

Improvement of the WTO Dispute Settlement System Effectiveness and the Monetary Compensation ¹

Melhoria da eficácia do Sistema de Solução de Controvérsias da OMC e da Compensação Monetária

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Abstract

Aqui deverá ser escrito o resumo nesta exata formatação This article examines the effectiveness of the suspension of concessions or other obligations taking into consideration the interpretation of the objectives of that measure by WTO doctrine and case law. In order to access if the suspension of concessions contributes to the effective implementation of the WTO DSB decisions and recommendations, the article adopts the theoretical concept of technical efficiency. Departing from an argument based on WTO doctrine and on the analysis of cases adjudicated by the WTO DSB, in which the measure was applied, the study demonstrates a mere partial efficaciousness of the suspension of concessions for the DSB compliance procedure. In this regard, it is suggested that the DSU adopts the institute of reparation, present in the International Public Law, aiming to stablish the obligation of indemnify the damages caused throughout the dispute settlement procedure, due to the continuation of the illegal practice by the transgressor member. The article concludes, therefore, with a proposal for including the retroactive monetary compensation in the DSU, to reinforce its compliance procedure and offering more effectiveness to the WTO DSS.

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Keywords: Dispute settlement system. DSB. Efficaciousness. Monetary compensation. Suspension of concessions. WTO.

Resumo

Este artigo examina a eficácia da suspensão de concessões ou outras obrigações, levando-se em consideração a interpretação dos objetivos da medida pela doutrina e jurisprudência da OMC. Para conferir se a suspensão de concessões contribui para a eficácia da implementação das decisões e recomendações do OSC da OMC, o artigo adota o conceito teórico de eficácia técnica. Partindo de uma argumentação fundada na doutrina e na análise de casos julgados pelo OSC da OMC, nos quais a medida foi aplicada, o estudo demonstra uma mera eficácia parcial da suspensão de concessões para o procedimento de execução do OSC. Nesse sentido, sugere-se que o ESC adote o instituto da reparação, presente no Direito Internacional Público, para se estabelecer a obrigação de indenizar os prejuízos causados ao longo de todo o procedimento de solução de controvérsias, tendo em vista a continuidade da prática ilícita pelo membro transgressor. O artigo conclui, portanto, com uma proposta de inclusão da compensação monetária retroativa ao ESC, a fim de reforçar o seu procedimento de execução e oferecer maior eficácia ao SSC da OMC.

Palavras-chave: Compensação monetária. Eficácia. OMS. OSC. Sistema de Solução de Controvérsias. Suspensão de concessões.

Introduction

The constant inconformity between the content of both rules or international organs decisions (or recommendations), and the very conduct of international law subjects has led the specialized doctrine to question the effectiveness³ of international law standards⁴. This concern has triggered studies

³The term 'effectiveness', in English, is a synonymous of efficacy, which, in turn, corresponds to the ability to produce the desired results, as well as the power or the ability to produce effects. According to the OXFORD dictionary: *producing the result that is wanted or intended; producing a successful result*; and the CAMBRIDGE dictionary: *successful or achieving the results that you want*. In: CAMBRIDGE. *Advanced Learner's Dictionary*. 3 ed. Cambridge: Cambridge University Press, 2008, p. 449; OXFORD. *Advanced Learner's Dictionary*. 8 ed. Oxford: Oxford University Press, 2010, p. 486; COLLINS. *Paperback English Thesaurus*. Glasgow: HarperCollins Publishers Limited, 2000, p. 194; LONGMAN. *Dictionary of Contemporary English*. 3.ed. Essex: Longman Dictionaries, 1995. p. 442.

⁴ DUPUY, Pierre-Marrie. *Droit international public*. 4. ed. Paris: Dalloz, 1998, pp. 10-23.

that seek some form of comprehension of the ways in which jurisdictional remedies contribute to the enforcement of international law obligations⁵.

One may unfold the concept of effectiveness in two independent strands: on the one hand, *social effectiveness* relates to the notion of normative success towards the mutable characteristic of society, under a variable perspective; on the other hand, *technical effectiveness* is related to the applicability of rules, such as the more or less extensive capacity to produce effects in reality.⁶ Assuming that a norm may be considered effective whenever certain technical requirements, related to its applicability, are present, this article elected the rule of article 22.1 of the *Dispute Settlement Understanding - DSU*, i.e. the *suspension of concessions or other obligations*⁷ application, to examine the effectiveness of the compliance procedure of the WTO Dispute Settlement Body (DSB).

This analysis will employ the notion of *technical effectiveness*, as the relation between norm and reality, i.e. its capacity of producing effects in reality⁸. Technical effectiveness allows for the visualization of efficiency degrees raging in accordance with the effectiveness functions fulfilled by the norm, namely: (a)

⁵ BORGES, Daniel Damásio. *Represálias nos contenciosos econômicos na Organização Mundial do Comércio: uma análise na perspectiva dos países em desenvolvimento*. São Paulo: Adaneiras, 2008. p. 50.

⁶ FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. São Paulo: Atlas, 2003, p. 200.

⁷ Shadikhodjaev explains that in the WTO: “Retaliation takes the form of suspension of concessions or other obligations under WTO agreements. (article 22 of the DSU) That ‘concessions’ and ‘obligations’ are mentioned separately suggests that these terms are different concepts. Given that they are interconnected by the word ‘other’, the concept ‘obligation’ is broader than ‘concession’ as it comprises the latter. Concessions are specific market-access obligations (bound tariff) of WTO Members inscribed in individual schedules. In trade in services, a removal of trade barriers as specified in the schedules is referred to as a ‘commitment’. This can be seen in: GOODE, Walter. *Dictionary of Trade Policy Terms*. 2. ed. Adelaide: University of Adelaide, Centre for International Economic Studies, 1998, p. 53 and 62. ‘Other obligations’ refer to Member’s duties arising from specific provisions of WTO agreements. These thoughts are found in: SHADIKHODJAEV, Sherzod. *Retaliation in the WTO dispute settlement system*. Alphen aan den Rijn: Wolters Kluwer, 2009.

⁸ This article assumes Tércio Sampaio Ferraz Júnior’s concept, according to which: “The quality of the norm which refers to the possibility of concrete production of effects, either because the required factual conditions for its (spontaneous or imposed) observance, or the satisfaction of its targeted objectives (effectiveness or social efficacy) are present; or because the technical and regulatory conditions required for its application are present (technical efficacy).” Translation from the original in Portuguese: “A qualidade da norma que se refere à possibilidade de produção concreta de efeitos, seja porque estão presentes as condições fáticas exigíveis para a sua observância, espontânea ou imposta, ou para a satisfação dos objetivos visados (efetividade ou eficácia social), ou porque estão presentes as condições técnico-normativas exigíveis para sua aplicação (eficácia técnica).” FERRAZ JÚNIOR, Tércio Sampaio. *Introdução ao estudo do direito: técnica, decisão, dominação*. São Paulo: Atlas, 2003, p. 203.

the *blocking function*; (b) the *programmatic function*; and (c) the *guarding function*.⁹ Those functions will beacon the study for it to demonstrate the measure's effectiveness in the context of WTO DSB.

In view of the primary objectives of WTO (1. promoting the maintenance of security and predictability of the multilateral trading system; and 2. ensuring the balance of rights and obligations among members within the parameters of the covered agreements as foreseen in article 3.2 of the DSU), and the importance to investigate the efficacy of the measure, this article, based on the above mentioned categories and the WTO cases in which the remedy was applied, will search for the factual correspondence between the employment of this measure and the compliance of the DSB legally binding recommendation.

According to Ali¹⁰, to examine the performance of the WTO-authorized countermeasures is necessary to consider their efficacy. If the purpose of such remedies is to promote compliance, it is undoubtedly necessary to ask whether these measures ensure compliance with the recommendations and decisions from the WTO DSB. With this in mind, this paper intends to investigate whether the *suspension of concessions* (here mentioned only as *measure, remedy or suspension of concessions*) is complying its function with effectiveness, and consequently if the DSB procedure of compliance is effective to all the members, particularly for developing countries and least developed countries (LDCs).

At the same time, this article argues if the current remedies are sufficient to reflect the WTO rights and obligations to developing countries¹¹ and LDCs or should these countermeasures be further changed?

The first part of this article presents a brief conceptualization on the measure's nature and prescription. The second part comprises an engagement with doctrinal and case law views on the function of the *suspension of concessions*. The third step is composed by an effectiveness assessment through the measure goals and actual implementation, in relation to the blocking,

⁹ FERRAZ JÚNIOR, Tércio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. São Paulo: Atlas, 2003, p. 201.

¹⁰ ALI, Asim Imdad. Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System. **Journal of Public and International Affairs**, v. 14, p. 1-22, 2003, p. 13.

¹¹ SANCHEZ, Michelle Ratton. Condições especiais para os países em desenvolvimento no SSC da Organização Mundial do Comércio. In: AMARAL JÚNIOR, Alberto do (Coord.). Direito do comércio Internacional. São Paulo: Juarez de Oliveira, 2002, p. 127.

programmatic and guarding functions. The fourth part examines the proposition of the monetary compensation as an instrument to improve the WTO compliance system. The article concludes with the indication of a mere partial effectiveness of the *suspension of concessions* and with a proposal for including the monetary compensation in the DSU rules for reinforcing its compliance procedure and offering more effectiveness to the WTO DSB.

1. The suspension of concessions or other obligations

The WTO Dispute Settlement System (DSS) prioritizes positive solutions to controversies through negotiation by the parties. However, whenever negotiation is impossible, the system enables the party that is interested in the implementation procedure to suspend the application of concessions or other obligations to the State concerned, according to articles 3.7 and 22.2 of the DSU. When the General Agreement on Tariffs and Trade of 1947 (GATT 1947) was in effect, the *suspension of concessions* was regulated in article XXIII:2; in the WTO, it was then covered by article 22.1 of the DSU and article 4.11 of the Agreement on Subsidies and Countervailing Measures (ASCM). While the SCM Agreement named it countermeasures, in the DSU the provision is called *suspension of concessions* or other obligations¹².

Article 22.2 of the DSU may be applied towards the defaulting party, after an expressed authorization by the WTO DSB. It aims at the implementation of the DSB legally binding recommendation, issued either by the panel, or the Appellate Body (AB). Such disposition provides that, once accepted by the retaliation panel (article 22.6 of the DSU), discriminatory suspensions may be employed. DSB's duty is to oversee the implementation of its decision and open arbitration proceedings, according to articles 21.3, 21.5 and 22.6 of the DSU, to establish: (1) a reasonable period of time for the implementation of recommendations; (2) the compatibility between the measures adopted by the

¹² JACKSON, John H. The world trade system: law and policy of international economic relations. 2. ed. London: MIT Press, 1997, p. 287-295; AMARAL JÚNIOR, Alberto do. A solução de controvérsias na OMC. São Paulo: Atlas, 2007, pp. 100-107; HOEKMAN, Bernard M.; KOSTECKI, Michel M. The political economy of the world trading system: from GATT to the WTO. 2. ed. Oxford: Oxford University Press, 2001, p. 10.

defaulting party and the violated agreements; (3) the application of equivalent *suspension of concessions* tantamount to the damage related to agreement violations¹³.

The *suspension of concessions* has a temporary character¹⁴, whose authorization must be requested by the member state to the DSB¹⁵. Articles 3.7 and 22.2 of the DSU indicate the measure is offered as a last resort, to be adopted by the injured member towards the propter, who had not complied with recommendations of the panel or the AB, either (i) immediately after they had been authorized by the DSB; or (ii) within the reasonable period of time granted by the DSB as established in article 22.1 of the DSU.

