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Capucio, Camila

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Camila Capucio

Universidade de São Paulo, International
Law – Center for Research on International
Tribunals, São Paulo- SP, Brazil
(ccapucio@usp.br).

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Implementing decisions of the WTO Dispute Settlement in Brazil: is there a place for transparency and participation?

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Abstract

This paper aims to discuss the democracy gap in the implementation process of decisions of the World Trade Organization Dispute Settlement System in Brazil and possible measures to increase its transparency and accountability. Although the selection of the implementation measure is a sensible political choice that impacts a wide spectrum of different interest groups in diverse manners, government shall give publicity and transparency to the selecting process, making possible for interest groups and agents to present their arguments regarding the possible implementation paths and connecting state governance structures to stakeholders, and allowing the collective and legitimate construction of public interest.

Keywords: World Trade Organization; Dispute Settlement System; Implementation process; Brazilian Foreign Policy.

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Introduction

It has been observed in the last decades a context of “densification of legality” (LAFER, 1998) in international relations and an increasing institutionalization of international law. This phenomena of legal and judicial expansion observed in international society has manifested, respectively, by the establishment of legal mechanisms for regulation of international relations and by the institution of International Tribunals (MENEZES, 2011).

International trade, as a field deeply influenced by the globalizing force, has been a very fertile ground for the development of these phenomena, as represented by the constitution and the

evolution of the multilateral trading system – with the passage from GATT 1947 to the WTO – and by the creation of the WTO dispute settlement system, in response to new demands and aspirations arriving from the international society (AMARAL, 2008).

As a unique dispute settlement system, resulting from the evolution of international commercial relations since GATT 1947, WTO dispute settlement does not fit into the classic configuration of international tribunals.¹ Nevertheless, although not ignoring its specificities, under international law theory, it is an international adjudicatory dispute resolution system.

A very brief comment on the legal nature of the WTO dispute settlement system and its decisions is necessary in order to achieve the main purposes of these paper, by truly comprehending the relation between political and legal dimensions regarding the subject, as the implementation of WTO dispute settlement decisions may impact a wide spectrum of different interest groups, and there are some basic legal standards that shall be considered under Brazilian legal system.

WTO dispute settlement is composed by adjudicatory [panels and Appellate Body] and political [Dispute Settlement Body – DSB] instances (PETERSMANN, 1997; JACKSON, 2006; MATSUSHITA; MAVROIDIS; SCHOENBAUM, 2007; MAVROIDIS, 2008). Hence, the legality of the dispute settlement procedure in the WTO “*is part of a broader context, one of diplomatic nature.*” (LAFER, 1998, p. 749).

In what regards to the components of the WTO dispute settlement system, DSB is an emanation, an “alter ego” of the WTO General Council (VAN DER BOSSCHE, ZDOUC, 3013, p. 206). However, in order to properly understand the legal nature of the decisions, it is necessary to remember that the most relevant decisions are adopted through negative consensus or reverse consensus (CROOME, 1998).² In this sense, doctrine has interpreted that the reverse consensus rule, in practice, renders the adoption of the adjudicative bodies reports – as well other relevant decisions- “*quasi-automatic*”(PETERSMANN, 1997, p. 179) or even *automatic* (LAFER, 1998; CAMERON; GREY, 2001).

DSB works, therefore, as an instance that emanates a decision that, nevertheless, is emanated as a result of the procedure developed in the dispute settlement system of the WTO as a whole, and therefore its performance does not nullify the legality of the reports of the adjudicative bodies of the system.³ On the other hand, the approval of the reports, even under the rule of negative consensus, is the act that formally concedes to these documents legal effects of an international adjudicatory decision.

1 As specificities of the dispute settlement system of the WTO in relation to other adjudicatory procedures of dispute settlement in international law, we may mention: (i) the relationship between the adjudicatory bodies and the DSB in dispute resolution; (ii) the strong presence of the negotiation aspect in the procedure, either at the stage of consultations or during other stages of the procedure; (iii) and the “open” character of the resulting decisions of this mechanism, leaving a “discretion space” to be completed by the implementing member.

2 This negative consensus is embodied in the reversal of the consensus rule expressed in Article 2.4 of DSU, that is, it is considered that the DSB has made a decision, unless there is consensus to not take the decision. This is the way decisions such as the establishment of a panel, adoption of panels and Appellate Body Reports and authorization to retaliate are taken.

