Deficiencies and Improvement Proposals for Retaliation Mechanism in WTO Dispute Settlement Understanding

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Abstract. As the last-resort enforcement mechanism within the WTO framework, the effectiveness and regime of Retaliation have been subjects of ongoing concern and scrutiny. This paper presents an in-depth analysis of the Retaliation Mechanism in WTO Dispute Settlement Understanding (DSU), highlighting its notable deficiencies and the various proposals aimed at enhancing its function. The defects can be split into procedural problems and substantial problems, including the “sequencing problem” of DSU Article21.5 and Article 22, flaws in the arbitration process, and the mechanism’s overall limited effectiveness in ensuring compliance and rebalancing interests among member states. Through detailed analysis of relevant judicial cases and consideration of suggested reforms, this paper explores the potential future improvements to make the Retaliation Mechanism more robust and equitable. This review aims not only to assess the current challenges but also to suggest feasible enhancements that could significantly optimize the mechanism's efficacy in resolving international trade disputes.

Keywords: Retaliation; WTO, Dispute Settlement Understanding.

1. Introduction

In the present society, international economy is developing rapidly. The increasingly buoyant international trade is of more focuses and concerns worldwide nowadays. Many countries joined the World Trade Organization in hope of a regulated trade system and a reciprocal outcome. However, in practice, many countries would take measures that devastate the economic balance and violate trade agreements out of domestic interest, environmental protection and so forth, leading to bilateral or multilateral disputes. When such a dispute arises within the scope covered by WTO agreements, and a party is deemed to have breached the obligations imposed by the WTO treaties, the party who suffered from the measures may resort to the WTO Dispute Settlement Body (DSB) for recommendations and rulings. If the respondent does not bring its measure into conformity in a reasonable period of time, or its responsive action is not acceptable to the complainant, the complainant may request authorization for retaliation from the DSB. Most recently, retaliation is deemed to be based on a reciprocity with a moral order, and in its negative form, the “suspension of the moral order” is initiated, creating a bilateral leverage in order to gain a satisfactory negotiation result [1]. The retaliation system under Dispute Settlement Understanding (DSU) has certain positive impact on maintaining the world trade order, and is critical to settling the world trade disputes and re-balancing the world trade order. However, as more and more international trade dispute cases arise, WTO panelists, scholars and contracting states find out that some deficiencies of retaliation system in the practice. The parties contrived and initiated a number of suggestions and assumptions to improve it.

This paper aims to discuss the proposals to improve and perfect the retaliation system under the WTO dispute settlement mechanism and probe for refined solutions for such problems, with delineation of deficiencies of retaliation system under the WTO dispute settlement mechanism. As the volume and complexity of trade disputes continue to rise, the need for a more robust and equitable dispute resolution process becomes increasingly evident. This research seeks to identify the systemic deficiencies within the current retaliation framework, which, while designed to enforce compliance with WTO recommendations and rulings, often falls short in achieving fair and balanced outcomes. Furthermore, the study explores potential improvements to the Retaliation system, which could include modifications to enhance transparency, fairness, and effectiveness. This is particularly crucial in a time when global trade dynamics are increasingly influenced by geopolitical tensions and economic uncertainties.

This paper comprises of 5 sections. Section 1 is the introduction, making a preliminary introduction of the background of this research and the structure of this paper, and referring to the correlative literature. Section 2 introduces the legal provisions of retaliation in DSU, and reveals and analyzes the procedural and substantial deficiencies and disfigurement of retaliation system under WTO dispute settlement mechanism. Section 3 probes deeper into the system by analyzing the exemplary cases utilizing retaliation system, using empirical research approach. By discussing the cases` focus of controversy and process of resolution, the defects and deficiencies of cross retaliation system can be assorted and generalized into procedural problems and substantial problems. Aiming at solving these problems, section 4 reviews and makes proposals for the improvement of this system. Section 5 comes with the conclusion of this subject and summarizes this paper.

2. Overview of Retaliation

2.1. Legal Framework of Retaliation

Retaliation is a WTO dispute settlement remedy that a complainant uses against the respondent when the respondent fails or refuses to bring its measure into conformity with WTO obligations in a reasonable period of time, or its responsive action is not acceptable to the complainant (DSU Article 21.3). The complainant may request authorization from the DSB to suspend concessions or other obligations discriminatively under the covered agreements. If it is deemed not practicable or effective to suspend concessions within the same sector or agreement, the member may resort to cross retaliation, extending the impact to other sectors or agreements (DSU Article 22).

