DISPUTE SETTLEMENT BODY OF THE WTO: ACCESS TO DEVELOPING COUNTRIES?

// ÓRGÃO DE SOLUÇÃO DE CONTROVÉRSIAS DA OMC: ACESSO AOS PAÍSES EM DESENVOLVIMENTO?

Inez Lopes

>> ABSTRACT // RESUMO

This article aims to analyze the importance of the Dispute Settlement Body (DSU) of the World Trade Organization (WTO) as mechanism for maintaining the multilateral trading system at the global level, in particular as regards access to the jurisdiction by member states. From the quantitative and qualitative analysis, the paper examines the performance of countries at different levels of development and seeks to demonstrate that existing asymmetries in the international trade rules and your reflexes to the OSC. Despite major advances in the creation of a permanent forum to address trade disputes between member states, it appears that developed countries and developing high-and middle-income countries are the biggest beneficiaries. Access to the jurisdiction of the WTO by the least developed countries is an improvement, but, paradoxically, also a denial of the full efficiency of the system, as will be seen ahead. The article also highlights the most active countries and agreements that are put in check before the OSC and the participation of Brazil as a global player in the logic of economic globalization. Finally, attempts to show why reform or revision of the system is essential for the OSC guarantees the right to the principle of special and differential treatment, especially to less developed nations, and promote greater equality between members, resolving conflicts in a more equitable manner. // O presente artigo tem por objetivo analisar a importância do Órgão de Solução de Controvérsias (OSC) da Organização Mundial do Comércio (OMC) como mecanismo para a manutenção do sistema multilateral do comércio em nível global, em especial no que diz respeito ao acesso à jurisdição pelos Estados-membros. A partir das análises quantitativa e qualitativa, o texto examina a atuação dos países em diferentes graus de desenvolvimento e procura demonstrar a participação perante o OSC reflete as assimetrias existentes nas regras do comércio internacional. Apesar dos grandes avanços na criação de um foro permanente para tratar das disputas comerciais entre os Estados-membros, constata-se que os países desenvolvidos e os países em desenvolvimento de renda alta ou média são os maiores beneficiados. O acesso à jurisdição da OMC pelos países menos desenvolvidos é um avanço, mas, paradoxalmente, também uma negação da plena eficiência do sistema, como se verá à frente. O artigo destaca, ainda, os países mais ativos e os acordos que são colocados em xeque perante o OSC e a participação do Brasil como *global player* na lógica da globalização econômica. Por fim, tenta mostrar por que uma reforma ou revisão do sistema é essencial para que o OSC garanta o direito ao princípio do tratamento especial e diferenciado, principalmente às nações menos desenvolvidas, e promova maior igualdade entre os membros, solucionando os conflitos de maneira mais equânime.

>> KEYWORDS // PALAVRAS-CHAVE

World Trade Organization; Dispute Settlement Body; Multilateral Trading System; Access to jurisdiction; Effectiveness. // Organização Mundial do Comércio; Órgão de Solução de Controvérsias (OSC); Sistema Multilateral do Comércio; Acesso à jurisdição; Efetividade.

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INTRODUCTION

The World Trade Organization (WTO) provides a main forum for trade negotiations among members and aims to achieve implementation, administration and functioning of the multilateral trading system. The institution was established at the Uruguay Round (1986-1994), and composes one of the three pillars that support the current international economic order –the others are International Monetary Fund (IMF) and the World Bank. In addition to setting a new milestone in the multilateral trading system replacing the old one, the General Agreement on Tariffs and Trade (GATT), the WTO adopts a new trade dispute settlement system between states at the global order. The Dispute Settlement Body (DSB) becomes the main international forum to solve trade disputes. Unlike the GATT-1947 system (Articles XXII and XXIII), which was based upon the *diplomatic orientation* (characterized by the control of the Member States in searching for solutions of their disputes, the DSB is embedded in the *rule orientation* (i.e. production, observation and application of WTO rules). In 47 years, the GATT dispute settlement system received nearly 300 cases of trade disputes, against the 488 that the WTO has recorded in 20 years of existence. The small number of cases in the GATT system is explained by the lower number of participants, trade agreements and sectors of economic activity under the jurisdiction of the organ[1].

The Dispute Settlement Body of the WTO is one of the most active and dynamic institutions of interstate relations. Currently, the WTO is made up of 160 Member States[2], representing 83% of the participating countries of the United Nations (193). The high number of participants gives greater legitimacy to the body compared to the previous system, considering that the WTO is an organization founded on the idea of a single undertaking, i.e. its nature is based upon a unified legal system, and not a contractual relation, how it was the GATT *à la carte*.[3] In 20 years of existence of the WTO and its dispute settlement system, 488 cases between member countries on various subjects, reveal certain reliability in the multilateral trading system, keeping the possibility of using the unilateral action away or other dispute resolution forums for issues related to WTO rules.

This article aims to demonstrate the importance of the Dispute Settlement Body (DSB) of the WTO as a body of "thickening of legality", a tool capable of establishing respect for the multilateral trading system at the global level and an outcome obligation. However, despite of the institutional legitimacy, asymmetries related to the access to the main "international economic tribunal" –especially regarding developing or less developed countries– serve as hurdle to promote a fair and an efficient multilateral system.

This paper is divided into seven parts. The first briefly reviews the dispute settlement system in the WTO, the transition from the old GATT system and the functioning of DSB. Contentious submitted to the Dispute Settlement Body are addressed in the second part, with a quantitative analysis of performances of the Member States as plaintiffs, defendants and third parties. It also provides a survey of the countries which

most have used the system and the trade agreements questioned in each case before the DSB. The benefits of the dispute settlement system and its evolution from the old GATT experiences are analyzed in the third part. Despite the DSB has been working properly, a review on the current mechanism is necessary. The fourth part examines its effectiveness from criticism regarding access to the body, instruments, procedural equality, applying the principle of special and differential treatment in the DSB and the fact-finding problem. The fifth section analyzes the international access to justice before OSC and the work of the Advisory Council on Law of the World Trade Organization (ACWL). The sixth part briefly addresses the issue of sanctions, in particular the effects of retaliation as measures taken in case of breach of decisions, and discusses the possibility of adopting monetary compensation to the least developed countries in the event of violation by industrialized countries. Finally, the last part presents the importance of Brazil as a global player in the multilateral system of world trade scenery and one of major developing countries to use the dispute settlement system.

1. DISPUTE SETTLEMENT SYSTEM AT THE WTO

The WTO dispute settlement system is an important mechanism for dealing with disputes in international trade, aiming to ensure greater security and predictability to the multilateral trading system, in accordance with article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and provide greater balance between developed and developing countries' relations. The current mechanism contrasts with the old dispute settlement system of the General Agreement on Tariffs and Trade (GATT), inasmuch as it used to grant veto power to developed countries against developing countries' reclamations, establishing a relationship of "procedural" inequality among its members.

This system is seen as a "confidence building measure" establishing a legal *track* to the pacification of conflicts between interstate interests and their markets, the DSB provides procedural stages (consultations - the panel - appeal - implementation - monitoring the implementation-clearing and suspension of concessions), that enable states parties to reach an agreement through diplomatic channels before starting proceedings before the dispute settlement body.

Considering the dispute settlement system as a legal obligation of all member states contemplated at Marrakesh agreement, based upon the *rule of law*, the WTO rules must be complied with in good faith. It also represents both continuity and change over the old GATT system, since there is an overrun of the concept of *rebalancing concessions* to *trade sanctions*.

The idea of creating a new body was due to a relative failure of the old GATT in the face of numerous problems, including the lack of transparency, the lack of penalties, certainty and predictability in procedural rules for settling disputes, the discretion of the acts of Contracting Parties (since there was not a right to establishment of a panel), a lack

of precision and clarity in decisions, delays in the adoption of recommendations, the partial or total failure of the judgment and the lack of international trade experts among the "judges" of the dispute settlement system. Add to that, the lack of political power to block the system operation itself and the concentration of complaints in developed countries –the United States and countries of the European Economic Community accounted for 92% of complaints.[4] However, despite these problems, decisions of the old GATT system are precedents in the current WTO system.

