The Effectiveness of the Dispute Settlement Body of the World Trade Organization: an analysis of its first twelve years of existence and proposals for its improvement

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Abstract

Purpose – The purpose of this paper is to analyse the performance of the Dispute Settlement Body (DSB) of World Trade Organization (WTO) performance, between 1995 and 2007, as well as to discuss the main proposals for its improvement.

Design/methodology/approach – First, the paper presents the legal predictability of the system; compliance with its procedural stipulations in regard to its proposed timeframes; and the participation of different groups of States within this system. The timeframes are compared with those that really happened. Thus, there is an analysis of the effectiveness of its decisions and the necessity to induce compliance and retaliation. Finally, the main proposals to change the system are discussed.

Findings – It is concluded that most of legal procedures are accomplished as previewed by DSB, but the system itself is highly dependent of the action of States, who need time to negotiate. It is also possible to conclude that there is a high level of effectiveness and States prefer to respect the decisions of DSB and maintain the legitimacy of the system as a whole than keep advantages in specific matters.

Originality/value – When the WTO was founded, there was an effort to generate a system guided by legal rules. The DSB has made efforts to maintain a high level of legal preciosity. However, it is clear that this system is still very limited by the traditional method of negotiation among States. The implementation of a rule-oriented system contributes to greater democratization of access to justice and, of course, in a limited way, the principle of sovereign equality of States. Finally, the majority of proposed changes attempt to apply the logic of domestic courts to an international body, assuming a level of organization of the international community as a whole that still does not exist. Others proposals suggest increasing the politicization of the system, which is also not appropriate.

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The Dispute Settlement Body (DSB) of the World Trade Organization (WTO) has proven to be an effective instrument in dealing with global commercial problems while providing an elevated degree of legal security in multilateral relations. The effectiveness is revealed both in the time taken to resolve legal disputes, relatively short given the amount of disputes, and in the execution of the States' decisions. This system bred innovations in the judicial logic in the mechanisms of international conflict resolution, attained legitimacy in the international realm and allowed for greater participation of the States, including developing States, in the system.

The World Trade Organization was created in 1995 and innovated with a system of conflict resolution that utilizes mechanism that are more cogent and rigid than those provided by the General Agreement on Tariffs and Trade (GATT). Between 1995 and July 2008, 378 cases were submitted for its appreciation, making it one of the international forums with the largest number of cases. It formulated a sum of decisions that add to over thirty thousand pages of jurisprudence, assuring a degree of predictability to legal interpretation of the different agreements that make up the WTO system, thus aiding in the legal security of the international legal system of commerce. Currently, it can be said that the interpretations of the DSB serve to limit public policies of commercial stimulus in the entire world and to avoid conflicts among States, fulfilling an important preventive function.

The efficacy of the system was attained through the high rate of compliance with its decisions. In a few cases there was an implementation of authorized commercial retaliation because the majority of cases resulted in spontaneous compliance, even by the great economic powers, who would rather endure minor losses yet guarantee the legitimacy of the system as a whole.

Nevertheless there is criticism to the effectiveness and functioning of the DSB, particularly coming from States that are less active in the international forums or that are not in the habit of practicing authorized commercial retaliations through legal mechanisms as an instrument of international commercial policy. The critics hold that there is no compliance with its decisions and even that the condensing of legality could be detrimental to multilateral economic expansion, built above all on political, as opposed to legal, negotiations. The fear of counter-measures that are unauthorized or masked by

the suspension of the System of General Preferences are among the main reasons by which resisting States justify the non-utilization of all possible and authorized measures by the Dispute Settlement Understanding.

In discussing this subject it is helpful to indulge in a brief analysis of the DSB in the early years of its existence. This analysis will use the database compiled by the World Bank as a source, which consists of a considerable amount of information regarding the DSB and its reports.[2] Thus, we will first discuss the legal predictability of the system, compliance with its procedural stipulations in regards to its proposed timeframes and the participation of different groups of States within this system. In this manner it will be possible to draw conclusions as to the effectiveness of its decisions and the changes in international law with the system as a whole.

1. *Brief description of the functioning of the Dispute Settlement Body in its first twelve years*

The DSB follows a series of procedural rules laid out in the Agreement on Conflict Resolution of the WTO, a small treaty with specific timelines and clear procedures for each stage of the process. Practically every WTO treaty aligns itself with this system of conflict resolution.[3] Though they are sometimes not followed to the tee in all cases, the timelines remain relatively short. The DSB is a jurisdictional body, despite the fact that the language utilized in its early documents suggest a voluntary mechanisms, non-jurisdictional. In a single dispute, there can be up to four separate stages: consultations, panel, appeal and implementation.