2.1.1. Starting Procedure

The implementation of retaliation is strictly constricted and would only be permitted under certain circumstances. According to DSU Article 22.2, the respondent must first attempt to comply with dispute recommendations and rulings or negotiate compensation if it fails to align its measures with the WTO agreements. If no satisfactory compensation is negotiated within 20 days' post-deadline, the complainant may request DSB authorization to suspend concessions or other obligations towards the non-compliant respondent.

Initially, the complainant should consider parallel retaliation—targeting the same sector where the violation occurred. If this is deemed impractical or ineffective by the panel or Appellate Body, cross-sector retaliation may be pursued, where concessions in other sectors under the same agreement are suspended (Article 22.3). There is no express stipulation of the specific definition and verdict criteria of "not practicable" and "not effective" in DSU, but case law, such as the European Communities Banana dispute, could provide practice and guidance. "Effectiveness" means that the retaliation to carry out can achieve the expected effect and has a strong impact on the respondent, but also allows the complainant to strategically choose cross retaliation options that minimize adverse impacts, based on a comprehensive assessment of strength and potential consequences.

If neither parallel nor cross-sector retaliation is feasible, and the situation is considered "serious enough", cross-agreement retaliation may be hence employed. Similarly, the criteria for what constitutes the term "serious enough" are not explicitly defined. In the European Communities Banana disputes, significant disparities in economic strength between a developed and a developing country involved in the dispute can qualify as "serious enough" for such measures, as a reference.

2.1.2. Objection Procedure

WTO dispute settlement mechanism has a unique decision-making approach, automatically passing the decision if it is not unanimous opposed. Due to this decision-making mechanism, all the retaliation is approximately authorized automatically. However, if the respondent disagree on the level of retaliation, arbitration can take place to determine the permissible level of suspension of concessions or obligations. The respondent could object to the level of suspension proposed, or claims that the principles and procedures set forth in Article 22.3 have been violated, and the matter shall be referred to arbitration. When the respondent submits a request for arbitration, the arbitrator shall make an assessment on three points :(1) whether the level of retaliation is equal to the degree of loss or impairment of interests, (2) whether the relevant agreement permits retaliation, and (3) whether the principles and procedures of Article 22.3, have been complied with.

Importantly, the process of implementing retaliation continues unabated during the review of objections.

2.1.3. Termination Procedure

According to DSU, retaliation is explicitly formulated as a temporary enforcement mechanism. The termination of such retaliation measures must be mandated once compliance is achieved. Specifically, if the offending measure is corrected, or if the respondent offers a resolution that adequately addresses the nullification or impairment of benefits, retaliation must cease. Additionally, if the parties involved reach a mutually satisfactory agreement resolving the dispute, this too necessitates the end of any retaliatory actions (Article 22.8). The termination process underscores the purpose of retaliation not as a punitive measure, but as a means to ensure compliance and rebalance the interest under the trade agreements.

2.2. Procedural Problems

The primary procedural problem of retaliation is the conflicted application order of DSU Article 21.5 and article 22 and the application dilemma they bring about. DSU Article 21.5 stipulates that where there is disagreement over the measures taken to comply with the recommendations and rulings, such disputes shall be resolved through the dispute settlement procedures, ideally by referring the matter back to the original panel. On the other hand, DSU Article 22 states that if the respondent disputes the proposed level of suspension or asserts that the established principles and procedures have been violated, the issue shall be submitted to arbitration. However, there is no clear answer that is the objection of implementation or the application of retaliation authorization to be settled first, or there is no strict sequence. Moreover, if the reformed measures were found still inconsistent under the Article 22, another 20 days would be needed as the "reasonable period of time"before resorting to retaliation. This could lead to an endless loop of litigation [2]. An alternative interpretation is presented by Mavroidis (2000, pp. 795-799). He argues that Article 22 pertains to the situation that the losing party does not reform its measures and Article 21.5 pertains to the situation where the losing party bring its measures into compliance and there is disagreement induced [3]. However, there remains the possibility for the losing party to make an endless series of inadequate reforms, as manifest in the EC-Banana Cases. The solution adopted in the EC-Banana cases has become the practice dealing with the "sequencing problem" of Article 21.5 and Article 22 afterwards [4].

