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RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM

By
Sherzod Shadikhodjaev



Wolters Kluwer
Law & Business

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*I dedicate this book to my teacher Prof. Nohyoung Park
as a small present for his 50th birthday.*

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List of Abbreviations

ACP Countries	African, Caribbean and Pacific Countries
BISD	Basic Instruments and Selected Documents
CDSOA	Continued Dumping and Subsidy Offset Act of 2000
CFR	Code of Federal Regulations
CLCs	Contingent Liberalization Commitments
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBO	Edible Beef Offal
EC	European Communities
EDC	Export Development Corporation
EEC	European Economic Community
ETI Act	FSC Repeal and Extraterritorial Income Exclusion Act
EU	European Union
FSC	Foreign Sales Corporation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GBGC	Global Betting and Gaming Consultants
GDP	Gross Domestic Product
HQB	High Quality Beef
ICJ	International Court of Justice
IGBA	Illegal Gambling Business Act
ILC	International Law Commission
LDC	Least Developed Country
MFN Treatment	Most-Favoured-Nation Treatment
PCIJ	Permanent Court of International Justice
PROEX	Programa de Financiamento as Exportações

S&D Treatment	Special and Differential Treatment
SCM	Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNRIAA	United Nations Reports of International Arbitral Awards
US	United States
USC	<i>United States Code</i>
US Fed. Reg.	United States Federal Register
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Chapter 1

Introduction

The most salient feature of dispute settlement in the World Trade Organization (WTO) is the possibility of authorizing a trade sanction against a scofflaw member government.¹

Steve Charnovitz

The multilateral trading system has served as an efficient framework for intergovernmental economic cooperation. In the era of globalization when boundaries among States are becoming more transparent, and when the interdependence of States is increasing dramatically, this system provides a strong institutional and legal basis for promoting world trade through liberalization of trade regimes at a global level. Furthermore, rules governing the multilateral trading system have become an integral part of contemporary international law.²

Dispute settlement is a significant area of the multilateral trading system. The General Agreement on Tariffs and Trade (GATT) of 1947³ and subsequent instruments thereunder had established a unique mechanism of dispute settlement which worked even better than initially expected.⁴ More than 200 complaints were filed under the GATT system.⁵ With the conclusion of the Uruguay Round of

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1. Steve Charnovitz, 'Rethinking WTO Trade Sanctions', *American Journal of International Law* 95 (2001): 792.
 2. See Section 2.1 *infra*.
 3. Whenever it is necessary to distinguish the 'old' and 'new' GATT, the original text dated 30 Oct. 1947 is referred to in this book as 'GATT 1947', while its modified version included in the WTO package is referred to as 'GATT 1994'. Where this distinction is deemed unnecessary, the term 'GATT' is used instead.
 4. John H. Jackson, *Restructuring the GATT System* (London: the Royal Institute of International Affairs Pinter Publishers, 1990), 59.
 5. 196 complaints were brought under GATT 1947 Art. XXIII. This figure does not, however, include complaints filed under the Tokyo Round Agreements of 1979. See GATT, *Analytical*

Multilateral Trade Negotiations (hereinafter the ‘Uruguay Round’) which brought a World Trade Organization (WTO) into being, this mechanism⁶ has improved and become one of the most successful conflict resolution systems in the international community.⁷ As of 1 August 2008, 378 complaints were brought in the WTO.⁸ The GATT/WTO diplomatic and legal means of dispute settlement⁹ have certainly contributed to promoting peaceful coexistence of nations.

Remedies have been one of the most important and controversial issues in WTO dispute settlement. Remedies are ‘[t]he means by which a right is enforced or the violation of a right is prevented, redressed, or compensated’.¹⁰ Thus, their special role lies in the fact that *they* are mostly responsible for ensuring credibility of the system. The more efficient remedies are the more confidence of its players the system gains.

This book is about retaliation – one of the WTO remedies. The word ‘retaliation’ is a generic term for ‘suspension of concessions or other obligations’ provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes – the Dispute Settlement Understanding (DSU) – and ‘counter-measures’ under the Agreement on Subsidies and Countervailing Measures

Index: Guide to GATT Law and Practice, 6th edn, vol. 2 (Geneva, 1995) (hereinafter ‘GATT Analytical Index’), 772-787.

6. For the GATT/WTO dispute settlement mechanism, see, e.g., John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement of Tariffs and Trade)* (New York: the Bobbs-Merrill Company Inc., 1969), 163-189; Ivo Van Bael, ‘The GATT Dispute Settlement Procedure’, *Journal of World Trade* 22 (1988): 67-77; Pierre Pescatore, ‘The GATT Dispute Settlement Mechanism – Its Present Situation and Its Prospects’, *Journal of World Trade* 27 (1993): 5-20; Norio Komuro, ‘The WTO Dispute Settlement Mechanism – Coverage and Procedures of the WTO Understanding’, *Journal of World Trade* 29 (1995): 5-95; Christopher Thomas, ‘Litigation Process under the GATT Dispute Settlement System – Lessons for the World Trade Organization?’ *Journal of World Trade* 30 (1996): 53-81; Peter Gallagher, *Guide to Dispute Settlement* (London/The Hague/Boston: Kluwer Law International, 2002); WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2004); David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 2nd edn (Cambridge: Cambridge University Press, 2004).
7. See J.G. Merrills, *International Dispute Settlement*, 3rd edn (Cambridge: Cambridge University Press, 1998), 197.
8. See WTO, ‘Chronological List of Disputes Cases’, <www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>, 1 Aug. 2008. For a statistical analysis of WTO disputes, see Kara Leitner & Simon Lester, ‘WTO Dispute Settlement 1995-2007 – A Statistical Analysis’, *Journal of International Economic Law* 11 (2008): 179-192; Nohyoung Park, ‘Statistical Analysis of the WTO Dispute Settlement System’, in *The WTO Dispute Settlement System 1995-2003*, ed. Federico Ortino & Ernst-Ulrich Petersmann (The Hague/London/New York: Kluwer Law International, 2004), 531-553.
9. See Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London-The Hague-Boston: Kluwer Law International, 1997), 66-70.
10. Henry Campbell Black et al., *Black’s Law Dictionary*, 6th edn (St. Paul, Minn.: West Publishing Co., 1990) 1294.