In the international regulation of state responsibility, countermeasures assume the role of inducing the state responsible for the damage to fulfill the secondary precept of a rule, once in breach of that rule. Article 41.1 of the 2001 Draft, within the core principle of cooperation, establishes obligations to cease the unlawful conduct and compensate for damages caused to another state. The obligation to repair consists, as often, in the payment of monetary compensation

¹³ Accordingly, O'CONNOR explains: "If the contracting party fails to comply within a reasonable period of time, the complaining party, at its exclusive discretion, may call for negotiations to determine compensation. Compensation needs to be agreed upon within 20 days of the expiration of the reasonable period of time. If no compensation is agreed upon within this 20-day period, the complaining party may request that the DSB authorizes "retaliation" (article 22.2 of the DSU) or more accurately "suspension of concessions". The DSB will grant such authorization within 30 days of the expiry of the agreed time frame for implementation. Disagreements over the proposed level of suspension may be referred to arbitration (article 22.6 of the DSU). In principle, concessions should be suspended in the same economic sector as that in dispute. If this is not practicable or effective, the suspension can be made in a different economic sector under the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the suspension of concessions may be made under another agreement (article 22.3 of the DSU)." These thoughts are found in O'CONNOR, Bernard. Remedies in the World Trade Organization dispute settlement system-the bananas and hormones cases. **Journal of World Trade**, v. 38, n. 2, p. 245-266, 2004, p. 246.

¹⁴ The retaliation panels (article 22.6 of the DSU) in the cases *Canada - Aircraft Credits and Guaranties* and *EC - Bananas III*, express the temporary nature of the suspension of concessions. This can be found on Panel Report in *Canada - Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/ARB, para. 3.105; Panel Report in the *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, para. 6.3.

¹⁵ See PALMETER, David; MAVROIDIS, Petros. *Dispute settlement in the World Trade Organization: practice and procedure*. 2. ed. Cambridge: Cambridge University Press, 2004, pp. 227-233 and 295-299; LAVRANOS, Nikos. Some proposals for a fundamental DSU reform. **Legal Issues of Economic Integration**, v. 29, n. 1, p. 73-82, 2002, p. 73; McRAE, Donald. What is the future of WTO dispute settlement? **Journal of International Economic Law**, v. 7, n. 1, p. 3-21 2004, p. 3.

for the caused damage¹⁶: “*comparison between existing WTO remedies and the remedies accepted in general international law indicates that there is no analogue of ‘reparation’ under the prevailing view of WTO law.*”¹⁷”

2. The measure’s goal(s) according to doctrine and case law

The DSU does not state the real function of the measure¹⁸. Although WTO case law indicates, mainly, a preference for a function of *prompting compliance to the recommendations*¹⁹, doctrine divides itself and lists several other possible purposes, among which are the following.

2.1 Maintaining a balance of benefits

As long as GATT 1947 was in force, doctrine and case law understood that the *suspension of concessions* was directed to the maintenance of the benefits balance, reflected in the tariff balance between the contracting parties as foreseen in article XXIII:1 of GATT 1947²⁰. Currently, according to the

¹⁶ SHADIKHODJAEV, Sherzod; PARK, Nohyoung. Cessation and reparation in the GATT/WTO legal system: a view from the law of State responsibility. *Journal of World Trade*, v. 41, n. 6, p. 1237-1258, 2007, pp. 1238-1239 and 1241-1242.

¹⁷ SHADIKHODJAEV, Sherzod. Retaliation in the WTO dispute settlement system. Alphen aan den Rijn: Wolters Kluwer, 2009, p. 33.

¹⁸ Panel report (*article 22.6*), *US – Offset Act (Byrd Amendment)*, WT/DS217/14 and WT/DS234/22, para. 6.2.

¹⁹ In the cases analyzed by the panel under article 22.6, the prevailing understanding is that the function of concessions suspension is to induce compliance with the recommendations and decisions of the DSB. That is visible in the majority position of the following arbitral awards: *EC – Bananas III (US)(article 22.6)*, para. 6.3; *EC – Hormones (US)(article 22.6)*, para. 40; *EC – Hormones (Canada) (article 22.6)*, para. 76; *EC – Bananas III (Ecuador)(article 22.6)*, para. 76; *Brazil – Aircraft (article 22.6)*, para. 3.44; *US – FSC (article 22.6)*, para. 5.52; *Canada – Aircraft (article 22.6)*, paras. 3.47, 3.105, 3.107; *US – 1916 Act (article 22.6)*, para. 5.5; *US – Byrd Amendment (article 22.6)*, para. 3.74; *US - Gambling (article 22.6)*, para. 2.7; among other cases.

²⁰ During GATT 1947, the prevailing understanding was that the purpose of the measure was to *preserve the balance of benefits and obligations established by the agreement*, which in practice consisted in tariff balance. This can be seen on the reports of the following panels: (i) *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (L/6627, adopted on January 25th, 1990, 37S/86, pp. 126-127, para. 144*; (ii) *European Communities – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* (paras. 4.36-4.37). GATT 1947 proposed the possibility of adoption of consistent *countermeasures* by the winning party. They consisted in the suspension of concessions as a last resort for the reestablishment of the balance of trade between the parties. Article XXIII:2 authorized one or more parties, once the circumstances were considered *serious enough*, to suspend, justifiably, the application of any concessions or other obligations under the General Agreement in relation to the interested parties.

WTO rules, doctrine has incorporated new purposes for the jurisdictional remedy, due to the very nature of the organization and the general objectives of its DSS.

Considering the characteristics of the WTO system, and the main objective of achieving a balance between maintaining rights and obligations, and to reach a satisfactory solution to the members according to articles 3.3 and 3.4 of the DSU, the general objectives of the system will continue shaping the judicial and arbitral proceedings of the dispute settlement mechanism²¹. According to Pauwelyn²², the *suspension of concessions* assumes an almost automatic character of adoption. First, because of to the negative consensus rule, the system requires an arbitration to assess the equivalence of the measure level and the level of nullification or impairment of benefits (article 22.4 of the DSU)²³. Second, due to the absence of a need to demonstrate the seriousness of circumstances, as required by article XXIII of GATT 1947²⁴.

²¹ PETERSMANN, Ernst-Ulrich; HARRISON, James (Eds.). *Reforming the world trading system: legitimacy, efficiency, and democratic governance*. Oxford: Oxford University Press, 2005, pp. 535-559. STEGER, Debra P. The challenges to the legitimacy of the WTO. In: CHARNOVITZ, Steve; STEGER, Debra; BOSSCHE, Peter van den (Eds.). *Law in the service of human dignity: essays in honour of Florentino Feliciano*. Cambridge: Cambridge University Press, 2005, pp. 202-221. MERCURIO, Bryan. Improving dispute settlement in the World Trade Organization: the dispute settlement understanding review-making it work? *Journal of World Trade*, v. 38, n. 5, p. 795-854, 2004. RUIZ FABRI, Hélène. Dispute settlement in the WTO: on the trail of a court. In: CHARNOVITZ, Steve; STEGER, Debra; BOSSCHE, Peter van den (Eds.). *Law in the service of human dignity: essays in honour of Florentino Feliciano*. Cambridge: Cambridge University Press, 2005, pp. 136-158.

²² PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 46-47.

²³ According to Ali: "Under Article 22.4 of the DSU the authorized level of suspension is to be made "equivalent to the level of nullification or impairment. The level is calculated by arbitrators, who determine the extent to which trade with the defending country is impaired because of the breach of WTO law. Strictly speaking, the word "equivalent" means that there is no question of punitive damages in the WTO context. Equivalence is to be judged by reference to the level of nullification and impairment. In the previous GATT regime the term used in place of "equivalence" was "appropriate". Thus the new DSU imposes a strict standard of equivalence between damage incurred and the level of countermeasures." ALI, Asim Imdad. *Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System*. *Journal of Public and International Affairs*, v. 14, p. 1-22, 2003, p. 9.

²⁴ See JACKSON, John; DAVEY, William; SYKES, Alan. *Legal problems of international economic relations: cases, materials and text*. 4. ed. Saint Paul: West Group, 2002, pp. 257-259. HOEKMAN, Bernard; KOSTECKI, Michel. *The political economy of the world trading system*. 2. ed. Oxford: Oxford University Press, 2001, pp. 74-78. HOWSE, Robert. The most dangerous branch? WTO Appellate Body jurisprudence on the nature and limits of the judicial power. In: COTTIER, Thomas; MAVROIDIS, Petros. (Eds.). *The role of the judge in international trade regulation: experience and lessons for the WTO*. Ann Arbor: University of Michigan Press, 2003, pp. 11-14. JACKSON, John. The Uruguay Round and the launch of the WTO: significance & challenges. In: STEWART, Terence. (Ed.). *The World Trade Organization: multilateral trade*

2.2 Prompting implementation of recommendations and decisions

Jackson and Pauwelyn list scholars who conceive that the function of the measure is to induce implementation of DSB legally binding recommendations. To corroborate that understanding, Pauwelyn²⁵ explains that the inaccurate nature of calculations of the amount to be suspended, and the difficulties involved in exercising that right, confirm that the measure does not represent an appropriate tool to provide a full compensation or a precise rebalance of benefits, as supporters of the first function would defend.

The function of prompting implementation has also been recognized by case law²⁶. The retaliation panel (article 22.6 of the DSU), in the *EC - Bananas*, was the first both to consider this function as the primary objective of the measure and to explicit the criteria for its imposition. The implementation panel (article 21.5) found that the function of prompting implementation relates to: (i) the temporary character of the measure²⁷, which implies its withdrawal as soon as the recommendations approved by the DSB are implemented (articles 3.7, 21.1, 22.1 and 21.6 of the DSU); and (ii) the mandatory nature of the panel and AB

framework for the 21st century and U.S. implementing legislation. Washington: American Bar Association, 1996, pp. 5-28. JACKSON, John. Designing and implementing effective dispute settlement procedures: WTO dispute settlement, appraisals and prospects. In: KRUEGER, Anne (Org.). The WTO as an international organization. Chicago: University of Chicago Press, 2000, pp. 161-180. PALMETER, David; MAVROIDIS, Petros. Dispute settlement in the World Trade Organization: practice and procedure. 2. ed. Cambridge: Cambridge University Press, 2004, p. 16. BOSSCHE, Peter van den.; ZDOUC, Werner. The law and policy of the World Trade Organization: text, cases and materials. 3. ed. Cambridge: Cambridge University Press, 2013, pp. 75-81 and pp. 205-291.

²⁵ PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad P.; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, p. 64.

²⁶ That conception is visible in the following arbitral awards (article 22:6): *EC – Bananas III (US)*, para. 6.3; *EC - Hormones (US)*, para. 40; *EC - Hormones (Canada)*, para. 76; *EC – Bananas III (Ecuador)*, para. 76. In subsequent cases involving prohibited subsidies, the arbitral panels (article 22.6) noted that one of the suspension functions corresponded to inducing compliance; as in the cases: *Brazil – Aircraft*, para. 3.44; *US - FSC*, para. 5.52; *Canada – Aircraft*, paras. 3.47, 3.105, 3.107. In the case *US – 1916 Act (article 22.6 of the DSU)*, para. 5.5, the arbiter understood that, despite only one of the measure functions is to induce compliance, it is the most important function of the measure. In contrast, in the dispute *US - Byrd Amendment (article 22.6 of the DSU)*, para. 3.74, of the arbiter indicated not to be convinced that prompting compliance was the only function of the measure, and that it was possible to attribute a number of functions to the measure. Finally, in the case *US - Gambling (article 22.6 of the DSU)*, para. 2.7, the arbitral panel considered that inducing compliance was the aim of suspension of concessions.

²⁷ Panel report in *EC - Bananas III (US)*, WT/DS27/ARB, April 9th, 1999, para. 6.3.

recommendations and, therefore, once the reports are approved by the DSB, it becomes the member's obligation to cease the illegal practice or adapt to the rules of covered agreements (article 19.1 of the DSU).

Subsequent panels, in the *US - 1916 Act*²⁸, and *Canada - Aircraft Credits and Guarantees*²⁹, also recognized respectively as the main objective, among others, to induce the losing party to comply with DSB recommendations. Similarly, the panel in *US - Offset Act (Byrd Amendment)* confirmed the role of inducing compliance with the recommendations and findings of the DSB, although it highlighted the possibility of variation of the induction capability in each case, that may related to – but not be restricted by – the level and value of the measure³⁰.

2.3 Sanction and self-defense

Islam³¹ adds a new element to the function to induce implementation of legally binding recommendations: the punitive character of the measure. He defines countermeasures, in the form of *suspension of concessions*, as *trade sanctions for compliance*. He expresses, though, a certain disagreement with the adoption of such remedy in the WTO, as he considers it an incongruous practice with the overall purpose of the dispute settlement system, namely the promotion of trade liberalization, not the encouragement of restrictive practices and measures.