Apart from the sequencing problem, the arbitration mechanism is much criticized as well. In DSU, there are little provisions providing references to the arbitration process. First, DSU Article 3.8 merely stipulates the overall inversion of evidential burden principle, but not specifically stipulates the rules of evidence. Therefore, there lies immense unpredictability in the arbitration process. Second, there is no clear guideline on determining the qualifications and status of third parties in arbitration proceedings. This results in different arbitrators granting varying degrees of rights to third parties, which can lead to inconsistencies in the arbitration process. Holger Spamann suggests that most ideally the counterfactual assessment can result in a "reasoned estimate". However, certain logical inconsistencies in the arbitrators' calculations, and potentially profound objections as to their choice of counterfactual, raise doubts about whether even this modest objective was met. [5]. CHAD P. BOWN suggests that even utilizing the most simplistic economic model to predict the counterfactual volumes, the slight differences in the methods applied can yield significantly divergent results [6]. Third, the prescribed time limit for arbitration is too short. In practice, due to the delay of applicants, the complexity of cases and the procedural delays such as conflicts in the order in which measures of enforcement are heard, the arbitrators often fail to complete the arbitration in 60 days, delaying the arbitration process to several months.

2.3. Substantial Problems

As the last-resort remedy of enforcement mechanism, retaliation is inevitably resorted to under certain circumstances. However, many problems and deficiencies of retaliation system have gradually manifested themselves in the practice.

Firstly, the purpose and function of WTO is to facilitate international free trade and eliminate trade barriers such as tariffs and compensations. However, the retaliation mechanism authorizes the initiation of trade barriers, contradicting the free trade motif of WTO. This violation could even lead to trade war in the worst case, therefore the unilateral retaliation must be prohibited given this consideration [7]. This inherent contradiction poses a fundamental question about the alignment of retaliation practices with the broader goals of the WTO. Chad P. Bown and Joost Pauwelyn indicate that given the nature that the GATT/WTO is inherently based on a mercantilist game of ‘reciprocal exchanges of market access’, and its assurance of trade liberalization, we may accept this violation as part and parcel of the mercantilist game [8]. Secondly, the DSU stipulates that the retaliation level is confined to be equal or less than the damage caused by the WTO-inconsistent measure, in seek of the “equivalence”. However, this “equivalence” in form is not necessarily equal to “equivalence” in essence. Kym Anderson simulates a case that a state implements prohibitive tariff as retaliation and concludes that ensuring such equivalence does not mean that retaliation has the same economic welfare effect on the respondent as the initially determined damage, and the complainant would suffer additional economic loss due to the import restrictions it sets up. Moreover, it has been challenged that if this constriction of retaliation level fails to fulfill the purpose of ensuing compliance. Kym Aandersin considers that it may be more appropriate to allow multiple of the damage to be the imposed retaliation level, in order to deter and induce WTO compliance [2]. Thirdly, retaliation could lead to destructive consequences for both the respondent and the complainant. For instance, if the complainant sets up a tariff to retaliate, it could increase the prices for consumers and the domestic unemployment [9], impair the domestic interest and damage the general welfare as well, hurting the countries with already weak economies disproportionately and causing a counterproductive result for them, while exporters continue to suffer from the protectionist measure. This not only harms the target country but also the initiating country, potentially leading to a lose-lose scenario where both economies suffer from escalated trade tensions, deterring some countries from implementing retaliation even authorized. Setting up tariffs and non-tariff barriers would even cause knock-on effects from financial market developments and bring about trade shock to the global economy [10]. Fourthly, a particularly challenged aspect of the WTO's retaliation mechanism is its limited effectiveness for small economies, such as developing and least developed countries. As the Sutherland Report observes, 'poorer WTO Members ... normally cannot effectively use the weapon of retaliation'. These countries often lack the economic leverage to impose significant retaliatory measures against larger economies. Their trade volume and influence are typically insufficient to exert meaningful pressure on dominant world powers, rendering their retaliatory capabilities ineffective and often symbolic [11]. Fifthly, the lack of retroactivity in the retaliation system means it does not take the losses incurred before the expiry of the “reasonable period of time” into account. This neglect leaves affected parties without recourse for past damages. Most essentially, this is because that retaliation is more driven by perceptions of unfair foreign policies than specific sectoral injuries [12]. Sixthly, When the complainant is carrying out a cross retaliation, it could bring adverse impacts to the irrelevant parties in other sectors or under another covered agreement, while the parties benefiting from the inconsistent measure are left unharmed.

