An Evaluation of proposals for Collective Retaliation and Third Party Retaliation in the WTO in the Light of the Trading Nations Dilemma Model and Article 22.6 Arbitrations

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This paper evaluates whether the WTO Understanding on Dispute Settlement should provide for Third party retaliation or collective retaliation. It notes proposals from a number of countries.

The paper begins by analysing the existing provisions of the DSU Article 22.2 and the relevant parts of Article 22.6 arbitrations. Analysis of the existing law indicates that:

1. any Member that has suffered a nullification may be able to retaliate but only if it is a Complainant in a case;

2. a Member which has suffered a nullification and which becomes a Third party in a dispute without becoming a Complainant may not retaliate;

3. the level of retaliation available to any individual member must be equivalent to the nullification or impairment of the trade that would have flowed between that individual member and the Respondent member.

The paper then uses a simple 2x2 Trading Nations Dilemma model (based on Abbott HILJ 1985) to explain the role of retaliation in the functioning of the WTO. It takes a political support view of the functioning of trade agreements and sets out how the GATT obligations change the domestic political pressures within Members. It treats the GATT obligations as liability rules rather than property rules in the sense that they permit efficient breach so as to give each party assurance of two things (1) that their position cannot be worsened by another party’s breach; and (2) that they can themselves breach if they restore other party’s political position. The paper then modifies the model so that one of the two players represents a coalition of 2 or 3 nations to analyse whether the system can carry out its function if (a) only Complainants can retaliate, (b) if Complainants and Third parties can retaliate, and (c) if all WTO members can collectively retaliate.

The author argues that the DSU should provide that any Member that has suffered a nullification or impairment can retaliate because that is the only rule setting which enables members to enter into the trade agreement being assured of the two abovementioned points. The paper therefore argues in favour of allowing Third party retaliation up to the level of nullification or impairment suffered by the Third party. The paper argues against Collective Retaliation. In practical terms, the author argues that the functioning of the system would be improved if Article 22 were to be amended to allow a mechanism for Members other than the Complainant to join the Complainant in requesting authorization to retaliate up to their individual levels of nullification or impairment.