Proceedings of the International Conference on Global Politics and Socio-Humanities
DOI: 10.54254/2753-7048/21/20230080

Research on the Retaliation System in the WTO's Dispute Settlement Mechanism

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Abstract: When conducting trade activities, due to the needs of countries' national interests or due to the general international context, it is inevitable that some acts will be used to disrupt the balance of world trade transactions, thus causing conflicts between two or more nations. If a dispute arises under the framework of the World Trade Organization (WTO) agreement, one party will be deemed to be in breach of the WTO agreement, and the injured party will resort to the WTO Dispute Settlement Body(DSB), and if the "losing party" does not fulfill the agreement, then the "winning party" will request the WTO Dispute Settlement Body to retaliate against it. If the "losing party" does not fulfill the agreement, then the "winning party" will request the DSB to authorize retaliation against it, to stop the behavior of the defaulting party and get certain compensation. Therefore, the retaliation system of the WTO dispute settlement mechanism is of great significance to maintaining the international economic order. The establishment of this system is of great practical significance for resolving disputes between disputing parties and achieving the rebalancing of the international economic order. However, along with the continuous occurrence of various dispute cases, and in the increasingly frequent use of the WTO panel members, member states and academics have gradually recognized certain shortcomings of the retaliation system, resulting in this system for certain violations of the agreement, often helpless. In this regard, all countries have improved the retaliation system under the WTO dispute settlement mechanism from their own or overall interests. This paper discusses the shortcomings of the retaliation system in the WTO dispute settlement mechanism and then makes some suggestions on how to modify and improve it.

Keywords: WTO, dispute settlement mechanism, retaliation system, suggestions

1. Introduction

For a long time, the retaliation system of the WTO dispute settlement mechanism has been difficult to be effectively applied in practice due to many reasons, such as the international status and economic and political power of the complaining party.

Although the retaliation system under the WTO dispute settlement mechanism has been greatly developed compared with the retaliation system in the GATT period, the existing legal provisions and the experience of dispute settlement over the years still have many defects in various fields, for example, the application of Article 21.5 and Article 22 of the Dispute Settlement Understanding (DSU) in the procedure has always been controversial for both parties to the dispute, which greatly

DOI: 10.54254/2753-7048/21/20230080

affects the efficiency of the WTO dispute settlement procedure. The efficiency of the operation of WTO dispute settlement procedures will also affect the normal operation of the WTO multi-party trade system. But even with such loopholes, the role of the retaliation system cannot be denied, the current WTO dispute settlement mechanism has clear requirements on the conditions and principles for the implementation of the retaliation system and places the retaliation system within the framework of the multilateral system. One of the open questions surrounding it is whether it will strengthen the power of developed countries, or stimulate fresh competition from developing countries. But one thing must be clear, that is, in the future of international trade, the retaliation system will increasingly play a positive role in areas such as the continued expansion of openness and the promotion of long-term development, and better maintain the authority and effectiveness of the multilateral economic and trade system. Therefore it is very meaningful to strengthen the study of the retaliation system, how to prevent the politicization of trade policy, how to prevent trade barriers, and how to work together to promote the long-term stable development of the world multilateral trading system, which also needs to be continuously discussed by experts and scholars.

2. Literature Review

2.1. Studies on the Retaliation System

Kym argues that against the retaliation regime [1], the enforcement objection procedure, as set out in Article 21(5) of the German Federal Court of Justice has adverse consequences, thus denying the prosecuting party the authority it deserves [1]. Lawrence discusses his views on the trade penalty regime and gives the rationale for government responses to WTO rule violations [2], as well as specific practical mechanisms and recommendations for reform [2]. Spadano analyzes the link between cross-retaliation and developing countries and states that developing countries should use the cross-retaliation system to achieve effective retaliation against developed countries [3]. Limenta explores the effectiveness of the retaliation regime and the objectives of the regime from three perspectives [4], especially about the objectives of the regime. Limenta argues for the inclusion of the purpose of "promoting reconciliation" in the retaliation system to enhance the effectiveness of the system by rejecting the "enforcement theory" [4].

