiations Committee. This text, which contains the progress of discussions for the negotiation, was evaluated as a foundation for future review

negotiations, and all negotiation matters were discussed by May 2010 with the chairman's text as a basis. Since May 2010, effective discussions were held by introducing a new negotiation format such as informal meetings with small number of countries for each issue. In April 2011, as a general status report by the chairman, a chairman's document was issued with the chairman's text of July 2008 and the summaries of negotiation meetings after May 2010 attached. It reported a certain degree of progress for most of the negotiated matters. On the other hand, the necessity for further discussions in order to achieve an agreement was also indicated in this document. At the 8th WTO Ministerial Conference held in December 2011, the chairman gave his report to confirm (1) the importance of dispute settlement procedures, (2) the current status of the negotiation, and (3) the direction of promoting conclusion of the negotiation. It was decided to proceed with discussions toward a rapid outcome of the negotiation. Subsequently, negotiation meetings and consultations between the chairman and the respective Members have continued to be held intermittently, as well as discussions on each negotiation matter.

The positions of major countries related to the negotiation are as follows.

(1) The United States

The United States is inclined toward enhancing governance by the Members. Specifically, in July 2003, the clarification of panel procedures and published opinions were proposed and, in December of the same year, the United States, jointly with Chile, proposed an interim report procedure for the Appellate Body (a procedure to send an interim report to the countries concerned before sending a final report; the provisions exist in the panel procedures) and a procedure to weaken the status of panel and Appellate Body reports and to allow control by the countries concerned regarding the partial deletion, endorsement, etc. of a report based on the agreement of the countries concerned. After that, in June and October 2005, proposals were made based on the proposals of 2003, "clarification" and "control of the countries concerned".

(2) The EU

The EU is inclined toward judicialization of the dispute settlement procedure. In addition to being part of the above-described joint proposal of 14 countries including Japan, the EU proposed introduction of a standing panel and remand authority (referring a case back to the panel where an Appellate Body is unable to make legal decisions due to the lack of confirmation of facts by the panel). Also, proposals such as mandatory compensation negotiations prior to taking countermeasures and the prohibition of “carousel” provisions (replacement of countermeasure items) were made. Proposals regarding the "post-retaliation (procedure for terminating countermeasures)" and "sequencing" were jointly made with Japan in 2005.

(3) G7 (Argentina, Brazil, India, Canada, Mexico, New Zealand, Norway)

Since the submission of the above-mentioned joint proposal in May 2004, the G7 countries strengthened cooperation to confront Japan, the United States and the EU. In February 2005, a joint proposal on remand and the expansion of rights of countries participating as third parties, etc. was submitted.

(4) Developing Countries

In 2003, proposals were made from groups of African countries, India, LDCs, and China etc. The contents were diverse. Some such as the extension of time frame for consultations and submission due dates, are relatively easy to comprehend, but others reflect exaggerated proposals by developing countries, such as financial support for utilizing the dispute procedure and the strengthening of enforcement power against advanced countries (taking countermeasures and paying compensations collectively). In June 2006, India, Cuba and Malaysia proposed special and

different treatment for the developing nations.

(5) Japan

Japan shares the position of the EU with regard to judicializing the dispute settlement procedures. In 2005, proposals related to "post-retaliation (procedure for terminating countermeasures)" and the "sequencing" issue were jointly submitted and cooperation has been strengthened.

C. ACTUAL CONDITIONS OF USE OF GATT/WTO DISPUTE SETTLEMENT PROCEDURES

From the time of the former GATT, dispute settlement procedures – through consultation and panels – have been used relatively frequently. The number of panels established was low in the 1960s, but it increased rapidly in the latter half of the 1970s. After the inauguration of the WTO in January 1995, dispute settlement procedures again increased. From the inauguration in 1995 to the end of December 2015, 488 cases (requests for consultation) have been initiated under the WTO dispute settlement procedures (Refer to Table II-17-3).

D. DISPUTES IN WHICH JAPAN WAS INVOLVED (AFTER WTO'S ENTRY INTO FORCE)

(1) Cases in which Japan was complainant

Name	Consultation requested	Panel establishment decided	Report adopted	Conclusion
United States — Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974 (DS6)	May 1995	-	-	Mutually agreed solution (July 1995) (Invocation of unilateral measures was avoided)
Brazil — Certain Automotive Investment Measures (DS51)	July 1996	-	-	Consultation suspended (Brazil effectively removed measures)
Indonesia — Certain Measures Affecting the Automobile Industry (DS55, 64)	Oct. 1996	Jun. 1997	Jul. 1998 (Panel report was adopted)	Japan's claim was approved
United States — Measure Affecting Government Procurement (DS95)	Jul. 1997	Oct. 1998	-	Panel dissolved (Feb. 2002) (US measure judged as unconstitutional in the United States)
Canada — Certain Measures	Jul. 1998	Feb. 1999	Jun. 2000	Japan's claim was approved

Name	Consultation requested	Panel establishment decided	Report adopted	Conclusion
Affecting the Automotive Industry (DS139)			(Appellate Body report was adopted)	
United States — Anti-Dumping Act of 1916 (DS162)	Feb. 1999	Jul. 1999	Sep. 2000 (Appellate Body report was adopted)	Japan's claim was approved
United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184)	Nov. 1999	Mar. 2000	Aug. 2001 (Appellate Body report was adopted)	Japan's claim was approved. Not fully implemented despite the compliance period being over
United States — Continued Dumping and Subsidy Offset Act of 2000 (The Byrd Amendment), (DS217)	Dec. 2000	Sep. 2001	Jan. 2003 (Appellate Body report was adopted)	Japan's claim was approved (Period for implementation has expired but it has not been put into practice)
United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (DS244)	Jan. 2002	May 2002	Jan. 2004 (Appellate Body report was adopted)	Japan's claim was not approved
United States — Definitive Safeguard Measures on Imports of Certain Steel Products (DS249)	Mar. 2002	Jun. 2002	Dec. 2003 (Appellate Body report was adopted)	Japan's claim was approved
United States — Measures Relating to Zeroing and Sunset Reviews (DS322)	Nov. 2004	Feb. 2005	Jan. 2007 (Appellate Body report was adopted)	Japan's claim was approved
United States — Measures Relating to Zeroing and Sunset Reviews (DS322) (compliance panel)	-	Apr. 2008	Aug. 2009 (Appellate Body report was adopted)	Japan's claim was approved
European Union —Tariff Treatment of Certain Information Technology Products (DS376)	May. 2008	Sep. 2008	Aug. 2010 (Panel report was adopted)	Japan's claim was approved
Canada — "Local Content Requirement" in the Ontario's Feed-in Tariff Program for Renewable Energy (DS412)	Sept. 2010	Jul. 2011	May 2013 (Appellate Body report was adopted)	Japan's claim was approved
China – measures related to exports of rare earth materials, tungsten and molybdenum (DS433)	Mar. 2012	Jul. 2012	Aug. 2014 (Appellate Body report was adopted)	Japan's claim was approved

Name	Consultation requested	Panel establishment decided	Report adopted	Conclusion
Argentina - Import Restrictions on Wide-Ranging Goods(DS445)	Aug. 2012	Jan. 2013	Jan. 2015 (Appellate Body report was adopted)	Japan's claim was approved
China - AD Measure on Japanese High-Performance Stainless Steel Seamless Tubes (DS454)	Dec. 2012	May 2013	Oct. 2015 (Appellate Body report was adopted)	Japan's claim was approved
Russian Federation - Recycling Fee on Motor Vehicles (DS463)	July 2013	-	-	Consultation suspended (Jan. 2014, measure corrected)
Ukraine - Definitive Safeguard Measures on Certain Passenger Cars (DS468)	Oct. 2013	Mar. 2014	Jul. 2015 (Panel report was adopted)	Japan's claim was approved
Korea — Import Bans, and Testing and Certification Requirements for Radionuclides (DS495)	May 2015	Sep. 2015		Panel composed (Feb. 2016)
Brazil — Certain Measures Concerning Taxation and Charges (DS497)	Jul. 2015	Sep. 2015		Panel pending

(2) Cases for which Japan was respondent

Name	Complainant	Consultation requested	Report adopted	Conclusion
Taxes on Alcoholic Beverages (DS8, 10, 11)	EC, US, Canada	Jun. 1995	Nov. 1996 (Appellate Body report was adopted)	Japan's claim was not approved
Measures Affecting the Purchase of Telecommunications Equipment (DS15)	EC	Aug. 1995	-	Mutually agreed solution (Sep. 1995)
Measures concerning Sound Recordings (DS28, 42)	US, EC	Feb. 1996	-	Mutually agreed solution (Jan. 1997)
Measures Affecting Consumer Photographic Film and Paper (DS44)	US	Jun. 1996	Apr. 1998 (Panel report was adopted)	Japan's claim was approved
Measures Affecting Distribution Services (Large-Scale Retail Store Law)(DS45)	US	Jun. 1996	-	Essentially closed at consultation stage