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[2] The database contains information from 1995 to 12/31/2006. Some methodological precisions must be detailed for accurate comprehension of the article. In some disputes, many members are involved. In this case, the authors of the study considered the parts bilaterally, so that in a dispute with two plaintiffs and three members as interested parties and one defendant, this would be considered five disputes. The total number of disputes considered, 351, was thus multiplied by almost three, totaling 965. Aside from that, contrary to previous categorization, Developing Nations that are parto f the OCDE were considered industrialized nations, notably México, China, Turkey and South Korea.

[3] Some plurilateral treaties (non-obligatory) can define how the Agreement on Dispute resolution is applied. JACKSON, J. *Sovereignty, the WTO, and Changing Fundamentals of international law.* Cambridge: CUP, 2006 p. 145

In the first phase, that of consultation, the members[4] express their discontent with commercial practices deemed irregular in relation to the treaties that make up the WTO system. The pretense for the State or International Organization in going to the WTO can be justified by the violation of a commercial agreement, as well as by the frustration of legitimate expectations of commercial gain derived from signed treaties, though the treaties themselves may not have been violated (*damnum sine injuria*). Negotiations must begin up to 30 days from the reclamation. During the consultations, members must attempt to find an amicable solution to the dispute for a period of at least 60 days before moving on to panel. The escalation from the consultation stage depends on the States, and not the WTO, for in escalating to the panel, the States must indicate a failure in bilateral negotiations express their desire to proceed to the panel.

This period is also utilized for the preparation of the legal case, material and personal resources. Interested third parties can also mobilize their resources to engage in the process in whatever capacity. In the first twelve years of the WTO's existence, the average duration of the consultation phase was seven months.[5] Nevertheless, practically half the disputes did not escalate beyond the consultation phase, either because an agreement was reached between the parties involved, or because the costs, economic and political, of escalation outweighed the possible benefits. In this stage, the President of the WTO can play the role of mediator, or appoint someone to play that role. Attempts at mediation or conciliation before the establishment of a panel can occur either in Geneva, or in the actual States involved in the dispute.

If a mutually agreed solution cannot be reached, the member can solicit the formation of a panel composed of three arbiters, chosen by the President of the WTO from a list of names proposed by the group of States, made up of employees from the diplomatic representations or of the WTO itself, professors or lawyers. It is interesting to note that the Indians, Swiss, New Zealanders, Australians and Brazilians are among those with the highest participation in the dispute settlement . Some States which are very active in the WTO have few arbiters in the panels during this period. For example, only two

[4] Here we use the term members and not member-States because some members are a conglomeration of States such as the European Union.

[5] MAVROIDIS, P.; HORN. H. *The WTO Dispute Settlement System 1995-2006*. Some descriptive statistics (World Bank 2008). http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/DescriptiveStatistics_031408.pdf, acesso em 29/09/2008, p. 27

Americans served as arbiters in the panels of the first 12 years, despite the fact that the United States is the most active member of the WTO. However, though there were few Americans on the panels, it is interesting to note that the vast majority of the arbiters were educated in the United States, which in a way explains the influence of American legal logic in different decisions, a mix of *common law* and continental law.

After the formation of the panel, the arbiters have up to six months to offer a decision, a timeframe that can be reduced to three months in urgent situations. During the first twelve years, the majority of the cases exceeded the six-month limit, but averaged under nine.[6] In this short period of time:

- Each party presents a written petition, detailing the points it intends to discuss;
- There is a first hearing for the presentation of the case by the plaintiffs;
- There is a second hearing where the first presentation is contested;
- The panel can solicit the presentation of documents by experts;
- The panel presents a first draft of its decision, to be commented on by the interested parties;
- Based on the parties' comments, a provisional report is prepared for new comments, and another week is conceded for final comments;
- The panel can, within its discretionary power, meet with the parties again, within a period of two weeks, and decide whatever particular concerns remain imprecisely decided upon;
- The final report is published, which can only be negated through consensus of the members of the WTO[7]. Up until this day, all reports have been accepted.

It is a reduced time frame, above all because this phase involves the presentation of the facts of the case and the analyzing of hundreds of documents. The final report is then sent to all members for approval or denial.

The decision can be taken to the Organ of Appeals, up to 60 days from the WTO's approval. The Organ of Appeals is composed of seven judges, three of them, chosen randomly, participate in judging the appeal. In this stage only legal questions can

[6] MAVROIDS; HORN, *op. cit.,* p. 27-34
[7] In August 2008 there were 153 members

be raised, there is ample interpretation and factual questions associated with legal questions are constantly revisited.