Moreover, the author adds another function, that he names the *function of self-defense*, which relates to the minimum impact on induction to the implementation of recommendations. Islam³² believes that the judicial procedure of authorization request to the DSB in order to adopt the remedy under article

²⁸ Panel report in *US - 1916 Act (EC)*, WT/DS136/ARB, February 24th, 2004, para. 5.5.

²⁹ Panel report in: (i) *Canada – Aircraft Credits and Guarantees*, WT/DS222/ARB, February 17th, 2003, para. 3.47; (ii) *Brazil – Aircraft (article 22.6 – Brazil)*, paras. 3.44, 3.54, 3.57 and 3.58; (iii) *US – FSC (article 22.6 – US)*, paras. 5.51-5.60.

³⁰ Panel report in *US – Offset Act (Byrd Amendment)*, WT/DS217/ARB/BRA, para. 6.2.

³¹ ISLAM, M. Rafiqul. Recent EU trade sanctions on the US to induce compliance with the WTO ruling in the foreign sales corporations case: its policy contradiction revisited. **Journal of World Trade**, v. 38, n. 3, p. 471-489, 2004, pp. 472 and 475.

³² ISLAM, M. Rafiqul. Recent EU trade sanctions on the US to induce compliance with the WTO ruling in the foreign sales corporations case: its policy contradiction revisited. **Journal of World Trade**, v. 38, n. 3, p. 471-489, 2004, p. 472.

22.2 of the DSU further raises trade tensions, generating highly derogatory effects to the total volume of global trade³³. In his opinion, the measure is to right a wrong with another wrong.

In Sacerdoti's view³⁴, the adoption of the measure by the prevailing party of the dispute results in a lose-lose game, while the option for trade negotiation of commitments would otherwise interfere in the process providing win-win situations for international trade. In a similar position, Bentes³⁵ understands that adopting the measure is not beneficial to any of the parties to the dispute, due to the high costs of the remedy, the restrictions to trade – especially for developing countries and LDCs that depend on the adverse party's market –, the lack of expertise on the subject, and the consequent increase of the imported product price in the prevailing party's domestic market due to surcharges applied as countermeasures.

³³ On the adverse effects of countermeasures (ASCM) and the suspension of concessions (DSU), see: ROBERTS, Lawrence. Beyond notions of diplomacy and legalism: building a just mechanism for WTO dispute resolution. **American Business Law Journal**, v. 40, n. 3, p. 511-562, 2003, p. 511; BARFIELD, Claude. WTO dispute settlement system in need of change. **Intereconomics: Review of European Economic Policy**, v. 37, n. 3, p. 131-135, May 2002, p. 131.

³⁴ SACERDOTI, Giorgio. The nature of WTO arbitrations on retaliations. In: BOWN, Chad; PAUWELYN, Joost. (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, p. 24.

³⁵ The views were expressed by Pablo Bentes in June 2011, when he was an AB Advisor. The interview was held at the WTO and stems from personal conviction. According explains Ali: "The fundamental issue, however, is that such countermeasures are inherently counter-productive. Retaliatory measures taken by members in accordance with WTO provisions are usually a withdrawal of concessions to the respondent's exports. In such cases the prevailing member's economy is not helped but further harmed by retaliation. This is the standard cost of protectionist barriers. Presently 'the injured country then suffers twice-once from the restrictions on its exports, imposed by foreign governments, and agains when tariffs or duties raise the domestic cost of foreign goods selected for retaliation' (Meltzer 2000). Moreover, retaliation does not help the export industry that has been denied market access by the respondent. It is the prevailing party's import-competing industries that enjoy temporary assistance because of the prohibitive retaliatory tariffs. In addition, the loser's industries that are harmed by the complainant member's retaliatory measures typically are not the same industries that benefit from the WTO-inconsistent measures. The winning member typically chooses sectors with a view to having the largest negative political impact on the losing government." ALI, Asim Imdad. Non-Compliance and Ultimate Remedies Under the WTO Dispute Settlement System. **Journal of Public and International Affairs**, v. 14, p. 1-22, 2003, pp. 13-14.

2.4 Modification of unlawful behavior

Zoller³⁶ adds to the implementation function³⁷ the retaliation, which corresponds to the aim of encouraging the losing party to modify its unlawful attitude. Withdrawal of retaliation is conditioned by the change in behavior. In this case, the injured party may apply the measure in order to induce the member state to adopt three positions: (i) to award damages already caused by the unlawful acts; (ii) to cease the act and indemnify already generated damages; and (iii) to submit to a dispute settlement mechanism.

2.5 Restoring the balance of benefits and trade liberalization

According to Malacrida³⁸, the immediate function of the suspension of concessions is restoring the balance between benefits and trade liberalization, even though its ultimate goal is to prompt compliance with recommendations. He argues that the priority of goals may change whenever the search for balance of benefits is prior to the nullification or impairment of concessions. In this case, induction to compliance would be a way to rebalance the benefits.

Sykes³⁹ considers the DSB decisions not to aim posing sanctions on the transgressor of WTO commitments, but to ensure the achievement of primary purposes of the multilateral trading system, namely trade liberalization, restoration of benefits balance and, in some cases, compensation for the injured state. He relates the need for an equivalent calculation of the *suspension of concessions* and the level of nullification or impairment of benefits, towards restoring balance. Therefore, if the purpose of the measure were to induce compliance or punish members in violation, the criterion of mere equivalence would not be adopted by the DSU.

³⁶ ZOLLER, Elisabeth. Peacetime unilateral remedies: an analysis of countermeasures. Dobbs Ferry: Transnational Publishers, 1984, pp. 50-52.

³⁷ This means pressure on the responsible member, represented by the application of such measures by the injured party.

³⁸ MALACRIDA, Reto. Towards sounder and fairer WTO retaliation: suggestions for possible additional procedural rules governing member's preparation and adoption of retaliatory measures. **Journal of World Trade**, v. 42, n. 1, p. 3-60, 2008, p. 5.

³⁹ SYKES, Alan O. Optimal sanctions in the WTO: the case for decoupling (and the uneasy case for the *status quo*). In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, pp. 347-350.

Pauwelyn e Bown⁴⁰ also defend that the measure (referred to as *retaliation*) comprises the function of restoring the balance of benefits in the WTO. They consider it to include a punitive nature, aimed to reach the restoration of trade balance between the litigants. The authors⁴¹ interpret that the effectiveness in the implementation of DSB recommendations holds a political character.

Jackson⁴² explains that during the GATT negotiations in 1947, ensuring continuous reciprocity and balance of concessions⁴³ was considered the main purpose of the DSS, and the adoption of suspension of concessions constituted an attempt to restore the mutual balance of existing benefits in the time prior to the occurrence of the nullification or impairment of benefits. However, according to the author, the restoration of the balance of concessions often occurs at a lower level than previously set, due to the reduction of trade flows between the parties, to the loss suffered by the impaired party and to the application of *suspension of concessions*⁴⁴. Similarly, Charnovitz⁴⁵ is a critic of the mutual balancing function doctrinal affirmation, as he draws attention to the transformations in the WTO, particularly regarding the enforcement procedure contained in the DSU.

Bown and Ruta⁴⁶, alongside Jackson and Charnovitz, do not join the support for the possibility of achieving a rebalance of benefits by the *suspension of concessions*. They justify their position of non-adoption of the reciprocity

⁴⁰ BOWN, Chad; PAUWELYN, Joost. Introduction: trade retaliation in WTO dispute settlement: a multi-disciplinary analysis. In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, p. 1.

⁴¹ BOWN, Chad; PAUWELYN, Joost. Introduction: trade retaliation in WTO dispute settlement: a multi-disciplinary analysis. In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, pp. 1-2.

⁴² PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad; PAUWELYN, Joost. The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, p. 61.

⁴³ ZIMMERMANN, Thomas A. WTO dispute settlement: general appreciation and the role of India. In: PADMAJA, K. WTO and dispute resolution. Hyderabad: Icfai University Press, 2007, p. 148.

⁴⁴ CHARNOVITZ, Steve. The path of World Trade Law in the 21st century. Hackensack: World Scientific Publishing, 2015, p. 205.

⁴⁵ CHARNOVITZ, Steve. The path of World Trade Law in the 21st century. Hackensack: World Scientific Publishing, 2015, p. 205.

⁴⁶ BOWN, Chad P.; RUTA, Michele. The economics of permissible WTO retaliation. In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, pp. 149-157.

parameter, or the theory of rebalancing benefits: under the guise of reciprocity, the applicant could lawfully employ a retaliatory measure, i.e. a restrictive measure to trade, so that the volume and balance of imports and exports between the litigants is stabilized, or at least recovered. To Bown and Ruta⁴⁷, the purpose covered by the theory of reciprocity, or theory of rebalancing benefits, is that the original violation and the retaliation achieve the same (equal) effect on the total volume of trade. They adopt as benchmark for retaliation: proportional tariffs, quotas, subsidies, and discriminatory national treatment.

As Breuss⁴⁸ shows in an empirical study of the case *US - FSC*⁴⁹, the *suspension of concessions* imposed by the EC to American products, combined with the amount of the US violation, resulted in an increase in well-being for the EC. Schropp⁵⁰, which, in its turn, investigated the role of retaliation in terms of well-being promotion, and in its findings draws attention to the fact that the purpose of retaliation does not consist in promoting reciprocity or rebalancing concessions or volumes of trade, but in compensation for the actual damage suffered by applicant for contractual breach.

2.6 Punitive function

In the DSB practice, *suspension of concessions* assumes a punitive function whenever it is applied to prohibited subsidies. They are considered illegal for exceeding the limits prescribed in articles 4.10 and 4.11 ASCM and the lists of commitments and concessions signed by members and attached to the WTO Agreement. The panel, under article 22.6, in the case *Brazil - Aircraft*⁵¹, confirmed

⁴⁷ BOWN, Chad; RUTA, Michele. The economics of permissible WTO retaliation. In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 149-157.

⁴⁸ BREUSS, Fritz. Comment on chapter 20. A general equilibrium interpretation of some WTO dispute settlement cases: four EU-US trade conflicts. In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 503-509.

⁴⁹ Panel report in *US – FSC*, WT/DS108/ARB, August 30th, 2002.

⁵⁰ SCHROPP, Simon. The equivalence standard under article 22.4 of the DSU: a ‘tariffic’ misunderstanding? In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO Dispute Settlement*. Cambridge: Cambridge University Press, 2010, pp. 446-467.

⁵¹ Panel report in the case *Brazil – Aircraft*, WT/DS46/ARB, August, 28th, 2000.

the objective of inducing compliance by countermeasures. However, in the case of prohibited subsidies, it indicated a more comprehensive purpose than merely inducing compliance, not limited to the equivalence criteria on article 22.4. The ASCM seeks to oppose prohibited subsidy by means of an *appropriate countermeasure* (footnote 10 of the ASCM), and indicated by panels in cases as *Brazil - Aircraft*⁵², *US - FSC*⁵³ and *Canada - Export Credits and Guarantees*⁵⁴.

Starting from the definition of appropriate countermeasures in the case *Canada - Export Credits and Guarantees*, case law consolidated the understanding that countermeasures imposition is superior to the amount equivalent to prohibited subsidies – yet to be considered punitive. In the case *Canada - Export Credits and Guarantees*, the panel not only adopted the full amount of the prohibited subsidies applied as benchmark for calculating the appropriate countermeasure, but increased to that amount 20% of the value due to Canada's statements that it would not implement the recommendations of the DSB.⁵⁵

2.7 Compensatory function

Although compensation does not enjoy regulation in the DSU, it may be also viewed as a possible purpose of *suspension of concessions* in the WTO as well. According Pauwelyn⁵⁶, the measure could work as a way to repair the damage caused to the applicant, due to the delay in the implementation of recommendations – even though the DSU does not tackle this possibility. In this way, Pauwelyn⁵⁷ compares the *suspension of concessions* in force during the GATT period to the remedy of treaty suspension of article 60 of the Vienna

⁵² Panel report in the case *Brazil – Aircraft*, WT/DS46/ARB, para. 3.58.