There have been numbers of discussions and suggestions regarding the reform of the WTO's retaliation mechanism. For instance, Mexico proposes to supplement retroactivity of compensation and alienability of retaliation rights, Brazil and Uruguay come up with the conception of collective retaliation and so forth. While some of these proposals show promise and could lead to significant enhancements, others might be considered premature and could introduce new complexities into the system. The potential for a stronger enforcement mechanism to create more severe trade disruptions underscores the need for a careful balance between assertiveness and adaptability. As the WTO considers these reforms, it must proceed with caution, ensuring that any new measures enhance overall compliance and fairness without leading to unintended consequences that could exacerbate existing trade tensions.

3. Judicial Practice of WTO Retaliation Mechanism

According to the statistics shared on WTO website, between the entry into force of the WTO on 1 January 1995 and 31 December 2023, WTO members have referred 621 disputes to the DSB, implementation have been determined in 53 disputes. As of 31 December, arbitration to determine a permissible level of retaliation has been initiated in 40 disputes, 21 of which resulted in at least one arbitration decision. Dated to May 2024, there had been 124 cases that the respondent has notified that it has implemented the DSB recommendations to bring the measure(s) into conformity with WTO law. There are no current cases requesting the DSB permission to impose retaliation against the losing party, and 5 current cases raising objection to the request for authorization to retaliate [13]. The figures manifest that in most disputes, the recommendations and rulings of DSB have been implemented, and authorized retaliation merely account for a minority. However, most members complied with the DSB recommendations and rulings out of the multilateral system. The effectiveness of retaliation is still to be questioned and discussed.

Table 1. Enforcement of cases of authorized retaliation [14]

Numble	Case	Consultation requested	DSU arbitration decision circulated	Compliance proceedings completed	Implementation of adopted reports
1	DS26: EC-Hormones (US)	26 January 1996	12 July 1999		Discrepancies still existed till 30 September 2009
2	DS48: EC-Hormones (Canada)	28 July 1996	12 July 1999		Discrepancies still existed till 30 September 2009
3	DS27: EC-Bananas III	5 February 1996	9 April 1999 24 March 2000		Discrepancies still existed till 11 December 2008
4	DS46: Brazil-Aircraft	19 June 1996	28 August 2000	23 August 2001	Compliance proceedings were completed without finding of non-compliance
5	DS108: US-FSC	18 November 1997	30 August 2002	17 May 2006	Mutually agreed solution was notified
6	DS136: US-Anti-Dumping Act of 1916	4 June 1998	24 February 2004		Respondent has notified that it has implemented the DSB recommendations
7	DS222: Canada-Aircraft Credits and Guarantees	22 January 2001	17 February 2003		Authorization to retaliate was granted
8	DS217, DS234: US-Offset Act (Byrd Amendment)	21 December 2000 21 May 2001	31 August 2004		Authorization to retaliate was granted
9	DS267: US-Subsidies on Upland Cotton	27 September 2002	31 August 2009		Authorization to retaliate was granted
10	DS285: US-Gambling	13 March 2003	31 December 2007		Authorization to retaliate was granted

Based on the form above, out of 11 cases, only 2 cases were settled with a relatively satisfactory outcome. This implies that the effectiveness of retaliation to settle the disputes is feeble.

There are 3 representative judicial cases resorting to the retaliation, European Communities-Regime for the Importation, Sale and Distribution of Bananas, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services and United States-Subsidies on Upland Cotton. These cases share the similarity that they all involved developing countries authorized to retaliate against developed countries; all related to disputes over trade in goods and services, with authorization to retaliate under the TRIPS Agreement. Interestingly, the developing countries authorized for retaliation did not actually implement these measures but used the authorization as a bargaining chip. This indicates a shared reluctance among the developing countries to implement retaliation measures and suggests that retaliation are more used as a negotiation tool. This situation highlights some of the fundamental flaws and limitations of the current retaliation mechanism within the WTO system.

3.1. EC-Bananas Cases

In EC-Bananas cases, the EC provided preferences to certain African, Caribbean and Pacific countries for the importation, distribution and sales of bananas. The measures concerned were found to be inconsistent with the GATT and the GATS agreements, and violate the non-discriminatory principle of WTO agreements.