The Organ of Appeals has between 60 and 90 days to offer a decision. In this period the petition for appeal is answered and a final decision regarding the dispute is made. The report also becomes active with the approval of the Dispute Settlement Body, which does not occur if there is a negative consensus among members. In these twelve years of its existence, all appeals decisions were judged within the 90 days and approved by the WTO.

The decisions of the Special Group and the Organ of Appeals are generally dense legal arguments, utilizing various multilateral treaties of the WTO, as well as, in a subsidiary manner, legal sources found outside of this legal subsystem. One by one the legal arguments raised are analyzed and it is decided whether any of the policies violate multilateral treaties. It is then decided that the States alter the incompatible policies, shaping them so they conform to international agreements. One notes that there is a reduction of cases that go to appeals, which may be a function of the increased predictability of the system, based on the construction and confirmation of jurisprudence on the different treaties.

In general, a little over half the alleged violations are confirmed by the WTO. With the confirmation of a violation, the defeated member must manifest itself within 30 days after the adoption of the report to state whether it will or will not change its policies and asks for a timeframe in which to realize the changes, which can vary from 15 to 18 months. The timeframe can also be a subject of dispute, a dispute whose timeframe is 90 days, which does not interfere with the total timeframe for the implementation of the final decision in regard to the adoption of the final report. In nine out of ten cases, the Special Group or the Organ of Appeals concluded that there was at least one violation of the agreed commitments.

After the established timeframes have elapsed, in cases where the final stipulations are not met, the victorious member can request the imposition of commercial sanctions, also known as compensatory measures, or the suspension of commercial concessions. The WTO itself utilizes these measures according to the dispute. There is no time limit on soliciting the authorization of sanctions, but on average, it takes the States

225.94 days to solicit a ruling on a failure to comply with the decision, after the previous timeframes have elapsed.[8] This time period is usually utilized for members to try and establish new negotiations or to verify the legitimacy of the alleged reasons for their failure to comply. We are then on the verge of the harshest measure afforded by international law and the instruments for the peaceful resolution of disputes. Before its applications, the members must negotiate, for at least 20 days, and if there is no agreement, constitute another panel to determine the amount of harm or loss and the forms of compensation. In general, in this stage, the winner overstates its losses, and as a result, the amount of compensation is reduced by the arbiters. In the case of European Communities – Bananas, for example, the United States proposed a retaliation of US$520 million, which the arbiters reduced to US$191.4 million.[9]

There are no penalties. The State does not pay the determined value. The compensation is relayed through commercial retaliation, preferably in the same product or commercial sector disputed. If that is not possible, then in other sectors. The most common retaliation is in goods, where a simple increase in the import tax causes damages to the other party and it is easy to calculate the damages imposed by the measure. The timeframe for the implementation of retaliations can be up to 15 months. After this period, the measures must be revisited and can be renewed if the illicitness persists. In practice, the States do not have to apply retaliations for that long to guarantee compliance; the average from the inception of the WTO is 9.48 months.[10]

The entire process lasts, therefore, up to 18 months in the first and second instances, another 18 months for implementation, totaling, taking into consideration the usual delays, up to four years in cases of non-compliance. The timeframe is vastly reduced if the dispute arises among States of Systems of Regional Integration with a high legal density, and that involve quantities that easily surpass one hundred million dollars and can reach four or five billion. As we have seen, only in some cases does the WTO not comply with the timeframes, which occurs above all in complex cases where external

[8] MAVROIDS; HORN, *op. cit.*, p.32
[9] WT/DS27
[10] MAVROIDS; HORN, *op. cit.,* p.32

experts are hired to perform econometric studies, such as the United States –Byrd Amendment[11] dispute, in which the timeframe greatly surpassed what was expected.

2. *The legitimacy of the system and its benefits*

Among the main benefits of the system for dispute settlement are: the strengthening of the international system, increasingly rule oriented and less power oriented (even a system guided by force is still predominant); the agreement among the interested parties, as opposed to mere penalties for damages suffered; disputes are resolved amicably, preventing international tensions and even wars; its expediency; the creation of legal precedents and increased legal security; questions of interpretation and ambiguities in treaties are resolved; compliance with international regulations is enforced; asymmetries among States are lessened; a sentiment of just proceedings is instilled in the participants; it allows governments to overcome internal resistances that undermine international law.[12] Bruno, gostaria de acrescentar alguma expressao no inicio que relativizasse todas estas afirmações, como "estimulo" a ou "melhoria das possibilidades de". O que você sugere?