3 It should be noted that the relation between DSB and panels and Appellate Body remains as a historical aspect of the passage from GATT to WTO. The existence of the control – more theoretical than practical – from DSB over adjudicative bodies decisions, therefore, does not have the power to obstacle recognition of the adjudicatory nature of the WTO Dispute Settlement System (ABI-SAAB, 2010-2011, p. 13).

Therefore, to recognize the WTO Dispute settlement System as an adjudicative system is to reaffirm that it was established in order to resolve disputes on the basis of rules, following the procedure set by previously by the DSU, enrolled by independent bodies and resulting in a binding decision to members in dispute (ROMANO, 2001).

According to this line of interpretation, that underlies the analysis of this paper, there are relevant characteristics of WTO dispute settlement decisions: (i) legality, (ii) bindingness and (iii) undeterminity (open character of the commands of the decisions, which are undetermined but determinable) (JACKSON, 2004).

Decisions of the dispute settlement system of the WTO are thus expressed as commands of results, by requiring that the measure recognized as in disconformity be brought in conformity to multilateral obligations. Although the choice of means by which the result expected is achieved is to be determined by the member, in its discretionary space, the member is legally bound to comply with the decision, not been an option the compliance per se, but only the means of compliance.

Implementing WTO decisions: some mechanisms and variables

Once a report is adopted, implementation phase of the decisions is inaugurated, and article 21.1 of DSU requires “prompt compliance” of recommendations and decisions of DSB. This “prompt compliance” may be achieved by means of (i) withdrawal/revocation of the measure; or (ii) modification of the measure, in its part containing the violation recognized by the report adopted.

Implementation of the decisions involves many variables, not only related to the nature of the measure questioned, but mainly related to the specificities of the domestic legal systems of members. The complexity of implementation, therefore, increases in the extent that each national legal system has a unique arrangement between powers and bodies involved in the various themes that – although have been elevated to international standardization – were classically in scope of action of national institutions.

The different national implementation mechanisms depend, however, on the very character of the measure whose disagreement with the multilateral discipline was recognized. Thus, for the purposes of systematization of implementation mechanisms, it is necessary to conceive a classification of measures that will be addressed by the respective implementation mechanisms.

Under the criteria of subjective competence of the measure, we can see: (i) measures emanated from executive bodies; (ii) measures emanating from legislative bodies and (iii) measures emanating from judicial bodies. Acts of the three branches are attributable to the States, and therefore entail international responsibility as stressed in previous Appellate Body Reports.^{4, 5} Therefore, if the

4 “[...] the United States, of course, carries responsibility for actions of both the executive and legislative departments of government.” WTO. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*. WT/DS2/AB/R, 29 abr. 1996. p. 28.

5 “The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.” WTO. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. WT/DS58/AB/R, 22 out. 2001. para. 173.

measures in violation of multilateral rules may emanate from organs of the three branches, it is reasonable to assume that the implementation may require measures of all these powers.⁶

It is acknowledged that the “simplest” mode of compliance usually occurs when implementation requires an action of the executive branch, in the exercise of its function of management and definition of policies based on its weighting on the situation and state interests. Implementation measures involving the legislative branch are, as a rule, more complex and time consuming, as these are actions in which is required modification of a *strict sense* legislation, and this difficulty can result from several factors. In addition to the procedures and deadlines regularly required for legislative process, there may be political composition of legislative bodies not necessarily in line with the party that exercises power in the executive branch, or a perception by parliamentarians that the modification required by the DSB’s decision is not relevant or appropriate (DAVEY, 2005, p. 9; DAVEY 2009).⁷

Implementing measures with the participation of the judiciary are not common, but cannot be discarded from the systematic of implementation by WTO members. In the case *Brazil — Measures Affecting Imports of Retreaded Tyres*,⁸ for example, the use of a *Arguição de descumprimento de preceito fundamental – ADPF* (literally translated as “Allegation of breach of Arguition of a fundamental precept), a kind of judicial review of constitutionality action, was essential to enable compliance without revoking the measure, which in substance was legitimate.

Therefore, implementation may involve measures together and separately, arising from (a) the executive branch; (b) the legislative branch; and (c) the judicial branch. Such measures may have (a) administrative; (b) legislative; or (c) jurisdictional nature.

