

PalArch's Journal of Archaeology of Egypt / Egyptology

THE PRINCIPLE OF JUSTICE TOWARD THE WTO RETALIATION BASED ON ARTICLE 22 OF DISPUTE SETTLEMENT UNDERSTANDING

Wening Tiarashanny¹, IntanInayatun Soeparna^{1*}

1. *Department of International Law, Faculty of Law, Universitas Airlangga, Surabaya, Indonesia*

**Corresponding Author: IntanInayatunSoeparna, Department of International Law, Faculty of Law, Universitas Airlangga, Campus B UNAIR Jl. Airlangga No. 4-6, Surabaya 60286, East Java, Indonesia. Email: intan@fh.unair.ac.id*

WeningTiarashanny, IntanInayatunSoeparna. The Principle Of Justice Toward The Wto Retaliation Based On Article 22 Of Dispute Settlement Understanding-- Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(4), 2570-2582. ISSN 1567-214x

Keywords: Principle of Justice, Retaliation, World Trade Organization.

ABSTRACT:

World Trade Organization (WTO) as the only world trade organization. The principle of justice in international trade is not done as it should because there are still many cases of fraud from various kinds of state backgrounds, thus it is necessary to hold retaliation as a form of corrective justice in international trade law, which aims to rebalance trade. This study aims to analyze the regulation of WTO international trade law based on the principle of justice, and analyze the fulfillment of the justice principle in implementing international trade retaliation which based on the provision of Article 22 Dispute Settlement Understanding (DSU). The type of study conducted was juridical-normative through the statute approach, case approach, historical approach, comparative approach and conceptual approach. Retaliation as a dispute resolution mechanism in the WTO did not work according to its objectives as specified in Article 3.3 of DSU. Based on the analysis, the legal regulation applied the first principle of justice to procedural aspects in each structure of the WTO, meanwhile the second principle of justice was applied to the substantial aspects from the implementation of international trade. In some cases, the fulfillment of the justice principle was fulfilled only in the retaliation conducted by Developed Countries and Developing Countries.

Keywords: Principle of Justice, Retaliation, World Trade Organization.

INTRODUCTION

Justice is an important thing in human life because it contains universal moral values which are the basic rights and needs of people throughout the world (Puspitasari&Firdauzy, 2019). Justice is a guidelines that used to stop war and schism(Gottfried & Trager, 2016). In order to actualize a justice, several principles of justice are formed which later become an agreement among various elements of society. The principle of justice is always applied in any fields of human life activities that want a justice, including one of them within free trade activity.

Free trade is a trade policy whose regulation is reciprocal and mutually advantageous. Trade in various countries is regulated in the form of a law (Hwang et al., 2018). In order to realize the implementation of free trade that runs well, smoothly and mutually advantageous, the World Trade Organization (WTO) was formed as the only world trade organization which has responsibility to remove trade barriers, both tariff and non-tariff barriers, and reduce the discrimination in international trade relationship(Hoekman&Mavroidis, 2007; Latifah, 2015).

WTO provides various ways and efforts to resolve the conflict or dispute in international trade (Ariadi et al., 2019). As for example by consultation or negotiation, but if the negotiation of the compensation determination cannot be agreed within 20 days, the winning country can request authorization from the DSB (Dispute Settlement Body) to suspend concession and other obligations in the covered agreement or better known as retaliation. The main objective of Article 22 DSU (Dispute Settlement Understanding) regulation is to make violating countries comply with the implementation of recommendation and decision which issued by DSB (Fukunaga, 2006). In addition, retaliation also aims to enable the harmed country to carry out recovery by balancing DSU, it also appears that the objective of retaliation is not to punish the guilty country, but rather to rebalance trade concession.

However, in reality retaliation does not work properly. International institution generally does not apply sanction that contradicts to the objective of the institution itself. A lot of the problems regarding international trade cause its own conflicts (Carranza, 2003). For example, the World Health Organization does not allow the member countries to spread the virus to other member countries. Likewise, the World Intellectual Property Organization does not oppose the acts of hijacking by the hijacking itself. Thus, the implementation of retaliation to support free trade practices is an odd thing.