Name	Complainant	Consultation requested	Report adopted	Conclusion
Measures Affecting Imports of Pork (DS66)	EC	Jan. 1997	-	Essentially closed at consultation stage
Procurement of a Navigation Satellite (DS73)	EC	Mar. 1997	-	Mutually agreed solution (Jul. 1997)
Measures Affecting Agricultural Products (DS76)	US	Apr. 1997	Mar. 1999 (Appellate Body report was adopted)	Japan's claim was not approved
Tariff Quotas and Subsidies Affecting Leather (DS147)	EC	Oct. 1998	-	Essentially closed at consultation stage
Measures Affecting the Importation of Apples (DS245)	US	Mar. 2002	Dec. 2003 (Appellate Body report was adopted)	Japan's claim was not approved
Import Quotas on Dried Laver and Seasoned Laver (DS323)	Republic of Korea	Dec. 2004	Feb. 6, 2006 (Panel report, including the details of the case only, was adopted)	Mutually agreed solution
Countervailing Duties on Dynamic Random Access Memories from Republic of Korea (DS336)	Republic of Korea	Mar. 2006	Jan. 2008 (Appellate Body report was adopted)	Part of Japan's claim was not approved
Countervailing Duties on Dynamic Random Access Memories from Republic of Korea (DS336) (compliance panel)	Republic of Korea	Sep. 2008	-	Since the suspension of proceedings over 12 months, the authority for the establishment of the panel lapsed and the proceedings are finished (Mar. 2010)

(3) Cases in which Japan was a third party (excluding cases essentially closed)

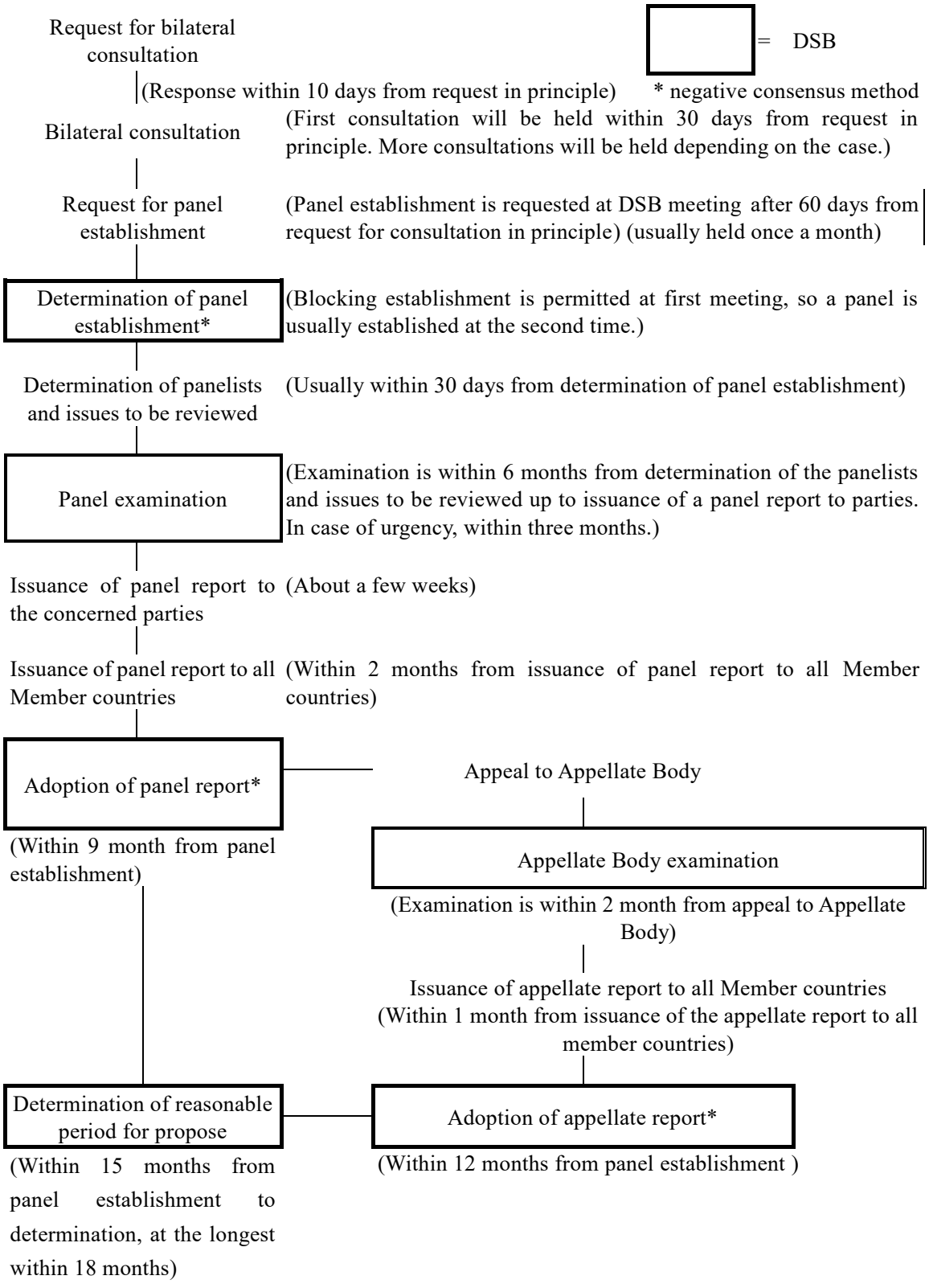
Name	Complainant	Stage
European Communities — Measures Affecting Trade in Large Civil Aircraft (DS316)	US	Compliance Panel
United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint (DS353)	EU	Compliance Panel
United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (DS379)	China	Confirming compliance
United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)	Mexico	Compliance period
European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (DS397)	China	Compliance Appellate Body (Report circulated)

Name	Complainant	Stage
European Communities — Measures Affecting Trade in Large Civil Aircraft (DS316)	US	Compliance Panel
European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (DS400, 401)	Canada, Norway	Compliance period
China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)	US	Confirming compliance
United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam (DS429)	Viet Nam	Compliance period
India — Measures Concerning the Importation of Certain Agricultural Products (DS430)	US	Compliance period
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS431, 432)	US, EU	Confirming compliance
Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (DS434, 435, 441, 458, 467)	Ukraine, Honduras, Dominican Republic, Cuba, Indonesia	Panel
United States — Countervailing Duty Measures on Certain Products from China (DS437)	China	Compliance period
United States — Countervailing and Anti-dumping Measures on Certain Products from China (DS449)	China	Confirming compliance
China — Certain Measures Affecting the Automobile and Automobile-Parts Industries (DS450)	US	Consultations
European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector (DS452)	China	Consultations
Indonesia — Importation of horticultural products, animals and animal products (DS455)	US	Panel
India — Certain Measures Relating to Solar Cells and Solar Modules (DS456)	US	Panel
China — Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union (DS460)	EU	Compliance Appellate Body (report circulated)
Russian Federation — Recycling Fee on Motor Vehicles (DS462)	EU	Panel
United States — Anti-dumping and Countervailing Measures on large residential washers from Korea (DS464)	Republic of Korea	Panel
United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China (DS471)	China	Panel
Brazil — Certain Measures Concerning Taxation and Charges (DS472)	EU	Panel
Russian Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the	EU	Panel