Thus, the system of dispute settlement of the World Trade Organization has gained legitimacy for several reasons: the constant adoption of reports by the WTO, the dense and relatively uniform legal analysis throughout the decision-making process, impartiality, high rate of effectiveness for its decisions, which leads to the greater participation of developing countries in the system.

Constant adoption of reports. In the previous system of dispute settlement, within the GATT, it was necessary that all members accept the report for its adoption (positive consensus). In the new system, all members must reject the report to keep it from being implemented (negative consensus). If in the old GATT a dispute rarely reached the stage of commercial retaliation, because the injured parties kept it from being approved, in the

[11] WT/DS217/ARB/KOR e WT/DS217/ARB/JAP
[12] JACKSON, *op. cit.,* p. 147-150.

current system the injured party cannot single-handedly block the report's implementation.

Legal density. In all the reports, there is a great preoccupation with the legal aspects of the dispute. From the very first reports, there was a constant effort to construct uniform interpretations on the different legal concepts, in light of international law and the rules of its interpretation. Though there is no obligation to respect precedents, in practice, the WTO maintains its previous positions, in a mixed system of continental law and *common law*, marked by the rigid interpretation of the WTO treaties and abundant use of its own precedents.

In any case, it is a very closed subsystem. Recourse to other treaties is realized in a subsidiary manner, with rare exceptions to general rules, such as the Vienna Convention on the Law of Treaties. It is interesting to note that with its increased legitimacy, and the States' willingness to utilize this dispute settlement body over other options, the WTO, in a way, imposes itself over other legal subsystems. Even if theoretically there is no hierarchy in international law, practically, the treaties of the WTO system are more frequently used as legal sources over others, taking precedence when conflicting with another system. This prevalence of commercial norms has wrought criticism from different sectors, such as the environmentalists, who in the nineties believed that the economic logic would neutralize the advances made by international environmental law. These criticisms were mitigated by the consolidation of a jurisprudence relatively favorable to the environment and public health.[13]

Impartiality. It cannot be said that more powerful States or more sensitive subjects are favored. The rate of irregularity confirmation for allegations is practically the same for different groups of States.[14] In a way, some politically sensitive subjects such as the environment, for instance, had more elastic interpretations of the utilized concepts, stemming from a structured risk analysis, but are nonetheless inline with the consolidated models of international tribunals in the European Communities and even in the United States.

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[13] Particularly the United States – Cameroon (WT/DS58/61); European Union – Asbestos (DS 135); European Union – Hormones (WT/DS26/48), among others.

[14] One exception refers to the number of sucesses of requests by the United States and the European Union against developing states, which surpassed on average, during the first twelve years, 90%. 144 reports were analyzed, 2369 points disputed.

To the present day, approximately one third of the members have been required to change its legislation to conform to the guidelines of the WTO[15]:

- Only seven members have been required only once: Brazil, Dominican Republic, Egypt, Guatemala, Indonesia, Thailand and Turkey.
- Ten members have been required to change legislation in more than one case: Australia (2), Chile (2), Japan (4), Korea (5), Mexico (4), India (5), Argentina (6), and Canada (8).[16]

In general, the States, even the greater economic powers, comply with the decisions of the WTO. The members of the European Communities, who lost sixteen cases and especially the United States, who lost 33 cases, almost half the world total, are the groups that have incurred the most defeats within the WTO. In the institution's own analysis, the United States and the European Union managed to alter and conform its norms and policies deemed irregular by the WTO in the great majority of cases and experienced residual difficulties in few cases, especially those that require Legislative approval.[17] This is of still greater importance given that the two groups comprise almost half of all cases since 1995. Though these members have the economic conditions to withstand retaliations, they prefer conforming and maintaining the legitimacy of the system as a whole, through some of its sectors may suffer in the process.

In these twelve years, the rate of compliance in all cases is of 83%, where as the remaining 17% revolve around subjects of disputes that existed prior to the creation of the WTO, were already firmly grounded in the States themselves, and the new system was an attempt at reverting these already consolidated situations. This is the case, as examples, in the disputes regarding the importation of bananas, which involved dozens of members and was already a subject of polemic in the 1970's, prior to the creation of the WTO; the hormones in North American beef, rejected by the European Union, above all, in function of the sanitary crises like mad cow, which makes any imposition by the WTO difficult.