For the consequences which caused by the implementation of retaliation, in this study the author will study further about the fulfillment of the justice

principle in the retaliation policy which regulated in Article 22 of DSU relating to the objective of retaliation to rebalance trade. This principle of justice needs to be applied to anticipate the loss resulting from retaliation (Thorbecke, 2006). This study aims to analyze the regulation of WTO international trade law based on the principle of justice, and analyze the fulfillment of the justice principle in the implementation of international trade retaliation which based on the provision of Article 22 Dispute Settlement Understanding (DSU).

RESEARCH METHODS

The type of the study used was juridical-normative research type. This study method was carried out by researching a legal problem based on theories, principles and legal rules that was applicable and relevant to the topic being written (Peter, 2006; Riadi, 2013). This study used a statute approach, an approach using legislation and regulation, by examining all the issues based on the legal regulation namely the applicable international law related to this writing (Pannen et al., 2019). The study used Understanding on Rules and Procedures Governing the Settlement of Disputes or commonly known as Dispute Settlement Understanding (DSU) and The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) as the basis for problem solving.

The conceptual approach was an approach that moves from the views and doctrines that develop in legal studies (Cassarino, 2004). In this paper, the author used the conceptual approach to examine the concept of retaliation and the concept of justice in order to build a legal argumentation in solving the issues encountered. Case approach was an approach that was carried out by examining the cases relating to the issues encountered and have become court decision and had permanent legal force (Peck & Theodore, 2012).

The author used a case approach because this study aimed to see the fulfillment of the justice principle for the implementation of retaliation as an effort to resolve international trade disputes. Legal Sources: Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C WTO Agreement 1994, General Agreement on Tariffs and Trade (GATT), Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), Annex 2 WTO Agreement 1994, The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) of 15 April 1994, World Trade Organization Decision in DS27 case: European Communities - Regime for the Importation, Sale and Distribution of Bananas Case 2008.

RESULT AND DISCUSSIONS

Justice According to Experts and Its Implementation in International Trade Law

In the theory of justice developed by Plato in Anam, (2015), he believed that the ideal country was a country based on justice. Justice according to Plato focused on harmony or conformity. Harmony meant that the citizens life in harmony and in line with the objective of the state, by living their life well according to God's will and social position of each person.

The justice that put forward by Plato could be found in the WTO free trade system. This could be seen from the adjustment of function to each country in accordance with its capabilities in carrying out free trade. Without the adjustment of the function, countries could not fulfill their needs because basically every country was unable to fulfill its own needs without assistance from other countries (Bottoms & Tankebe, 2012). It was because each country had different resources.

In contrast to Plato who emphasized his theory of justice in harmony or conformity, Aristotle in Nasution, (2014) emphasized his theory of justice in balance or proportion. Broadly speaking, Aristotle's justice theory was based on the principle of equality, which meant that justice happened when the same things were treated equally and things that were not the same were treated unequally.

In developing his theory of justice, John Rawls was influenced by several political thoughts. First, was a political tradition of liberalism. Liberalism was a doctrine of normative political morality, which was a set of moral arguments about the justification of political action and institutions. Liberalism required society to be arranged neutrally and fair without referring to the value and belief of each group. Society could be well arranged if society was regulated based on the basic moral principle, namely justice (Rawls, 2009).

In conclusion, justice was the principle of equalizing a treatment regardless of any conditions. The treatment towards fellow being without regard to differences.

The subject of justice according to the Expert and its Implementation in International Trade Law

For Rawls, the main subject of justice was the basic structure of society, or rather the way the main social institutions distributed fundamental rights and obligation, and determined the division of the profit from a social cooperation. The main social institution referred to by Rawls was institutions related to politics, law, and economics (Rawls, 2009).

Country practices as subject of justice for international trade law must be limited by moral limitation (Aqimuddin, 2012). The moral limitation which meant was a structural equity (structural equity), which was about how a

trading system distributed the benefit and burden arising from the trade to different countries with different classes.

The principle of justice according to John Rawls and its Implementation in International Trade Law

According to John Rawls, the principle of justice needed to be applied to regulate the method of distributing the rights and obligation, benefit and burden of community social cooperation result was carried out by the main social institutions fairly. The principle of justice could only be effective if it was accepted by everyone. To reach mutual agreement on the principle of justice, then society needed to position themselves in the position of origin equity (Rawls, 2009).