The DSB decided that the measure was in breach of the WTO Coverage Agreement, and the EU issued Regulations 1637/98 and 2362/98 to adjust the banana import regime to bring its measure into conformity. However, the complainant Ecuador and the US asserted that this adjustment did not meet the requirements of enforcement, and requested a review of the conformity of the new measure under Article 21.5. However, the EU suggested that this reviewing proceedings should wait until the reasonable period expires. Afterwards, in order to thwart the retaliation authorization procedure, the EU requested a review of its enforcement measures under Article 21.5. Subsequently, Ecuador submitted an application for the implementation review, and the United States requested for trade retaliation against the EU. The EU filed an arbitration application against the level of retaliation in response. As a result, the panelist had to deal with these requests simultaneously. The disputing parties thus leaves the “sequencing problem” to the panel and the arbitrators composed of the same panelists. After discussions, the panel adopted the considered "logical solution" of “sequencing problem”, and incorporating the Article21.5 procedure into the Article 22.6 procedure. However, in the arbitral decision, the arbitrator found it impossible to assess the level of retaliation before reviewing the compliance [15]. Therefore, the DSB suspended the U.S. request for retaliation. Ultimately, an overall Article 21.5 report was written to cover the issues of whether there had been compliance and whether to authorize retaliation. This report found the EU's second banana regime to be non- compliant and the panel placed the suspension of concessions at $191.4 million per year. The panel refused to determine the proper “sequencing” of procedural steps and stated that this issue belongs to the WTO itself for consideration [4].”

After the authorization of retaliation to the US, Ecuador requested authorization from the DSB to implement retaliation under the TRIPS Agreement, GATS and GATT 1994, pursuant to DSU Article 22.2, in an amount of USD450 million. Ecuador claimed that retaliation in goods sector was not practicable or effective, and requested for authorization for cross-agreement retaliation. The arbitrators agreed on this claim after examining the possibility of cross retaliation, as Ecuador producers were highly dependent on those goods as inputs. The arbitrators also considered the economic disparity between Ecuador and the EC, determining that the circumstances were severe enough to warrant cross-agreement retaliation.

To calculate the level of nullification and impairment, the arbitrators evaluated the various counterfactuals and decided to choose the same counterfactual as in the US/EC Bananas III arbitration to ensure the consistency and no double-counting [16].

However, even granted the remedy of violating intellectual property rights, Ecuador has never employed the measure, settling the case instead [17].

In this case, the EC has revised its regime for the importation, distribution and sale of bananas before the United States requested for authorization for retaliation. However, it merely replaces the inconsistent measures with another inconsistent measure. Due to the finality of arbitration, the retaliation should be terminated when the former inconsistent measure is withdrawn, otherwise the retaliation would contribute to another dispute. If the new measure is to be determined as an “inconsistent measure”, then it is requested to establish a new panel to examine the matter, or to establish an implementation review panel. The practice of making superficial changes without addressing the underlying issues is often done deliberately to buy more time for their own interests.

After 13 months of implementation of retaliation, the EC agreed to enforce unified banana tariff regime. In a sense, the retaliatory system not only fails to facilitate a prompt and effective implementation of the losing party, but also “encourages” members with relatively strong economic strength to exploit the short-lived DSU dispute settlement procedure to achieve specific political and economic objectives by intentionally and unsubstantially modifying the inconsistent measures. The need for enhancement of retaliation to effectively balances these considerations remains daunting but essential for the integrity and functionality of the international trade system.

3.2. US-Gambling Case

In US-Gambling case, the United States enacted a measure that banned the cross-border supply of gambling and betting services. This measure was subsequently challenged by Antigua and Barbuda, who argued that it contravened the U.S. commitments under the GATS regarding market access.

The arbitration panel undertook an in-depth analysis of several factors to assess the situation, including the substantial economic and size disparity between Antigua and the United States, Antigua’s limited natural resources, and its significant dependence on tourism—a sector critical to its economy. Furthermore, the panel considered the highly imbalanced trade relations between the two nations and the fact that Antigua's economy relies heavily on the very sectors that would be targeted by any retaliatory measures [17].

Given this backdrop, the arbitrators determined that the circumstances were sufficiently grave to warrant cross-agreement retaliation within the framework of the TRIPS Agreement. However, they noted that due to the relatively small scale of Antigua's economy, any retaliation would likely have a minimal impact on the United States. Conversely, it could have detrimental effects on Antigua itself, potentially increasing the costs of services within the island nation and adversely affecting its economic stability [18].

This arbitration award strengthened the principle that when significant economic disparities between the disputants exist, the circumstance would weigh considerably in favor of the economically weaker country.