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[15] Considering reports from 1995 – 2007 the European Union as the 27 member-states. WILSON, B. *Compliance by WTO members with adverse WTO Dispute Settlement Rulings: the record to date*, Journal of International Economic Law, p. 398-399.
[16] WILSON ob cit., p. 399.
[17] WILSON, *op. cit.,* p.397.

One can note that of the more than 305 disputes in the period between 2005 and march 2007, only 109 reached a decision, which means in other words, a solution was not found among the involved parties. Of these only 18 were not voluntarily solved (approximately 5%) and led to requests for retaliation. Only half of these cases (9 cases, or 2.5%) contained an arbitrage to calculate the retaliation, in the other half, the parties were in agreement on the issue of retaliation. Of these 9 cases, 8 contained a retaliation, for in the case of the United States – Anti-Dumping Act of 1916[18], the United States conformed prior to the implementation of a retaliation.[19]

The system's increased legitimacy brought about other benefits. The amplification of legal security from its decisions enables a degree of predictability and formation of public policy so as not to violate not only the treaties of the WTO, but also the consolidated interpretations of said treaties. There is no denying that the decisions of the WTO, the assurance that they will be implemented and the threat of eventual retaliation generate a degree of self-limitation on the part of legislative bodies and executives in the whole world, in a clear quest to refrain from setting policies that could later be questioned by the WTO.

Greater participation of developing countries. The previous system, that of the GATT, was practically abandoned by developing countries, whereas now they comprise about one third of demands. Even so, only eight less advanced countries participated in cases in the first 12 years, which is very low, especially considering that in most cases they participated as interested third parties. Brazil, for example, which participated in only two disputes in the previous system, is currently the sixth most active State, behind only the United States, the European Union, Canada, India and Mexico and ahead of more important international commercial actors such as China and Japan. In all, between 1995 and 2006, Brazil initiated 31 disputes and participated as an interested third party in another 34.

In any case, the two largest users of the system are the United States and the European Union, which participate more in passive roles (56.1%) than in active roles (26%). In other words, the system serves more as a venue for smaller commercial actors

[18] WT/DS 136.
[19] WILSON, *op. cit.*, p. 399.

to demand compliance from the larger ones, than the other way around. Here's another important fact: these two commercial giants tend to more often act against developing nations, than against established, industrialized powers or against each other (98 cases).[20] The clear beneficiaries of the system are the Industrialized States, except for the United States and the European Union, who are twice as often the recipients of the dispute, as opposed to being the originators.

However, the Dispute Settlement Body was initially structured not as a judicial organ but as a diplomatic conflict solving instrument and this represents a problem to the consolidation of the organ's legitimacy. This can be noticed within the system's characteristics like the confidentiality of the procedures, which contributes to the suspiciousness of the judicial operators. With time the juridical character within the process gained space in face of the political. In the first litigation, the United States case – gasoline, the Dispute Settlement body demonstrated it could revert the Special Group decision and in Banana III litigation there is the confirmation of the possibility of effective participation by private laywers[21]. On the other hand, the lack of a clear judicial characterization made the organ's approval by the American Congress possible.

The judges themselves have already manifested in favor of the proceedings' transparency. Since the European Communities litigation – Asbestos, there finally was a regulation of civil society (amicus curiae) participation[22]. Anyhow, confidentiality prevails, which contributes do the system's suspiciousness.

3. *The originality of the legal logic for induction to conformity of the Dispute Settlement Body*

The decisions of the DSB/WTO declare in a first moment that a certain policy of the State (legal or political) violates the assumed international agreements. In the final phase, after the calculation of the amount of damages incurred from the illegality of the policy, commercial retaliations are authorized, without the possibility of counter-retaliation.

[20] MAVROIDS; HORN, *op. cit*., p.5.
[21] WIELER, J. H. H. The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO Dispute Settlement *in* Harvard Jean Monnet Working Paper, 2000.
[22] RUIZ-FABRI, H. Le juge de l'OMC : ombres et lumières d'une figure judiciaire singulière *in Revue Générale de Droit International Public, 2006,* v. 6, n.1, p. 41.

From the point of view of international law, it makes no difference whether the infringing policy is of a legislative or administrative nature. All that matters is that the final measure conforms to international agreements. International law also does not verify the normative value of the treaties within the realm of domestic law. Thus, it does not matter whether the infringing norm was implemented before or after the WTO, or whether, by internal law, the norm is hierarchically superior to the multilateral treaty, a case in which, according to Brazilian law, the efficacy of the treaty would have to be suspended. For international law, it does not matter whether the infringing norm is in the State's constitution. A declaration of infringement indicates that the member is internationally responsible and could suffer the economic consequences of an eventual retaliation.