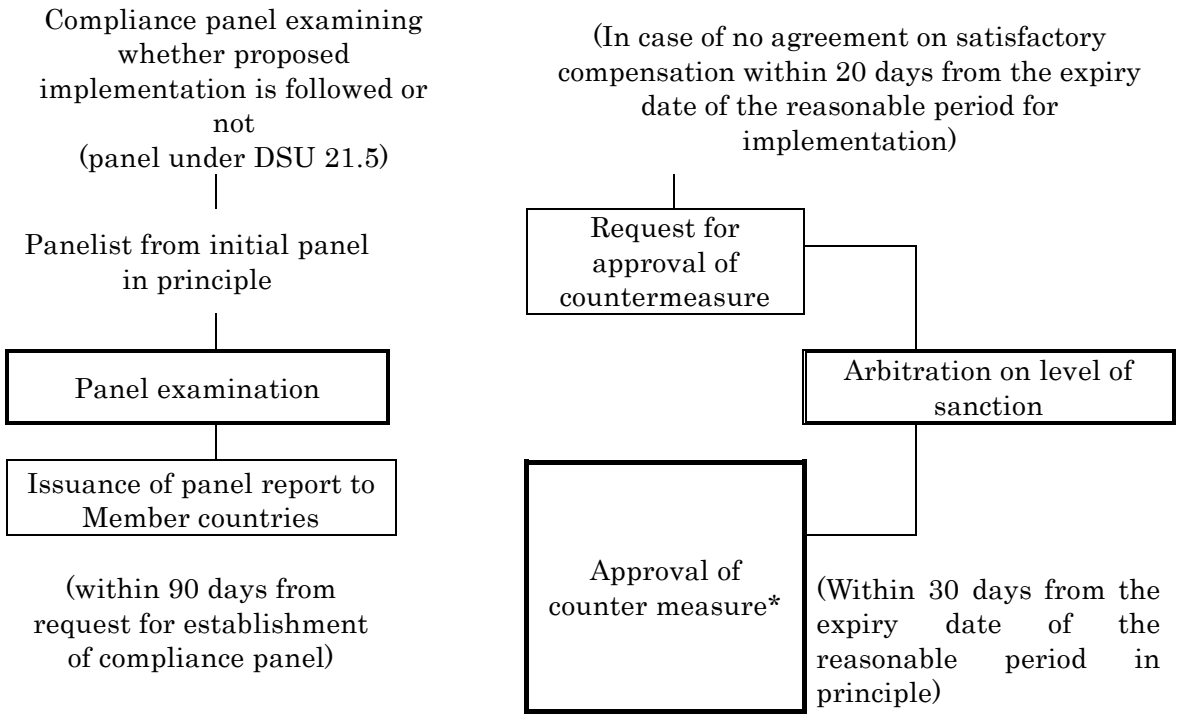
Name	Complainant	Stage
European Communities — Measures Affecting Trade in Large Civil Aircraft (DS316)	US	Compliance Panel
European Union (DS475)		
European Union and its Member States — Certain Measures Relating to the Energy Sector (DS476)	Russia	Consultations
Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy (DS479)	EU	Panel
European Union — Anti-Dumping Measures on Biodiesel from Indonesia (DS480)	Indonesia	Panel
China — Anti-Dumping Measures on Imports of Cellulose Pulp from Canada (DS483)	China	Panel
Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products (DS485)	EU	Panel
United States — Conditional Tax Incentives for Large Civil Aircraft (DS487)	EU	Panel
China — Measures Related to Demonstration Bases and common Service Platforms Programmes (DS489)	US	Consultations
Indonesia — Safeguard on Certain Iron or Steel Products (DS490, 496)	Taiwan, Vietnam	Panel

(As of January 2016)

Figure II-17-1 Flow of Dispute Settlement Process in DSU



<In case of dispute over implementation between the parties>



* In recent years, approval of countermeasures is usually requested after the compliance panel examination concludes.

Figure II-17-2 Past Requests for the Authorization of Countermeasures in the WTO Dispute Settlement Procedure

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
Australia: salmon (DS18: Canada)	Requested countermeasures of 4.5 million CAD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
EC: hormone-treated beef (DS26: U.S.)	Requested countermeasures of 202 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	Countermeasures of 116.8 million USD per year in total by the U.S. were authorized.	The U.S. imposed a supplemental tariff on imports from EC in July 1999.
EC: hormone-treated beef (DS48 (merged with 26): Canada)	Requested countermeasures of 75 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	Countermeasures of 11.3 million CAD per year in total by Canada were authorized.	Canada imposed a supplemental tariff on imports from EC in August 1999.
EC: banana (DS27: U.S.)	Requested countermeasures of 520 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	Countermeasures of 191.4 million USD per year in total by the U.S. were authorized.	The U.S. imposed a supplemental tariff on imports from EC in April 1999. The U.S. lifted its countermeasures by July 2001, following an agreement reached between the U.S. and EC on measures to settle this dispute.
EC: banana (DS27: Ecuador)	Requested countermeasures of 450 million USD per year in total. (Cease of certain obligations under GATS and TRIPS)	Countermeasures of 201.6 million USD per year in total by Ecuador were approved.	Not invoked.

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
Brazil: aircraft (DS46: Canada)	(i) Cease application of certain obligations under GATT Article 6 (ii) Cease of certain obligations under textile agreement (iii) Cease application of certain obligations under import license procedures agreement (iv) Addition of supplemental tariff (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff) Requested above countermeasures of 700 million CAD per year in total.	Countermeasures of 344.2 million CAD per year in total by Canada were approved.	Not invoked.
Canada: dairy products (DS103: U.S.)	Requested countermeasures of 35 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
Canada: dairy products (DS113 (merged with 103): NZ)	Requested countermeasures of 35 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
U.S.: FSC (DS108: EC)	Requested countermeasures of 4 billion 430 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and	Countermeasures of 4 billion 430 million USD per year in total by EC were approved.	EC increased tariff on imports from the U.S. in phases from March 2004 to January 2005. The U.S. abolished FSC tax system in

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	impose supplemental tariff)		October 2004.
U.S.: 1916 AD Law (DS136: EC)	Enactment of "mirror act"	Accumulated amount paid by EC companies based on the final decision of the court or reconciliation.	Not invoked. (The U.S. abolished the 1916 AD Law in December 2004.)
U.S.: 1916 AD Law (DS162: Japan)	Enactment of "mirror act"	No arbitration awarded. (1916 AD Law abolished during the interruption of arbitration.)	-
U.S.: Copyright Act Section 110 (DS160: EC)	Requested countermeasures of 1.22 million Euro per year in total. (Cease of obligations under TRIPS agreement and addition of special expenses at national borders)	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
U.S.: Byrd Amendment (DS217: Japan, Brazil, EC, India, Republic of Korea)	Concession equivalent to the amount distributed annually based on the Byrd Amendment or cease of obligations. ((i) distributed funds attributable to the AD duties/countervailing duties imposed on the products of the country (ii) among the distributed funds above, the total of the proportionately divided parts of distributed funds attributable to the AD duties/countervailing duties imposed on the products of member states that did not request the authorization of countermeasures)	Among the amounts distributed to U.S. industries each year, amounts attributable to exports from requesting companies in question multiplied by 0.72	EC in May 2005 and Japan in September 2005 imposed supplemental tariff on imports from the U.S. Republic of Korea, India and Brazil did not invoke.
U.S.: Byrd Amendment	Concession equivalent to	Among the amounts	Not invoked.

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
(DS217: Chile)	the amount distributed annually based on the Byrd Amendment or cease of obligations. (Among funds distributed annually to domestic companies in the U.S., amount attributable to exports from Chile)	distributed to U.S. industries each year, amounts attributable to exports from requesting companies in question multiplied by 0.72	
U.S.: Byrd Amendment (DS234: Canada)	Supplemental tariff equivalent to the amount of annual distribution based on the Byrd Amendment, cease of certain obligations under GATT Article 6 and subsidiary agreement. ((i) distributed funds attributable to the AD duties/countervailing duties imposed on the products of the country (ii) among the distributed funds above, the total of the proportionately divided parts of distributed funds attributable to the AD duties/countervailing duties imposed on the products of member states that did not request the authorization of countermeasures)	Among the amounts distributed to U.S. industries each year, amounts attributable to exports from requesting companies in question multiplied by 0.72	Canada imposed supplemental tariff on imports from the U.S. in May 2005.
U.S.: Byrd Amendment (DS234: Mexico)	Cease application of obligations pertaining to the area of products equivalent to the amount of annual distribution based on the Byrd Amendment. ((i) distributed funds attributable to the AD duties/countervailing duties imposed on the	Among the amounts distributed to U.S. industries each year, amounts attributable to exports from requesting companies in question multiplied by 0.72	Mexico imposed supplemental tariff on imports from the U.S. in August 2005. It imposed supplemental tariff on imports from the U.S. for a limited period from September to the end of October in 2006.

