

A Study of Retaliation and Blocking Legislation in WTO Law

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In the WTO dispute settlement system, the defendant member state has the legal obligation to implement the Panel and the Appellate Body reports within a reasonable period of time. In the case of non-implementation, the plaintiff member state can thus retaliate, that is to suspend the concession or other obligations under the WTO law against the defendant under certain conditions provided in the Dispute Settlement Understanding (DSU). Among them, the principle of proportionality (the level of the retaliation must be equivalent to the level of the nullification or impairment) is the most important condition, because it secures the compatibility of retaliation in each case with the WTO Law. It is the arbitrators under Article 22: 6 of the DSU who are responsible for the evaluation of the proportionality and the decision of the level of the retaliation in each case. The method of the evaluation employed by the arbitrators is the “trade effect analysis”.

However, in those cases where an internal law itself of the member state is considered incompatible with the WTO law, so-called as such cases, the “trade effect analysis cannot always be useful and appropriate for the evaluation of the proportionality, because of the “chilling effect”. This fact renders the retaliation incompatible and therefore the WTO Law insecure. Thus, this article aims to clarify the problems of the trade effect analysis in as such cases by examining the decisions by the arbitrators under Article 22: 6 of the DSU and to resolve these problems to provide security and predictability to the WTO multi-lateral trading system. Moreover, member states often enact a blocking legislation against an internal law of other member states when the latter law is incompatible with the WTO law. However, the WTO law interdicts the member states to react by an act incompatible with the WTO law against the incompatible act with the WTO law of other member states. This article also examines if the blocking legislation is incompatible with the WTO law.