Moreover, the general steps followed by the arbitrator in the United States-Gaming case may be typical for arbitration under Article 22.6: first determine the extent of loss of interest or injury, then examine whether the principles and procedures under Article 22.3 were followed (if requested), then analyze an equal number of issues again, and finally reach a conclusion.

3.3. US-Upland Cotton Case

In US-Upland cotton case, it was found that US subsidies on upland cotton were illegal prohibited and actionable subsidies under the ASCM, and the United States also defied the DSB recommendations and rulings. With respect to both prohibited and actionable subsidies, Brazil requested authorization for cross-agreement retaliation under the TRIPS Agreement and the GATS.

The arbitration panel undertook a detailed analysis and determined that it was neither practicable nor effective for Brazil to retaliate against U.S. capital goods, intermediate goods, and other goods that are crucial inputs into Brazil's economy. Imposing restrictions could lead to adverse economic impacts domestically for Brazil. Therefore, the arbitrators permitted Brazil to lawfully implement cross-retaliation under the TRIPS Agreement [16].

This dispute was the first practice that the complainant is in a position to adequately use cross-retaliation received such authorization. However, rather than employing retaliation, Brazil accepted an offered settlement and failed to resolve illegal issues [4].

3.4. Reflections on the Retaliation Mechanisms

The three pivotal cases illustrate the complexities involved in the retaliation mechanisms. Firstly, there is a clear challenge in balancing the interest between developed and developing nations. Secondly, the cases reveal that procedural rules can sometimes allow for continued non-compliance through minimal or superficial changes, because the respondent is not required to suspend its controversial measure in the DSU proceedings. This highlights the need for clearer rules and more stringent enforcement mechanisms. Thirdly, the strategic use of retaliation as a bargaining tool rather than a punitive measure manifests its ineffectiveness.

Moreover, many contracting members have expressed dissatisfaction with the provision in Article 22.4 that authorizes the retaliation to the extent equal to the loss or damage of interests. It is believed that the “non-punitive” principle of “equivalence” fails to impose its deterrence as the last-resort remedy. Furthermore, many scholars are discontented with the determination level of retaliation. It is considered that the calculation standard is not transparent and objective, and some arbitration bases are not convincing enough.

4. Improvement Proposals for WTO Retaliation Mechanism

Based on the analysis above, there lies a number of procedural and substantial problems in the retaliation mechanism. These include conflicting procedures between DSU Articles 21.5 and 22, lack of explicit legal guidelines for arbitration, and the inability of the current retaliation mechanism to fully resolve disputes or adequately rebalance the interest. In response, numerous improvement proposals have been initiated to address these deficiencies. The complexity of international trade disputes and the diverse interests of WTO member states demand robust and comprehensive reforms.

4.1. Sequencing Problem of DSU Article 21.5 and Article 22

To settle the mentioned sequencing problem between Article 21.5 and Article 22, some contracting members make particular agreements on the application sequence, but such agreements are only binding on the signatories and do not have universal validity.

A more effective solution is needed to initiate universal amendments in the DSU clarifying the sequence of application. Drawing from the EC-Banana case, it would be more effective and reasonable to require the implementation objections to be reviewed and resolved before any authorization of retaliation is considered. This approach would ensure that the primary goal of the retaliation system—to enforce compliance—is achieved before moving to punitive measures. By this means, it can be prevented that the misuse of the retaliation mechanism as a form of undue leverage, thereby upholding the integrity and primary objectives of the WTO's dispute resolution framework.

4.2. Addressing Arbitration Problems

Scholars and member states have proposed several enhancements to refine the determination of retaliation level, focusing on timing, responsible entities, and methodology.

First, it is believed that ascertaining the amount of interest loss at an early stage can make the consequences of non-enforcement clear to the parties concerned, provide a strong incentive for the respondent to enforce the recommendations and rulings, and facilitate the negotiation of compensation.

Second, there is a divergence in views on who should determine the level of interest loss. South Korea argues that this task should fall to the panel convened under DSU Article 21.5. Meanwhile, Mexico believes that the originally constituted panel should reassess the level of interest loss, ensuring consistency and continuity in the evaluation process.

Third, many contracting parties propose that the calculation of interest loss should be retrospective. Some suggest that the following three points could be selected to calculate the interest loss: the date of implementation of the measure, the date of request for consultation and the date of establishment of the panel. It was also proposed that mandatory compensation should be offered to the developing members for their losses incurred in the ongoing course of the dispute settlement procedure.