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	products of the country (ii) among the distributed funds above, the total of the proportionately divided parts of distributed funds attributable to the AD duties/countervailing duties imposed on the products of member states that did not request the authorization of countermeasures)		
Canada: Aircraft 2 (DS222: Brazil)	(i) Cease application of certain obligations under GATT Article 6 (ii) Cease of certain obligations under import license procedures agreement (iii) Addition of supplemental tariff (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff) Requested above countermeasures of 3 billion 44.2 million USD per year in total.	Countermeasures of 447.8 million USD per year in total by Brazil were approved.	Not invoked.
Japan: Apple (DS245: U.S.)	(i) Addition of supplemental tariff (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff) (ii) Cease of certain concessions related to SPS agreement (iii) Cease of certain concessions related to agricultural agreement Requested above	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	countermeasures of 143.4 million USD in total.		
U.S.: Softwood IV (DS257: Canada)	Requested countermeasures of 200 million CAD per year in total. (Cease application of concessions and other obligations under GATT 1994 (excessive taxation))	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
U.S.: Softwood V (DS264: Canada)	Requested countermeasures of 400 million CAD per year in total. (Cease application of concessions and other obligations under GATT 1994 (amount equivalent to excessive taxation through zeroing))	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
U.S.: Raw Cotton (DS267: Brazil)	(i) Requested countermeasures of 1 billion 37 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff) Considering it as insufficient, requested (ii) and (iii) below as well in addition to (i). (ii) Restriction on the protection of intellectual property rights (iii) Restriction on protection under GATS	Arbitration interrupted. (Now under the panel for the confirmation of implementation)	Not invoked. (Bilateral Agreement was concluded which provided Brazil would not impose the countermeasures as long as the mutually agreed framework is in effect.)
U.S.: OCTG (DS268: Argentina)	Requested countermeasures of 44 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose	Arbitration interrupted. (At the time of sunset review, ITC had a negative determination of	-

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	supplemental tariff)	continuing Anti-dumping measures for OCTG imported from Argentina.)	
U.S.: Softwood VI (DS277: Canada)	Requested countermeasures of 4 billion 250 million CAD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	No arbitration awarded. (Reached a bilateral agreement during the interruption of arbitration.)	-
U.S.: Cross-Border Gambling (DS285: Antigua and Barbuda)	(i) Restriction on protection under GATS (ii) Restriction on the protection of intellectual property rights Requested above countermeasures of 3 billion 443 million USD per year in total.	Countermeasures through the cease of obligation based on TRIPS agreement to an extent not exceeding 21 million USD per year in total.	Not invoked.
EC: Genetically Modified Products (DS291: U.S.)	(i) Cease of application of concessions and other obligations under GATT 1994 (ii) Cease of certain concessions related to SPS agreement (iii) Cease of certain concessions related to agricultural agreement Requested above countermeasures. (Level of the cease of obligations is equivalent to the annual lost earnings of the U.S. due to the measures taken by EC)	Arbitration interrupted. (Now before the panel for the confirmation of implementation)	-
US: Zeroing (DS294: EU)	Addition of supplementary tariff of 310.0 million USD per year in total. (Cease application of	Arbitration completed. (In February 2012, Japan and the US	-

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	concessions and other obligations under GATT 1994 and impose supplemental tariff)	agreed to a Memorandum of Understanding, pursuant to which the US amended the DOC regulation to abolish the zeroing measure. In August 2012, pursuant to the Memorandum, Japan withdrew a request for arbitration by withdrawing the request for countermeasures.)	
U.S.: Zeroing (DS322: Japan)	Addition of supplementary tariff of 248.5 million USD per year in total. (Cease application of concessions and other obligations under GATT 1994 and impose supplemental tariff)	Arbitration completed. (In February 2012, the EU and the US agreed to a Memorandum of Understanding, pursuant to which the US amended the DOC regulation to abolish the zeroing measure. In June 2012, pursuant to the Memorandum, the EU withdrew a request for arbitration by withdrawing the request for countermeasures.)	-
EU: Large Civil Aircraft (DS316: US)	(i) Termination of the application of concessions and other obligations under the 1994 GATT. (ii) Termination of horizontal or sectional commitments under the GATT.	Arbitration interrupted.	-

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
	Requested above countermeasures of approx. 7-10 billion USD per year in total.		
US: Large Civil Aircraft (Second Complaint) (DS353: EU)	(i) Termination of the application of concessions and other obligations under the 1994 GATT. (ii) Termination of the application of concessions and other obligations under the SCM Agreement. (iii) Termination of horizontal or sectional commitments under the GATT. Requested above countermeasures of approx. 12 billion USD per year in total.	Arbitration interrupted.	-
US: Clove Cigarettes (DS406: Indonesia)	(i) Termination of the application of concessions and other obligations under the 1994 GATT. (ii) Termination of the application of concessions and other obligations under the TBT Agreement. (iii) Termination of the application of concessions and other obligations under the Agreement on Import Licensing Procedures. Requested above countermeasures.	Arbitration terminated. (Reached a bilateral agreement during the interruption of arbitration.)	-
US: Certain Country of Origin Labelling (COOL) Requirements (DS384: Canada) (DS386: Mexico)	Suspension of the application of concessions and other obligations under the GATT 1994.	Countermeasures of 1,054.73 million USD per year in total by Canada and 227.76 million USD per year in total by Mexico	Not invoked.

Case	Article 22.2 (Request for the authorization of countermeasures)	Article 22.6 (Extent of countermeasure and result of arbitration)	Result of the countermeasure
		were approved.	

Figure II-17-3 Changes in the Number of Dispute Cases

(Note) The number of dispute cases covers cases in which consultations are requested, equivalent to the dispute cases numbered.

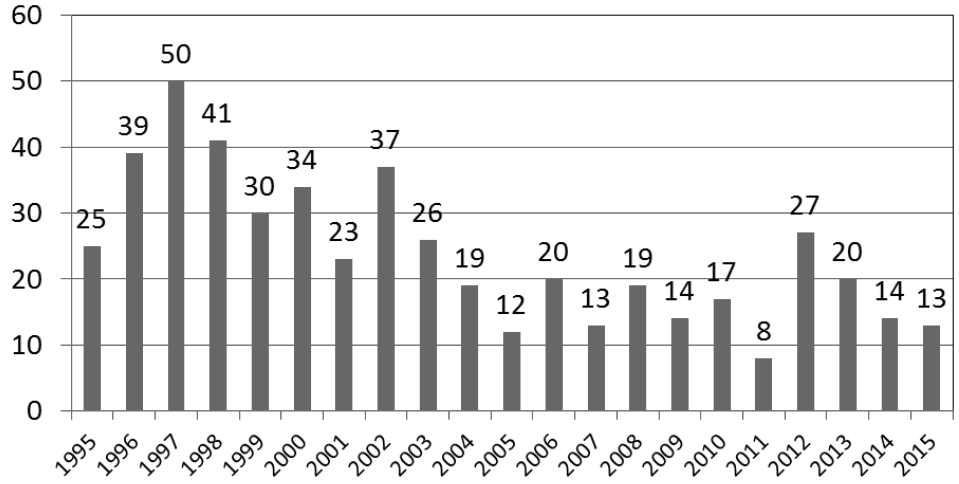


Figure II-17-4 Consultations and Panels Based on Files Made by Japan in the History of GATT (including some exceptions)

(1) Consultations* Refer to (2) below for cases being shifted to a panel.

Subject	Counter-part country	Supporting clauses	Files made in	Period of discussion	Other status
Import restrictions	Italy	Paragraph 1, Article 22	Jul 1960		
Chassis cab (raise of tariffs through changes in tariff classification)	U.S.	Paragraph 1, Article 22 Paragraph 1, Article 23	Aug 1980 Apr 1982	Jul 1981 Nov 1982	No request made for panel
VTR (import restrictions)	Austria	Paragraph 1, Article 22	Mar 1981	Mar 1981 Nov 1981	Import restrictions abolished
VTR (import restrictions)	EC (France)	Paragraph 1, Article 23	Dec 1982	No consultation	France normalized customs procedures
Semiconductor (unilateral measure)	U.S.	Paragraph 1, Article 23	Aug 1987	Aug 1987	No request made for panel
Polyacetal resin (abuse of AD duties)	Republic of Korea	AD Code Paragraph 2, Article 15	Sep 1991	Oct 1991 May 1992	U.S. filed to the panel in October 1991 Panel adopted in April 1993
Inclusion of paid AD tax in costs (abuse of AD duties)	EC	AD Code Paragraph 2, Article 15	Apr 1992	Oct 1992 Apr 1993	Provisions in the new AD Agreement on this issue were clarified
U.S. market of photographic films and photographic papers	U.S.	1960 decision pertaining to the consultation on restrictive practices	Oct 1996		Request for consultation was received from the U.S. in June 1996. Consultation following files by both Japan and the U.S. had not been implemented so far.

