

Enforcement of WTO Obligations: Re-checking Retaliation

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Abstract

The exchange of goods among countries across the globe is as old as human civilization. However, the era of globalization due to the advancement of science and technology, made it more obvious and complex at the same time. With the passage of time, many rules evolved and vanished, giving shape to what we know in the name of International Trade Law. Clarity and precision could be achieved only with the establishment of the World Trade Organization (hereinafter, 'WTO'). It has not only laid down the rules to carry out trans-border trade but also acts as a platform for member countries to negotiate their terms of trade and have flexibility for the LDCs and developing countries in the international trade market. Since all nations do not stand on equal footing as far as scientific and technological advancement and economy are concerned, overpowering by the abled member countries is natural, though not just. This calls for organization like the WTO to have a sound enforcement mechanism so that the trust of all members is intact and its rules and recommendations hold considerable value for all. So, in this article, we shall endeavour to study the problem of the WTO enforcement mechanism, with special reference to retaliation, that is, how the WTO enforces its obligations and what remedies it provides in case of breach.

Keywords: Retaliation, reasonable period of time, recommendations, compliance, compensation

INTRODUCTION

Meaning and Definition

Retaliation is the last resort or remedy in the hierarchy of remedies in the WTO dispute settlement provided by the Article 3.7 of the Dispute Settlement Understanding (DSU). Article 3.7 reads as follows:

“ . . . The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures [1].”

The words of the above Article very succinctly explain retaliation without actually using the word itself. It says that the last method or way to avail the dispute settlement procedure is to suspend concessions or other obligations for the liable party which are in general applicable to all other WTO members. To put it differently, a WTO member is required to extend some benefits to the other members of WTO. These benefits can be refused by the complainant to the party at fault [2].

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However, it also attaches a condition for retaliation to effectuate, that is, the same must be authorized by the Dispute Settlement Body (DSB).

Illustration—In order to retaliate, duties were imposed by Country B against Country A on products above tariff binding. In general, countries are committed not to impose duties above certain specified rate on any product [3].

WHAT CAN MAKE A COUNTRY TO RETALIATE AGAINST THE OTHER?

When there is a dispute and a country's act is found inconsistent with the WTO Agreements, the panel and Appellate Body recommend it to bring itself in conformity with the WTO obligations such as by repealing or amending some of its laws, and so on. Besides, the country is given reasonable time to implement the recommendations if it is impracticable for it to implement the recommendations immediately. But what if a country fails to implement the recommendation within that reasonable time as well? This is what calls for the other party to retaliate!

As per the Article 22.3 of DSU, retaliation is invoked only when the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time and no if no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time [4].

PROCEDURE OF RETALIATION

Article 22.2 also provides for the procedure to retaliate. At first, an initial determination is made by the complaining party that the defending party has failed to implement the DSB recommendations within the reasonable time fixed for them. Next, compensation may or may not be sought by the complaining party from the defending party. If the compensation is sought but the negotiations to that effect fail, the complaining party may request authorization from DSB to retaliate within twenty days after the expiration of the compliance period. However, the text is not clear as to what course of action should be taken by the complaining party in case compensation is not sought. One may infer that even if compensation is not sought, the complaining party will have to fulfil the requirement of waiting for the expiration of the compliance period and can retaliate within twenty days after the expiry of the said period.

HOW TO DETERMINE THE LEVEL OF SUSPENSION OF CONCESSIONS/OBLIGATIONS?

The proportion in which the nullification or impairment has been done under Article 22.4 of the DSU, suspension of concessions or obligations for retaliation can be made only in that proportion [5]. And counterfactual situations in turn, determine the level of such nullification or impairment. This means that hypothetical state of affairs is imagined which would have existed if the defending party had complied with the obligations. Exempli gratia, in EC Banana Case, a range of counterfactual situations were considered to determine the monetary value of the impairment caused to United States. A comparison was made between the value of EC imports from the United States under the then existing WTO inconsistent regime and the value of the EC imports from the United States under various alternative WTO consistent regimes. Similarly, in EC Hormones Case, a series of assumptions were made on what the United States and Canadian exports of hormone-treated beef to the EC would have been had the ban not withdrawn by EC. In fact, there was also an assessment of issues such as—trade volumes, price, and the division of market share between Canada and the U.S. Besides, in U.S. Foreign Sales Corporations (FSC), a retaliation request of U.S. \$ 4.03 billion was made by the EC. That request remains to be the largest retaliation request made till date in the history of multi-lateral trading system.