Perhaps for this very reason, there is a resistance by the classic jurists in accepting the legality of the WTO. In practice, the increased cogency in the international decisions limits the sovereign capacity of the State to change its own legislation, especially evident in States with vast territories and traditionally involved in self-regulation such as Brazil, China, Russia, India or the United States. The main difference in the law of the WTO is not only legal, but has to do with how its economic and political instruments of coercion are prescribed in its own law. Previously, in classical international law, a State could simply ignore sanctions or even excuse itself from the organization, without greater repercussions, validating its internal law. Only in extreme cases would the sanction lead to more important retaliations or even be known by the general population. Today there are enough modes of economic retaliation to mobilize internal sectors to exert instruments of political pressure over government to avoid such sanctions.

The difference lies in the legal mechanism used to assure implementation of its decisions. Compliance comes with the insatisfaction of the affected sectors who then exert pressure on the government to act, and not on the national Judiciary, which internalizes an international decision. The legal logic of classical international law cannot explain this phenomenon.

We might ask why the richer States don't simply ignore retaliation from a poorer State. Or even, why don't the richer States, explicitly or implicitly, counter-retaliate. The do not because an action of this nature would detract from the legitimacy of the system as a whole, driving other States away from the organization. Any State could also withdraw

from the WTO, but this is also not a viable option, for the advanced process of economic globalization would preclude such an action, even for the great powers. Thus, the best alternative remains to incur the losses, reach a consensus and obtain global gains.

Commercial retaliations consist of, in the vast majority of cases, increases in importation taxes on goods, normally 100% *ad valorem*. Retaliation occurs, if possible, in the same affected sector of the dispute. If not possible, in the same treaty. If not effective, in other treaties, termed crossed retaliation. Retaliation is conducted only by the victors of a dispute. These products then become so expensive that there is an impeding of sales, a loss of markets. The very announcement of a possible retaliation has immediate impact on contracts and produces losses for the party suffering the retaliation. In this process they lose:

a) exporters of the overtaxed goods, not necessarily the exporters that were gaining from the irregular policy;
b) consumers, who have to pay more for retaliated products, having to substitute them for other products that were otherwise not their first choice.

Thus, all commercial retaliation has a negative impact on the internal market. When a retaliation is applied it must affect the relevant sectors of the exporting State, but not overly afflict the importing State. In this way, the correct choice of sectors is fundamental. The great majority occurs in the goods sector, 94% in these first twelve years.[23] When the size and influence of the disputing States is greatly disproportional, a retaliation in goods becomes difficult, for even if the smaller State overtaxes a product of the large exporting State, it would probably not be enough to change the large State's legislation in function of the losses suffered, for they would be relatively negligible.

In some cases, the sector that receives the benefit of a policy deemed irregular by the WTO is a sector that is very close to the government, therein making it difficult to induce compliance, except in the case that the sector itself is harmed. In the dispute United States – Emenda Byrd, for instance, the Bush government had been strongly financed by the steel industry during the elections process. When Bush assumed power, a tax was instituted on the importation of steel, which aside from leading to an increase in

[23] MAVROIDS; HORN, *op. cit.*, p.12.

the cost of imported steel, the benefits of the tax went to the American steel industry itself, thus hobbling the competition twice over. Japan, the first State to successfully dispute this case concluded that it would probably not be able to make the White House accept the WTO's retaliation of other economic sectors. It therefore decided to retaliate with products that would have a greater electoral repercussion in the United States, products made in the larger States with larger constituencies, though of lower aggregate value. It publicized within the United States that the Bush Administration was more preoccupied with the steel industry than with maintaining jobs in the affected states, a strategy which led the Bush Administration to eventually capitulate.

Retaliation is not very common. Between 1995 and 2007 retaliation was authorized in only eight cases, 2.5% of the total. The table below illustrates this scenario.

Dispute	*Amount authorized/retaliation*	*Final Result march 2007*
CE – Bananas III (EUA e Equador)	US$ 115 million, by USA	Mutual consensus, but new recourses in 2008
CE – Hormones (Canada and USA)	US$ 130 million by USA US$ 20 million by Canada	Ongoing, but in March the retaliations were judged beyond what is permissible
EUA – FSC	US$ 4 billion by the EU, but only in part	Mutual consensus, after a manifestation of the US Congress
EUA –Byrd Amendment	8 parts were authorized to retaliate against the USA. Japan, EU, Canadá and México retaliated.	In function of NAFTA, Mexico and Canada withdrew retaliations. Japan and EU still retaliate.
Canadá/Brasil – Aircrafts – Embraer Bombardier	Mutual condemnation in different cases	Measures were never imposed

Source: Adapted from WILSON, B. *Compliance by WTO members with adverse WTO Dispute Settlement rullings: the Record to date in* Journal of International Economic Law 10(2), p. 403.

