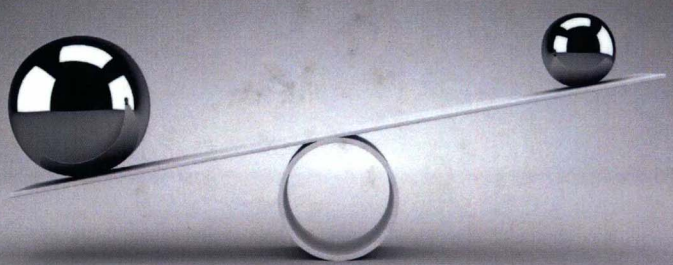
Michelle Limenta

WTO RETALIATION

Effectiveness and Purposes



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WTO RETALIATION

The central point of this book concerns three main issues: the problems of WTO retaliation, the question of the effectiveness of retaliation, and the purposes of retaliation. WTO retaliation is often deemed ineffective due to its inherited shortcomings. This book highlights the significance in identifying the purposes of retaliation prior to evaluating its effectiveness. Put differently, it refers to the purpose-based approach of effectiveness. It is a common understanding that the purpose of WTO retaliation is to induce compliance. This book, nevertheless, argues in favour of coexistence of the multiple purposes of retaliation, including reaching a mutually agreeable solution. These views are based on the extensive research conducted on the purposes of WTO retaliation, namely through interpreting Article 22 of the DSU; examining the remedies rules within the frameworks of public international law, and law and economics; and assessing the academic writings/debates as well as the statements of arbitrators. Finally, by evaluating a number of disputes involving WTO retaliation, this book demonstrates the reasonableness and soundness of WTO retaliation in light of its multiple purposes.

Foreword

While the negotiation and subsequent creation of new rules in international law can be a long and difficult process, it is often only the end of the beginning. One of the more troubling aspects of international law is that once those rules are agreed upon, some parties do not comply with the rules. The WTO Dispute Settlement System is therefore often deservedly praised by many international lawyers not just for the fact that WTO members agree to its compulsory adjudication process, but also because the vast majority of the WTO Panel and Appellate Body Reports result in compliance. It is perhaps the most successful system of dispute settlement and compliance in international law when compared with the rest.

However, even the WTO system can be, and has been, tested by the rare cases when WTO members have not complied with the adopted reports. In such cases, *in extremis*, retaliation may be authorised by the WTO Dispute Settlement Body. Few legal scholars have really focused on this aspect of the WTO as, unlike the litigation process, which is transparent, little information about the diplomatic and political aftermath of the cases are readily available. Nonetheless, it has been accepted orthodoxy that the purpose of retaliation is to induce compliance and that this indeed does happen.

In this ground-breaking study, Dr Limenta questions this comfortable paradigm, providing a compelling alternative narrative through comprehensive research. She sets out the various possible purposes beyond inducing compliance, and analyses each one in light of the WTO jurisprudence on and experience with retaliation. Rather than relying on only one perspective, Dr Limenta looks at the issue through multiple perspectives and even multiple disciplines. She avoids quick impressionistic conclusions, so aptly illustrated by the parable of the blind men and the elephant, and instead focuses her attention on the elephant in the room—the cases of continued non-compliance in the WTO.

Indeed, as Dr Limenta points out, if retaliation is the only response to such continued non-compliance, we end up with a paradoxical equilibrium in the global trading system where the WTO actually authorises more trade barriers instead of facilitating the reduction of such impediments to trade. She therefore astutely suggests that retaliation cannot be about either inducing compliance (it does not in some difficult cases) or a rebalancing countermeasure, because it then undermines the whole system. The purpose she suggests must be more nuanced than that. Instead, she examines the purpose of the retaliation option in the WTO system and proposes instead that the

search for one purpose misses the point—the option of retaliation can have multiple equally valid purposes with the ultimate objective that the global system is strengthened rather than weakened. This she terms as a purpose-based approach of effectiveness.

Her ultimate conclusion that while inducing mutually amicable settlements is a valid purpose of retaliation as well, some settlements like those reached in the Clove Cigarettes and Upland Cotton disputes, and the provisional settlement agreed in the Hormones dispute, are problematic. These settlements are often not negotiated in the open, can be lacking in transparency and may affect other WTO members, particularly those from developing countries.

This book is a bold and sophisticated commentary by a young scholar publishing her first book. It bodes well for the future of the WTO and the global trading system that we are seeing the rise of such younger scholars, especially from developing countries, able to comment on the system and suggest new ways of seeing the issues. As developing countries play an ever-greater role in international trade, contributions such as these by Dr Limenta to the rule of law and our understanding of it will be increasingly important. We live in an imperfect world, and while it may be easy to suggest that the status quo is the 'best of all possible' systems, scholars like Dr Limenta highlight the need for the reconsideration of the accepted explanations and an urgency for the refinement of the system. It is good, but it can be better.