The Dispute Settlement Body (DSB) of the WTO is responsible for the implementation of the Understanding on Rules and Procedures Governing the Settlement of Disputes and has the responsibility under article 2, paragraph 1 (i) to establish panels, (ii) adopt panel and Appellate Body reports, (iii) maintain surveillance of implementation of rulings and recommendations and (iv) to authorize the suspension of concessions and other obligations under the covered agreements.

According to Amaral Junior, the DSU "has combined the diplomatic approach, which focuses on the direct negotiations between the parties, to the judicial approach, with the strengthening of procedural guarantees and production of binding decisions to the parties involved into a dispute".[5] In addition, the "thickening of legality" in the WTO dispute settlement system "has reduced the diplomatic dimension –characterized by political control of the member states to bring forward solutions– by multiplying the secondary rules governing the organization and operation of the system".[6]

In addition, three other issues characterize "thickening of legality": the first is the creation of "reverse consensus" rule by the DSB's decision making; the second is about the jurisdiction automaticity, in accordance with article 6 of the DSU[7]; and the third provides for the enactment the right of "double jurisdiction", with the possibility of appeal against the decision of the panel to the Appellate Body, and the right to have a report from this body.[8] The Panel, consisting of three qualified people, has the task of objectively evaluate the facts and evidence submitted by the parties and applies the rules in the WTO agreements. Its decisions and recommendations are published in a final report. The Appellate Body is responsible for examine the legal issues related to the interpretation of WTO rules of the decisions of panels, playing a "legal control"[9] in the examination of rights under the multilateral trading system. The Appellate Body may confirm, modify or revoke the legal decision of the Panel, but may not examine questions of law that were not ventilated in the report.

The transformations from the old system to the new WTO dispute settlement system show a decrease in power relations between developed and developing countries over the previous GATT system. Moreover, changes are important to avoid political unilateralism by the great powers, to prevent "unilateral blockade" of states in compliance with the recommendations made in the DSB report and to allow greater participation of developing countries as complainants in proceedings for WTO.

Although access to the dispute settlement system is presented as a purely intergovernmental mechanism, disputes are fought for the

defense of interests of national markets and multinational companies. In addition to the international public actors, private actors are directly and indirectly affected by the decisions taken within the WTO. The DSB's recommendations have effects on power relations between the countries involved in the dispute, the national trade policies of states and the commercial activities of economic agents.

Thus, the use of the right to resolve interstate disputes shows a passage of *power-oriented* to the *rule-oriented* system,[10] strengthening, to some degree, the power of developing countries into the multilateral trading system. In this sense, "the rules eliminate the opportunistic actions of countries with more power and prevent that the relative condition of power between the parties interfere with the litigation of judgment."[11]

However, access to the system is concentrated in a few countries. Of the total cases, only 43.12% of the member states are directly involved in commercial disputes. This represents less than half of WTO members, whereas the European Union is composed of 28 countries and not all are directly involved in international disputes. This is demonstrated by the recent change in DSB records that began to adopt the terms "European Union and a Member State" and "European Union and certain Member States". It is observed that in twenty years of the WTO "tribunal", more than 41% of cases are concentrated in disputes promoted by the United States and the European Union, either as complainants or as respondents. Nevertheless, the 488 cases in the WTO show a true "judicial activism" by some of Member States before the DSB.

Regarding the effectiveness of DSB, the fact that member states use the dispute settlement system of the WTO demonstrates greater reliability in the current WTO rules and the mechanism for dispute resolution. McRae says that the dispute settlement mechanisms play an important role in our domestic legal systems "providing an alternative to unilateral and arbitrary behavior by those who consider that their rights have been infringed."[12] In this sense, the author states that the WTO dispute settlement can be seen as effective, as some WTO members have being used the system, they are not ignoring their obligations and look for other ways to solve their disputes in accordance with the rules of the organization.

Despite the undeniable effectiveness of the WTO dispute settlement system in terms of predictability, reliability and safety for implementation mechanisms, monitoring and compensation, the question is whether all members states are been benefited from and have equal access to the system, in accordance with paragraph 2 of the preamble of Marrakesh Agreement.

2. THE DISPUTE SETTLEMENT BODY: A QUANTITATIVE APPROACH

Since the creation of the Dispute Settlement Body (DSB) in the WTO, 488 claims were demanded by member states. These precedents have built and consolidated the multilateral system of trade in the WTO, based upon the questions that were and are raised before the DSB. Thus, the most active

countries are more likely defense of their interests in the global market.

The survey and analysis of these disputes brought to the OSC enables examine the amount of participants, the forms of participation of the member states of the WTO as plaintiffs, defendants and third parties, the most active and less actives countries and the most questioned trade agreements.

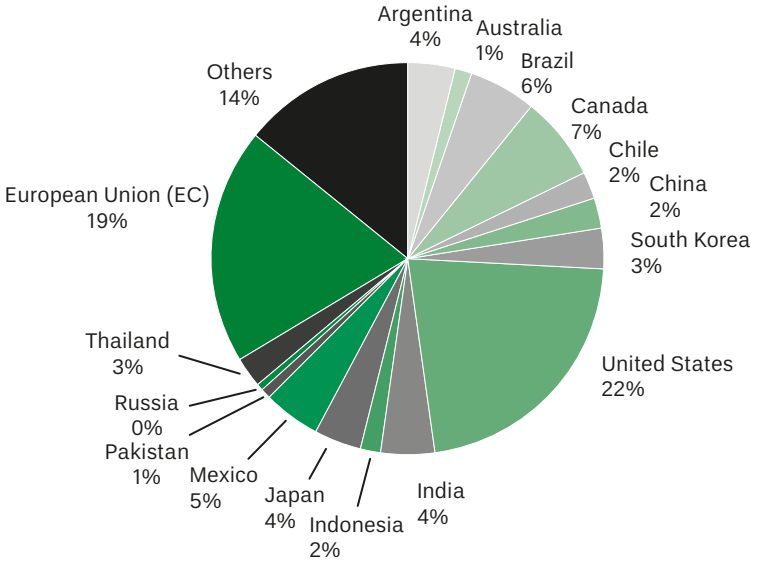
2.1 COMPLAINANTS OF MEMBER STATES

One of the primary characteristics of the WTO trading multilateral system is the consolidation of a "tribunal" so that countries could settle their international trade disputes and defense their markets in order to promote fair and healthy competition. For this, existing imbalances need to be reduced so that states, in fact, rely upon a system which benefits all its members. This is not a zero-sum game.

Despite the deep changes from GATT to WTO system, it is observed that the G7 countries (Canada, United States, Japan, Germany, Italy, UK and France) still have dominion over the number of complaints. They are responsible for most of requests before the DSB (Canada, United States, Japan and European Union accounts for 52.25%, corresponding to 255 cases).

It is observed that there was a deep progress to include new actors in international trade disputes, as there is greater participation of developing countries in the demands before the DSB, such as Argentina, Australia, Brazil, Chile, China, South Korea, India, Indonesia, Mexico, Thailand and the recent entry of Russia, which accounts for 32.99% of complains, corresponding to 161 cases (Table 1).

COMPLAINTS BEFORE DSB -
NUMBER OF CASES - % OF PARTICIPATION



Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

The BRICS countries account for 12.7% of all cases (62) before the DSB, although South Africa has not recorded a single complaint, as example of other African nations.

In the Americas, the number of cases is concentrated in high-income developing countries, such as Argentina (20), Brazil (27), Chile (10) and Mexico (23), despite the complaints requested by Colombia (5), Costa Rica (5), Ecuador (3), Guatemala (9), Honduras (8), Panama (7), Peru (3), Uruguay (1) and Venezuela (1). These all countries account for 25% of total complaints before the DSB (122 cases).

In Asia, Bangladesh is the sole country classified as less developed that has complaint before the DSB.

Finally, this research shows that of the 160 of the WTO member states, 43 are responsible for 86.06% of the complaints. The other countries, which accounts for 73.12% of all WTO members, represents 14% of the DSB requests –it is emphasized that only few countries have been complainants. These data also discloses that there is inequality in access the DSB system that mainly affects the least developed countries.