⁵³ Panel report in the case *US - FSC*, WT/DS108/ARB, para. 5.52.

⁵⁴ Panel report in the case *Canada - Export Credits and Guarantees*, WT/DS222/ARB, para. 3.48.

⁵⁵ Panel report in the case *Canada - Export Credits and Guarantees*, WT/DS222/ARB, paras. 3.107 and 3.121.

⁵⁶ PAUWELYN, Joost. Enforcement and countermeasures in the WTO: rules are rules – toward a more collective approach. *American Journal of International Law*, v. 94, n. 2, p. 335-347, 2000, p. 344.

⁵⁷ PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad P.; PAUWELYN, Joost. *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, p. 48.

Convention on the Law of Treaties; and article 22.1 of the DSU to the countermeasures set out in article 49 of the Draft Articles on Responsibility of States.

According to the panel in *US - Offset Act (Byrd Amendment)*⁵⁸, the equivalent *suspension of concessions* to the level of nullification or impairment of benefits may represent a way for temporary compensation. However, countermeasures in the form of compensation, in the WTO system, have temporary nature and do not seek to repair the damage caused, as regulated by article 40 of the International Law Commission Report on International Responsibility of States. Indeed, they may be compared to the suspension of a treaty, regulated by article 60 of the Vienna Convention on the Law of Treaties of 1969, authorized in cases of violation or breach of contractual terms; but even so, the nature of countermeasures in the WTO remains distinct from the suspension of a treaty⁵⁹.

2.8 Multiplicity of functions or lack of a defined role

After investigating what the doctrine construes on the purposes of the *suspension of concessions*, as expressed in the DSU, it is possible to suppose that article 22 of the DSU does not expressly translate the purpose(s) of the measure; for that reason, while the prevailing understanding of the WTO case law indicates compliance induction as the main objective, doctrine is divided on the interpretation of the matter.

Therefore, we suggest questioning, in each case, what does a member purpose when applying for authorization to employ the measure; and what, in fact, does the DSB intend when it grants such authorization in response to non-compliance with the recommendations and rulings of the DSB. By this point of

⁵⁸ Panel report in *US - Offset Act (Byrd Amendment)*, WT/DS217/ARB/BRA, August 31th, 2004, para. 6.3.

⁵⁹ A more comprehensive analysis can be found in: SHADIKHODJAEV, Sherzod; PARK, Nohyoung. Cessation and reparation in the GATT/WTO legal system: a view from the law of State responsibility. *Journal of World Trade*, v. 41, n. 6, p. 1237-1258, 2007, pp. 1249-1250; SICILIANOS, Linos-Alexander. 'The relationship between reprisals and denunciation or suspension of a treaty'. *European Journal of International Law*, v. 4, pp. 341-359, 1993 and ANNACKER, Claudia. Part two of the international law commission's draft articles on State responsibility'. *German Yearbook of International Law*, v. 37, p. 206-253, 1994, pp. 236-239.

view, the purpose of the measure may change, according to the case variables. As we have seen, the purpose of the measure in the multilateral system of the GATT/WTO has historically been, and remains so today, obscure and confused: it covered areas as the balance of concessions or benefits compensation and losses during the GATT 1947, and the sanction function or inducement to comply with recommendations, currently under the WTO⁶⁰.

Pauwelyn⁶¹ ranks the evolution of understandings about the measure into three phases:

(i) phase 1: filled with clear statements that inducing compliance was the goal of the measure, as in the cases: *EC - Bananas (US)*; *EC - Hormones*; *EC - Bananas (Ecuador)*; and *US - Gambling*;

(ii) phase 2: decisions developed towards the idea that induction to compliance requires more than an equivalent level of *suspension of concessions*, which gives a punitive character to the measure, specially in cases involving prohibited subsidies (*appropriate countermeasures*) as in the cases: *Brazil - Aircraft*; *US - FSC*; and *Canada - Export Credits and Guarantees*;

(iii) phase 3: one could note an actual crisis regarding the purpose of the measure in DSU declarations about the lack of clarity in this regard, with questions about the mere purpose of inducing compliance, given the requirement of constant equivalence in article 22:4 of the DSU, as in the case *US - Continued Dumping and Subsidy Offset Act of 2000 (US - Offset Act) (Byrd Amendment)*.

The author believes in the plurality of purposes, or in the overlapping of objectives, as present in the retaliation panel report, in *US - 1916 Act*⁶², in which it was concluded that inducing compliance is a key objective of the *suspension of concessions* in the WTO, but not the sole goal of the measure.

⁶⁰ PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 34, 36 and 44. See also: CHARNOVITZ, Steve. Rethinking WTO trade sanctions. *American Journal of International Law*, v. 95, n. 4, p. 792-832, 2001, p. 792.

⁶¹ PAUWELYN, Joost. The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In: BOWN, Chad; PAUWELYN, Joost. *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 51-55.

⁶² Panel report in the case *US - 1916 Act*, WT/DS136/ABR, paras. 5.3, 5.5 and 5.7.

Therefore, is it possible to conclude that the doctrine brings together divergent understandings and questions, while the WTO case law composes a more objective guidance on the objective(s) of the measure. Altogether, it is clear that an investigation into the effectiveness of *suspension of concessions*, based on data provided by the DSB, should focus on: (i) the criterion of equivalence of article 22.4, relating the measure and the level of nullification or impairment of benefits; (ii) the desired purpose by the member seeking authorization to the DSB to adopt the measure; and (iii) the member's purpose whenever it employs the measure against other member State.

3. *Suspension of concession's effectiveness according to its goal(s)*

3.1 The Effectiveness

Ferraz Júnior⁶³ translates the meaning of effectiveness as the norm quality standard related to the possibility of concrete production of effects, either because the factual conditions for its – imposed or spontaneous – observance are present, or for the satisfaction of the targeted objectives (effectiveness or social efficacy); or because the technical and regulatory conditions required for their application (technical efficacy) are present.

According to Ferraz Júnior⁶⁴, *social effectiveness* deals with the notion of normative success under a variable perspective, or uncertainty, as it is subject to the social reality, in constant transformation. Thus, the concepts of social efficacy and effectiveness are similar, or identical, and correspond to one of the effectiveness modes. In its turn, the *technical effectiveness* relates to the applicability of norms as a more or less extensive ability to produce concrete effects on reality.

As already pointed out, this study explores the effectiveness of the *suspension of concessions* from the perspective of the technical efficiency, yet not losing sight of the elements in the proposition of social efficiency, that relate

⁶³ FERRAZ JÚNIOR, Tércio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. São Paulo: Atlas, 2003, p. 203.

⁶⁴ FERRAZ JÚNIOR, Tércio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. São Paulo: Atlas, 2003, p. 199.

the effectiveness evaluation to components of social reality, and to a more comprehensive context in which the measure is employed.

Effectiveness by itself relates to the production of effects. As the author explains⁶⁵, the capacity to produce effects is subject to the presence of certain requirements, some of a factual nature; others, of a technical and normative nature. The presence of *de facto* requirements, or appropriate conditions, leads to a socially effective norm. Likewise, the presence of certain technical requirements gives it efficacy from a technical point of view.

When transporting the theoretical framework to the assessment of effectiveness in the case of *suspension of concessions*, it arises an initial and theoretical insight about the effectiveness of the measure. Once one verifies that the main purposes of the WTO system include the preservation of security and predictability of relations between the members; and once one observes the existence of a causal link between an unlawful practice and the nullification or impairment of benefits to other member, article 3.7 of the DSU provides for the duty to suppress the illegal act and adapt the conduct inconsistent with the terms of violated covered agreement(s). According to article 3.8 of the DSU, normally, there is a presumption that every violation of the covered agreements produces unfavorable effects to other members. It remains to be accessed, however, what kind of effects are expected of the subsequent *suspension of concessions* and which are its actual effects in WTO disputes.

The objective of this paper is therefore to demonstrate, first, whether the measure is effective from the perspective of the concept proposed by Ferraz Júnior for technical efficiency; and afterwards, to investigate – based on the objective(s) set under WTO rules, and on the success rate achieved in inducing compliance – whether the measure can be considered an effective judicial remedy in the WTO, and consequently contribute to the efficiency of the DSB.

⁶⁵ FERRAZ JÚNIOR, Tércio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. São Paulo: Atlas, 2003, p. 199.

Among the effectiveness functions to be fulfilled by the norm, as analyzed above, the following elements constitute the level of technical efficiency⁶⁶, to be applied to the case of the *measure*.

3.1.1 Blocking function

The norm is intended to prevent or curtail occurrences of transgressive behavior. In relation to this first variable, we perceive, in theoretical terms, the completion of the first intended purpose of the DSU with the *suspension of concessions*, whenever it is impossible to reach a mutually-satisfactory solution to the demand. In article 3.7 of the DSU, the measure constitutes the last resort available in the WTO system for the acts considered compatible with provisions of one or more covered agreements.

Indeed, articles 19.1 and 19.2 provide that, when a panel or the AB considers that a commercial practice adopted by a member is inconsistent with a covered agreement, it shall recommend the adequacy of the attitude to the agreement(s), and may even suggest the way the member who caused the damage can comply with these recommendations. The organs may not, however, in its conclusions and recommendations, increase or reduce rights and obligations established in the WTO agreements. The commitment to implement DSB legally binding recommendations is reiterated in article 21.1, as fundamental to ensure the effective resolution of disputes and benefits of all members.

3.1.2 Programmatic function

The second effectiveness function is embodied on the intention of the norm to accomplish a goal, i.e. for a program to be completed. We understand that this second variable, once applied to the *suspension of concessions*, is faced with the following proposed objectives by the doctrine and case law, to be achieved individually or cumulatively:

⁶⁶ FERRAZ JÚNIOR, Tércio Sampaio. Introdução ao estudo do direito: técnica, decisão, dominação. São Paulo: Atlas, 2003, p. 201.

(i) *to induce implementation of recommendations issued by panels or the AB*, as widely seen in the WTO case law. The panels, in cases as *US - 1916 Act*⁶⁷ and *Canada - Aircraft Credits and Guarantees*⁶⁸, recognize as one of the prime purposes of the measure to induce the member that has violated the WTO rules to comply with the recommendations and decisions approved by the DSB;

(ii) *to establish the balance of impaired rights and obligations and, consequently, the economic balance between the members involved in the case*: as already seen, preservation of the balance of rights and obligations under the covered agreements is one of the main purposes of the WTO system. To that end, the Understanding evokes prompt solutions for situations where a member considers that it has been harmed in any of its benefits arising from WTO agreements due to adoption of incompatible measures by another member, as provided under articles 3.2 and 3.3 of the DSU.

During the history of the GATT 1947 negotiations, as Jackson⁶⁹ reports, ensuring continuous reciprocity and balance of concessions was considered the main purpose of the DSS. The application of the *suspension of concessions*, constituted an attempt to restore the balance of litigants's mutual benefits that existed previously to the occurrence of nullification or impairment of benefits. However, restoration of the balance of concessions often occurs at a lower level than previously in force, due to the reduction of trade flows between the parties, because of the injury suffered by the aggrieved party and by the very *suspension of concessions*.

⁶⁷ Panel Report in the United States - Anti-Dumping Act of 1916 (US - 1916 Act) case, WT/DS136/ARB, para. 5.5.

⁶⁸ Panel Report in Canada - Export Credits and Loan Guarantees for Regional Aircraft, WT/DS222/ARB, para. 3.47.

⁶⁹ JACKSON, John. World trade and the law of GATT: a legal analysis of the General Agreement of Tariffs and Trade. New York: The Bobbs-Merrill Company Inc., 1969, pp. 170-171. JACKSON, John. The world trade system law and policy of international economic relations. 2. ed. London: MIT Press, 1997, p. 287. THORSTENSEN, Vera. OMC – Organização Mundial do Comércio: as regras do comércio internacional e a nova rodada de negociações multilaterais. 2. ed. São Paulo: Aduaneiras, 2001.