(2) Panels

Cases	Counter-part country	Supporting clauses	Panel organized in	Reports distributed in	Report adopted in	Conclusion
Settlement on the definition of subsidies (Zenith case)	U.S.	Working group was established without going through consultation	May 1977 (Working group)	Jun 1977	Jun 1977	Japan's position was accepted
AD regulation on parts by EC (abuse of AD duties)	EC	Paragraph 2, Article 23	Oct 1988	Mar 1990	May 1990	Japan's position was accepted
Audio cassette (abuse of AD duties)	EC	AD Code Paragraph 5, Article 15	92.10	Apr 1995	Not adopted	

Figure II-17-5 Panels Filed to Japan in the History of GATT

	Country filed	Panel organized in	Panel report adopted in (report to committees adopted in)	Conclusion of the panel, etc.
Import restrictions by industrialized countries (Article 23)	Uruguay	Feb 1962	Nov 1962	Some of restrictions on primary products placed by 15 industrialized countries were ruled to be violations of GATT.
Import restrictions of silk threads	U.S.	Jul 1977	May 1978	Concluded through bilateral agreement.
Import restrictions of leather	U.S.	Jan 1979	Nov 1979	Concluded through bilateral agreement.
Import restrictions of leather	Canada	Nov 1979	Nov 1980	Concluded through bilateral agreement.
Import restrictions of tobacco products	U.S.	Feb 1980	Jun 1981	Concluded through bilateral agreement.
Import restrictions of leather	U.S.	Apr 1983	May 1984	Violation to Article 11 of GATT was approved.
Import restrictions of leather footwear	U.S.	Jul 1985		Concluded through bilateral agreement.
Import restrictions of twelve agricultural products	U.S.	Oct 1986	Feb 1988	Application of GATT Article XI to national trade was ruled, and violation to said article was identified.
Tariffs, inland duties and labeling pertaining to alcohol beverages	EC	Feb 1987	Nov 1987	Violation to Article III of GATT by the liquor tax system was ruled.
Third-country monitoring for semiconductors, etc.	EC	Apr 1987	May 1988	Violation to Article XI of GATT by third-country monitoring was ruled.
Tariffs on SPF processed materials	Canada	Mar 1988	Jul 1989	Wide scope of discretion approved in relation to tariff classification, and violation to Article XI of GATT was ruled.
Import restrictions of beef and citrus fruits	U.S.	May 1988		Concluded through bilateral agreement.
Import restrictions of beef	Australia	May 1988		Concluded through bilateral agreement.
Import restrictions of beef	New Zealand	May 1988		Concluded through bilateral agreement.

COLUMN: ACTUAL STATUS OF COMPLIANCE ASSURANCE IN THE WTO DISPUTE SETTLEMENT PROCEDURE AND CAUSAL ANALYSES

1) INTRODUCTION

In the WTO dispute settlement procedure, a panel or the Appellate Body recommends that a measure inconsistent with a WTO Agreement be brought into conformity with the Agreement, but it usually does not indicate the specific compliance methods (paragraph 1, Article 19 of the DSU) (see Part II, Chapter 17, (6)). The remedy recommendation is only prospective (future correction of measures) and not retroactive (compensation for damage caused in the past).[1] The method used in practice for encouraging implementation of the recommendation when it is not implemented is almost always the suspension of concessions or other obligations (so-called countermeasures).[2] There is no system for directly enforcing compliance with a recommendation. However, in spite of such restrictions in the compliance procedure, the WTO dispute settlement procedure has functioned very effectively in actuality, as mentioned in II below.

It cannot be overlooked that measures of doubtful WTO consistency have been rectified in many cases through bilateral or multilateral negotiations in or outside the WTO framework because of the possibility that the case will become subject to the dispute settlement procedure (see II.2 below). While taking this point into consideration, this column focuses on the high compliance rate of respondent countries in cases where the Dispute Settlement Body ultimately finds their measures to be WTO-inconsistent. It also briefly studies the background and cause thereof in III below, based on the trends in recent years.[3]

2) EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT PROCEDURE

(1) Resolution before adoption of determination

A large number of cases are resolved before the panel or Appellate Body makes determination on the case. Such cases can be divided into the following categories: (a) cases in which the measures of the other country are rectified before the case becomes subject to the WTO dispute settlement procedure through use of bilateral consultations outside the WTO framework or the WTO's various committee meetings, (in such cases the claim of WTO inconsistency puts pressure on the country by indicating that WTO consultations might be requested); and (b) cases that are resolved during the WTO consultation phase of the WTO dispute settlement procedure. With regard to the cases of category (b), among the 502 cases for which consultations have been requested as of March 2016,[4] 235 cases[5] were resolved before the report of the panel or Appellate Body was

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[1] Compensation (see footnote 2 below) is a temporary measure pending the withdrawal of the measure (paragraph 7, Article 3 of the DSU). It is only to be used temporarily to promote action to take remedial action.

[2] Articles 22.1 and 22.2 of the DSU also provide for compensation as a method for encouraging implementation. However, it has only been used in a few cases for temporarily extending the compliance period. By mutual agreement it was used in the case of United States — Section 110(5) of US Copyright Act (DS160) for the three years during which measures were non-compliant (the parties resorted to arbitration [Article 25 of the DSU] in order to determine the level of nullification or impairment of benefits, with compensation in mind).

[3] For an empirical and multilateral study on the compliance system of the WTO dispute settlement procedure, see "WTO Funsō Kaiketsu Tetuzuki Ni Okeru Rikō Seido" (Compliance system in the WTO dispute settlement procedure) (Kawase and Araki ed., Sanseido, 2005).

[4] Unless otherwise mentioned, the number of cases is that as of March 1, 2016, and in even where the proceedings are consolidated through joint filing of complaints, the number is counted individually based on the DS Number (i.e., based on each complainant).

[5] These are the total number of cases in which measures were withdrawn or the two countries mutually agreed on a solution (for which notification is to be given to the WTO under paragraph 6, Article 3 of the DSU) before a panel

adopted,[6] which means that the proportion of cases that were resolved through agreement before the adoption of the determination after the consultations were requested was high, about 47%. In respect to trade remedy cases alone, consultations were requested in 245 cases, out of which 99 cases were resolved bilaterally. The proportion of these cases that were resolved before the adoption of the determination after the consultations were requested was about 40%. The percentage is slightly lower than the percentage for all cases, but still, a large number of cases were resolved through agreement before the adoption of a panel or Appellate Body report. These cases can be positively evaluated as those which could be efficiently resolved between the parties without requiring a ruling by a third-party body and without increasing the dispute cost.

In this regard, among cases in which Japan sought rectification of WTO-inconsistent measures of other countries, there were (a) cases where the measures were rectified before consultations were requested under the WTO dispute settlement procedure, such as the case of China's failure to fulfill tariff concessions for photographic film (see Part I, Chapter 1 [p. 25] of *2008 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA, BIT* -, etc.)[7] and the case of India's special additional tariffs on imported products (see Part I, Chapter 11, Tariffs 2)), and (b) cases where the measures were rectified in the consultation phase of the WTO dispute settlement procedures, such as the case of Russia's recycling fee on motor vehicles (see Part I, Chapter 9, National Treatment 1)).

As shown in Figure 1 below, the appeal rate is declining (as of 2015, a significant difference in the rate was observed between the first 10 years after the establishment of the WTO and the second 10 years). While various causes can be assumed, one is considered to be the enhancement of the persuasiveness and foreseeability of the panel determinations resulting from the accumulation of precedents.

<Figure 1: Changes in the Appeal Rates[8]>

Period	No. of panel determinations	No. of appeals	Appeal rate (%)
2011–2015	32	20	62.5
2006–2010	30	19	63.33
1996–2005	105	74	70.47
Total	167	113	67.66

and/or Appellate Body report was adopted (94 cases)and cases in which establishment of a panel was not requested after two years had passed from the request for consultations(141 cases).
Regularly updated information on the status of individual cases for which consultations were requested is published at the following website -- https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm. Unless otherwise mentioned, the number of cases uses the figures published on the website as of March 1, 2016.

[6] When the total number of requests for consultations reached 500 (November 2015), the WTO released an overview of the status of use of the dispute settlement procedure up to that point of time (https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm). The article indicates that among the 500 disputes that had been brought to the WTO, 110 were resolved bilaterally or withdrawn, 282 proceeded to the panel as phase, and for the remainder, the WTO was not notified of the outcome.

[7] In one case China imposed specific duties exceeding the tariff concession rates committed to upon China's WTO accession (when translated to *ad valorem* rates) on photographic films from 2002 to 2007 after the accession. As a result of raising this issue at bilateral consultations including regular vice-ministerial-level talks held between the Ministry of Economy, Trade and Industry and the Ministry of Commerce, bilateral talks at the APEC Trade Ministers' Meeting, as well as at the Chinese TRM of the WTO Market Access Committee, China gradually reduced the tariff rates to the level of the bound rates it committed to upon accession.

[8] The figures are from WorldTradeLaw net. They do not include the number of panel reports or the number of appeals in the compliance review phase.

(2) Compliance rate of panel and Appellate Body determinations

With regard to the rate of compliance with DSB recommendations in cases that were not resolved through negotiations between the parties and for which a panel or Appellate Body determination or recommendation was circulated and adopted by the DSB, the WTO announced that the rate "is very high, around 90%"[9] as of November 2015.

Since there are cases for which the evaluation of whether compliance was achieved may be divided, it is difficult to calculate an unambiguous compliance rate. Nevertheless, as of March 2016, there were about 190 cases in which a panel or Appellate Body report was adopted and for which the compliance period expired,[10] out of which slightly less than 20 became subject to a request for countermeasures or the compliance review procedure.[11] This suggests that the WTO's analysis that the compliance rate is about 90% reflects the actual situation generally well.