2.2. Research on WTO Dispute Settlement Mechanisms

Golman and Wilfred's study focuses on the notable absence of South Pacific Island countries in the WTO dispute settlement mechanism process and attempts to explain why participation is weak or underutilized [5], with debate continuing about whether it serves the interests of developing or least developed members [5]. The findings of Wood & Wu show that the key factors determining a developing country's ability to initiate a dispute against another country include export intensity [6], retaliatory capacity, economic strength, and economic threats from potential defendants. This implies that not all developing countries can participate in the trade dispute settlement mechanism, so the WTO dispute settlement system has relative legitimacy [6]. Kennedy examines the Dispute Settlement Union [7], the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement on Tariffs and Trade (GATT) 1994, and other WTO agreements on intellectual property issues arising from issues that have been comprehensively reviewed. These issues range from procedural pitfalls to substantive treaty interpretation conflicts, and remedies, including cross-retaliation [7]. Boklan identifies several possible objectives for applying the dispute settlement mechanism [8]. They can be to induce the state to comply with its obligations; to compensate for damage caused to domestic industries and national producers; to rebalance the concessions offered by the offending and injured state; and to punish the offender. Understanding the objectives of concession suspension is crucial and is related to determining the appropriate level

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of retaliation; the criteria for considering the number of concessions to be suspended, and the sector of trade in which the concessions are suspended [8].

3. Research Methodology

3.1. Historical Research Method

The origin of the WTO retaliation system can be traced back to the Greek era of the concept of "an eye for an eye and a tooth for a tooth", which existed not only in ordinary international conventions but also in the predecessor of WTO, GATT. The current retaliation system results of the adjustment and development of the WTO dispute settlement mechanism through some of its original provisions. Therefore, this paper uses the historical research method to follow the phylogeny of the retaliation system, to grasp the value of the retaliation system better, better understand the legal ideas and connotations contained in the provisions of the retaliation system, as well as the legal meaning of the provisions of the WTO retaliation system.

3.2. Method of Legal Hermeneutics Research

Using the research method of legal hermeneutics, we analyze the relevant provisions of the retaliation system involved in the dispute settlement mechanism and other rules, explore the scope of application and conditions of the retaliation system, discover the ambiguity of the existing system, and provide more targeted countermeasures from the text of the agreement.

3.3. Case Study Method

So far, the WTO Dispute Settlement Body has dealt with several cases involving the retaliation system. Because most cases are very representative and complex, they often require lengthy discussions among the Full Court, the Appellate Body, and the Arbitration Body before making a final decision. Therefore, to better understand the punishment mechanism of WTO, this article will analyze the WTO retaliation system from the relevant cases to get more legal inspiration from the judgment and to conduct a more comprehensive and profound discussion on the retaliation system.

4. Deficiencies in the WTO Dispute Settlement Mechanism Retaliation System

On March 21, 2003, the Government of Antigua made a formal referral to the WTO Dispute Settlement Committee regarding decisions made by the U.S. federal and local authorities that would have an impact on cross-border gaming and the provision of gaming operations. On June 21, 2007, the Government of Antigua filed an application with the WTO for approval to terminate its liability under the TRIPS Agreement and to claim $3.443 billion. The U.S. argued on July 23rd over the extent of retaliation and how and why the WTO dispute mechanism works, then only agreed to provide $500,000 a year in damages. The dispute settlement body reached an agreement on July 24, 2007, deciding on the extent of retaliation. The World Trade Organization Arbitral Tribunal rendered its final judgment on December 21, 2007. The Government of Antigua is entitled to seek the approval of the WTO Arbitration Committee to terminate obligations in five areas, namely copyright and neighboring rights, trademarks, industrial designs, patents, and protection of confidential information [9].

4.1. Gaps in the Provisions of the Retaliation System

Article 22(3) of the DSU regulates the conditions and requirements when a successful party applies for approval of parallel retaliation, and cross-retaliation (including cross-sectoral retaliation and

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cross-agreement retaliation). However, a careful examination and analysis reveal that some of these provisions are not very clear and are not accompanied by detailed instructions. This provision also provides the conditions of "impracticable" "ineffective" "inefficient" and "very serious". When the respondent party breaches the agreement and causes great damage and loss, the prevailing party can request the suspension of concessions and performance of other agreements, while the "impracticable", "ineffective" and "very serious " three conditions are not detailed. But the vagueness of the rules gives considerable autonomy to both parties to the dispute as well as to the arbitral tribunal. In the U.S. Gambling case (DS285), the winning Antigua asked the DSB for permission to cross-retaliate, but the final report produced by the panel nevertheless broke down the negotiations. This has left countries at a loss when it comes to initiating mutual retaliation to protect their interests. Although the WTO dispute resolution mechanism has made relatively detailed provisions on the time limits for the application of arbitration claims and rulings, the time limits for the application of this provision tend to extend the time limits for the application of arbitration claims and rulings, thereby violating the WTO principle of rapid response. The U.S. gaming case has been postponed for more than four years, and the U.S. did not follow the views of the panel and the appellate body but eventually adopted the GATS approach of amending the specific obligations it made in its Statement of Preferences in Trade in Services, resulting in simply shelving the case [10].