Even though authors like Charnovitz⁷⁰ disagree with this function, in force during the GATT 1947, because it does not observe the transformations in the WTO in respect to enforcement contained in the Understanding, authors like Pauwelyn and Bown defend the ability of the measure to restore the balance of benefits in the WTO, for whom the measure has a sanction character, directed to the scope of restoring the balance of trade between disputants.

(iii) *compensate the injured party for the delay in implementation*: it represents the third goal, among the non-exhaustive range of purposes, defended by the doctrine and case law⁷¹.

3.1.3 Guarding function

The third and final technical effectiveness function, is to ensure the realization of a behavior or desired behavior, by identifying the norm's ability to achieve the purpose for which it was designated. When investigating the fulfillment of this function by the *suspension of concessions*, the norm's ability to suppress illegal practice or adapt it to WTO rules is to be analyzed.

Since the WTO enactment until December 31th, 2013, the DSB issued 18 panel recommendations (article 22.6) for the imposition of *suspension of concessions*. In certain cases, such as in *US - Offset Act* case, the DSB granted two permits. The DSB also authorized the implementation of countermeasures requested under article 8 of the Agreement on Safeguards, to combat invalid safeguard measures employed by the US, in the *US - Steel Safeguards* and *US - Wheat Gluten Safeguards*. In such cases, however, the mere threat of countermeasures led to the implementation of the recommendations.

In order to better contextualise the use of the measure, the following information will allow comparing the cases that obtained authorization from the DSB to apply it, to those who have effectively suspended concessions:

(i) In the following cases, the panel (article 22.6) recommended, and the DSB authorized the prevailing member to *suspend concessions*:

⁷⁰ CHARNOVITZ, Steve. Should the teeth be pulled? An analysis of WTO sanctions. In: KENNEDY, Daniel; SOUTHWICK, James (Eds.). The political economy of international trade law: essays in honor of Robert E. Hudec. Cambridge: Cambridge University Press, 2002, p. 423.

⁷¹ Panel report in the case *US - Offset Act (Byrd Amendment)*, WT/DS217/ARB/BRA, para. 6.3.

Table 1. Table of arbitration decisions and level of suspension authorized

DS nº	Case	Member(s) requesting the authorization	Applicable provisions	Level of suspension authorized
DS27	<i>EC — Bananas III</i>	US	Article 22.6 DSU	US\$191.4 million (annual)
DS27	<i>EC — Bananas III</i>	Ecuador	Article 22.6 DSU	US\$201.6 million (annual)
DS26	<i>EC — Hormones</i>	US	Article 22.6 DSU	US\$116.8 million (annual)
DS48	<i>EC — Hormones</i>	Canada	Article 22.6 DSU	CAN\$11.3 million (annual)
DS46	<i>Brazil — Aircraft</i>	Canada	Article 22.6 DSU Article 4.10 SCM Agreement	CAN\$344.2 million (annual)
DS108	<i>US — FSC</i>	EC	Article 22.6 DSU Article 4.10 SCM Agreement	US\$4,043 billion (annual)
DS136	<i>US — 1916 Act</i>	EC	Article 22.6 DSU	Cumulative monetary value of any amounts payable by EC entities pursuant to final court judgements, and/or settlements of claims, under the 1916 Act
DS217 DS234	<i>US-Offset Act (Byrd Amendment)</i>	Brazil, Chile, EC, India, Japan, Korea	Article 22.6 DSU	Additional duties on yearly value of trade equal to amount of Byrd duties distributed multiplied by 0.72
DS222	<i>Canada — Aircraft Credits and Guarantees</i>	Brazil	Article 22.6 DSU Article 4.10 SCM Agreement	US\$247.8 million
DS285	<i>US — Gambling</i>	Antigua and Barbuda	Article 22.6 DSU	US\$21 million (annual)

DS267	<i>US — Upland Cotton (Article 22.6 — US I)</i>	Brazil	Article 22.6 DSU Article 7.10 SCM Agreement	US\$147.3 million (annual)
DS267	<i>US — Upland Cotton (Article 22.6 — US II)</i>	Brazil	Article 22.6 DSU under Article 4.11 SCM Agreement	US\$147.4 million (annual)

This schedule is available on the World Trade Organization website under item “(d) Table of arbitration decisions and level of suspension authorized”. Available at: <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article22B7c>. Accessed on: August 3rd, 2017.⁷²

(ii) In the following cases, the prevailing member effectively *suspended concessions*:

- 1) *EC – Hormones (Canada)*, DS48 – authorization from the DSB obtained by Canada to suspend concessions on July 26th, 1999. (measure applied).
- 2) *EC – Hormones (US)*, DS26 – The US was authorized by the DSB to suspend concessions on July 26th, 1999. (measure applied).
- 3) *EC – Bananas (US)*, DS27 – The US was authorized by the DSB to suspend concessions on September 4th, 1999. (measure applied).
- 4) *EC – Bananas (Ecuador)*, DS27 – Ecuador obtained authorization by the DSB to suspend concessions on March 24th, 2000. (measure applied).
- 5) *US – Offset Act 2000 (Byrd Amendment)* – Six authorizations by the DSB, in November 26th, 2004: to Brazil (DS217), Canada (DS234), EC (DS217), India (DS217), Japan (DS217), Mexico (DS234) e Republic of Korea (DS217), to suspend concessions; and one, on December 17th, 2004, to Chile (DS217). (six measures were applied).

⁷² See also on WTO retaliation practice: SHADIKHODJAEV, Sherzod. Retaliation in the WTO dispute settlement system. Alphen aan den Rijn: Wolters Kluwer, 2009, pp. 187-195.

First it, is interesting to notice that given the number of consultations notified until December 31th, 2013 (474 requests of consultations)⁷³, the number of circulated panel recommendations under article 22.6 (19), the number of DSB authorizations for the adoption of the measure (18), one may notice the amount of controversies that reached the final stage of the procedure without achieving a negotiated solution.

Second, it is also relevant to observe developed countries (DCs) which suspended concessions of DCs. The US imposed tariffs of 100% on products selected and approved by the DSB in both cases in which it applied the *suspension of concessions*: *EC - Bananas* and *EC - Hormones*, while the EU imposed partial rates in the case *US - FSC*, subject to potential progressive increase if the US did not comply with the decision⁷⁴. Mexico and Japan, alongside the EU and Canada, also applied *suspension of concessions* to US imported products, in the case *US - Offset Act (Byrd Amendment)*.

After mentioning quantitative data, this study examined the results achieved in cases where the measure was imposed, as well as those in which the party managed to comply with the recommendations and decisions, in face of the threat of employing the measure. From the analysis of these cases, it is clear that the *suspension of concessions* fills the *guarding function* proposed by Ferraz Júnior for the verification of their technical effectiveness.

However, in both cases in which the US imposed the measure (*EC - Hormones* and *EC - Bananas*) the government was guided by pressure of adversely affected exporters⁷⁵. At the time that the measure imposed failed to induce EU to implement the recommendations, the US Congress immediately

⁷³ WORLD TRADE ORGANIZATION. Chronological list of disputes cases. Available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm. Accessed on: August 23rd, 2017.

⁷⁴ Cf. Ehring: "(...) countermeasures were applied in the form of a 5 per cent additional import duty, to be increased by 1 per cent every month of a period of one year, until the level of 17 per cent". EHRING, Lothar. The European Community's experience and practice in suspending WTO obligations. In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, pp. 248-250.

⁷⁵ ANDERSEN, Scott; BLANCHET, Justine. The United States' experience and practice in suspending WTO obligations. In: BOWN, Chad; PAUWELYN, Joost (Eds.). The law, economics and politics of retaliation in WTO dispute settlement. Cambridge: Cambridge University Press, 2010, pp. 237-241.

enacted the Carousel Retaliation Act authorizing the US Trade Representative to change the products listed every 180 days. Therefore, the truth is that, the initially employed *suspension of concessions* exercised a partial role in inducing compliance with the recommendations in these cases, complemented by political pressure and the legislation passed in the US.

In general, the *suspension of concessions* is applied by raising tariffs on imported products of the member that incurred in an unlawful practice, according to the DSB. The increase in tariffs on the imported products of the defendant constitutes a pressure tool for this member to cease unlawful practice or adapt such practice to WTO rules. However, as explained by Nottage⁷⁶, this ideal scenario is directly linked to the size of the domestic market of the member applying the retaliation against the other who suffers the impact of the measure. Thus, the incidence of *the suspension of concessions* raises concerns and questions about its effectiveness when imposed by developing countries.

As a result, Hudec perceived⁷⁷ a small or absent interest of developed countries in strengthening the DSU rules on the implementation of the DSB's recommendations and decisions; and the subsequent questioning by developing countries, on the effectiveness of the DSS and its judicial remedies⁷⁸.

The example of the case *US - Gambling* illustrates the difficulty of most developing countries and LDCs, when deciding on the request of a possible *suspension of concessions* towards the US, in view of the reduced participation of the country in international trade and its high economic dependence to the US. Antigua and Barbuda, among other examples, stated in its request to the DSB⁷⁹

⁷⁶ NOTAGGE, Hunter. Evaluating criticism of WTO retaliation rules. In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, p. 321.

⁷⁷ HUDEC, Robert. Broadening the scope of remedies in WTO dispute settlement. In: WEISS, Friedl (Ed.). *Improving WTO dispute settlement procedures: issues and lessons from the practice of other international courts and tribunals*. London: Cameron May, 2000, p. 349.

⁷⁸ This can be found on document TN/DS/W/17 named Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group. Submitted by Zambia on behalf of the LDC Group, October 9th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W17.pdf&Open=True>. Accessed on: August 14th, 2021.

⁷⁹ This is foreseen on document WT/DS285/22 named Request sent to the DSB by Antigua and Barbuda under article 22.2 of the DSU, in the case *US – Gambling*. June 22th, 2007, para. 3. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/285-22.pdf&Open=True>. Accessed on: August 14th, 2021.

that ceasing all trade with the US would involve an amount equivalent to US\$ 180 million in annual US dollars, which would correspond to less than 0.002% of all exports from the US. This example points to the insignificant amount it means to the US, easily compensated by a trading partner replacement.

Another concern expressed by Antigua and Barbuda, in its request for authorization to suspend US concessions, stems from the fact that 50% of its imports come from the US. Consequently, a cessation or restriction of trade with the US would represent a huge disadvantage to its domestic market, an actual blowback⁸⁰.

In addition to that, albeit the implementation rates of DSB decisions are high, they often do not show the considerable time taken for the member to cease the illegal practices in its territory. Similarly, despite the effectiveness of implementations by members that violated WTO rules, sometimes the implementation is incomplete, and always do not meet the damages arisen from the unlawful practice maintained throughout the course of the procedure in the DSB, because the DSU does not regulate this. Davey⁸¹ already demonstrated his concern about the persistence of these problems, despite the high implementation data registered by the WTO.

Moreover, difficulties faced in the implementation phase, particularly by developing countries and LDCs⁸² may eventually accrue from the way the procedure unfolds, instead of the implementation phase results.

⁸⁰ MAVROIDIS, Petros. Remedies in the WTO legal system: between a rock and a hard place. **European Journal of International Law**, v. 11, n. 4, p. 763-813, 2000; BRONCKERS, Marco; BROEK, Naboth van den. Financial compensation in the WTO: improving remedies of WTO dispute settlement. **Journal of International Economic Law**, v. 8, n. 1, pp. 101-126, 2005; HOEKMAN, Bernard; MAVROIDIS, Petros. WTO dispute settlement, transparency, and surveillance. Washington, DC: World Bank, 1999, p. 6.

⁸¹ DAVEY, William. The WTO dispute settlement system: the first ten years. **Journal of International Economic Law**, v. 8, n. 1, p. 17-50, 2005. See also: QURESHI, Asif. Interpreting WTO Agreements for the Development Objective. **Journal of World Trade**, v. 37, n. 5, p. 847-882, 2003.

⁸² Zambia's representative in Africa relates small participation of developing countries and LDCs in the dispute settlement system with the absence of remedies, rules and appropriate solutions in the Understanding directed to those countries. See document TN/DS/W/17 named Negotiations on the Dispute Settlement Understanding: Proposal by the LDC Group. Submitted by Zambia on behalf of the LDC Group, October 9th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W17.pdf&Open=True>. Accessed on: August 14th, 2021.