It also highlights that the existence of some complaints with "joint litigants", i.e. with plurality of claimants (DS16, DS27, DS29, DS35, DS217), questioning the import regime for bananas, the restrictions on imports of textile and clothing products, subsidies to agriculture and dumping. According to article 9 of the DSU, which establishes procedures for multiple complainants, a single panel should be established to examine such complaints whenever feasible.

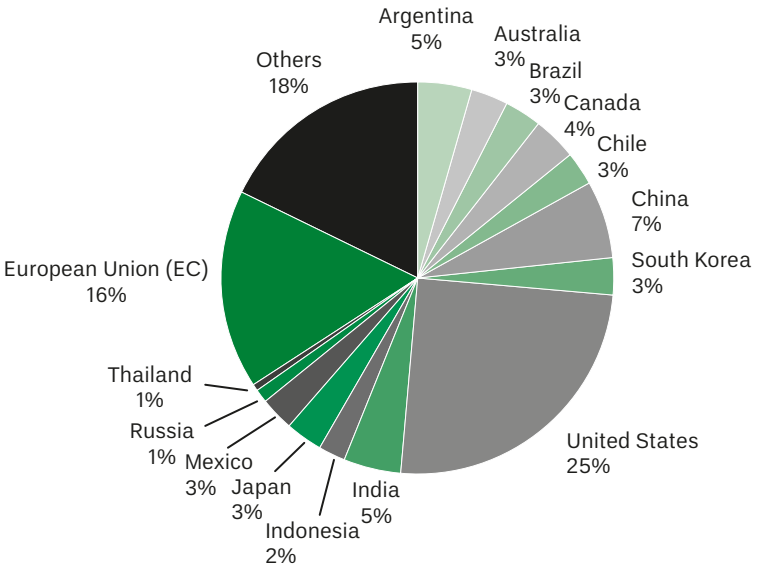
2.2 MEMBER STATES AS RESPONDENTS

To the member states which are demanded by other countries before the WTO dispute settlement system; there remains only the right to defend itself, bearing all the costs necessary for the international dispute solution.

In respect of respondents before the DSB-WTO, the United States and European Union were requested in 41.59% of cases (203). These figures do not include complaints against several members of the European Union individually. Member countries of the European Union appear as isolated defendants in some cases, such as Germany (2), Belgium (3), Denmark (1), Spain (3), France (4), Greece (3), Hungary (2), Ireland (3) Italy (1) Netherlands (3), Poland (1), Portugal (1), United Kingdom (1), Czech Republic (2) and Sweden (1). Consequently, adding 39 cases plus the complaints against Japan and Canada, the numbers raises to 236 cases. In other words, the United States, European Union, Japan and Canada are the questioned countries with 56.35% of the total cases.

As regards the participation of developing and least developed countries as respondents, they were driven in 165 occasions, representing a total of 33.81% (Table 2). In addition, many developing and least developed countries were triggered only once, such as Uruguay, Panama, Malaysia, for example; other defendants were two, three or more times, as shown in Table 2, which presents the most requested countries before the ESC.

RESPONDENTS BEFORE OSC - OMC
NUMBER OF CASES - % OF PARTICIPATION



Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

Regarding the BRICS' countries, they were requested in 15.98% of cases, and South Africa, and Russia were driven in four and five cases, respectively.

An analysis of the reading of the participation of developing countries in the Americas shows that Argentina (22), Brazil (15), Chile (13) and Mexico (14) are the main actives as respondents, despite the complaints brought against Colombia (4) Ecuador (3), Peru (5), Uruguay (1) and Venezuela (2). These countries represent 16.18% of the respondents' countries before the DSB.

With the exception of South Africa and Egypt, which were demanded four times each; other African countries have not had any involvement as defendants. This shows that the current division of labor and the rules of international trade rule out the participation of African countries in the global market competition, making these economies almost meaningless to the point of not jeopardize the international big business.

2.3 PARTICIPATION OF MEMBER STATES AS THIRD PARTIES

The Article 10 of DSU establishes to all WTO members the right to be heard by and to make written submissions to the panel when a member has a substantial interest in a matter and has notified its interest to the DSB. This right is one of the positive balances in WTO dispute settlement system as it allows countries to "hitchhike"" in major global discussions on international trade. Consequently, interested member states may defend their interests in particular issues of their economies; and at the

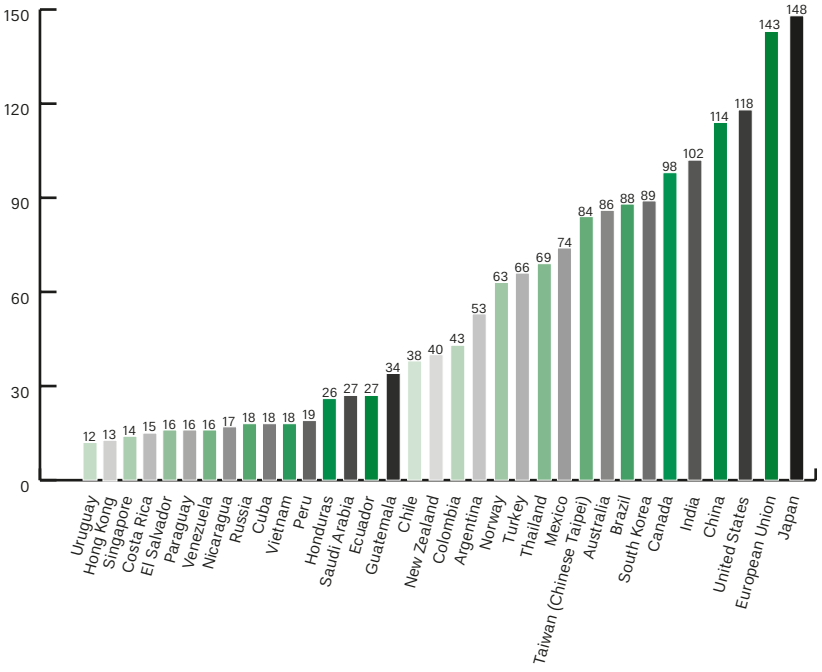
same time they join efforts to enable the respondent state, who has allegedly acted contrary to the WTO rules of the multilateral trading system, be held accountable and modify its behavior in order to act according to the rules of the game.

It is important to highlight the industrialized countries' participation using their rights before the dispute settlement system. Interestingly, unlike what happens in relation to the complainants and respondents, the European Union (143 cases) and the United States (118 cases) are the second and third places in terms of leadership, respectively. Japan is most active country as interested third party (148 cases). See Table 3.

Among the BRICS, China, India and Brazil are also at the top of the disputes participation as third parties with 114, 102 and 88 cases, respectively. Although Russia has acted only in 18 cases, it is emphasized that its admission to the WTO only occurred on 22 August 2012. South Africa has acted only in seven cases as third party.

THIRD PARTIES

Number of cases



Source: WTO. Obtained in 23/Dec/2013 (http://www.wto.org)

It is observed that the right under Article 10 of the DSU has strong impact on the least developed countries' participation. The African countries, for example, have a much higher participation as third parties than as claimants or respondents. Nevertheless, these countries are the least benefited by the WTO dispute settlement system. The number of cases of African

countries' participation as third parties achieve 56 (South Africa, 7; Chad, 1; Ivory Coast, 4; Egypt, 7; Ghana, 1; Kenya, 3, Madagascar, 4, Mauritius, 6; Namibia, 1; Nigeria, 6, Senegal, 2, Swaziland, 3, Tanzania, 3, Zambia, 2, Zimbabwe, 6). These data confirm the high asymmetry in the multilateral trading system. The participation of African countries as third parties before the dispute settlement system is only 11.47% of all participants.