In that position, no one knew his place, the position or social status in society, no one knew his wealth, intelligence, and strength. Thus, the selection of the justice principles was conducted with the situation without knowledge. This was to ensure that no one was benefited or harmed in the process of determining the principle of justice.

In his theory of justice, namely Justice as Fairness, Rawls, (2009) divided the principle of justice into two, namely: The first principle of justice, the Principle of the Equal Freedom for Everyone (Principle of Greatest Equal Liberty). This principle required equal rights for everyone to obtain the basic freedoms. The basic freedom which meant by John Rawls were the freedoms as referred to in the rule of law concept, including:

- a) Freedom of politics (the right to elect and be elected to occupy political position);
- b) Freedom of speech and association;
- c) Freedom of belief and freedom of association;
- d) Freedom of maintaining property rights (personal);
- e) Freedom from arbitrary arrest.

Here Rawls was not talking about the general theory of freedom, but rather how the principle of justice could guarantee the fulfillment of basic freedoms for everyone. The freedom referred to here was a freedom which was understood as a system of certain public rules that defined the rights and obligation. The freedom relationship of everyone was limited by legal limitation.

Below was a description about the implementation of two justice principles in international trade law which related to the procedural and substantive fulfillment of justice. In general, substantive justice was a justice that related to material law. It meant that substantive justice was achieved by fulfilling the legal rights that have been regulated according to the law. While, procedural justice was a justice that related to formal law, namely the legal rights of the parties in the process of enforcing material justice (Syamsudin, 2014). In

international trade law, fair procedurally meant that each country was seen as countries that have equal standing and equal voices in the implementation of international trade. Meanwhile, fair substantially was meant that international trade law must be able to fulfill the substantive rights of WTO member countries as the implementers of WTO international trade policies.

Relationship of Justice with Law

There was a reciprocal relationship between the law and justice. In the sense that, the law was actually created from the values of justice that had already existed in people's life and the law as an instrument in achieving that justice (Wantu, 2012). This meant that the values of justice existed before the existence of the law. However, can the law that did not realize justice still be called a law?

The law could not be abolished the status as a law if it did not bring about justice. Because, it needed to know that justice was not the only legal objective, but there were also other legal objectives such as legal certainty. If the law did not realize the justice but realized a legal certainty, then this was known as what was called the antinomy of the law and the law did not lose its status as law (Syamsudin, 2014).

In several theories of justice that exist, some experts such as Stammler, Radbruch and Kelsen in Nasution, (2014) emphasized the objective of the law simply and solely was justice. This was stated by Gustav Radbruch, as he stated that: "*Est autem jus a justitia, sicut a matresua ergo prius fuit justitia quam jus*". Thus, the law that realized the justice was absolutely necessary in nation and state life. Without the law, human life became disorganized and humans lost the possibility to develop humanely.

The law must create a situation of peace. To create that situation, the law considered interests carefully and created a balance among those interests (Zamroni, 2018). That objective could be achieved if the law as much as possible provided a fair regulation, namely a regulation in which there were interests that were protected equally, thus as many people as possible got what became their part. Therefore, law was needed to bring about justice so as to create a situation of peace.

Trade Remedy in the WTO Dispute Resolution System

The objective of the WTO dispute resolution system was to rebalance trade concession (rebalancing trade concession) that was harmed by violating country action. In resolving WTO disputes, violating country was required to comply with the recommendation and decision which issued by the Dispute Settlement Body (DSB).

Based on the provision of Article 21 of DSU, there was an obligation for violating country to comply with the DSB recommendation and decision within a certain period of time (Prasudhi, 2016). However, under certain conditions, some countries found it difficult to implement DSB decision because the implementation of DSB decision would also be at risk of adverse national interests. Therefore, the decision making process in resolving WTO disputes must balance the interests of the parties. Moreover, political and economic pressures could influence the decisions of violating country in implementing DSB decision, which eventually would harm the complainant country. This was where the procedural justice must play a role so that the resulting decision did not harm any of the dispute parties.

If within a specified period of time the violating country did not implement the DSB decision, then the complainant country could negotiate the compensation or repatriate the losing country in accordance with the Article 22 of DSU. The provision of Article 22 of DSU emphasized that every action carried out in accordance with this article must be able to make the violating country comply with the DSB recommendation and decision. In other words, the actions which regulated in Article 22 were basically intended to make the losing country complied with WTO rules (to induce violating country to comply with WTO rules) (Schwartz & Sykes, 2002).