4.2. Retaliation System Is Contrary to the Free Trade Theory

The use of a trade retaliation system not only brings great trouble to the free trade exchanges among member countries, but also leads to competition among member countries, constantly raises the access threshold, and to a certain extent, promotes a kind of trade protectionism. Since developing countries have a substantial degree of external dependence, they will inevitably lose their economic rights and interests if they take retaliatory measures, so this "retaliatory" and "reciprocity" is often "superficial" and "fair". This "retaliatory" and "reciprocity" is often "inherently unfair" under the guise of "apparent fairness" [11]. Although the Antigua government prevailed on a legitimate basis, its final pushback was weak because it did not have much impact on the U.S., forcing it to comply with the recommendations and rulings of the WTO dispute settlement mechanism, and thus it did not have access to an effective remedy for a long time. For example, Antigua will pick and choose some of these industries that can deal a huge blow to the U.S. In this case, it will find ways to suppress other industries that will also deal a huge blow to their economy, so retaliation will increase their economic burden and fuel trade protectionism.

4.3. The Economic Power of the Disputants Influences the Effectiveness of the Retaliation

In the case of U.S. gambling (DS285), Antigua, a North American island separated from the United States by an ocean, has a weak internal economic base and a simple type of gambling; tourism is the largest economic component, which accounts for approximately 74.2% of its Gross Domestic Product (GDP), while offshore financial institutions and online gambling establishments are Antigua's main financial revenue, while agriculture is share of the national economy is declining and food is not yet available, and, its industrial base is relatively weak, dominated by manufacturing and construction industries. Moreover, Antigua and the United States have a close trade relationship, with the help and tourists from the U.S., both of which are its main trading partners. If Antigua had taken a tough countermeasure against the United States, instead of causing any harm to the United States, it would have intensified the conflict between the two countries, which in the long run would have done them only good and no harm. This is why no retaliatory measures were taken in Antigua. Thus, retaliatory acts are largely a manifestation of an act of might. Although their legal and moral

DOI: 10.54254/2753-7048/21/20230080

success is admirable and respectable, in practice, the economic damage caused by the developed countries' violation of WTO regulations is irreparable. Many developing countries face such a situation with a sense of both frustration and powerlessness.

5. Discussion

5.1. Clarify the Order of Application Between DSU Article 21.5 and Article 22

For the losing party to implement the rulings and recommendations made by the DSB as soon as possible, the order of application between Article 21.5 and Article 22 of the DSU should be clarified in detail to fill this gap in the provisions of the retaliation regime. In the author's opinion, the order of application of Article 21.5 and 22 should be treated on a case-by-case basis. In the first case, if there is no disagreement between the losing party and the winning party within a reasonable period after the judgment, the winning party may request permission to retaliate from DSU Article 22 under DSU Article 22, thus eliminating the need to consider Article 21(5); in the second case, if, after the expiration of a reasonable time limit, the disputing parties have a dispute as to whether the losing party has implemented the offer and decision in question, and the appropriateness or otherwise of the results of that implementation, then Article 21.5 of the DSU may be considered for the application first and used as a prerequisite for the granting of the request for revenge in Article 22. That is, in such cases, the disputing parties should first engage in an enforcement objection and then let the panel decide whether the winning party has complied with the rulings and recommendations made by the DSB or whether the results of the compliance are appropriate. When the panel determines that the losing party has not performed its obligations or has not adequately performed its obligations, the winning party may request the DSB to seek approval for retaliatory measures against the losing party, citing Article 22 of the DSU [12].

When the panel concludes that the losing party is justified in complying with the judgment and opinion, the prevailing party can no longer invoke Article 22 to take retaliatory measures against the losing party. By clearly delineating the order of application of Article 21.5 and Article 22 in this manner, it can, in practice, prevent the two parties in dispute from being unable to reach a consensus in the process of application because they cannot, thus reducing the occurrence of disputes and saving the time spent by the parties in dispute in the process of choosing to litigate. However, it should be noted that if the execution objection procedure is used as a previous step for the successful party to apply for the application of retaliation, the deadline for requesting retaliation, as stated in Article 22 of the DSU, will be delayed, and the successful party will likely continue to suffer from the damages caused by the failure due to the failure, i.e., the damages caused by the failure cannot be promptly compensated. Therefore, the author believes that, in addition to applying the prerequisites outlined in Article 25 of the DSU to the prerequisites outlined in Article 22, the time limit outlined in Article 25 for the panel to review the performance of the losing party should be reduced. This would not only effectively prevent conflicts between the two articles, but also allow the prevailing party to seek relief by invoking the retaliation system.