Although the participation as interested third parties may increase the costs of litigation before the DSB, the involvement of these countries is especially important for the poorest ones, since they may benefit from claims made against the industrialized countries if the dispute is successful, or may increase the chances for negotiating a resolution to trade disputes. Another advantage is likely to be heard. Thus, being able to have the option to bring a dispute to the DSB at any stage is still a better solution than not litigating, as this has no benefits at all in terms of market access.[13] Thus, strengthening the participation as third-party and their rights is "vital to "the health of the multilateral regime" of trade.[14]

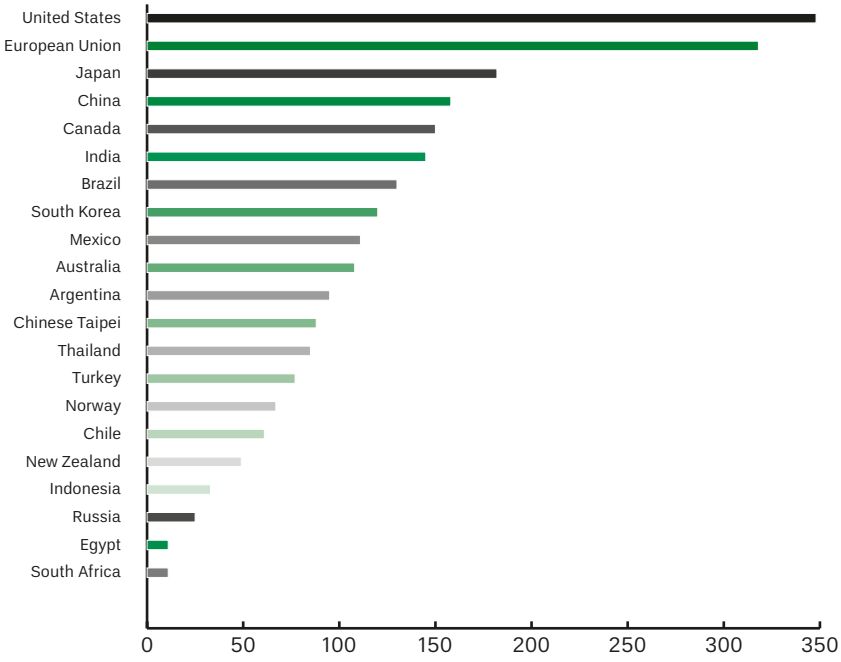
2.4 MOST ACTIVE MEMBER STATES

The most active countries in the WTO system are those who are among the largest economies in the world. Most developing countries' participants are those of high or medium income. The other low-income developing countries and least developed ones have little participation before the WTO dispute settlement system.

Table 4 presents a ranking of the most active countries, with the total number of cases in which a member state has acted or has been acting in all poles of the procedural relationship, whether as complainant, respondent or third party. The G7 countries are those which most use the DSB mechanisms. Of the 488 disputes, the United States are involved in more than 70% of the total disputes, followed by the European Union, in 63.7% of cases, followed and Japan and Canada, both with 37.1% and 30.7 %, respectively.

MOST PARTICIPANT COUNTRIES BEFORE THE OSC - WTO

Number of cases by country – complaint, respondent, third party



Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org)

In geopolitical terms, the participation by continent focuses on five countries in the Americas, the European Union, six Asian countries and two countries in Oceania. Only two African countries have above ten cases in participation, the others have no more than six cases. This reflects the wealth distribution in the world by continent. African countries are the least involved the international trade game, quite meaningless numbers. To what extent the DSB can promote policies that ensure greater access to international dispute settlement system? To what extent international trade rules can be interpreted in favor all countries' participation? A multilateral trading system that keeps an entire continent and several less developed countries excluded cannot be considered efficient.

2.5. DISPUTES BY TRADE AGREEMENT

Law rules are provided by a commercial dispute system established in the World Trade Organization (WTO) multilateral system, in which member states have the right to make complaints of alleged violations of the Agreement Establishing and other agreements contained into the Annexes.

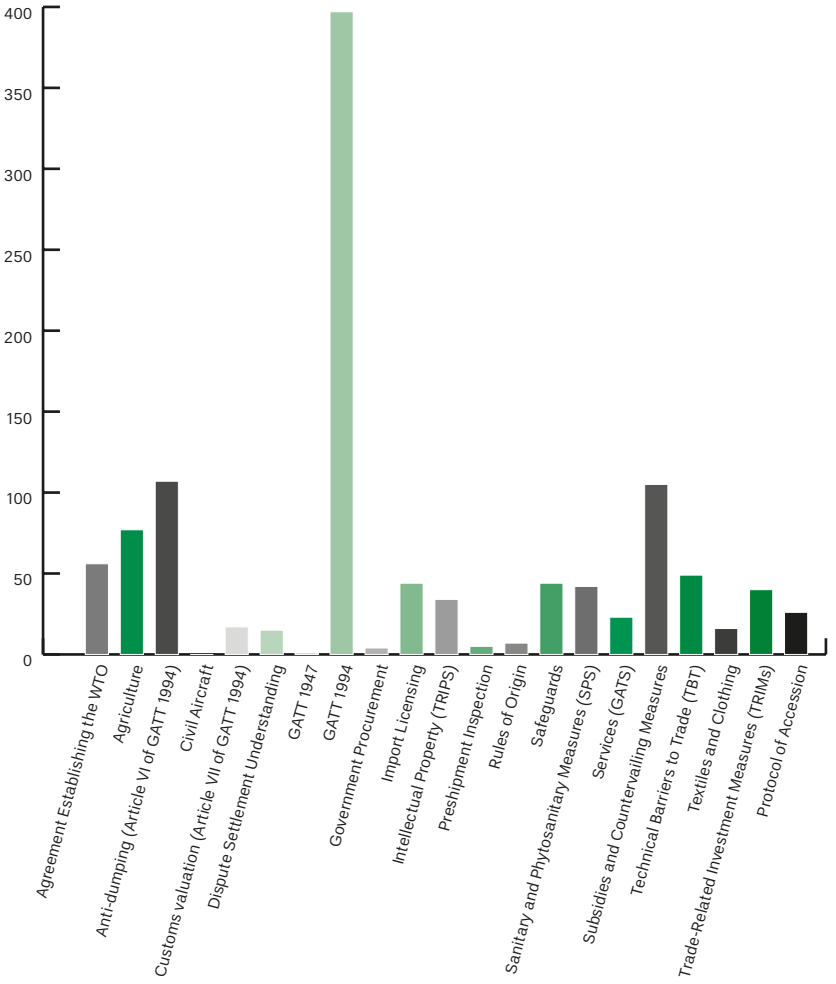
The examination of admissibility of a complaint by a member state is the responsibility of the Dispute Settlement Body (DSB), which may establish panels, adopt panels and the Appellate Body reports, maintain

surveillance of implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations under the covered agreements, pursuant to Article 2, paragraph 1. Furthermore, the DSB is responsible for providing consultations. The complaint member must submit a request for consultation before the DSB, identifying the agreements it believes are being violated by one or more members.

Regarding the WTO rules' content, these 20 years, there are 488 complaints, jeopardizing the effectiveness of compliance in more than 22 agreements by some of member states. Many of these agreements are questioned at the same complaint. The most mentioned agreements on the cases are: the GATT 1994 in 397 cases, questioned in more than 80% of cases; anti-dumping in 107 cases (21.92%); on subsidies and countervailing measures in 103 cases (21.10%); agriculture in 77 cases (15.77%); establishing the WTO 56 cases (11.47%); technical barriers to trade in 49 cases (10%); safeguards and import licensing in 44 cases each (9%). The Table 5 shows the WTO trade agreements and the number of cases pointed out in the complaints before the DSB.

AGREEMENTS OF WTO MULTILATERAL SYSTEM

Disputes by Agreements cited in the request for consultation



Source: WTO. Obtained in 23/Dec/2014 (http://www.wto.org).

These issues point the subjects that cause the major "commercial legal wars" of international market. There are some common complaints between developed and developing before the DSB. Regarding anti-dumping measures to protect trade, since the creation of the WTO in 1995 until 2013, Brazil, for example, has implemented measures of trade defense, accounting for a total of 439 cases, with or without application of the law against several countries, including China, USA, India, Russia and some European Union. Some of these cases have not had a complete investigation. With regard to measures relating to investments related to trade, Brazil was sued in four cases (DS1, DS52, DS65 and DS81), for

complaints made by the European Union, United States and Japan. On the other hand, Philippines (DS195) and India (DS 175) have complained against the United States on this subject.