Based on these aspects, what follows is that one of the DSU failures results from its exclusive attention to the objectives of *avoiding future damage due to the persistence of unlawful conduct, and to terminate the unlawful conduct*, which constitute the priorities of the DSU, in detriment of *damages already caused by the very behavior*, and the *concern to compensate them retroactively to the injured party*. For that reason, a proposal had been created to include, into the objectives of the WTO DSS, the obligation of a member to monetarily compensate the nullification or impairment of benefits. This topic will be discussed bellow.

Regarding the purposes of *suspension of concessions*, one may conclude that its immediate goal is *prompting compliance with the recommendations and decisions of the DSB*; and mediate objectives are to *restore economic balance and modify the state's behavior*, as it: (i) induces the implementation of recommendations; (ii) induces a change of behavior, changes in the domestic law contrary to WTO rules, change of domestic trade policy of the member incurred in illegal practice, restoring economic balance (balance of benefits).

Although Shaffer and Ganin⁸³ advocate that only by observing the attitudes and practices of a member in international trade it becomes possible to recognize, for sure, which are the primary objectives of the measures employed, they indicate that the ultimate goal of concession suspension would determine the strategy of its application. Thus, if the intention were to obtain compliance, members would generally be more reluctant to impose the *suspension of concessions*, because such restriction to trade would not guarantee the induction of compliance; and, undoubtedly, it would render imported goods more expensive to the member who is suspending concessions. In contrast, if the members seek to rebalance concessions, they will be less hesitant to apply the measure, among other strategies. However, neither skills to create strategies, nor their effective implementation are generally possible to least developed members.

⁸³ SHAFFER, Gregory; GANIN, Daniel. Extrapolating purpose from practice: rebalancing or inducing compliance. In: BOWN, Chad; PAUWELYN, Joost (Eds.). *The law, economics and politics of retaliation in WTO dispute settlement*. Cambridge: Cambridge University Press, 2010, pp. 73-76.

As a rule, the WTO *per se* lacks power or capacity to implement, or to ensure that its rules and decisions be implemented by all members. In the midst of a dispute, the DSB just recognizes an entitlement judicially, and gives, to the injured member, the prerogative to claim it as a right. The Organization does not hold instruments or capability to force or coerce compliance with its decisions, as it would commonly occur in domestic law.

It is observed that its power of implementation manifests itself, in general, as a collective expression that reflects the politics, diplomacy, economics, strategy, and influence of the market on the members in dispute. Founded on the corollary of formal equality among states, the multilateral trading system, on articles 3.2, 3.3 and 3.4 of the DSU, seeks to provide members with the opportunity of obtaining a positive solution that enables the preservation of rights and obligations within the parameters and limits of the covered agreements.

In the case of the WTO, implementation invariably falls within the domain of the balance of power among the members in a dispute⁸⁴. Therefore, in this system, the effectiveness of a judicial remedy tends to be very relative and dynamic, because it is directly related to the variables and the parties involved in each case.

According to the exposed elements, the difficulty of the measure to achieve full technical efficiency results from factors other than just its inability to induce compliance with the recommendations and decisions, to promote the re-balancing of benefits, or the suppression of unlawful practice; but also stems from the imbalance of economic and political power among members, the lack of technical expertise in developing countries and of LDCs on the WTO or the DSB, and, mainly, the interests that move the measure employment and its compliance in face of the pressure that such action provokes on the state.

Under those circumstances, the third effectiveness function proposed by Ferraz Júnior, consistent of the guarding function, remains impaired; and,

⁸⁴ On the influence of power balance among members during the conflict resolution proceedings and decisions implementation, see: BROEK, Naboth van den. Power paradoxes in enforcement and implementation of the WTO dispute settlement reports: interdisciplinary approaches and new proposals. **Journal of World Trade**, v. 37, n. 1, p. 127-162, 2003; MALAWER, Stuart. The U.S. and the WTO: lessons learned for trade litigation and global governance. Available at: <http://www.vsb.org/publications/valawywe/apr03/malawer.pdf>. Accessed on: August 7th, 2017.

consequently, it compromises that the *suspension of concessions* has to be considered just partially effective.

4. The proposal to include the monetary compensation in the DSU

4.1 Contextualization

The proposal of monetary compensation was offered for the first time by the Mexican delegation⁸⁵ with the scope of improving the *suspension of concessions*. The Mexican proposal foresaw: (i) the establishment of a retroactive calculus to measure nullification or impairment of benefits suffered by the offended member; (ii) the transformation of *suspension of concessions* into a negotiable instrument; (iii) the anticipated determination of damage level. Dated November 4th of 2002⁸⁶ it was based in: (i) a concern with damages related to benefits jeopardized by inconsistent practices of WTO rules during the whole DSB procedure; and (ii) the absence of any disposition in the Understanding on the topic.

In its proposal, Mexico suggested the anticipated calculus over the amount concerning the nullification or impairment of benefits to occur in the initial panel, based on DSU article 22.7. Also, the alternative of *suspending concessions and other obligations* in the evaluated amount. It still foresaw the possibility of AB revision within the evaluated amount; and advocated for incorporation of retroactivity in the DSU, as regulated by Public International Law under article 36.3(d) of the International Court of Justice Statute, with the aim of eradicating the harmful effects of what is considered as a ‘waiver’ of the DSU

⁸⁵ This can be found on document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Accessed on: August 14th, 2021 and on document TN/DS/W/40 named Amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes Proposed Text by Mexico. Communication from Mexico, January 27th, 2003. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W40.pdf&Open=True>. Accessed on: August 14th, 2021.

⁸⁶ See document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002, p. 1. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Accessed on: August 14th, 2021.

rules which does not provide for illicit measure anticipated withdrawal or for damages by illicit practice during DSB proceedings⁸⁷.

At the time, the initial Mexican suggestion⁸⁸ of transforming the right to suspend concessions and other obligations into something negotiable among litigants was among the innovative proposals by the developing countries which would help them overcome negotiation and implementation debility. However, the proposal did not present further criteria about the negotiation procedure.

Alongside the Mexican suggestion, Ecuador⁸⁹ proposed to anticipate damages for nullification of impairment of benefits, which should start from the moment when the respondent member informs the DSB that recommendations and decisions will not be complied with immediately. In that case, the applicant may request the panel (article 22.3 of the DSU) to determine such amount⁹⁰.

The Republic of Korea⁹¹, defended that the anticipation of the value of the nullification or impairment of benefits and/or damages and should be carried

⁸⁷ This is foreseen in document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002, pp. 2-4. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Access on: 14 aug. 2021.

⁸⁸ See document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Accessed on: August 14th, 2021.

⁸⁹ See document TN/DS/W/26 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Ecuador, November 26th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W26.pdf&Open=True>. Accessed on: August 14th, 2021.

⁹⁰ This can be found on document TN/DS/W/9 named Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO. Communication from Ecuador, July 8th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W9.pdf&Open=True>. Accessed on: August 14th, 2021.

⁹¹ See document TN/DS/W/11 named Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO. Communication from the Republic of Korea, July 11th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W11.pdf&Open=True>. Access on: 14 aug. 2021.

out by the implementation panel (article 21.5 of the DSU). The EC⁹² and Japan⁹³ have suggested the anticipated calculation for the time prior to the negotiation of compensation and subsequent to the decision of the implementation panel.

Mexico⁹⁴ added a suggestion to the ideas offered by other members considering usual difficulties to remedy perceived damages caused by illicit practice, measures to prevent such damages should be adopted, also known as preventive measures, as set forth in the ASCM and the Anti-Dumping Agreement, and widely advocated by Malaysia. According to Mexico, such measures could result in the payment of compensation in case the amount of the preventive measure exceeded the sum of nullification of impairment of benefits calculated *a posteriori*⁹⁵.

The second proposal forwarded by Mexico⁹⁶ reiterated concerns expressed in the first draft and suggested the authorization and advanced computation by the panel under article 22.6 of the DSU. The intention was to offer the plaintiff the possibility of requesting the *suspension of concessions* for a reasonable period, in case the illegal measure had not yet been withdrawn and

⁹² See document TN/DS/W/1 named Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding. Submitted by the EC, March 13th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W1.pdf&Open=True>. Accessed on: August 14th, 2021.

⁹³ See document TN/DS/W/32 named Amendment of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Proposal by Japan, January 22nd, 2003. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W32.pdf&Open=True>. Accessed on: August 14th, 2021.

⁹⁴ See document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Access on: 14 aug. 2021.

⁹⁵ This can be found on document TN/DS/W/23 named Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, November 4th, 2002, p. 5. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=36031&CurrentCatalogueIdIndex=0&FullTextSearch=. Access on: 14 aug. 2021.

⁹⁶ See document TN/DS/W/91 named Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, July 16th, 2007, pp. 1-2. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W91.pdf&Open=True>. Accessed on: August 14th, 2021.

the incidence of damages were difficult to repair.

As stated by Huerta-Goldman⁹⁷, the *suspension of concessions* effectiveness will depend, in particular, on the interest of the losing member in the winning member's market allied to the interests and possibilities of implementing changes in the internal market - embodied in the reform of trade policy and legal rules, and in the behavior change of its nationals. In his opinion, among the main reasons that justify the resistance of the members to incorporate retroactive monetary compensation to the procedure are: (i) the absence of rules in the Understanding that expressly provide for an eventual indemnificatory or compensatory character retroactive to the measures authorized by the DSB; (ii) the lack of guarantees by the system regarding the decision enforceability. Thus, the lack of compliance, due to the lack of enforceability of the system constitutes the main obstacle to the WTO DSS. The system deficiency also compromises the institutionalization of a tariff compensation procedure with a focus on: (i) future imports and/or exports; or (ii) the stipulation of the obligation to pay pecuniary compensation among the plaintiffs.

The above-mentioned concerns also led to the African group proposal⁹⁸ for retroactive calculation of nullification or impairment of benefits, starting from the illegal measure adoption date. The proposal added the suggestion of monetary compensation to the developing countries affected by the contested measure.

Amidst ideas that *suspending concessions or other obligations* constitute an unfavorable and ineffective remedy for developing countries, and that, in the current system, the definition of the level of nullification or impairment of benefits conferred by the panel (article 22.6) only occurs after the request for authorization

⁹⁷ The information and deposition offered by Jorge A. Huerta-Goldman, diplomat on the Mexico Mission to WTO, in Geneva, were obtained in an interview conceded in August 2011. The opinions expressed stem from his experience in negotiating the proposals offered by Mexico for the improvement of the dispute settlement mechanism and his personal convictions.

⁹⁸ See document TN/DS/W/15 named Negotiations on the Dispute Settlement Understanding. Proposal by the African Group, September 25th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W15.pdf&Open=True>. Accessed on: August 14th, 2021.

to suspend concessions: the EU⁹⁹ proposal suggested the need to make monetary compensation a viable alternative to the implementation process. It contended that monetary compensation is the instrument capable of benefiting the less developed members because: (i) it rises a direct reward, resulting from nullification or impairment of benefits and it is not hazardous to the domestic economy of the country applying the measure; (ii) it is able to discourage inertia or delay as strategies by developed countries in the compliance with recommendations and decisions.

Nevertheless as it is recognized by the EU, monetary compensation faces certain difficulties which obstruct access by other members to that mechanism in the WTO system, such as: (i) those arising from the calculation of the nullification or impairment of benefits or from damages regarding the illegal practice; (ii) the fact that it is more convenient for developed countries to pay the calculated amount than to implement the recommendations; and (iii) the lack of financial resources to pay for it among developing countries - which would only give them the option of implementing the decisions.

Ecuador¹⁰⁰ and the LDCs¹⁰¹ also proposed the establishment of monetary compensation, both to the developing countries and to the member

⁹⁹ See document TN/DS/W/1 named Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding. Submitted by the EC, March 13th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W1.pdf&Open=True>. Accessed on: August 14th, 2021.

¹⁰⁰ See document TN/DS/W/9 named Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO. Communication from Ecuador, July 8th, 2002. Available at:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W9.pdf&Open=True>.