Regarding the criteria of the extent of inconsistent measure, they can be classified as: (i) single or specific measures (in respect of a specific act or identifiable and distinguishable products) or (ii) general applicability measures (concerning procedures, methodologies). Correlatedly, the correspondent implementation measures tend to track the amplitude of scope of the inconsistent measure, being naturally also related to the multilateral obligation and its Agreement in case. Thus, implementation may involve measures together and separately, of: (a) specific character; or (b) general character.

6 “We note that a WTO Member “bears responsibility for acts of all its departments of government, including its judiciary.” This is supported by Article 18.4 of the Anti-Dumping Agreement, Article XVI: 4 of the WTO Agreement, and Article 27 of the Vienna Convention, The judiciary is a state organ and even if an act or omission derives from a WTO Member’s judiciary, it is nevertheless still attributable to that WTO Member. Thus, the United States cannot seek to avoid the obligation to comply with the DSB’s recommendations and rulings within the reasonable period of time, by relying on the timing of liquidation being “controlled by the independent judiciary” WTO. Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews (Recourse to Article 21.5 of the DSU by Japan)*. WT/DS322/AB/RW, 29 ago. 2008. para. 182.

7 The implementation that demands conduct of Congress has proved especially problematic in the US (DAVEY, 2005, p. 9).

8 “At the oral hearing, Brazil indicated that acts of the judiciary had to be attributed to the state just as acts of the legislature or of the executive. Therefore, the judiciary, like other branches of power, could contribute to achieving compliance with international obligations. Brazil considered “totally misplaced” the European Communities’ focus on the government’s ability to control the achievement of the intended objective of proposed implementation acts. Brazil argued that the Federal Government could not “ensure” that its intended results would be achieved, irrespective of whether it undertook action through the legislature or judiciary in order to implement the recommendations and rulings of the DSB, because both the legislature and the judiciary are separate from the executive. Brazil stated that, even though these two powers operate with a different degree of autonomy, there is no difference in the sense that Brazil’s Federal Government cannot guarantee a certain outcome either in the National Congress or before the Federal Supreme Court”. WTO. *Brazil – Measures Affecting Imports of Retreaded Tyres (Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes)*. WT/DS332/16, 29 ago. 2008. para 65.

Additionally, in what concerns decision-making and bureaucracy related to the implementation, the mechanisms can be: (a) *ad hoc* or (b) may have parameters provided in a general regulatory framework.

An example of a general regulatory framework is the procedure in US law (*Uruguay Round Agreements Act* -URAA) establishing consultations with committees of Congress, private sector committees and the public sphere in general, before the definition of the way in which the decision of WTO dispute settlement system will be implemented (GRIMMETT, 2001).

Is enshrined in the URAA the impossibility of a private party to seek direct implementation of a report of the panel and/or Appellate Body, since only Congress and administrative bodies could decide to implement a recommendation and, if they decide to do so, and how to implement the referred recommendation.⁹

This legal framework contains two procedures by which “a WTO report” can be implemented in US law. In both procedures, there is the possibility for comments by interested parties, by submitting written comments and holding a hearing during a public session about the extent of the implementation measure proposed. However, according to this instrument, the implementation is only possible if there is no conflict with US law, situation in which the case would require a further action by the US Congress (BARNETT, 2010-2011).

Finally, there are other variables that can contribute to the design of the implementation measure, in particular: (a) legal and political aspects of the power structure within the State; (b) polarization of interests involved in disputes and the ability of different groups to influence implementation.

Implementation process in Brazil and its actors: problems and challenges

Implementation of the WTO Dispute Settlement System decisions falls under the broader subject of the implementation of international tribunals decisions in Brazil. Brazilian Federal Constitution of 1988 is silent in this regard, and existing practice is ambiguous¹⁰ (DALLARI, 2003). Thus, the mandatory basis and enforceability of international adjudicatory decisions is grounded on the respective constitutive treaties of international organizations to which they are attached and / or statutes of the International Courts and Tribunals.¹¹

9 Thus, shortly after the release of a report, the United States Trade Representative must: (i) notify the respective Congressional Committees; (ii) consult the Congressional Committees on an appeal to be made; (iii) being the report not favourable to the United States, should also consult the appropriate Congressional Committees on whether the report shall be implemented, and if so, the manner of such implementation and the period of time necessary for such measure. Uruguay Round Agreements Act (URAA), section 123 Available at: <<http://www.gpo.gov/fdsys/pkg/BILLS-103hr5110enr/pdf/BILLS-103hr5110enr.pdf>>.