Moreover, the experience of the DSB demonstrates better balance between member states, with the possible participation as third parties, which implies an "empowerment" for less developed economies. This requires for those countries most domestic control of foreign trade, allowing them as third parties enjoy a "process optimization" – despite the increase of costs– on issues affects to the other states affected by unfair trade practices, almost like a "homogeneous individual right" (in class actions).

Interestingly, in no case was called into question the agreement on civil aircraft (Table 5), but eight cases are related to production aircraft. However, the agreements in question are related to the GATT 1994, to the Understanding on Rules and Procedures Dispute Solutions and to subsidies and countervailing measures on exports.

Thus, the legal activism of both developing and developed countries demonstrates some degree of confidence in the WTO DSB system. Despite the symmetries, this is a positive issue.

3. BENEFITS OF THE WTO DISPUTE SETTLEMENT SYSTEM

Although the WTO dispute settlement system is a continuation of the previous model of the GATT, there are evidences of deep changes either in structure or in the DSB procedures. According to Varella, the structure of the system was created "initially not as a judicial body, but as another diplomatic instrument for conflict resolution, and that is a problem for the consolidation of legitimacy itself."[15] However, since the first cases, the role of DSB has been marked by a judicial bias, although it has sought to resolve disputes between Member States amicably in order to avoid tensions and even wars.

The access to WTO dispute settlement system is concentrated in three countries (Canada, United States and Japan) plus all members of European Union, accounts for 52,47% of all cases, that is, more than half of disputes. Furthermore, in comparison to the predecessor GATT, there is a considerable increase in participation of developing and least developed countries, either as complainants or as third parties. According to Article 10, paragraph 2 of the DSU,

> *"Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."*

Another change in its structure was the strengthening of an international legal system, a true "density of legality", with the application of rules of law, directing the *power orientation* activities of the former GATT to *rule orientation*. This has strengthened the system to reduce the political pressures of the great economic powers. In addition, there has been a reduction of existing asymmetries between countries, to strengthen the countries of high and medium income, reinforcing the sense of a fair procedure, since there are many cases of recognition the WTO rules' violations by developed countries.

The high degree of standardization of DSB procedures is increasingly consolidated either by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), or by regulation produced in technical reports on the decisions of panels. For Carvalho, "the knowledge of the legal texts, the ability to deal with legal knowledge and the degree in which the legal culture of a country converges with the DSB are factors that cooperates to a country to have an access and victory in setting off the DSB".[16]

With regard to procedures, the actions of the DSB are guided, primarily, by maintaining trade between the parties active, looking for more reconciliation between member-countries than compensation for damage suffered. According to McRae, the DSB system depoliticizes disputes between countries and highlights the importance of the informal nature of the WTO process:

> *"It downplays the diplomatic importance of the dispute and provides a practical means of resolving it. This is assisted by the informal nature of the WTO process. The use of email for the exchange of pleadings, the use of conference rooms as courtrooms and the relative informality of panel and even Appellate Body hearings, all contribute to making the dispute settlement process a standard or routine way of conducting relations between states."* [17]

There is case-consolidated system in more than 480 cases. These precedents contribute both to increase the reliability of the system and how to give greater legal certainty in interstate relations. The DSB role in adjudicating cases has been important in interpreting international agreements, solving the gaps and ambiguities contained in international treaties. Thus, the DSB of the WTO has been responsible for promoting compliance with the regulatory framework of international trade law.

The analysis of conflicts is quicker compared with the predecessor system and has contributed to the member states seek to solve their trade disputes before the DSB.

The system legitimacy is an important aspect pointed out by Varella, motivated by "adoption of periodic reports by the DSB, a dense legal analysis and relatively uniform over the decisions, impartial, high effectiveness index of decisions, which leads to greater participation of developing countries in the system."[18]

4. CRITICISM OF THE WTO DISPUTE SETTLEMENT SYSTEM

While there have been positive changes in terms of access to DSB system, the survey shows that 86% of the complaints are concentrated in 43 countries. Bangladesh appears as the sole less developed (LDC) country to make a claim before the DSB against India, questioning the anti-dumping measures imposed on the batteries originating from its territory. In this respect, Carvalho says that

> *"The performance of member states with the DSB varies according to the level of income class. Developed members in the first place, and the developing members with upper middle income, which are in the second place, have more resources to use the DSB and therefore are those who do it more often."*[19]

In diametrically opposite direction, despite the increased participation of developing countries compared with the old GATT, the asymmetries between the WTO member states are still seen as negative points, since it directly affects the system access and brings into question the real efficiency of the DSB procedure. Carvalho also points out the following matters: "the technical and legal knowledge of the set of rules that underpin the DSB procedure, material resources and market size."[20] In the same direction, Amaral Junior states that the WTO dispute settlement system "contains a paradox", and, in this context, the main problems faced by developing countries are "the high economic costs of litigation, fear of adverse reactions from developed countries, lack of experience and technical training, besides the ineffectiveness of the rules on the decisions implementation."[21]

Regarding the exercise of countries' rights before the DSB, Blancas asserts that the financial, human and institutional restrains may impede WTO members' exercise their rights under DSU rules, and create asymmetry between countries, which impacts in the ability of developing-country and LDCs to obtain favorable outcomes with regards to their complaints and to fully benefit and make use of the WTO dispute settlement system.[22] In this context, Bohl affirms the smaller economies tend or to shy away from participating in commercial disputes or are unable to access the system for the following reasons: besides the lack of resources and of institutional capacity, there is a lack of political will of these countries. The author points out that "although many international trade scholars view the dispute settlement system of the World Trade Organization (the "WTO") as a success, the definition of "success" depends on the perspective and experience of each Member state". Hence the need to strengthen the application of special and differential treatment in trade disputes.[23]

When the WTO states parties are acting as defendants, developing countries have little choice since the dispute settlement system is compulsory.[24] Thus, the DSB is autonomous and has the capacity to accept the author request, take decisions, seek information and obtain evidence, among other functions and activities.

With respect to economic differences between countries, they present themselves as a problem for developing and least developed countries that may, indeed, be in equal conditions with industrialized countries. Carvalho stresses that

> *Developing and least developed countries have therefore significant drawbacks to using the full extent of the resources available at the DSB. The characteristics of their economies, smaller, with little complexity and often dependent on trade with the largest economies reduce their bargaining power and hinder the possibility that those countries can make use of sanctions if the developed country does not implement the favorable decision established by the panel.*[25]

Another criticism concerns the mistrust in the WTO dispute settlement system, since confidentiality prevails in the procedures adopted by the DSB for the analysis of cases.[26] Moreover, the lack of criteria for assessing the facts and rules for admissibility of evidences are mentioned as negative aspects of the system. However, it should be noted that there are rules and assumptions regarding burden of proof.[27] Reforming the dispute settlement system is needed to ensure greater confidence of participants and ensure the adoption of more appropriate measures in the implementation of possible retaliations.

4.1 SPECIAL AND DIFFERENTIAL TREATMENT PRINCIPLE AT THE DSB

Recognizing the differences in economic development between countries, the multilateral trading system created the principle of special and differential treatment under the GATT in 1979, with the Tokyo Round, and adopted the enabling clause or decision on differential and more favorable treatment to developing countries.[28] This clause has "legitimized" the general system of preferences and dismissed the more favorable treatment with respect to non-tariff barriers, to preferential trade rules for developing countries and to special treatment for least developed countries".[29]

The Uruguay Round used to contain some measures on special and differential treatment, but the result in single undertaking of the WTO has eliminated almost all previous flexibility enjoyed by developing countries.

Nevertheless, the WTO member countries recognize the different levels of economic development established in paragraph 2 of the preamble of the WTO Agreement, and the need for positive efforts for developing countries and especially for the least developed that should enjoy the benefits of international trade.[30] For these reason, the WTO Agreement contains 97 provisions on special and differential treatment, some mandatory, others are not.[31] According to the UNDP (United Nations Development Program), "some of these provisions relate to the conduct, providing space for developing countries implementing their policies. Others relate to the results, aiming to correct imbalances between

procedures and results."[32] The goal, therefore, is to reduce the asymmetries between WTO member countries with different levels of development, favoring the smaller economies.