(3) Recommendation compliance status for cases in which Japan was a party

Looking at the compliance status of cases in which Japan was a complainant and its claims were approved by the panel or Appellate Body determination (Figure 3 below), out of nine cases (excluding DS445 for which the compliance status is being examined closely and DS454 for which the compliance period has not expired), compliance was completed in seven cases. Although the proportion of cases for which the compliance period has passed (four cases) is slightly high, the compliance rate is generally high. The two cases for which part of the recommendations have not been implemented (DS184 and DS217) relate to United States' AD measures, which are a category for which the compliance rate is relatively low (see III.2 below). Complete compliance to achieve WTO consistency is hoped for regarding these two cases, but the fact that the United States has made improvements and achieved compliance even in part and has shown an attitude to respect the recommendations is worth consideration.

The factors contributing to the high compliance rate include that Japan has closely examined its legal claims (such as placing emphasis on consistency with the rules and making claims that are highly likely to be found to be legally justified, and building legal claims while assuming the contents of panel/Appellate Body recommendations) and that Japan is using various tools for promoting compliance after obtaining a determination that measures are WTO-inconsistent (such as establishment of a reasonable compliance period, close examination of the compliance status of the respondent, coordination with joint complainants,[12] and countermeasures).

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[9] See the article in footnote 6.

[10] The number of cases was obtained by subtracting from the total number of requests for consultations, the sum of cases at a stage before the adoption of a report, those after the adoption of a report and before expiration of the compliance period, cases in which the basis for establishment of a panel lapsed due to suspension of the panel procedure for more than 12 months (paragraph 12, Article 12 of the DSU), and cases in which the WTO was notified of withdrawal or bilateral settlement.

[11] Of the cases for which the indisputability of compliance is relatively clear are 91 in which the respondent notified the WTO of the compliance and the claimant did not object to it and 23 in which the WTO was notified of an agreement on compliance between the parties.

[12] Many of the cases in which Japan was a complainant are those in which multiple countries were complainants (including joint-complainant cases) (all cases listed in Figure 2, except for DS184, are cases with multiple complainants). The question of how and why there are multiple complainants in a case differs for each case, but compared to cases with a single complainant, those with multiple complainants are advantageous in that the complainants can share the cost of collecting evidence, requesting compliance, etc.

<Figure 2: Compliance Status of Cases in which Japan Was a Complainant and Japan's Claims Were Approved by the Panel or Appellate Body Determination>

Case	Compliance status	Outline of the measures and the progress of compliance
Indonesia - Certain Measures Affecting the Automobile Industry (DS55)	Compliance completed (before expiration of the compliance period)	• Preferential measures including tax reduction were taken for vehicles that are designated as domestic vehicles. • After adoption of the panel report (July 1998), Indonesia completely abolished the measures before the expiration of the compliance period (July 1999).
Canada - Certain Measures Affecting the Automotive Industry (DS139)	Compliance completed (before expiration of the compliance period)	• See Part II, Chapter 1, 2. Major Cases (1). • After adoption of the panel and Appellate Body reports (June 2000), Canada abolished the measures before the expiration of the compliance period (February 2001).
United States - Anti-Dumping Act of 1916 (DS162)	Compliance completed (compliance period expired / countermeasures requested)	• See Part II, Chapter 6, 2. Major Cases (1). • After adoption of the panel and Appellate Body reports (September 2000), the compliance period expired at the end of December 2001, and the complainant requested suspension of concessions. While the matter was referred to the arbitration set forth in paragraph 6, Article 22 of the DSU, the arbitration was suspended in response to signs of amendment of the law by the United States. The United States abolished the Anti-Dumping Act in December 2004 and achieved compliance.
United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184)	Compliance completed in part	• See Part I, Chapter 3 "The United States" Anti-Dumping Measures 3.(3). • After adoption of the panel and Appellate Body reports (August 2001), the compliance period (15 months) was extended three times in response to signs of amendment of the law by the United States. • The United States achieved a partial remedy by 2002, and abolished the AD measures as a result of sunset reviews in 2010, but has yet to amend the law in response to the determination of WTO-inconsistency.
United States - Continued Dumping and Subsidy Offset Act of 2000 (DS217)	Compliance completed in part (countermeasures implemented)	• See Part I, Chapter 3 "The United States" Anti-Dumping Measures 3. (1). • After adoption of the panel and Appellate Body reports (January 2003), the compliance period (December of the same year) expired. Multiple complainants

		implemented countermeasures (suspension of concessions) in 2005. Japan and the EU have been extending the countermeasures every year (while not implementing the countermeasures in certain years). • The United States abolished the Byrd Amendment in 2006, but continues to distribute the amount collected from taxes imposed on goods that were imported in or before October 2007 pursuant to the Byrd Amendment.
United States - Definitive Safeguard Measures on Imports of Certain Steel Products (DS249)	Compliance completed (before adoption of reports)	• See Part II, Chapter 8, 2. Major Cases (5). • The United States removed the measures before the panel and Appellate Body reports were adopted (the reports were adopted in December 2003, and the measures were removed in the same month).
United States - Measures Relating to Zeroing and Sunset Reviews (DS322)	Compliance completed (compliance period expired / countermeasures requested)	• See Part I, Chapter 3 "The United States" Anti-Dumping Measures 3. (2). • After adoption of the panel and Appellate Body reports (August 2009) in the compliance review procedure, the matter was referred to the arbitration set forth in paragraph 6, Article 22 of the DSU. In February 2012, the parties concluded a Memorandum of Understanding (MOU) for resolving the dispute. In the same month, the United States amended the USDOC regulations and abolished the zeroing practice pursuant to the MOU.
European Communities and its Member States - Tariff Treatment of Certain Information Technology Products (DS376)	Compliance completed (compliance period expired)	See Part I, Chapter 4 "European Union" Tariffs 2) Tariff Classification Issue on the Treatment of Products Covered by Information Technology Agreement (1) WTO Panel Discussions on Target Products. • After adoption of the panel report (September 2010), the compliance period (June 2011) expired, the EC changed the tariff classifications by amending the tariff regulations over the period from June 2011 to October 2013 and made the target products tariff-free (a tax reduction effect worth 14 million yen even for multifunctional digital machines alone).
Canada - Certain Measures Affecting the Renewable Energy	Compliance completed (compliance period expired)	• See Part II, Chapter 2, 2. Major Cases (5). • After adoption of the panel and Appellate Body reports (May 2013), the compliance period (March 2014) was extended once to June of the same year. In June 2013,

Generation Sector (DS412)		Canada notified the DSB of interim remedies (abolishing large-scale projects under the feed-in-tariff program in June 2013, and lowering the local content requirement rate for small-scale projects in August 2013); in July 2014, it abolished the local content requirements through amendment of the law.
China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS433)	Compliance completed (before expiration of the compliance period)	• See Part II, Chapter 3 "Quantitative Restrictions," <Reference> Export Restrictions, 4. Major Cases (5). • After adoption of the panel and Appellate Body reports (August 2014), compliance was achieved before expiration of the compliance period (May 2015) (export quotas were abolished in January 2015, and export duties lowered in May 2015).
Argentina - Measures Affecting the Importation of Goods (DS445)	Compliance period expired / compliance status under close examination	• See Part II, Chapter 3, 2. Major Cases (4). • After adoption of the panel and Appellate Body reports (January 2015), the compliance period expired (December 2015). Argentina notified the DSB in January 2016 that it has completed compliance, but the joint complainants are closely examining the compliance status.
China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan (DS454)	Before expiration of the compliance period	• See Part I, Chapter 1 "China" Anti-dumping and Countervailing Measures [Individual Measures](2). • After adoption of the panel and Appellate Body reports (October 2015), a compliance period of nine months and 25 days was set.
Ukraine - Definitive Safeguard Measures on Certain Passenger Cars (DS468)	Compliance completed (after adoption of a report and before establishment of a compliance period)	• See Part II, Chapter 8, 2. Major Cases (8). • After adoption of the panel report (July 2015), Ukraine abolished the measures at the end of September 2015.

Meanwhile, Japan's compliance status of cases in which Japan was a respondent and Japan's claims were not approved by the panel or Appellate Body determination is as shown in Figure 3 below. While the number of cases itself is limited, Japan has completely achieved compliance although the compliance period was expired in some cases.