Accessed on: August 14th, 2021. See also document TN/DS/W/33 named Negotiations on Improvements and Clarifications of the DSU. Proposal by Ecuador, January 23rd, 2003. Available at:

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W33.pdf&Open=True>.

Accessed on: August 14th, 2021.

¹⁰¹ See document TN/DS/W/17 named Negotiations on the Dispute Settlement Understanding. Proposal by the LDC Group, October 9th, 2002. Available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W17.pdf&Open=True>. Accessed on: August 14th, 2021.

which fails to comply with the recommendations within the time limit. The distinguishing feature of Ecuador's proposal and the LDCs lies in the suggestion of the *suspension of concessions* as the final remedy to induce compliance with DSB decisions; and its consequent substitution by the compulsory monetary compensation, which should be calculated based on the amount defined by the original panel. The proposal suggests a six (6) months deadline for payment of the monetary compensation.

Taking into consideration the negotiations within the DSB amid the Understanding reform program, there is no way to close our eyes for the difficulties faced by the nations to conclude the Doha Round negotiations. The difficulty of advancing reforms, considering the Round standstill, significantly increased the role of the case law, based on the scrutiny of the cases by the DSB, alongside clarifications of doubts and procedural obscurities in the agreements and in the DSU itself.

4.2 Proposal for the Improvement of the WTO DSS

The subject of this analysis is one of the most debated issues in the recent years. Some observers considered it the central theme of the reform process about the Understanding in 1994¹⁰². Since then, the *suspension of concessions* effectiveness, as a measure to ensure the operationalization of the DSB recommendations and decisions, aroused controversial opinions, as it may be seen as a measure contrary to the ideal of trade liberalization and reduction of barriers between States.

However, the absence of provisions in the Understanding about (i) the continuance of the unlawful practice throughout the dispute settlement procedure in which it is questioned and (ii) the non-accountability of the losing member, for the damages and nullification or impairment of benefits¹⁰³ caused by the

¹⁰² HUDEC, Robert. Broadening the scope of remedies in WTO dispute settlement. In: WEISS, Friedl (Ed.). Improving WTO dispute settlement procedures: issues and lessons from the practice of other international courts and tribunals. London: Cameron May, 2000.

¹⁰³ Schropp, previously quoted on footnote 50, also inquiries about the lack of predictability in the DSU regarding the use of the retroactivity criteria. According to the author, nothing proves it to be the detrimental remedy to the positive law established in the DSU, as defined in *Australia - Automotive Leather II*. According to Schropp: "The question of whether retroactivity is possible

continuance of the illicit practice throughout the dispute settlement may generate hazardous effects in the domestic economy of members, especially to developing countries and LDCs, as they are dependent on the importations of the respondent members¹⁰⁴.

Article 22.4 of the DSU stipulates that the level of *suspension of concessions* authorized by the DSB shall be equivalent to the degree of nullification or impairment of benefits. Moreover, once authorized, the measure usually manifests itself in the form of surcharges on the importation of products, services or intellectual property rights selected by the member who intends to suspend concessions or defined by the retaliation panel.

At no time, in the judicial proceedings, the *suspension of concessions* is applied with the intention of repairing the annulment of rights or the loss of benefits, since it is not a measure of a reparatory nature, such as the countermeasure existing in the international Law of the State Responsibility¹⁰⁵.

The injured party's right to request DSB's authorization to suspend concessions from the other party causing this commercial loss is therefore the result of the non-implementation or incomplete recommendations implement, over a reasonable period of time; or non-negotiation of mutually acceptable compensation between litigants, within a period of twenty days following the expiration of the stipulated time period according to article 22.2 of the DSU.

Briefly, once the DSB has authorized the *suspension of concessions*, the measure should be applied, solely prospectively and temporarily, until the actual

under current DSU rules is still unresolved in WTO scholarship. (...) the prospective nature of damages is not put down expressis verbis in any WTO provision, and we side with the Panel Report in *Australia – Automotive Leather II*, para. 6.26, which did not detect any constraint on retroactive remedies as a matter of positive DSU law.”

¹⁰⁴ According to the study developed by Mexico in JOB(03)/208, November 10th, 2003, p. 12 – the average period of time between the original panel composition and the expiration of the reasonable period of time, equals 775 days, or slightly more than 2 (two) years; and 1,507 days, from the request for consultations, slightly more than 4 (four) years, according to the data in the schedule in Annex 1.3 of this document. Special Session of the DSB. Diagnosis of the problems affecting the dispute settlement mechanism. JOB(03)/208, November 10th, 2003, pp. 25-33. The link in which the document JOB(03)/208 is available is not quoted, because this document is secret.

¹⁰⁵ See SHADIKHODJAEV, Sherzod; PARK, Nohyoung. Cessation and reparation in the GATT/WTO legal system: a view from the law of State responsibility. **Journal of World Trade**, v. 41, n. 6, p. 1237-1258, 2007, pp. 1249-1256. MERCURIO, Bryan. Improving dispute settlement in the World Trade Organization: the dispute settlement understanding review-making it work? **Journal of World Trade**, v. 38, n. 5, p. 795-854, 2004, pp. 840-845.

cessation of the unlawful practice. Therefore, the *suspension of concessions* may not exceed the amount of nullification or impairment of benefits assessed by the retaliation panel (article 22.6), and there must be an equivalence between both variables, otherwise it would become punitive, in nonconformity with the role of the DSU.

Islam¹⁰⁶ clarifies that the intention of legislators in clearly delineating the *suspension of concessions* application in article 22.3 of the DSU, as it demonstrates the care to avoid possible harmful or adverse effects of the measure on other areas covered by the WTO agreements.

Generally, in the majority of proceedings that reach the implementation stage, the illicit practice is not removed or adapted to the rules of multilateral agreements and continues to have detrimental effects in the internal market of the claimant for periods that lasts more than three years - as e.g. in the *US - Offset Act (Byrd Amendment)*, until such member was authorized by DSB to obtain compensation or to suspend concessions of the US¹⁰⁷. Also, once DSB has been authorized to *suspend concessions* in the amount equivalent to the nullification or impairment of benefits the member may only exercise it if the unlawful practice continues after issuing the AB report approved by the DSB.

The lack of remedies or retroactive monetary compensation under the WTO rules regime was widely discussed in the *EC - Bananas III (Ecuador)*, where the amount of damages suffered, solely during the reasonable period of time, was about US\$ 161 million. In total, the average loss calculated between the establishment date of the original panel and the reasonable period deadline was US\$ 428 million; and US\$ 832 million considering as the initial date the day of the request for consultations¹⁰⁸.

¹⁰⁶ ISLAM, Rafiqul. Recent EU trade sanctions on the US to induce compliance with the WTO ruling in the foreign sales corporations case: its policy contradiction revisited. **Journal of World Trade**, v. 38, n. 3, p. 471-489, 2004, p. 474.

¹⁰⁷ In *US – Offset Act (Byrd Amendment)* case, it took Mexico three years and one month to be able to negotiate compensations or obtain authorization to suspend concessions. Information on time period of proceedings is available at the World Trade Organization Website: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article22B7c. Accessed on: August 3rd, 2017.

¹⁰⁸ The diagnosis of the problems affecting the dispute settlement mechanism is found on

For all the above-mentioned, the proposal of this paper consists in adding to the Understanding, along with the purposes of the system, the right to request retroactive monetary compensation equivalent to the nullification or impairment of benefits. In order to find the causal link with the illegal practice of the member, the original panel must assume the establishment date of the original panel as the starting point for the calculation.

The amount received by the member, as monetary compensation, should be directly destined, under the supervision of the DSB, to the injured sector of the considered member. This way, the addition of a right of a member to request monetary compensation equivalent to the calculated amount of nullification or impairment of benefits would be in a practice favorable to the restoration of economic damages to the impaired commercial sector.

Adding such restorative purpose to the WTO DSS would possibly unencourage procrastination in the compliance procedure. The monetary compensation would be an obligation granted by the Understanding and, consequently, by the DSS itself, once added in the list of objectives in articles 3.3, 3.7 and 22 of the DSU. It would not, therefore, be a consequence of the *suspension of concessions*, which is a jurisdictional remedy of temporary nature and prospective effect, and directed to prompt compliance with recommendations and decisions of the DSB¹⁰⁹.

Considering the wide impact of the Most Favorable Nation principle (MFN)¹¹⁰ on the WTO commitments, this paper proposes that the obligation to pay monetary compensation must not be extended to the other members, in order to restrict the burden on the respondent member. Also, under these circumstances, the two remedies must be maintained independently: *retroactive monetary compensation* and the *suspension of concessions or other obligations*,

document JOB(03)/208, November 10th, 2003, p. 12. The link in which the document JOB(03)/208 is available is not quoted, because this document is secret.

¹⁰⁹ Panel report (article 22.6), in EC – Hormones case, para. 39.

¹¹⁰ See: GATT Secretariat. The MFN clause in the GATT: the rules and exceptions. **Journal of World Trade**, v. 4, n. 1, 1970, p. 791-803, p. 791; The Prebisch Report of the Secretary-General of UNCTAD. Towards a New Trade Policy for Development. New York: United Nations, 1964, p. 66. Available at: <https://digitallibrary.un.org/record/696640#record-files-collapse-header>. Access on: August 15th, 2021.

both in the implementation phase of the proceedings.

This monetary compensation modality was only used in the following cases: in the (i) *US - Copyright*¹¹¹, whereby the US agreed to a payment of US\$ 3.3 million to a hedge social rights fund, assistance to its members and protection of the authors' rights; and in the (ii) *US - Upland Cotton*¹¹². In the first case, the negotiation of compensation payments followed the Brazilian announcement of its decision to suspend concessions or other obligations from a list of US products and rights, previously designated and approved by DSB. The Brazilian initiative was materialized after seven years of approval of the AB report by the DSB. In *US - Upland Cotton* litigation, the payment of monetary compensation was also the result of negotiations between the parties, after the reasonable period of time arbitrated in the implementation phase.

Undoubtedly, the scarcity of examples for negotiating monetary compensations creates a more consistent demonstration of potential benefits and advantages of the procedure. Yet, the fact that, in the WTO DSS practice, this alternative has not received much adherence in the past does not mean that monetary compensation cannot constitute an alternative capable of gaining the confidence of members and contributing to the system's effectiveness.

We demonstrated above that the partial effectiveness of the *suspension of concessions* is more related to external factors to the measure itself than to its own ability to induce compliance with the recommendations and decisions of the DSB. So we do not suggest any change in the employment of *suspension of concessions*, which could simultaneously induce compliance.

As already mentioned, the compensation in the Understanding does not have the same aims as those instituted in the international public law, regulated by Article 36:2(d) of the ICJ Statute and by the state responsibility in international law¹¹³. In those last two cases, the compensation reaches the principle standard

¹¹¹ Notification of a Mutually Satisfactory Temporary Agreement in US – Copyright, WT/DS160/23, June 26th, 2003.

¹¹² Panel report (article 22.6), in US – Subsidies on Upland Cotton, WT/DS267, September 27th, 2002.

¹¹³ The ILC of the UN has prepared two texts on international liability for harmful consequences arising from non-prohibited acts by international law. The first document, from 2001, deals with Article 1 on the Prevention of Transboundary Damage Leading from Dangerous Activities and

of an international public law principle, and it is directed to the pecuniary reparation of damages and losses generated by an illicit practice. The principle has a retroactive effect in order to achieve the reestablishment of the *status quo ante* and avoid the continuation of future losses¹¹⁴.