It is important to highlight two points to assess to what extent the application of this principle has guaranteed for developing and least developed countries enjoy the benefits of international trade. The first refers to the current international division of labor, in which developing countries and the least developed are the major producers of commodities in the world market, adding little value to the economic development of the state. The second point concerns the issue of access to agribusiness products markets that are distorted by subsidies not prohibited in international trade, and are still stiffened in the Doha Round impasse.

The DSB was created primarily to enforce the agreements of the WTO multilateral trade system, giving greater certainty and predictability, and to maintain the balance between the rights and obligations of members, pursuant to Article 3, Paragraph 2 of the DSU. The special and differential treatment principle is distributed sparsely on various articles.[33] However, a review of the application of those provisions deserves further study to measure the degree of effectiveness and if the adopted forms guarantee a procedural legal equality both to developing and least developed countries.

4.2 THE PROBLEM OF THE FACT-FINDING

The panel has the right to seek information and technical advice of the person or entity subject to the jurisdiction of a member state, which has an obligation to provide a quick and complete response, protecting the right to confidentiality of information obtained, pursuant to Article 13 of the DSU. In the case complained by the European Community against the United States Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (WT/DS213/AB/R), the Appellate Body of the WTO pointed out that "although panels enjoy a discretion pursuant to Article 13 of the DSU, to seek the source "from any relevant source, Article 11 of the DSU imposes no obligation on panels to conduct their own fact-finding exercise, or to fill in gaps in the arguments made by parties". [34]

It is observed that the power of facts investigation and the taking of evidence, there are differences between the common law and civil law systems, as highlighted Howse:

> *One of the fundamental differences between the two main kinds of domestic legal system (civil and common law) concerning the powers inherent in an adjudicator's fact-finding role is whether these extend to the "inquisitorial function of seeking information not brought to attention of the adjudicator by litigants, or through briefs of intervenors. In civil law systems, crudely speaking, such an inquisitorial role is generally assumed as a normal judicial power, whereas in most kinds of litigation it would not be seen as appropriateness of an adjudicator 'seeking' information, an explicit authorization was clearly*

> *appropriate given the choice of member of the WTO to opt for the inquisitorial model*[35]

However, with respect to such systemic differences, in the complaint brought by India against the United States regarding the Measure Affecting Imports of Woven Wool Shirts and Blouses from this country (WT/DS33/AB/R), the Appellate Body decided that with the production of evidence, it is a generally-accepted rule of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient.[36]

The problem for developing and least developed countries lies in the operating cost to provide the evidence, both in the complainant and in the defense. Elementary evidence, for instance, as the record of antidumping measures adopted or subsidies and countervailing measures, are easily obtained because some public policies measures adopted by the State. However, more complex evidences involving private individual's actions, such as auditing, can be highly costly. Reforming the dispute settlement system is needed to establish the responsibility of the Secretariat to ensure an advice qualified technical cooperation services to developing countries, impartially, pursuant to Article 27, paragraph 2, combined with Articles 11 and 13 of DSU. It is not enough to have a technician, it is necessary to see how it is possible to adopt the measures identified in legal assistance, when the costs are extremely high, particularly for the least developed countries.

The creation of an investigative body (fact-finding body) in the WTO DSB system would be a solution to make it easier for developing countries to produce evidence before the panel? This is the solution to the problem presented by Collins, who advocates the institutionalization in the face of trade disputes are increasingly complex for factual background analysis and the need for WTO panels to possess a complete evidentiary record has never been clearer.[37] For him, the more complete the evidence, the closer the proximity to the truth and therefore the stronger likelihood that justice will be done when the law is applied.[38] However, despite being a positive proposal to seek to ensure to developing and least developed countries access to the DSB of the WTO, with support in the production of evidence requested by the panel, the creation of the fact-finding body is doomed to failure by many reasons: more bureaucracy, costs for maintaining the body, choice of leaders etc.[39]

Anyway, the panel shall adopt measures in order to developing and least developed countries have technical assistance to provide the evidence requested on equal terms. This means that special and differential treatment is necessary, since access to the jurisdiction of the WTO dispute settlement system is extremely expensive, especially regarding the presentation of evidence and information requested by the panel.

5. DISPUTE SETTLEMENT SYSTEM: THE PROBLEM OF ACCESS TO JUSTICE

The Dispute Settlement Body (DSB) is endowed with legitimacy to preserve rights and obligations of the member states within the parameters established in the WTO multilateral system agreements. In addition, it is also responsible for the security and predictability of the system itself.

Whereas the DSB is a judicial body, its legitimacy depends on the recognition of the member states as guarantor body of the right to access justice. In addition, the DSB works as a real "tribunal" for the resolution of international commercial disputes between countries. To what extent does the DSB have jurisdiction and for which issues?

In this context, the term "access to justice" is used in this article borrowed from the idea arising from the fundamental rights, in the sense that parties can exercise their rights to claim rights; the legal system should be accessible and produce solutions that are socially just.

Thus, the "access to justice" expression refers to the right of WTO member states to bring a case before the dispute settlement system, regardless of their economic capacity in the international market, either as complainants, as respondents or as interested parties. Considering the existing asymmetries and the high costs of being an active participant before the DSB, does the current system ensure least developed countries access to the WTO "tribunal" in order to promote a fair solution?

With respect to the jurisdiction of the OSC, Mitchell and Heaton state that "WTO Tribunals do have inherent jurisdiction but that recognition of this jurisdiction does not give them *carte-blanche* to use *any* international law principles to resolve WTO disputes."[40] Thus the DSB's jurisdiction is limited to agreements covered by the organization's structure and cannot promote the increase or decrease of rights and obligations defined in those agreements, as provided in Articles 2 and 3 of the DSU.

The DSB establishes the right to appeal, this means that once accepted the complaint, is formed a special group, which will examine the factual and legal issues; in relation to the right to appeal to the Appellate Body, the trial will be limited to matters of law. According to Mitchell and Heaton,

> *WTO Tribunals increasingly seem to fall back on principles and rules, the application of which is best explained by the concept of inherent jurisdiction—the bundle of principles and rules applicable by international courts by reason of their judicial character and because their application is necessary for the proper exercise of their judicial function. However, WTO Tribunals have exercised inherent jurisdiction without explicitly stating that they are doing so. This is undesirable since it means that the exercise of these powers is not properly scrutinized. It also obscures why panels and the Appellate Body have certain powers in the first place, and the limits on those powers.*[41]

Thus, the jurisdiction assigned to the OSC ensures access to the jurisdiction of all Member States? According to McRae, "a dispute settlement

system to which a large majority of WTO Members do not have any realistic access cannot claim to be an effective system."[42] This was verified in the analysis of all cases brought before the DSB to date. As seen, the first and the single case that has been claimed by least developed country before he DSB was Bangladesh (DS306), which has questioned a certain anti-dumping measures imposed by India on batteries from its territory in 2006. The case was not judged by the WTO, due to the communication to the DSB submitted by the parties, informing that they have adopted a mutually satisfactory solution to the matter raised by Bangladesh, after consultations were terminated by India's Customs Notification No. 01/2005.[43]

Regarding the power relations between the communities of states, the DSB consists in being an important transformations' forum. Accordingly,

> *A settlement of disputes into the WTO dispute settlement system, when supported by consistent legal reasoning, may clearly influence the conduct of national interests in the various the WTO's negotiating groups. A particular example is the creation and performance of the G20 agriculture group, which could strengthen their positions with the panels/Appellate Body's decisions and interpretations, arising from cotton and sugar cases.*[44]

However, the power relations still stand out in the WTO system. Although the disputes submitted to the DSB are based upon rules-based forum, yet the power politics of trade are omnipresent and influential on both the national and international level.[45]

Considering the power relations in commercial disputes between industrialized countries and developing and least developed ones, Carvalho points out that "the small size and low complexity of the market of these countries also cooperate impede them acting before he DSB."[46] Conversely, ensuring the access to DSB would help to guarantee the right to participate in the multilateral trading system and also to respect the rules of the WTO system.