This does not, however, mean that there was spontaneous conformity in all other disputes, for in some cases, the winning States preferred not to retaliate. Nevertheless, it can be noted that the larger players in the globalization process effectively use their legal possibilities to induce compliance on the other States. Only in three disputes do retaliations persist (Byrd Amendment, Bananas III and Hormones), but these are isolated cases that reflect problems that existed prior to the WTO.

We can now discuss the effectiveness of crossed retaliation, via other sectors, such as intellectual property or services, when there is an offense to treaties related to goods. Such is the case in the dispute between the United States and Brazil in regards to cotton. Brazil reasoned taxing cotton imported from the United States would not be effective because Brazil is an exporter of cotton, and barely imports any at all. It would also not be effective to retaliate in other goods, because Brazil represents a very small percentage of total American exports and the retaliations would not be enough to convince exporters to lobby the government to change their policies of agricultural subsidies, particularly due to the political strength of the agricultural sector. The solution was to target the sector of intellectual property, where Brazil exerts a greater influence and is able to apply greater pressure on the American government to convince it to not sacrifice its products in defense of agricultural subsidies.

Retaliation in intellectual property does not necessarily lead to losses for Brazilian consumers. It can involve the withholding of royalties to foreign countries, temporary limits on the rights of intellectual property, mechanisms to force the transference of technology, compulsory licenses for didactic materials or for pharmaceutical products that can be produced by Brazilian companies or imported from other States with more reasonable prices, which could in turn lower costs for consumers. It could make it so that Brazil could freely license and distribute, for public, non-commercial use, medications used to treat diseases like AIDS or cancer. These medications could even be exported at lower cost to other States in need of these medications.

Crossed retaliation in intellectual property was authorized by the WTO for Ecuador against the European Communities and for Antigua and Barbuda against the United States. In the first dispute, an agreement was reached between the parties. In the second, the negative impacts were so small that they did not generate grave consequences. In any case, the precedents now allow Brazil to solicit retaliations with significant values. The critics to this strategy affirm that Brazil could be considered commercially hostile to American eyes by exerting its rights, which could lead to its exclusion from the System of General Preferences, whereby certain products enter the United States untaxed (a US$3.628 billion market in 2005).

In any case, we do not believe that the United States would counter-retaliate, because in several instances when they suffered retaliation, they did not counter-retaliate. In fact, they could exclude Brazil from the System of General Preferences which could lead to losses of up to 400 – 500 million dollars, because many products that benefit from the SGP would have prohibitively high prices and would not be able to compete with other States. But even if this were to occur, the country would receive benefits in the billions of dollars and would be free to break away from its historic dependency on the American SGP, which has been the pressure point used in the past to force the adoption of commercial policies in the past.

4. *Proposed reforms to the system*.

Some authors propose mechanisms to perfect the system of dispute settlement of the WTO. The main suggestions involve collective commercial sanctions; the concentration of sanctions in benefits to affected companies; the application of monetary penalties on States; and the direct effect of WTO decisions on national law[24], the creation of simplified procedures to make it possible for cases of lesser value to integrate the system or the publicizing of hearings and the decision-making process[25], more stabitiliy of the

[24] CHARNOVITZ, S. *Rethinking WTO trade sanctions, mimeo, p. 6-16.*
[25] BOWN, C. P.; HOEKMAN, B. *Developing countries and enforcement of trade agreements. why disputes settlement is not enough*. Discussion paper series, n. 6459. Centre for Economic Policy Research, www.cepr.org/pubs/dps/DP6459.asp , p.16. Acesso em 14.08.2008, e JACKSON, ob.cit., p. 160.

members of the panels or a better politic intervention in favor of the irradiation of the WTO law[26].

The application of collective commercial sanctions by a number of States against those that resist compliance could be interesting, particularly if there is an asymmetry in the power and influence of the States involved in the dispute. If a weak State cannot cause a sufficiently negative economic impact on a strong State, a collective of States could participate in the sanctions. This solution would find its limit in the amount of damages caused by the illegal policy, which in the current logic serves as the ceiling for retaliation. In other words, only when the weak State cannot alone impose the requisite sanctions would other States be involved. The system would continue to be ineffective when the amount of damages is negligibly small for the retaliated State, a common occurrence when there is an asymmetry in the power of the States involved in the dispute. In this situation, the efficacy of the measure would depend on the revoking of the rule of proportionality between the damages and the sanctions, which has not been properly evaluated.