Forth, a number of contracting members believe that constricting the retaliation level to the level of nullification or impairment lacks deterrence, and suggest applying a “punitive” retaliation mechanism. For instance, the arbitrators could multiply the outcome of calculation with a coefficient to determine the ultimate retaliation amount. Some proposes that taking other factor into account in the arbitration, such as the indirect impact caused by the illegal measures.

Fifth, to address concerns over the excessive discretionary power of arbitrators, it is imperative to establish clearer criteria for determining the level of retaliation, to diminish ambiguity in arbitrators' decisions and lead to more consistent and equitable outcomes across different cases.

4.3. Solving Substantial Problems

The DSU currently does not allow for retrospective retaliation. The mechanism calculates the level of retaliation from the expiration of the reasonable period for the respondent to comply, rather than from the time point that the violation initially occurred. The complainant's losses incurred during the dispute are hence ignored. Accordingly, Mexico proposes that the compensation for the retaliation regime should be retroactive to the time when the violation of the agreement was initiated, or when the complainant requested consultations on the violation, or when a panel of experts was formed. The traceability of reprisals can truly balance the interests of both parties and encourage quicker compliance with WTO.

Furthermore, the effectiveness of the retaliation mechanism varies significantly due to the economic strength of different countries. For weak economies, the impact of authorized retaliatory measures is often minimal and insufficient to compel compliance from economically stronger members. These measures can also result in greater losses for the smaller economies to implement them. Therefore, some Least Developed Countries (LDCs) proposed a system of collective retaliation authorizations, allowing other contracting members to implement the collective retaliation when the respondent refuse to conform to the recommendations and rulings. While this could escalate the effects of retaliation, its success depends on the willingness of other contracting members to participate, making the outcomes uncertain and potentially undermining the free trade objectives by justifying protectionist measures. This proposal could bring about certain technical problems, but could also improve compliance to a degree.

Additionally, the level of retaliation a complainant can impose is capped by the DSU at the loss or impairment suffered, but implementing such measures can adversely affect the complainant’s own economy. To solve this problem, Mexico’s proposal for an “Alienable Retaliation Mechanism” allowing the right of retaliation to be sold enables weaker economies to benefit from their rights without direct implementation. Critics, including Chile, Canada, and the Philippines, argue this treats the right of retaliation as a marketable commodity and introduces undue commercialization into WTO mechanisms, potentially complicating the political landscape of international trade disputes. However, the Alienable Retaliation Mechanism can better prompt the implementation of respondents and resolve the problem that many developing or least developed countries give up the right of retaliation and have no way to deal with the illegal measures of the dominant economies.

Moreover, the existing compensation mechanism in DSU relies on voluntary agreements between disputing parties before retaliation is authorized. Some developing countries hence put forward a proposal that initiate a “Monetary Compensation Mechanism”, forcing the respondent to compensate the complainant with money when the respondent does not implement the recommendations and rulings. This idea was first initiated by Ecuador in its retaliation against the EU in the 1995-2000 EC-Bananas case, where both the US and Ecuador were authorized to retaliate against the EU. While the US imposed significant trade restrictions, Ecuador found itself unable to effect meaningful retaliation due to limited trade volumes with the EU. This approach would help ensure that smaller or economically disadvantaged countries could still obtain relief for trade violations without bearing the often-prohibitive costs of traditional retaliation. Although it is worried that some economic powers will choose to pay money instead of fulfilling WTO obligations, which will undermine the WTO mechanism, this monetary compensation mechanism can resolve the problem that some small economies cannot fulfill the retaliation measures to a certain degree. Though counterintuitive it might be, “monetary compensation” could be a feasible way to deal with the retaliation`s inability to relieve the developed countries. William F. Davey believes that initiating the monetary compensation mechanism is an imperative option [20].

5. Conclusion

Based on the aforementioned analysis, as the last-resort enforcement mechanism, retaliation aims to urge the parties in violation of the WTO agreement to implement the recommendations or rulings and rebalance the interest between the parties. However, in the authorization and implementation process, several inherent procedural and substantial deficiencies are gradually revealed, causing discussions and controversies among the contracting members and scholars. Based on the academic analyses by scholars and the empirical evidence presented by the judicial practice, the currently concerned problems manifest as the sequencing problem of DSU Article 21.5 and Article 22, the defective arbitration mechanism, the lack of retroactivity and deterrence, and other substantial problems.