The distinct nature of the remedy in the DSU does not confer all those prerogatives within compensation. Ultimately, among the objectives of the WTO DSS, as described in the DSU, there is no provision for the reestablishment of the *status quo ante*. Rather, it provides for (i) the re-establishment of rights and obligations between the parties; (ii) the removal of the illegal measure or the adequacy of the practice to WTO rules; and (iii) the achievement of a positive solution to the parties¹¹⁵. Also, as discussed before, in the Understanding, compensation is a subsidiary, temporary and prospective remedy¹¹⁶; offered as the last negotiation alternative between the parties, in the amount equivalent to the nullification or impairment of benefits to be remedied by tariff restrictions on products importation, services or respondent country rights. It should be noted that the remedy is not mandatory in the WTO; it is a possibility of the mechanism to the parties in a dispute.

restricts its scope to activities non prohibited by international law which involve the risk of causing significant transboundary harm due to its physical consequences. (Draft Articles on 'Responsibility of States for Internationally Wrongful Acts', adopted by the ILC at its Fifty-Third Session, 2001, in UN, Official Records of the General Assembly, Fifty-Sixth Session, Supplement n. 10 (A/56/10), Ch. IV.E.1, Appendix 3). By its turn, the first principle of the Draft 2006, is about the Allocation of Loss in Case of Transboundary Injury Leading from Dangerous Activities, and its application also extends to injury/damage caused by hazardous activities not prohibited by international law (ILC, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in UN, Official Records of the General Assembly, Fifty-Sixth Session, Supplement n. 10 (A/56/10), Ch. IV.E.2. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Accessed on: August 12th, 2017.

¹¹⁴ This understanding is according to what has been decided by the Permanent Court of International Justice (PCIJ), in the Chorzow Factory case, in 1928. In: The Chorzow Factory case, 1928 Permanent Court of International Justice (PCIJ) Series A, n. 17, p. 29; See also Trail Smelter Arbitral Tribunal Decision. **American Journal of International Law**, v. 35, n. 4, p. 684-736, 1941, p. 684.

¹¹⁵ VÁZQUEZ, Carlos; JACKSON, John. Some reflection on compliance with WTO dispute settlement decisions. **Law and Policy in International Business**. v. 33, n. 4, p. 555-568, p. 558.

¹¹⁶ See GATT's panel report in the European Communities – Restrictions on Imports of Dessert Apples case (EC – Dessert Apples), 1989, paragraph 12.35.

Our proposal comprises the modification of the nature usually attributed to the compensation regulated in the DSU, so that this institute resembles, in its form and in its objectives, the compensation provided in rules of states responsibility in international law. In the *Australia Case - Automotive Leather*¹¹⁷, the panel reinforced the necessity of such alteration, as it argued that the absence of such provision in the DSU leads to a temporary breach of commitments in the WTO agreements. That is related to the fact the *suspension of concessions* finds space to be applied solely in case of non-compliance to the DSB recommendations and decisions and after the reasonable period of time. So one may assume that a member could take advantage of such an opportunity, in bad faith, to maintain the violation until this deadline without any penalization¹¹⁸.

As assessed in the *US - Upland Cotton AB Report*¹¹⁹, the DSU rules do not provide for a *suspension of concessions* as compensation for nullification or impairment of benefits over a reasonable period of time, the remedy only affects the nullification or impairment of benefits not terminated after the termination of that time.

The *US - Lamb Meat case*¹²⁰ illustrates difficulties and damages faced by the applicant member due to the non-cessation of the illegal practice, and possible evidence of bad faith on the part of the respondent. The panel and the AB considered that the tariff on imports applied by the US to lamb meat imported from Australia and New Zealand violated article 19 of the GATT 1994 and to the WTO Agreement on Safeguards. Throughout the dispute settlement procedure, Australia exported to the US and suffered the incidence of US surcharges¹²¹, which ceased only after negotiations between the parties and completion of the

¹¹⁷ GARBELINI JÚNIOR, Antônio. A implementação das decisões do OSC e a possibilidade de retaliação cruzada. In: PADUA LIMA, Maria Lucia; ROSENBERG, Barbara (Coords.). O Brasil e o contencioso na OMC. São Paulo: Saraiva/Fundação Getulio Vargas – Direito GV, 2009, pp. 207-208.

¹¹⁸ GARBELINI JÚNIOR, Antônio. A implementação das decisões do OSC e a possibilidade de retaliação cruzada. In: PADUA LIMA, Maria Lucia; ROSENBERG, Barbara (Coords.). O Brasil e o contencioso na OMC. São Paulo: Saraiva/Fundação Getulio Vargas – Direito GV, 2009, p. 208.

¹¹⁹ Appellate Body Report, in the US – Upland Cotton case, footnote 494.

¹²⁰ Appellate Body Report, in the US – Lamb Meat case, WT/DS177AB/R and WT/DS178/AB/R, May 1st, 2001.

¹²¹ These facts were reported on the journals The Telegraph of Sydney and Australian Financial Review.

proceedings on November 2001¹²². The US adopted a postponing strategy over the entire implementation period, which lasted approximately two (2) years, and the Australian estimated loss represented more than US\$ 30 million. Although it was considered successful in the dispute, Australia did not have the chance to recover the loss suffered due to the absence of a legal provision in the WTO to secure that compensation.

In the specific case of article 22.2 of the DSU, the suggestion of the new wording eliminates the negotiation phase of mutually satisfactory trade-offs, within twenty days of the expiration of the reasonable period of time, and extinguishes the controversial problem of sequencing. We suggest that monetary compensation could be assigned as a new prerogative, independent of the request and authorization to suspend concessions.

Finally, the alteration of the nature of the compensatory measure in the DSU would not lead to detrimental changes in WTO DSS foundations, since it is well-established resource in public international law. It could actually represent an incentive for the member concerned to promptly comply with the recommendations and decisions of the DSB and to terminate the illegal practice as soon as possible.

4.3. The difficulties to refine the WTO DSS in face of the AB crisis

The proposal of the inclusion of retroactive monetary compensation is legally founded and has been applied in two cases previously analyzed, but difficulties to its implementation exist due to the current AB crisis. In the current WTO crisis, the main North-American action has been the blocking of the appointment of new AB members, which impedes the existence of a minimum number of members as well as the renovation of the body and threatens the continuous construction of a case law that leads to security and predictability.

The reasons for this North-American position inside the WTO are two systemic issues that are questioned by this country: overarching interpretations of the AB and the presence of *obiter dicta* in AB decisions. An example of decision

¹²² These facts can be found on the Department of Foreign Affairs and Trade (DFAT) media release of September 1st, 2001 and on the journal Sunday Telegraph of Sydney.

considered to be overreach is the one that allowed *amicus curiae* briefs. The questioning of these issues is not shared by all WTO members. The US understands that these systemic issues persist and are increased due to the absence of effective check on AB decisions and to a tradition of *stare decisis*, which has its origins on the WTO case law. Grave consequences of the judicial overreach and of the *obiter dicta* are the creation or abolishment of rights and obligations of WTO members, a flagrant violation of articles 3.2 and 19.2 of the DSU, the impossibility of a prompt settlement of disputes and the wrong influence on future disputes.

The inertia in face of the AB crisis can have nefarious consequences. The presence of less than three members in the AB means in practical terms that the AB is unable to address the requests of panels' reviews. In the absence of an AB, disputes that started through the panel process are unable to be subject to an appeal, which impedes the conclusion of disputes as the right to appeal is foreseen on the DSU. Moreover, according to the DSU rules, winner countries in a dispute at the panel stage cannot vindicate the award of that victory while there is a pending appeal. A losing country could then adopt the strategy of appealing the panel decision when the AB has insufficient quorum to analyze an appeal in order to forestall any legal result. In the disputes at the panel level there can be a blockage by the means of an appeal of the panel report by any party. The rule of law nature of WTO can cease to exist.

A more critical aspect is that, due to the central position of the dispute settlement mechanism in the WTO, it is possible that the inoperability of the AB could quickly provoke the demise or the stagnation of the WTO. The implications of this worse scenario on dispute settlement of trade issues will be analyzed below.

4.3.1. A possible scenario: dispute settlement in a world of free trade agreements

In light of the AB crisis, the dispute settlement on trade issues could disappear with the passage of time or be limited to free trade agreements. In the first scenario, there can be a regress from the world trading system to a power-

based free-for-all in which major players act in an unilateral manner and apply retaliation to achieve what they seek. In a worse situation, as countries would not see their appeals completed, most of them can solve issues in a manner similar to self-care in which they make use of unilateral retaliation, which may lead to additional retaliation by the country that firstly presented the appeal.

The first scenario can be considered, however, as excessively pessimistic as there are a number of free trade agreements (FTAs) with rules on dispute settlement. This second scenario characterized by a multiplicity of FTAs is now analyzed. Limitations on FTA rules, nevertheless, exist and must be understood. The first one consists on the idleness of dispute-settlement mechanisms foreseen on these FTAs. Over the time period from 2007 to 2016, the sole case of inter-state litigation on trade successfully initiated and completed under an FTA was the Costa Rica v El Salvador dispute, under the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR).¹²³

The second one consists on the nonexistence of community pressure in adjudication as the one that exists on WTO disputes. If adjudication generates enough community pressure, retaliation becomes relatively less attractive as an immediate response to the breach, and mostly attractive as a means of escalating the dispute once the path of community pressure has been exhausted.¹²⁴ In the absence or ineffectiveness of community pressure adjudication is a less powerful remedy, which may make immediate retaliation the more attractive choice.¹²⁵

¹²³ VIDIGAL, Geraldo. Why is There so Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement. **Journal of International Economic Law**, v. 20, n. 4, p. 927-950, 2017, p. 928.

¹²⁴ VIDIGAL, Geraldo. Why is There so Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement. **Journal of International Economic Law**, v. 20, n. 4, p. 927-950, 2017, p. 950.

¹²⁵ VIDIGAL, Geraldo. Why is There so Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement. **Journal of International Economic Law**, v. 20, n. 4, p. 927-950, 2017, p. 950.

5. Final remarks: a partial effectiveness and its potential

The question of this study related to the effectiveness of *suspension of concessions* or other obligations to the implementation of the recommendations and decisions of the DSB. Its first conclusion was that mediate goals are often confused with the purposes of the very WTO DSS, namely the suppression of unlawful measure, reaching a positive solution to the parties, and restoring the balance of benefits between the litigants. Otherwise, WTO doctrine and case law clearly prioritize, as an immediate function, the induction to compliance procedure.

In order to access the effectiveness of the measure, this study adopted a theoretical concept of technical efficiency. Departing from an argument based on the WTO doctrine and case law, this article demonstrated the partial effectiveness of the measure, considering:

- (i) the capacity of *suspension of concessions* to fulfill only the first two effectiveness functions among the three functions necessary to measure the efficacy degree of a norm (blocking function, programmatic function, and guarding function); and,
- (ii) the evidence that, considering the cases analysis in which the application of the measure was authorized by the DSB, although used in a residual number of cases –considering the 474 requests for consultations, 19 recommendations of the measure by the panel (article 22.6), and 18 DSB's authorization of employment – the remedy was able to meet the first goal, recognized by the case law, to induce compliance with the recommendations and rulings of the DSB, but even in these disputes, it was not always able to produce concrete effects on reality (which includes: suppression of the unlawful measure or adequacy of the unlawful practice to WTO rules; transgressive behavior modification; and, restoration of the balance of benefits between litigants, as an illustrative list).

We verified, then, that the problem of partial effectiveness of the *suspension of concessions* to achieve the purposes, mediately and immediately,

indicated by doctrine and case law, may be linked to other factors besides the measure itself. As widely known, in the WTO, the implementation of decisions and recommendations of the DSB invariably falls within the domain of the balance of strategic, economic and political power among the members in dispute.

The retroactive monetary compensation, albeit adopted only in two disputes in the WTO: *US - Upland Cotton* and *US - Copyright*, has been the subject of proposals during the Doha Development Round for the improvement of the mechanism, particularly for developing countries and LDCs. The suggestion indicates the incorporation of this remedy by the DSU, as a new tool to strengthen the guarantees of security and predictability to the system, since it would act directly in the induction and acceleration of the implementation process of the recommendations and decisions, what could coexist with the *suspension of concessions* autonomously or cumulatively.

Failing to carry out the reparation of rights nullification or impairment of benefits suffered during the substantial time lag between the initiation of proceedings by the DSB and the issuance of the AB Report – the point when the calculation of the *suspension of concessions* is permitted – would cause further damage to the restoration of the economic balance of the impaired party. It is reasonable to assume that the attitude to compensate, monetarily and retroactively, the nullification or impairment of benefits arising from the unlawful practice, added to other purposes already provided for in the DSU, would encourage gradual change in the behavior of transgressive members, since it would make such practice even more disadvantageous.

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