TERMINATION OF RETALIATION

Retaliation is not a permanent injunction but a temporary remedy which should be terminated as provided under Article 22.8 of the DSU:

- The measure inconsistent with any covered agreement has been removed;

- The party which was supposed to implement the recommendations provides a solution to the nullification or impairment such as in form of a temporary compensation;
- Mutually satisfactory settlement takes place between the parties.

However, in some cases, the suspensions due to retaliation still exist like in EC Hormones case, EC has not yet lifted ban on hormone treated beef and sanctions between U.S. and Canada remain intact.

TYPES OF RETALIATION

Article 22.3 of the DSU deals with different types of retaliation:

1. *Parallel retaliation*: Article 23.3(a) says that suspension of concessions or other obligations must be sought by the complaining party with respect to the same sector(s) as that in which a violation or other nullification or impairment has been found by the panel or Appellate Body [6]. This is called parallel retaliation.
2. *Cross-sector retaliation*: Article 23.3(b) says that if complaining party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s) in which impairment has been caused, it may seek to suspend concessions or other obligations in other sectors under the same agreement [7]. This is termed as cross sector retaliation.
3. *Cross agreement retaliation*: Article 23.3(c) says that if the complaining party considers that it is not practicable 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, which is known by the name cross agreement retaliation [8].

The very first case in which cross retaliation was authorized was the EC Banana Case.

In *causa celebre*, EC Hormones, the meat and dairy products coming from the United States in EC were treated with five hormones, three out of which were natural and other two artificial. EC banned those products from the United States contending that it caused health hazards. The United States said there was no evidences as such and this was inconsistent with the WTO obligations. Both Panel and Appellate Body ruled in favor of the United States and held that precautionary principle cannot override WTO Agreements. But EC did not lift the ban. Consequently, the United States and Canada made retaliation requests against EC and got authorization to suspend concessions against EC and its member states up to U.S.\$ 116.8 million per year and Cdn\$11.3 million per year, respectively. The United States and Canada, both implemented this retaliation by levying 100% taxes on agricultural products from EC. Still EC has not lifted the ban and the United States and Canadian sanctions are also intact till date.

WHETHER THE EXISTING ENFORCEMENT MECHANISM IS REALLY EFFECTIVE: A CRITICAL ANALYSIS

If we try access the success of the enforcement mechanism that the WTO has presently, we will end up concluding that most of the WTO rulings so far have been abided by the respective countries. Problem generally arises in situations where there is question of non-trade concerns. Exempli gratia, EC had committed to contribute in the economic development of its former colonies like African, Caribbean and Pacific (ACP Region) but it did not which further caused problem in compliance of EC in the banana case.

Issues and Challenges

Furthermore, there stand a pool of issues and challenges for the existing mechanisms as there are certain loopholes in the mechanisms itself and some of its rules need to be changed in order to meet the pace of the growing times. First, timing of the process is unfair to the developing countries or smaller countries [9]. As per the DSU Appendix 3, the maximum time for the conclusion of any dispute settlement process is 12 months which is unbearable for smaller countries as they cannot afford legal people for such long durations and are unfamiliar with both the substantive as well as the procedural WTO law.

Next, the mechanisms appear to be biased towards the developed countries. This is the biggest challenge in the sense that it follows a diplomatic model in the dispute settlement rather than judicial model. The system has the rules and procedures that is understood by the trading giants who participate regularly and are listened to at considerably. But in judicial model, a system not only needs to be fair but more importantly needs to appear fair especially to the defendant party. The party must be able to convince its political constituency that they were given chance to present their case, they were listened and justice was done and that they were able to understand what actually happened. But the scenario with the developing, LDC or smaller countries are completely opposite.