<Figure 3: Japan's Compliance Status of Cases in which Japan Was a Respondent and Japan's Claims Were Not Approved by the Panel or Appellate Body Determination>

Case	Compliance status	Outline of the measures and the progress of compliance
Japan - Taxes on Alcoholic Beverages (DS8, 10, 11)	Compliance completed (compliance period expired / compensation agreed)	• See Part II, Chapter 2, 2. Major Cases (1). • After adoption of the panel and Appellate Body reports in November 1996, compensation was agreed in December 1997, and after the compliance period (February 1998) expired, compliance was achieved in October 2000.
Japan - Measures Affecting Agricultural Products (DS76)	Compliance completed (compliance period expired)	• The measure to test and confirm the efficacy of the quarantine treatment for each variety of certain agricultural products including apples was found to be inconsistent with the Agreement on Sanitary and Phytosanitary Measures (SPS) (Article 2.2, Article 5.6, etc.). • After adoption of the panel and Appellate Body reports in March 1999, a bilateral agreement was reached in August 2001 after the expiration of the compliance period (the end of December 1999).
Japan - Measures Affecting the Importation of Apples (DS245)	Compliance completed	• The measure of quarantine concerning fire blight, which was a requirement for lifting of the import ban on apples, was found to be inconsistent with the SPS (Article 2.2, Article 5.6, etc.). • After adoption of the panel report in the compliance review procedure (July 2005), the DSB was notified of a bilateral agreement (paragraph 6, Article 3 of the DSU) in August 2005.
Japan - Countervailing Duties on Dynamic Random Access Memories from Korea (DS336)	Compliance completed	• See Part II, Chapter 7, 2. Major Cases (2). • After adoption of the panel and Appellate Body reports (December 2007), Japan implemented a countervailing duty measure based on the result of a new investigation in September 2008 immediately after the expiration of the compliance period (August 2008); it abolished the measure in April 2009 after conducting changed circumstances reviews. • Korea requested establishment of a compliance review panel in September 2008, but requested the panel to suspend its work in March 2009. The panel lapsed in March 2010 (paragraph 12, Article 12 of the DSU).

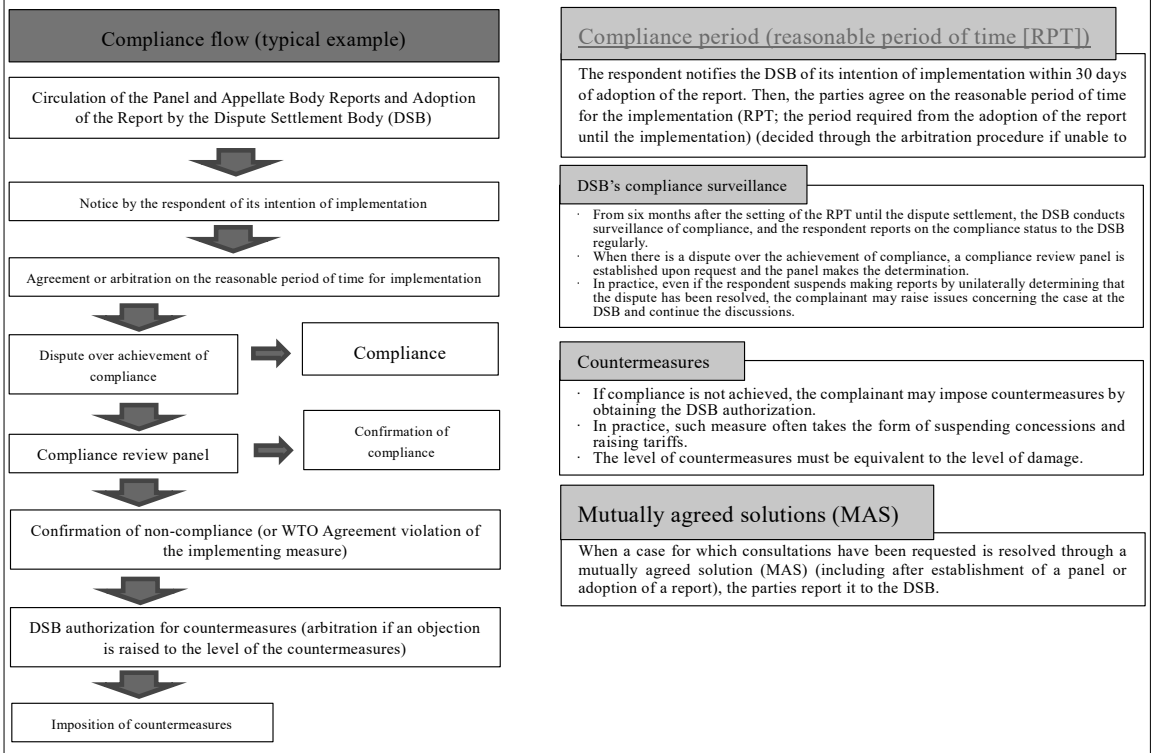
3) BACKGROUND AND CAUSAL ANALYSIS

(1) Legal nature and actual state of recommendations and countermeasures

(a) Outline of the compliance scheme of the WTO dispute settlement procedure: the nature of recommendations and countermeasures

Under the compliance scheme of the WTO dispute settlement procedure, member countries are prohibited from imposing sanctions (unilateral measures) against violation of obligations under the WTO Agreements solely based on their own judgment; they must follow the procedures set out in the DSU (Article 23) (see Part II, Chapter 15). When the respondent fails to comply with the recommendations, as a means to urge the respondent to achieve compliance, the complainant may impose countermeasures, such as suspension of concessions, based on authorization by the DSB (paragraphs 1 and 2, Article 22 of the DSU). The level of countermeasures must be equivalent to the level of the nullification or impairment (paragraph 4, Article 22 of the DSU), and must not include measures of a punitive nature.[13] The outline of other compliance processes is shown in Figure 4 below.

<Figure 4: Compliance processes of the WTO dispute settlement procedure>



From the viewpoint of compliance assurance, Panel and Appellate Body recommendations in the WTO dispute settlement procedure (which become the DSB's recommendations by being adopted by the DSB) have the following limitations in comparison to domestic courts and commercial or investment arbitration determinations. First, in light of the objectives of international law to respect national sovereignty, etc., under international law it is generally construed that, in a dispute between countries, a party to the dispute cannot be directly forced to perform obligations against its will. Thus, compulsory execution is not possible. In addition, as mentioned above in 1), recommendations request a prospective (future) remedy for WTO-inconsistent measures, and not retroactive compensation of past damage. At the same time, the means used for urging compliance

[13] European Communities — Regime for the Importation, Sale and Distribution of Bananas (DS27), Recourse to Article 22.6 Arbitration Report, Decision by the Arbitrators, para. VI.3.

is almost always suspension of concessions; use of monetary compensation is very limited.

(b) Actual state of use of countermeasures

To date, authorization for countermeasures (paragraph 2, Article 22 of the DSU) has been requested in 38 cases (see Part II, Chapter 17, Figure II-17-2),[14] and countermeasures were actually imposed in eight.[15] They respectively correspond to about 20% and about 4% of the cases for which recommendations were adopted and the compliance period expired (about 190 cases).[16] Thus, the proportion of cases in which authorization for countermeasures is requested is not high, and the actual imposition of countermeasures is relatively rare.

The respondent in cases where the authorization for countermeasures was requested is mostly a developed country, particularly the United States.[17] These are cases in which compliance is not achieved easily, such as subsidy cases, US AD measure cases, and cases on transatlantic issues (see 2 below). In addition, the United States has become a respondent in a notably large number of cases as compared to other member countries.[18] Compliance has been achieved in many of these cases, and that cases in which compliance has not been achieved are relatively limited among all the cases in which the United States became a respondent.

(2) Causal analysis of non-compliance cases

(a) Non-compliance cases / counter-filing cases

Conventionally, the following cases have been discussed as famous non-compliance cases: (a) subsidy cases (such as shipbuilding subsidies in the EU and the Republic of Korea[19]; aircraft subsidies in Canada and Brazil[20]; and aircraft subsidies in the United States and the EU[21]); (b) SPS cases (Australia - Measures Affecting Importation of Salmon[22]); (c) the so-called transatlantic issues[23] (European Communities - Measures Concerning Meat and Meat Products (Hormones)[24]; European Communities - Regime for the Importation, Sale and Distribution of Bananas[25]; United

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[14] The arbitration determination under paragraph 6, Article 22 of the DSU was made in 20 of these cases.

[15] The breakdown of the eight cases is as follows: four cases related to the United States - Continued Dumping and Subsidy Offset Act of 2000 (DS217/DS234) (imposed by the EU, Japan, Canada, and Mexico) (see Part I, Chapter 3 "The United States" Anti-Dumping Measures 3.(1)); one case related to the United States — Tax Treatment for "Foreign Sales Corporations" (DS108) (imposed by the EU) (see Part II, Chapter 7, 2. Major Cases (8)); two cases related to the European Communities — Measures Concerning Meat and Meat Products (Hormones) (DS26 and DS48) (imposed by Canada and the United States) (see Part II, Chapter 11, 2. Major Cases (1)); and one case related to the European Communities — Regime for the Importation, Sale and Distribution of Bananas (imposed by the United States) (see Part II, Chapter 15, 2. Major Cases (3)). The background leading to imposition of countermeasures can be analyzed in the same manner as the background for non-compliance (see 2(2)). (For the specific background of each case, see the section on major cases in each relevant chapter).