To overcome all the problems of international trade, compensation and retaliation was usually applied, the desired final result was the abolition of the violation by the violators. Compensation and retaliation was conducted solely to achieve removal of violation by violating parties.

Compensation

Compensation was a refund act that was often related to the pecuniary concept. Compensation in the international trade system was in the form of profit (concession/ commitment) provided by the violating country to the complainant country in accordance with the amount that could cover the loss value of trade profit (nullification or impairment). Nullification or impairment was considered as a loss arising as a result of the failure of the contracting party in carrying out its obligation, the implementation of trade policies that contradicted or not to WTO rules, or as a result of certain other situations.

Retaliation

The next trade remedy action that became the focus of Article 22 was suspension of concession or other obligations or more commonly referred to as retaliation (Palupi, 2013). This action was the latest action that could be taken if the party in the dispute failed in determining the agreed amount of compensation. Before carrying out retaliation, the important thing that must be carried out was find out the number of nullification or impairment caused. This was important because in carrying out a retaliation, the level of the

retaliation implementation must be equivalent to the number of nullification or impairment that arose as mandated in the provision of Article 22.4 of DSU that: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment".

Implementation of Retaliation to Achieve Corrective Justice in International Trade Law

The existence of corrective justice in international trade law played an important role to ensure that the implementation of international trade relation taken place fairly. Fair international trade as referred to in the Agreement Establishing the World Trade Organization, was a trade that was reciprocal and mutually advantageous (Syamsudin, 2014). If a trade relationship harmed one of parties, retaliation could be applied for the aim of rebalance trade and induce compliance in order to achieve fair international trade.

Based on the previous description, it was known that retaliation was one of the WTO dispute resolution mechanisms. Therefore, retaliation also played a role as a form of corrective justice in international trade law. That role was seen in its aim to rebalance trade concession.

The retaliation must be carried out fairly, both procedurally and substantially. Fair procedurally meant that retaliation must be carried out transparently and see the countries which involved in the dispute as countries that had equal standing and equal voices (McAdams, 2006). Meanwhile, fair substantially mean that retaliation must succeed in balancing the balance of trade concessions in order to create reciprocal and mutually beneficial trade. By fulfilling these values of justice, it could be said that corrective justice existed in international trade law.

Retaliation as a form of corrective justice could be done through four schemes, namely was carries out between developed country vs. developed country, developed country vs. developing country, developing country vs. developed country, and developing country vs. developing country. By referring to the four schemes, the author would analyze whether retaliation as corrective justice in international trade law could rebalance trade concession mandated by Article 3 (3) DSU in order to realize fair international trade.

1. Developed Countries vs. Developed Countries (EU vs. US)

The US and the EU reached an agreement to resolve the dispute in 2001 and the US decided to stop its retaliation of the EU since 1999 (Lailah, n.d.). However, even though the retaliation was finally stopped by the US in 2001, but by several EU companies were carried out the increasing tariffs since April 19, 1999 to June 30, 2001.

Based on this description, it appeared that there was an unfair situation for business actors as the object of retaliation. Moreover, those who experienced the loss due to retaliation were entrepreneurs who did not have a direct relation to the banana trading activity. The retaliation through an increase in trade tariffs resulted in their trading profit also decreasing. In fact, one of the objectives of the WTO Agreement was to increase trade profit for business actors from member countries.

However, it should be recalled that the role of retaliation as a mechanism for dispute resolution was as corrective justice. It meant that retaliation must bring about trade remedy thus the trade returned to being fair. In this case, it appeared that the retaliation which carried out by the US has succeeded in making the EU complied with the DSB decision and this was in line with the objective of retaliation for induce compliance. With EU compliance, it could be said that retaliation has succeeded in rebalancing the trade concession in accordance with the objective of other retaliation was to rebalance trade concession. Thus, the role of retaliation as a form of corrective justice in international trade law has been run on a retaliation scheme between developed country vs. developed country.

Injustice that experienced by business actors must be judged as an injustice arising from non-compliance to the country and not injustice that arose due to retaliation. The loss that experienced by these business actors was a risk that must be beared in order to rebalance trade due to the country's non-compliance with the WTO rules. In addition, the loss that experienced by EU business actors, it turned out to have only a small impact on the EU economy. Thus, it could be said that substantial justice was also not disrupted in this case.