A number of proposals were put forward on the improvement of the retaliation system, such as explicitly stipulating the application sequence of DSU Article 21.5 and Article 22 and enhancing the arbitration process by providing clearer guidelines on evident rules. Although the conception of collective retaliation is relatively premature and can be further discussed and modified, the proposal of alienable retaliation mechanism is feasible in many ways. To defend the lawful rights of the contracting members and resolve the problems that many developing and least developed countries are unable to fulfill the retaliation measures, it is imperative to initiate the retrospective retaliation and monetary compensation mechanism.

Although in form, some proposals may appear to offer particular favor to the developing countries and to be unfair to other member states, in essence, they may be a way to prevent the dominant economic powers from taking advantage of the inadequacies of the WTO retaliation system and oppressing developing or least developed countries. We should keep an open mind and proactively probe for more improvement conceptions to benefit all the WTO contracting members.

References

[1] Froese, Marc D., Does Trade Retaliation Work? How Members Learned Effective Retaliation at the WTO and Applied Those Strategies to the Trump Tariffs. SSRN Electronic Journal, 2022.

[2] Anderson, KYM. Peculiarities of retaliation in WTO dispute settlement. World Trade Review, 2002, 1(1): 123-134.

[3] Mavroidis, P., 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', EuropeanJournal of International Law, 2000, 11(4): 763 813.

[4] O'Neal Taylor, Cherie. Beyond retaliation. Northwestern Journal of International Law & Business, 2017, 38(1): 55-136.

[5] Spamann, Holger. The myth of 'rebalancing' retaliation in WTO dispute settlement practice. Journal of International Economic Law, 2006, 9(1): 31-80.

[6] Bown, C. P., & Brewster, Rachel. Us-cool retaliation: the WTO's Article 22.6 Arbitration. World Trade Review, 2017, 16(2): 371-394.

[7] Qin, Julia Ya, WTO Reform: Multilateral Control over Unilateral Retaliation – Lessons from the US-China Trade War. 2020, Wayne State University Law School Research Paper No. 2020: 73.

[8] Bown, C. P., & Pauwelyn, J. Introduction: trade retaliation in WTO dispute settlement: a multi-disciplinary analysis. In C. P. Bown & J. Pauwelyn (Eds.), The Law, Economics and Politics of Retaliation in WTO Dispute Settlement, 2010: 1–20.

[9] Ben G. Li, Gary Lyn, Xing Xu. China's Trade Retaliation: Factuals vs. Counterfactuals. SSRN Electronic Journal, 2022.

[10] Ciuriak, Dan and Ouyang, Mengchun and Xiao, Jingliang, Trade Wars #2018: The Likely Trade and Economic Impact So Far ,2018.

[11] William J. Davey, The WTO Dispute Settlement System: How Have Developing Countries Fared? Illinois Public Law and Legal Theory Research Papers Series, Research Paper, 2005: 5-17.

[12] Furceri, Davide and Ostry, Jonathan D. and Papageorgiou, Chris and Wibaux, Pauline, Retaliation Through Temporary Trade Barriers. 2022.

[13] World Trade Organization, Current status of disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm

[14] World Trade Organization, Follow disputes and create alerts, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results

[15] Zhu Lingye.DSU Article 21.5 and Article 22 procedural conflict and its resolution [J]. International Journal of Economic Law,2011(1):1-17

[16] Shadikhodjaev, Sherzod, Cross-Retaliation: Dispute Settlement System of the World Trade Organization (WTO). 2018, Max Planck Encyclopedia of International Procedural Law [MPEiPro], Oxford Public International Law, 2018.

[17] Abbott, Frederick M. Cross-Retaliation in TRIPS: Options for Developing Countries, ICTSD Programme on Dispute Settlement and Legal Aspects of International Trade, 2009, Issue paper No. 8, International Centre for Trade and Sustainable Development, Geneva, Switzerland.

[18] Bodien, Clint. Cross-retaliation in the WTO: Antigua and Barbuda's proposed remedy against the united states in an online gambling disputes. Law and Business Review of the Americas, 2008, 14(4): 847-858.

[19] Xiao Wei. Research on Monetary Compensation System in WTO Trade Remedy System, Jiangsu Social Sciences, 2009(4): 132-136

[20] William F. Davey, The Sutherland Report on Dispute Settlement: A Comment", Journal of International Economic Law, 2005, 8(2): 322.