[16] Among the cases listed in Figure 2 in which Japan was a complainant, Japan applied for countermeasures in three (DS162, DS217, and DS322) and actually imposed countermeasures in only one (DS217).

[17] The breakdown of the 38 cases is as follows: the United States — 26 cases; Australia — one case; Brazil — one case; Canada — three cases; the EU — six cases; and Japan — one case.

[18] See the article in footnote 6. The top ranking is the United States, at 124 cases, followed by the EU, at 82 cases, and China, at 33 cases (Japan — 15 cases).

[19] DS273, DS307

[20] DS46, DS70, DS71, DS222

[21] DS316, DS317, DS347, DS353, DS487

[22] DS18

[23] Cases between the United States and Europe which are pending under the dispute settlement procedure where the two parties came to file multiple cases against each other because of the other party's non-compliance.

[24] DS26

[25] DS27

States - Tax Treatment for "Foreign Sales Corporations"[26]; United States - Section 110(5) of US Copyright Act[27]; and United States - Section 211 Omnibus Appropriations Act of 1998[28]); and (d) US AD measures (such as United States - Continued Dumping and Subsidy Offset Act of 2000[29]; and United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)[30]). Among these, (b) and (d) are cases where compliance is not achieved in spite of recommendations to remedy the measures (non-compliance cases), whereas (a) and (c) are cases where, in addition to non-compliance in the first case, the respondent filed another case under the dispute settlement procedure as if to counter the first case (counter-filing cases).

A notable trend in recent years is that China has actively participated in the dispute settlement procedure both as a complainant and a respondent after its WTO accession. When it has received recommendations as a respondent, it has achieved compliance relatively quickly, and no notable non-compliance cases have been observed. (For example, China has achieved compliance within the compliance period in the case of China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum[31]).

Meanwhile, examples of cases that appear to be counter-filing cases by China include the case where China imposed special duties on Japanese automobiles in response to Japan's provisional safeguard measures against China on three products, including leeks (see Part II, Chapter 8, 2. (Reference)), and where, in the case of the United States - Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (DS399), China requested consultations immediately after the United States imposed its measures (see Part II, Chapter 8, 2.(6)). However, the former was a measure taken before China's WTO accession, and both cases were responses to the other country's trade remedy measures instead of the other country's use of the dispute settlement procedure. Accordingly, they do not correspond to counter-filing cases in the sense that a countering measure was taken against use of the dispute settlement procedure or disadvantageous determination made in such procedure.

(b) Background and impact of non-compliance cases

The factors that could affect smooth compliance include the following:

- Design of the measure/gravity of the remedial process: If the Congress' involvement is required for the remedy, the respondent could lean toward non-compliance.[32] In fact, the recommendation compliance rate is relatively low for cases related to US AD measures if legislation by the Congress is required.
- Characteristics of the measure: If the purpose of the regulation is environmental conservation, consumer protection, etc., an argument can easily be raised that the measure falls within the scope of regulatory discretion, and political opposition tends to become strong. In this respect, giving a convincing explanation that the WTO compliance will be beneficial for the implementing member country itself (common interest through WTO-compliance) (3 (iv)

[26] DS108
[27] DS160
[28] DS176
[29] DS217, DS234
[30] DS294, DS322
[31] DS431, DS432, DS433
[32] The domestic legal effect of international law in the implementing country's legal system and the mode of domestic implementation of the WTO Agreements (for example, in the United States, WTO Agreements are regarded as one type of administrative agreement concluded by the government based on authorization by the Congress, and domestic law stipulates that if federal law and a WTO Agreement conflict, the former is to take precedence) could also affect the level of difficulty of amendment of a law by the Congress on the grounds of WTO inconsistency.

below) is considered to be important for contributing to a determination that achieving compliance would be beneficial even when considering the regulatory purpose of the measure.

- Scale of the countermeasure (suspension of concessions): Generally, a countermeasure of a larger scale has a stronger effect of promoting remedial action.

With regard to the impact and consequent effects of non-compliance, there are actually cases where use of a dispute settlement procedure evokes another dispute settlement procedure and becomes a "trade dispute" as in counter-filing cases, but it would also be possible to evaluate such cases as succeeding in depoliticizing trade disputes, in that the trade dispute are concentrated in the legal framework of the WTO dispute settlement procedure and are detached from diplomatic relations and political issues as much as possible.

(3) Causal analysis of the high implementation rate

As mentioned above in 1 and 2(2), countermeasures are not imposed frequently, and respondents have a certain level of incentive for non-compliance, but still, the implementation rate of recommendations in the WTO dispute settlement procedure is high in reality. This appears to be because the losing country voluntarily implements the recommendations in many cases. Why do losing countries do this with high probability? The probable factors are listed below in (i) through (iv), though they are not necessarily exhaustive.

Meanwhile, it should be taken into account that, while the direct implementing entity is the government, whether the government can smoothly implement the recommendations is critically affected by domestic interested parties that are affected by the government measure in question. Such parties include both parties that are benefitting from and seeking continuance of the measure and those that are adversely affected and seeking abolishment of the measure. For example, among the four factors below, the factors that affect the aspect of whether the government can persuade the domestic interested parties seeking continuance of the measure are considered to be the burden incurred from the imposition of the countermeasure ((i) below) and the persuasive power and credibility of the panel and Appellate Body reports ((iii) below).

(i) Institutional security: As shown in Figure 4 above, apart from countermeasures, there is a compliance status surveillance system by the DSB for promoting voluntary compliance. The DSB involves in various compliance processes including notice of the respondent's intention in respect of implementation of the recommendations, establishment of a reasonable period of time (RPT) (paragraph 3, Article 21 of the DSU), and authorization of countermeasures (suspension of concessions) (paragraph 2 of Article 22 of the DSU). As a result of surveillance by the DSB, the respondent becomes more strongly aware that, if it selects non-compliance, it will bear an increasing procedural burden of external explanation and its reputation will be affected.

(ii) Interchangeability of the positions of a complainant and respondent: As in the case of China in 2(1) above, a country that is more likely to become a complainant in the future is more likely to be inclined to determine that compliance should be achieved when there is a determination of WTO-inconsistency, so as not to give potential respondents an excuse for not implementing recommendations in the future.

(iii) Persuasive power and credibility of refined panel and Appellate Body reports based on accumulated precedents: The higher the logical quality of the panel and Appellate Body report is, the more likely the respondent will be able to persuade domestic interested parties to remedy the measure on the basis of the report's high international credibility and external pressure. In

addition, if the norm becomes clearer through the accumulation of precedents, it is likely to have the effect of preventing the introduction of WTO-inconsistent measures (see II.1 above).

(iv) Securing and enhancing "common interest" (stabilization and maintenance of a free trade order)[33] among the member countries through observing the WTO Agreements: By securing a free trade order, the member countries will be in a win-win relationship in the long term. "Common interest" (stabilization and maintenance of a free trade order) in the context of the WTO is economic interest, and the fact that such interest can be easily determined to be beneficial for a country may be one reason that common interest has an effect of promoting compliance. Meanwhile, the "common interest" of stabilization and maintenance of a free trade order involves a consideration that, unless a country remedies a measure that has been explicitly determined to be WTO-inconsistent by a third-party body, it would give an excuse for allowing other member countries to implement WTO-inconsistent measures, which is the same as in (ii) above.

Regarding this point, Japan has advocated a rule-based approach based on international rules including the WTO Agreements in examining trade issues. On top of this, Japan should assert more intentionally and persuasively that the observance of rules contributes to promoting "common interest" and is, therefore, also beneficial for the implementing country, from the viewpoint of promoting the observance of rules (including but not limited to the implementation of recommendations) by other countries (see 2(2) above). For Japan, the WTO is an important arena where all member countries are subject to a fair discipline based on the same basic international trade rules - WTO Agreements - and the WTO dispute settlement procedure supports the basis of the WTO system by securing appropriate application of those rules. Japan's continued effort to persuasively assert the common interest that can be achieved through the observance of rules would be significant also for promoting the use, maintaining the vitality, and further increasing the effectiveness of the WTO dispute settlement procedure and the WTO framework.

[33] There are various concepts, such as the comparative advantage theory, regarding the substantive contents of stabilization and maintenance of a free trade order as common interest. Meanwhile, close examination and identification of common interest are beneficial for discussing whether the dispute settlement procedure should be modified or improved (e.g., whether monetary compensation is required).