Third, rules governing the preliminary procedural questions are missing, that is, questions as to whether a complaint has been properly filed or not, whether the complainant really has the basis to bring the complaint, and so forth. Then, there is no provision to get the interlocutory decisions which further worsens the situation. Fourth, there is problem of transparency, that is, the mechanism should include such process which allows more observation of the proceedings. If the experience and expertise will be the monopoly of a few, the credibility of the mechanism will always be surrounded by suspicions.

Last, economic costs are invariably levied as a consequence of retaliation on the consumers and businesses of the complaining party. For instance, a higher price is faced by the consumers of complaining party where tariffs are raised on the consumer goods of the defending party. Furthermore, since compensation is voluntary, members may or may not agree and it does not talk about financial compensation but only alternative trade concession.

CONCLUSION

The World Trade Organization or WTO functions as the global system of trade rules and operates as a forum or platform for negotiating the agreements. It ensures obedience to its obligation through its enforcement body, mainly, panel and appellate body and through its enforcement mechanism, that is, compliance, compensation and retaliation. Whenever any member country acts in breach of any of WTO agreements, the WTO recommends that member to bring its inconsistent action into conformity with the WTO obligations. In fact, it also suggests ways in which the member can bring its inconsistent act in conformity with WTO and a reasonable period of time is also given for the same if it is impracticable to comply with the recommendations immediately. When WTO recommendations or rulings are abided by the member, compliance is said to have taken place. However, if there is failure on the part of the member in complying with the rulings within reasonable period of time, the second-best option available is compensation. That is to say a kind of concession by respondent state on a product or service of interest to complaining party. The enforcement mechanism provides an option between compensation and retaliation, latter being the last resort as it is considered a harsh measure. It implies suspension of concessions or other obligations which are in general available to all other members. A party retaliates when the defendant has failed to comply with rulings within reasonable period of time and negotiations for the mutually agreed compensation has also failed. The level of suspension is determined keeping into mind the level of nullification or impairment and in turn, the counterfactual situations. The enforcement mechanism has been effective in the sense that it has been abided by all but there are certain issues that need attention like timing, biasness with the LDCs, procedural defects, absence of monetary compensation, and so on.

Recommendations

- The timing of the process must be made such as not to cause hardship to the LDCs and developing countries. Judicial model should be adopted and such countries should be made to understand the proceedings and greater participation must be ensured.
- Well-defined procedure to file a case must be there and interlocutory decisions must be allowed.
- Financial compensation should be included and Litigation cost should be recovered from losing party but at the same time interests of LDCs must be taken into account.

- International Financial Institution Advisory Commission recommended the use of fines, that is, instead of retaliation, countries guilty of illegal trade practices should pay an annual fine equal to the value of the damages assessed by the panel or provide equivalent trade liberalization.

REFERENCES

1. Dispute Settlement Understanding Article 3.7. [Online] Available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [Accessed on October 2023]
2. McGivern BP. Seeking compliance with WTO rulings: theory, practice and alternatives. *Int Lawyer*. 2002; 36 (1): Article 14.
3. Ibid.
4. Dispute Settlement Understanding Article 22.2. [Online] Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm [Accessed on October 2023]
5. Matsushita M, Schoenbaum TJ, Mavroidis PC, Hahn M. *The World Trade Organization*. Oxford, England, The United Kingdom: Oxford University Press; 2015.
6. Dispute Settlement Understanding Article 23.3 (a). [Online] Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#23 [Accessed on October 2023]
7. Dispute Settlement Understanding Article 23.3 (b). [Online] Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#23 [Accessed on October 2023]
8. Dispute Settlement Understanding Article 23.3 (c). [Online] Available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#23 [Accessed on October 2023]
9. Kuyper PJ, Parlin CC. *Remedies and retaliation in the WTO: are they likely to be effective? The state perspective and the company perspective*. Oxford, England, The United Kingdom: Cambridge University Press; 1997.