The concentration of sanctions in benefits to affected companies would require a change in the logic of the current system. Today, the system is very State-centric, and the subjects of international law involved, especially the WTO, ignore, as a rule, the companies that suffer the damages imposed by retaliations. The main objective is to affect politically important sectors, to induce compliance to a decision and not to seek compensation.

The application of pecuniary penalties to the State, where resources would be destined to an international fund, would also necessarily change the logic of the system, which today is concentrated upon the suspension of commercial concessions and does not involve the public budget. This measure would be difficult to apply, for a legal reason and a political one. Legally, few States have domestic mechanisms in place to make payments on penalties imposed by international organizations. Politically, this new logic negates one of the benefits of the current system, the strengthening of the State by external measures and the creation of disputes within the States themselves.

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[26] WIELER, op. cit., p. 13

The direct effect of the decisions allows for the possibility of the States' Judiciary to give immediate effect to the measure. It is attractive to States that recognize the preponderance of treaties over internal norms, for it would consider illegal any posterior norms that would conflict with signed agreements. However, in other States where this relation between national law and international law is not as clear, such as in Brazil, it could signify the inefficiency of the system, for adherence to the treaty could be suspended (or revoked) in light of the internal policies. The effectiveness of the decisions would then depend on the degree of monism or dualism of each State, generating legal insecurity in the entire system. Aside from this, the system would depend on the agility of the national judiciaries, which would be the targets of internal processes that would be slower than in the multilateral ambit. In disputes such as European Communities– Tyres, where condemnation is due to the Brazilian judiciary's own inability to offer a reasonable timeframe for a definitive decision, the measure would be ineffective.

The creation of a more simplified procedure is also being proposed, to deal with disputes that involve smaller values, such as those that affect, above all, developing Nations. It could be an interesting solution, if adopted with strong procedures to induce compliance, such as collective sanctions, beyond the limit of damages suffered or other mechanisms that are favorable to less advanced countries.

Lastly, there is an important movement, even by the United States in some instances, towards the opening up of the decision making process and the hearings. The system functions in a confidential manner and, in some moments, interested third-parties are barred from participation in the hearings. In the case of the European Communities – Hormones, in function of the social and sanitary importance of the dispute, in response to a request from the interested parties, the WTO made possible a public hearing, but this is an isolated incident. The documents that are presented and discussed are many times secret and sensitive and their publication could compromise important information. In function of the economic and political interests involved, there is strong resistance to this idea.

Some authors defend that the more stability to the arbiter and the end of automatic exclusion of arbiters in reason of their nationality or because of the parties involved. Practically, there is some stability in the arbiters composition. The Special Group's

decisions demonstrated respect for previous interpretations and a certain corporate attitude even with rotation among arbiters.

Cooperativeness is due mostly from the important role of the Secretariat, which in a practical manner develops the main interpretations in the disputes, which also deserves some critic remarks from judicial theory. The judges are accused[27] of not deciding on their own, in other words that their personnel or other staff are the authors of the decisions in practical terms.

Finally, it is be possible and necessary that the members of the Appellation Organ acted in a more active manner to consolidate WTO's positions in the supranational and even national courts, in such a way as to avoid resistance and provide better conditions of the irradiation of Organization's decisions. Currently, the judicial legitimacy has been acquired by the strength in the authorized retaliations and it would be optimized with the consciousness of the importance of the Organization's normative body by the Judical Power of each member[28].

Final considerations

Thus, the law and the practice of the World Trade Organization contribute to a new dimension in contemporary international law. New methodologies of action, more cogent norms and a new logic for the peaceful resolution of disputes are among its main contributions. This is a branch of international law that contains an agile solution for the settlement of disputes with considerable efficacy and that has been able to give a sense of legal security to a branch of law that is profoundly marred by political clashes driven by economic disputes.

This experience can serve as inspiration for other branches of international law, that function in a different manner, with their own chronology. Nevertheless, while the different subsystems of international law evolve in their own right, international economic law imposes itself on the other subsystems.

The new legal scenario poses new questions that must be answered. Sure, there is a body of dispute resolution that functions with relative efficacy, but it is still far from

[27] WIELER, op. cit., p. 14
[28] WIELER, op. cit., p. 14

neutralizing the asymmetries in power among States. Maybe this is the main challenge for its evolution, something that will only occur if the more powerful States are willing to sacrifice some of their power of action in the name of greater international legal security.

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