5.2. Clarify the Specific Criteria for Choosing the Type of Retaliation in Article 22.3 of the DSU

The clear and specific specification of the circumstances under which the prevailing party may choose which type of retaliation to enforce will serve to highlight the predictability and security features of the WTO dispute resolution system while also providing sound guidance to the prevailing party member in making a quick and appropriate choice of the type of retaliation and to the arbitrator of the matter in making a quick decision. Article 22.3 of the DSU is comprehensive and vague as to the basis and conditions to be used by the prevailing party in parallel or mutually

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(across industries or agreements), and the level of expressions such as "feasible", and "serious" is not clear in the actual there are no clear guidelines for the level of expressions such as "feasible" and "serious" to be used in actual dispute decisions. Although arbitrators in dispute resolution bodies are now confronted with the general terms "impracticable or invalid", "feasible" and "serious" in Article 23 of the DSU, they mainly cite or refer to the previous decisions of the DSB. This is done to supplement the deficiencies in the original DSU provisions [13].

However, it is generally believed that this case law-based approach, which is widely used in general legal jurisdictions, may not be fully applicable to international proceedings in certain circumstances. Since international disputes often involve many countries and regions, and the disputes are followed by many political and regional developments and other intricate reasons, the cases will be very different from one to another. If we just quote and refer to the previous cases without more specific regulations on the relevant conditions and requirements, this may give the winning party more freedom and discretion in applying for approval and deciding the case by the arbitrator and may lead to differences between the disputing parties on the relevant issues, making it difficult to reach agreement in the short term, thus leading to a long delay. For this reason, the DSU should provide a detailed explanation of the choice of retaliation, and the suspension of concessions in the same industry or other industries under the same agreement is "not feasible or effective", where the "not feasible or ineffective" means the arbitrator should also define and explain more about the words "feasible", "serious" and other words that express "possible". In this way, the arbitrator will be able to follow the rules during the arbitration process; in the process of requesting approval, the successful party will be able to indicate the specific basis for the type of penalty it wants to choose, thus reducing unnecessary disputes caused by the lack of clarity of the rules and allowing the dispute to be resolved as soon as possible.

5.3. Try to Introduce A System of Monetary Compensation

Because the purpose of trade retaliation is to bring economic harm to the losing party, which the losing party may be afraid of, they will choose to fulfill the DSB's judgments and recommendations in the shortest possible time. However, such retaliation, while causing great economic harm to the winning party, also inevitably damages certain interests of their home country and deprives them of certain benefits of their home country. Financial compensation, however, does not create such a "lose-lose" dilemma; rather, it only causes pain and punishment to the loser and comfort to the winner for failing to satisfy the judgment. Property compensation, on the other hand, is designed to avoid harm to the parties involved through revenge, while causing them to suffer damage. In the retaliation system, the real bearers of the countermeasures implemented by the winning party are the operators of the products imported by the winning party and the operators of the products exported by the losing party, rather than the losing party who violated the WTO rules. In the case of monetary compensation, it is the losing country that compensates the winning party in monetary terms [14]. In other words, in this system, only the losers sanctioned by the WTO are the sanctioned parties, not those sanctioned parties. In arbitration, the losing party must pay a large sum of money to the winning party, so that the losing party, in time for arbitration, can fulfill its decision to change or cancel trade policies that violate WTO regulations. Compared with those who need a long time to play a deterrent trade revenge, monetary compensation is undoubtedly much simpler. No member country will pay too much to win the case, even those rich countries.

6. Conclusion

The WTO's main achievement in the Uruguay Round negotiations was the inclusion of a retaliation system in the WTO's dispute-handling process. The WTO Understanding on Dispute Settlement and

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Rules provide a comprehensive definition of retaliation in international trade, from the concept to the timing, conditions, and extent of implementation. However, since its establishment, it has not fully performed its proper function and task, and some of the provisions of this article are still vague, and the rules are not clear. Therefore, a legal improvement of the retaliation system itself is inevitable, and the exploration of new forms of retaliation is also explored and advocated by many scholars and member states, but these improvement measures have to be thoroughly investigated and proved by relevant professionals for many times and tested in practice, so the final change plan should take some time.

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