The establishment of the Advisory Centre on Law of the World Trade Organization (acronym, ACWL) based in Geneva, in 2001, was an important initiative to provide developing and least developed countries an opportunity to obtain legal aid to defend their interests before the DSB. It is an intergovernmental organization whose main objectives are providing legal assistance and training on WTO law, including support before the DSB at all levels. Currently, there are 74 participating countries, 32 developing countries and 42 less developed countries.[47]

The ACWL functions independently of the WTO Secretariat, and is composed of the members of the WTO. McRae notes that "although the existence of the WTO Advisory Centre has helped in this regard, as submissions made in the context of DSU reform point out this still does not provide realistic access for many states."[48] The lack of experience and the high costs continue being a problem for least developed countries to be active participants.

Since 2002, the ACWL acts to support countries in potential disputes at the WTO, in the production of legal opinions, in training people to work in the DSB system.[49] The advisory center report has pointed out that 215 legal advices were given in 2013, 231 in 2012 and 218 in 2011. The issues addressed in these legal advices were: WTO rules, trade facilitation, agriculture, anti-dumping, GATS, subsidies, constituent agreement WTO, safeguards, technical barriers to trade, TRIPS and others.[50] In the assessment report of ten years, the ACWL has advised nearby 20% of all new complaints and found that the ten most recent disputes, eight were from developing countries.[51] Despite the positive results, the legal aid services have a high cost for many countries.

As regards the procedural aspects, the participation of developing and least developed countries as third parties is still fairly limited. Although Article 10 of the DSU be the main access channel, owing to its restrictive interpretation and of there be no treatment uniformity, "the third parties have no access to all documents and communications circulated between the parties, particularly before first hearing" and "not always they are authorized to participate in all procedure phases, such as exclusive hearings for parties, arbitration and special proceedings maybe established."[52]

Another problem tackled by developing and least developed countries during the WTO litigations comes up against the language issue, particularly with respect to the translation of documents submitted by the litigants. In 1992, for example, a Brazilian anti-dumping duty placed on jute bags resulted in the ceasing of all Bangladeshi exports. In its defense, Brazil submitted all the requisite legal documents in Portuguese, which took months for the Bangladeshi authorities to translate all documentation.[53]

Due to all of the above-mentioned topics, a reform of the system to ensure all states the right to access the WTO "tribunal, based upon special and differential treatment to "hypo-sufficient" states, is essential to promote equality among states, pursuant to Article 4 of Convention on Rights and Duties of States, signed in Montevideo on December 26, 1933: "States are juridically equal, enjoy the same rights and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law."

6. SANCTIONS: SOLUTION OR PROBLEM?

At the multilateral trading system, a sanction is linked to the idea of fulfillment of WTO decisions. If the member state is convicted of international trade rules' violations, there is a possibility that the winner country apply retaliations to the loser one. However, since the beginning of the DBS, retaliation is not very common, being permitted by less than 5% of the cases tried. In this context, Varella states that

> *The system effectiveness was acquired with the high rate of fulfilment of decisions. In few cases, there have been implementations of authorized trade retaliations, because most of the cases have resulted in voluntary fulfilment, even by great economic powers, preferring to endure minor losses on certain issues, but to assure the legitimacy of the system as a whole.*[54]

Retaliation are more severe measures, since one of its main consequences is to limit economic freedom by imposing restrictions on the movement of goods between the countries affected by the right to retaliation. This has a strong impact on local economy, and, consequently, in other areas of the society due to the damage suffered by the affected industries.

On the other hand, retaliations become important instruments authorized to trade negotiations between the states involved in a dispute, including the possibility of cross-retaliation on intellectual property sector. However, it has been inquired to what extent retaliations are efficient, considering the asymmetries between nations, for example, the impotence of the least developed or developing countries to impose sanctions on industrialized countries. With property, Kramer says that the core problem is purely political, and adds:

> *Any changes that may be made to the system will not make to developing and least developed countries receive the benefits of the WTO system, in fact. It is fear of tacking a developed country in an international tribunal, because they know that, although several times they have the right to do so, they will suffer other political and economic retaliations that would not outweigh a victory in that particular case."*[55]

Hence the importance of special and differential treatment in order to developing and least developed countries can enjoy the benefits of the structure of the dispute settlement system. However, important to highlight the problems pointed out by Blancas: the first, in relation to the DSU provisions that there is vagueness in the wording of some special and differential treatment's provisions to developing and LDCs countries; and second, with regard to the lack of sanctions for non-compliance of decisions, which diminish the value of their applicability in practice.[56] Retaliations are seen as self-defeating and ineffectual.[57] Therefore, several studies have examined the possibility of least developed countries are entitled to monetary compensation[58] as an alternative to retaliation, since to fulfill with the WTO obligations may be politically impossible, because it may violate the sovereignty of the defeated state, and the compensation may not. The monetary compensation could provide reparation to those sectors of industry that suffered due to the WTO-illegal trade measure and, in circumstances where the member wishes to avoid monetary payment, can help to induce compliance without restricting trade in retaliation.[59]

Despite the advances made in the WTO system, the review of the dispute settlement mechanism, including current mechanisms of sanctions, it is necessary. Although the "density of legality", disputes between

nations go beyond the purely economic issue; they are still strongly influenced by the political dimension, to determine markets dominion. Power relations between industrialized countries and developing ones are still very present in the WTO system, and economic inequality between them has strong implications for promoting legal equality between the disputing nations in the WTO.

7. THE ROLE OF BRAZIL IN THE WTO: INDIRECT ACCESS TO LDCS

Brazil is a "global player" in international relations. In the World Trade Organization (WTO), the country maintains a permanent diplomatic delegation in Geneva.

In 2001, a general-coordination of litigation (GCL) of the Ministry of External Relations (MRE) was established by Decree No. 3959 of 10 October 2001. The aim is to coordinate in Brazil into the dispute settlement system. The CGL's main function is to prepare and conduct the Brazilian intervention in the proceedings in consultations and before the DSB - the panels and the Appellate Body. In addition, for a more effective performance, it seeks coordination between the Ministry of External Relations and other government bodies and the private sector.[60]

It should be noted that beyond this general coordination, Brazil has the support of specialized law firm, where appropriate. This has occurred, for instance, because of the experience accumulated by Brazil in the first WTO cases (grated coconut, gasoline, chickens and aircraft) and the increasing complexity of the issues discussed in the panels.[61] The recent election of a Brazilian to head the WTO, a career diplomat Roberto Azevedo, one of the most important institutions in the international arena, shows the importance of Brazil as well as a change in power relations between nations, strengthening the developing countries and the South-South relations. Since the GATT this is the first time a South American director is elected (also the first in the Americas). Aside from Supachai Panitchpakdi, Thai nationality, the other directors from the GATT to the WTO have always been Europeans.

In terms of activities before the WTO Dispute Settlement Body, Brazil is in seventh place among the most active countries in the system, accounting for almost 26% of cases -130 (see Table 4). Besides questioning issues related to the multilateral trading system, other issues have been presented as grounding in cases submitted before the DSB, such as public health and the environment.

Brazil has presented 27 complaints, 5.53% of the all cases. It is observed that the countries in which Brazil has most claimed into a dispute are the United States (37%), the European Union –the former European Community (25.9%), Canada (11.1%) and Argentina (7.4%). Indirectly, the Brazil activity has been allowed the participation of developing and least developed countries as third parties.

On the other hand, Brazil was sued in 15 cases, representing 3% of disputes. Of this total, 60% were complaints of the United States (4 –DS50;

DS65; DS197; DS199) and European Community (5 –DS81; DS116; DS183; DS332; DS472). Among developing countries, applications were promoted by Argentina (DS355), Canada (DS46), India (DS229), Japan (DS51), Sri Lanka (DS30) and Philippines (DS22).

Finally, as an interested third party, Brazil ranks the eighth position, in 88 cases, representing 18% of all litigations. Cordeiro points out that Brazil's performance as one of the "most successful" country of the DSB system and its participation as a third party in disputes "has also enabled greater contribution of the country in legal discussions on the scope of the commitments undertaken in almost all organization's agreements"; as well as specific achievements in the field of market access, defense of strategic economic sectors such as steel, aircraft industry, agriculture and also in health and environment.[62]

As for the substantive issues, Brazilian claims against the industrialized and developing countries have questioned the agreements referred to anti-dumping duties, generic drugs seizure, customs classification, subsidies, safeguards measures, intellectual property (patents), export credits and investments, among others. Regarding themes brought into international trade disputes, they are: frozen chicken, orange, cotton, sugar, aircraft, coffee, vehicles and gasoline.