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List of Tables and Figures

List of Abbreviations

AB	Appellate Body
ACP	Africa, the Caribbean and the Pacific
ACWL	Advisory Centre on WTO Law
ASEAN	Association of Southeast Asian Nations
BITs	Bilateral Investment Treaties
CEPA	Comprehensive Economic Partnership Agreement
CDSOA	Continued Dumping and Subsidy Offset Act
DISC	Domestic International Sales Corporation
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FSC	Foreign Sales Corporations
FTA	Free Trade Agreement
GATS	General Agreement on Tariff in Services
GATT	General Agreement on Tariff and Trade
GPA	Agreement on Government Procurement
GSP	Generalised System Preference
ICJ	International Court of Justice
ILC	International Law Commission
ITO	International Trade Organisation
LDC	Least-Developed Countries
MAS	Mutually Agreed Solution
MFN	Most Favoured Nation
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Law

RTA	Regional Trade Agreement
SCM	Subsidies and Countervailing Measures
SCVPH	Scientific Committee on Veterinary Measures relating to Public Health
SEOM	Senior Officials Meeting
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
VCLT	Vienna Convention on Law and Treaties
WTO	World Trade Organization

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Overview

> [T]o avoid economic warfare ... This [international trade] organization would apply to commercial relationships the same principle of fair dealing that the United Nations is applying to political affairs. Instead of retaining unlimited freedom to commit acts of economic aggression, its members would adopt a code of economic conduct and agree to live according to its rules. Instead of adopting measures that might be harmful to others ... countries would sit down around the table and talk things out. In any dispute, each party would present its case. The interest of all would be considered, and a fair and just solution would be found. In economics, as in international politics, this is the way to peace.[1]

I. INTRODUCTION TO WTO DISPUTE SETTLEMENT: THE BEST VOTE OF CONFIDENCE FOR THE MULTILATERAL TRADING SYSTEM

THE WORLD TRADE Organization (WTO) has its basis in the General Agreement on Tariff and Trade (GATT) 1947; and as the successor of the GATT, it has established more comprehensive agreements and rules. One of these is the effective protection and enforcement system under dispute settlement.

The provisions that have governed dispute settlement since GATT 1947 are Articles XXII and XXIII of GATT. Although neither provision refers to the term 'dispute settlement' nor provides a detailed procedure for disputes, they are the primary articles for dispute settlement. Article XXII contains the 'consultation' provision, and Article XXIII provides the 'nullification or impairment' rule. From these two 'simple' articles, the current WTO dispute settlement system, embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding (DSU), has created the rules and procedures for the management of disputes.[2]

[1] President Harry S Truman, 'Address on Foreign Economic Policy', Speech at Baylor University, Texas, 6 March 1947 www.presidency.ucsb.edu/ws/?pid=12842.

[2] WTO, *A Handbook on the WTO Dispute Settlement System: A WTO Secretariat Publication prepared for publication by the Legal Affairs Division and the Appellate Body* (Cambridge, Cambridge University Press, 2004) 12; DSU, Art. 3.1.

The WTO dispute settlement system has been a success.[3] This is evidenced by a substantial number of requests for consultation submitted by WTO Members. Twenty years since the system came into being, there have been 497 WTO complaints or consultation requests made pursuant to the DSU.[4] Pascal Lamy, the former WTO Director-General, viewed this significant number as 'a vote of confidence' in the system.[5] To the contrary, other dispute settlement mechanisms provided under Regional Trade Agreements (RTAs) are hardly used. A number of them have not even been tested at all.[6]

In his speech to the United States Chamber of Commerce, Lamy promoted the 'hymn to compliance: consult before you legislate; negotiate before you litigate; compensate before you retaliate; and comply—at any rate'.[7] It delineates the practical value among the WTO Members that by establishing a dispute settlement system, WTO Members confirm that they are committed to their obligations under the WTO Agreement.

There are three primary stages in WTO dispute settlement: (a) consultations between parties to a dispute; (b) adjudication by panels and, if requested, by the Appellate Body; and (c) the implementation of the ruling.[8]

A. Consultations

The DSU clearly states that the aim of dispute settlement is to achieve a positive solution to a dispute.[9] It demonstrates a preference for solutions mutually acceptable to parties rather than solutions resulting from adjudication by a panel.[10] Therefore, the first stage in WTO dispute settlement is consultations between the Members concerned. Put differently, parties to a dispute must enter into consultations prior to requesting the establishment of a panel.

The rules and procedures of consultations can be found largely in Article 4 of the DSU. Article 4.3 provides that if a Member requests a consultation with another Member under a WTO covered agreement, the Member to which the request for consultation is made, unless mutually agreed, must

[3] WTO, 'Azevêdo Says Success of WTO Dispute Settlement Brings Urgent Challenges' News Item (Geneva, 26 September 2014) www.wto.org/english/news_e/spra_e/spra32_e.htm.

[4] WTO, 'Chronological List of Disputes Cases', www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

[5] WTO, 'WTO Disputes Reach 400 Mark', Press Release (Geneva, 6 November 2009) www.wto.org/english/news_e/pres09_e/pr578_e.htm.

[6] WTO (n 3).

[7] Pascal Lamy, 'Has International Capitalism Won the War and Lost the Peace?' Speech at the US Chamber of Commerce, Washington DC, 8 March 2001.

[8] WTO (n 3) 43.

[9] DSU, Art 3.7.

[10] P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization*, 3rd edn (New York, Cambridge University Press, 2013) 183.