2. Developed Country vs. Developing Country (Canada vs. Brazil)

Based on the description of the case, in 2000, Canada was granted permission by the DSB to retaliate in the Textile & Clothing and License Procedure trade sector to reach a value of C\$344.2 million per year. The retaliation could be carried out by suspending tariff concession up to 100% on some imported goods from Brazil (Ambarita, 2018).

Although in the end, this retaliation was not enforced by Canada, but if this retaliation was enforced it would result in an increase in the price of each piece of clothing that was imported from Brazil on the Canadian market. This of course would cause the loss to Brazilian exporters which would ultimately lead to a decrease in the level of trade welfare for Brazilian exporters and producers.

The implication of collecting very high import tariffs on developing country products would also increase the price of developing country export products. The increase in the price of developing country export products meant that

consumers in developed country would prefer to buy substitute goods from other exporting countries that sold at lower prices. This would very harm the developing country, moreover competition between fellow exporters from developing country was stronger because developing countries often exported similar products. Besides to harming Brazil as a retaliated party, it turned out that the implementation of the retaliation would also harm Canada as the party that retaliated. Canada considered that the implementation of retaliation in Brazil would not be effective.

From this point of view, it could be said that retaliation did not bring about the justice to the subject or the object of retaliation. Justice on the subject was not achieved because the two countries were not benefited from retaliation, while justice on the object was not achieved because retaliation would reduce the level of welfare of business actors as individuals with an increase in tariffs that hampered the trade. In the end, no substantial justice which was achieved from the implementation of retaliation itself, because the retaliation has failed to improve living standards and expand trade activity. This case also showed that the objective of retaliation for rebalance trade concession and induce compliance was not achieved. Thus, the retaliation regulation in article 22.2 of DSU as a form of corrective justice did not work.

3. Developing Country vs. Developed Country (Antigua and Barbuda vs. US)
These conditions indicated that there was an imbalance of position between Antigua Barbuda and the US in resolving disputes using retaliation which then resulted in the non-fulfillment of justice towards the subject of retaliation. Justice towards the subject of retaliation, in this case was the country, was not fulfilled because Antigua could not exercise its right to retaliate due to its weaker position compared to the US as a developed country. Using retaliation or not, both provided difficulty for Antigua to make the US comply with the DSB decision. Thus, it appeared that the retaliation that should have been given to provide protection for the winning country was apparently not enjoyed by Antigua Barbuda because of its position as a developing country which was weaker than developed country. This meant that Antigua has lost its rights to obtain trade remedy from the US's non-compliance (Cooper, 2008).

The failure to fulfill justice on the subject of retaliation led to the not fulfilling of substantial justice in the implementation of retaliation itself. The failure to fulfill substantial justice then caused the retaliation failed in achieving its objective to rebalance trade concession and induce compliance. In the end, corrective justice in the retaliation scheme by developing country towards developed country did not run as it should.

4. Developing Country vs. Developing Country

Until now, the retaliation schemes between developing countries and developing country have never happened.

CONCLUSION

The principles of justice could be found in the theory of Justice as Fairness which owned by John Rawls , namely the Principle of Greatest Equal Liberty as The First Principle of Justice; The Difference Principle and the Principle of Fair Equality of Opportunity as the Second Principle of Justice. International trade law as a law, then the law must be fair as a condition and proof of its status as the law. The first principle of justice was applied to the procedural aspects of each WTO structure, while the second principle of justice was applied to the substantial aspects of the implementation of international trade.

Based on an analysis of several cases, the fulfillment of the justice principle was fulfilled in the retaliation carried out by the Developed Country vs. Developing Country because in the end, retaliation as corrective justice was able to achieve its objective to rebalance trade concession and induce compliance. However, on the other hand, the implementation of retaliation by the Developed Country vs. Developing Country and Developing Country vs. Developed Country apparently did not fulfill the principle of justice because the retaliation was not able to create a trade balance (rebalance trade concession), which in the end the objective of induce compliance was also not achieved. Then, it indicated that retaliation as a dispute resolution mechanism in the WTO did not run as intended as specified in Article 3.3 of DSU.

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