CONCLUSIONS

The WTO dispute settlement system is a milestone in the institutionalization of international procedural law, with most of the pre-defined instruments. It is the main forum for resolving international economic conflicts and disputes, especially those related to international trade.

The legal nature of the WTO dispute settlement system is jurisdiction, in the sense that the Dispute Settlement Body (DSB) has the capacity to seek for solutions through consultation between litigating states, to decide imperatively trade disputes before the Panel and Appellate Body and exercise complex procedural activities. The DSB decisions' main objective is to assure the compliance of international agreements, established by the multilateral trading system which has been negotiated by states community.

The WTO "tribunal" is seen as one of the most powerful in the world, since authorize states to retaliate if they are winners in a commercial dispute. The DSB of the WTO assigns the winner state the right to apply sanctions against another sovereign state within the limits set by international law. In spite of authorization in some trade disputes, retaliations have been avoided to keep international trade business active. The WTO's decisions which authorize relation are important, since it may be as "currency" bargaining in future negotiations. However, the asymmetries between developed, developing and least developed countries unbalance these negotiations.

Despite the advances and the number of cases that create international precedents to improve the multilateral trading system globally,

the DSB's decisions have contributed to diminish the asymmetries and distortions of the market, reflected in regional and even local level. Conversely, the system keeps least economic developed countries excluded from the game.

In this sense, it is necessary to assure "access to justice" to all member states, with special and differential treatment for developing countries with low-income and least developed ones, so that the current critical, as high costs and expertise, for instance, being not an obstacle to effective participation of those members. There is a need for more technical training for specialists in international trade to low-income countries, particularly the "procedural system" of the DSB. Unequal access to the DSB system creates procedural discrimination between countries, increasing the gap between developed and less developed and, consequently, it threatens the very legitimacy of the body and the WTO itself, since almost a quarter of its members is composed of those countries.

The role of the WTO Secretariat goes beyond mere amalgamation of countries for strengthening and progress of the multilateral trading system. The Secretariat is duty bound to make more effective the application of Article 27.2 of the DSU, which should be read in conjunction with the principle of special and differential treatment for developing countries and international access to justice principle, in order to guarantee the necessary assistance to settlement dispute of its members, including experts assistance and technical cooperation at a low cost and according to economic development level. The creation of an investigative body (fact-finding body) proposed by Collins is an interesting idea to guarantee the right of access to information required for presentation to the panel, especially for smaller economies. Nevertheless, this idea should be ripe for that, in fact, these countries can exercise this right before the fact-finding body. For this, the WTO member states should contribute to the maintenance budget and avoid excess body bureaucracy.

The sustainable development of the world economy depends on fair rules of the multilateral trading system. This means that WTO agreements should assure the development of all nations, not favoring the strongest economies, and allowing for special and differential treatment for low-income countries. Sustainability requires ethical, social and environmental standards throughout the production chain. The DSB functions as an important mechanism of consolidation of multilateral trading rules; however, its efficiency depends not only on its decisions fulfilment, as it has been in most of cases, but also a more "egalitarian" participation of all nations in a globalized world.

There is no simple solution to the complexity of the multilateral trading system. One should take into account the cultural diversity in the forms of world production and the profound differences in political, economic and social development. Although the current international division of labor keeps commodity production as the basis of developing and least developed countries' economy, the free movement of goods is restricted by the great powers. Agricultural subsidies granted by the industrialized countries and policy barriers in access to markets for these

products are still sensitive issues that distort and undermine the international trade and economic liberalization itself. The reform of the WTO, either to terminate the Doha Round positively or, if not, to form a new economic round, is essential for the survival of the system itself. Industrialized countries must accept what they have promised in the Uruguay Round – *pacta sunt servanda* must be respected to ensure the free movement of goods, including those of agribusiness. Kant's perpetual peace is possible, pursuant the objectives set out in the preamble of Marrakesh Agreement, provided that all participate in the international trade game, which is not a zero sum game. However, they will not make the multilateral trading system more fair and equitable, but only will diminish the existing asymmetries among nations.

>> ENDNOTES

[1] Zimmermann, 2005: 31.
[2] Nowadays, eight least developed countries are in negotiation phase to adhere the WTO: Afghanistan, Bhutan, Comoros, Equatorial Guine, Ethiopia, Liberia, Sao Tomé & Prince and Sudan. Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm Accessed: 06/09/2014.
[3] Lafer,1998: 23-24.
[4] Lafer, 1998: 114-120; Trebilcock; Howse, 2001: 51-56; Amaral Júnior, 2008: 96-100.
[5] Amaral Júnior, 2008: 103.
[6] Lafer, 1998: 126.
[7] Lafer, 1998: 123.
[8] Lafer, 1998: p. 149.
[9] Amaral Júnior, 2008:102.
[10] Jackson, 2000: 121.
[11] Carvalho, 35-36.
[12] McRae, 2008: 6.
[13] Darracott, 2011-2012: 13.
[14] Busch; Reinhardt, 2006: 475.
[15] Varella, 2009: 13.
[16] Carvalho, 2012: 36.
[17] McRae, 2008: 13.
[18] Varella, 2009: 10-11.
[19] Carvalho, 2012: 40.
[20] Carvalho, 2012: 36.
[21] Amaral Júnior, 2008, 124.
[22] Blancas, 2012: 693-735, 695
[23] Bohl, 2009: 132
[24] McRae, 2008: 11.
[25] Carvalho, 2012: 36.
[26] Varella, 2009: 14.
[27] McRae, 2008: 15.
[28] Thorstensen, 1999: 231.
[29] PNUD, 2004: 109.
[30] PNUD, 2004: 110.
[31] PNUD, 2004: 110.
[32] PNUD, 2004:111.
[33] ESC. Arts 3º, § 12, 4.10, 8.10, 12.10, 12.11, 21.2, 21.7, 21.8, 24.1, 24.2 e 27.2.
[34] WT/DS213/AB/R: parágrafo 153.
[35] Howse, 2001: 225.
[36] WT/DS33/AB/R: 14.
[37] Collins, 2006: 367
[38] Collins, 2006:387.
[39] See Bohl, 2009.
[40] Mitchell; Heaton, 2010: 563.
[41] Mitchell; Andrew D; Heaton, David. 2010, p. 620.
[42] McRae, 2008 p.16.
[43] WT/DS306/1.

[44] Pereira; Costa; Araújo, 2012: 134.
[45] Bohl, 2009: 197.
[46] Carvalho, 2012: 38.
[47] ACWL. Available at http://www.acwl.ch/e/documents/Final%20quick%20guide%202014%20for%20website.pdf, Accessed: 06/08/2014.
[48] McRae, 2008: 12.
[49] See the reports prepared in 2013. ACWL. Report on Operations 2013. Available at http://www.acwl.ch/e/documents/reports/Oper_2013.pdf e ACWL. Report on "The ACWL at Ten: Looking Back, Looking Forward", Accessed: 05/07/2014. Available at Report on "The ACWL at Ten: Looking Back, Looking Forward" (pdf) , Accessed: 05/07/2014. http://www.acwl.ch/e/documents/reports/ACWL%20AT%20TEN.pdf
[50] ACWL, 2013: 8
[51] ACWL, 2013: 14
[52] Benjamin, 2013: 728-729
[53] Darracott, 2011-2012: 10-11.
[54] Varella, 2009: 6.
[55] Kramer, 2005: 287.
[56] Blancas, 2012: 700.
[57] Collins, 2009: 225,. 230.
[58] SeeYang, 2008: 423-464; Ullman, 2010: 167-198.
[59] Darracott, 2011-2012: 29.
[60] Ministério das Relações Exteriores. Disponível em http://www.itamaraty.gov.br, Acessado em 05/07/2014.
[61] Pereira; Costa; Araújo: 2012: 125.

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