10 Regardless of the specifics of the decisions of international tribunals, is conferred to them legal nature of decisions of International Organizations, from the perspective of domestic law. However, a distinction should be made within the broader concept of “International Organizations decisions” between “adjudicatory decisions” and “non adjudicatory decisions.”

11 It is widely known the general rule of mandatory compliance with international obligations contained in treaties duly ratified by States and the prohibition of a State to exempt itself from compliance with an international obligation alleging its domestic law, both codified by the Convention Vienna on the Law of Treaties. Articles 26 and 27 Viena Convention.

In Brazil, however, there is no prevision of a procedure for the implementation of decisions of any international organizations and in practice the implementation has occurred in a casuistic way – depending on the peculiarities and uniqueness of the concrete case.

Nevertheless, a serious concern arrives because no formal act is provided to insert a decision of international organization or as adjudicative decision in Brazil, and neither to concede publicity to its content, as is required for ratified international treaties. This act of formal incorporation, therefore, is related to respect to constitutional principles of publicity and legality and – at least in what concerns international treaties – constitutes an essential requirement for its national invocability and applicability. (GABSCH, 2010).

It is relevant to stress that the non-existence of an official act internalizing naturally does exempt Brazil from international responsibility, but may prevent the enforceability of its rules domestically. (GABSCH, 2010, p. 55). Moreover, the inexistence of a formal act incorporating these decisions in Brazilian legal order has been given to Executive branch an almost unlimited “freedom” to choose the way to implement it, as it may prevent judiciary bodies to control it or to regard these decisions as legal sources.

When Brazil was required to implement a decision of the WTO Dispute Settlement System, the implementation was in a “diffuse” manner, “*through adoption of internal acts of adequacy of the legislation challenged in the WTO, inspired by the decisions of the DSB, but not necessarily legally grounded in these decisions.*” (BENJAMIN, 2013, p. 587)

Thus, under a broader perspective, it is clear that the mechanisms available in Brazil for the implementation of decisions of the DSB are the remedies regularly used internally for modification of illegal or inconvenient acts,^{12, 13} and there is no previous procedure to discuss it, which could enhance legitimacy of decision-making.

An interesting experience, that has served as an inspiration basis for some of the steps on the procedure proposed in the last part of this paper was the implementation path to Brazilian right to retaliate in *United States – Subsidies on Upland Cotton* case. Although that was not an implementation of WTO Dispute Settlement Decisions on the perspective of the implementing member, in this opportunity Brazilian government have made important choices that expressed a more transparent and democratic perspective in what regards to domestic agents and diverse interests (ANDRADE, 2013).

With the authorization to retaliate against the US for non-compliance in that case arrived for Brazil the challenge for effectively implementing its “right”. This implementation of Brazilian “right” to retaliate in this case involved the following aspects that serve as a successful example

12 In the case of aircrafts, the decision was implemented through changes in normative acts emanated from the Executive Branch (Central Bank norms) as well as in the law that established the program considered inconsistent with the multilateral obligations in its original formulation.

13 The case of retreated tires proved to be exceptional, in which the judiciary branch, in the exercise of its internal competences, was practicing conducts obstructing the realization of the protective purpose of the measure imposed by the Executive branch. Thus, the implementation of the decision of the Dispute Settlement System of the WTO involved a need to standardize national court jurisprudence, in order to ensure that courts would not allow the importation of retreated tires prohibited by the Executive.

and as inspiration for the procedure proposed in last part of this paper: (i) institutionalization of the procedure;¹⁴ (ii) publicity of the acts related to this implementation,¹⁵ (iii) public access and possibility to participate in oral hearings or with written documents,¹⁶ (iv) establishment of a general legal framework for implementation¹⁷ (SCHMIDT, 2013).

Although there is no precise competence expressly conceded to any body in the matter of implementation of these decisions, in practice two ministries have been until now standing out in the conduct of relations under the framework of the multilateral trading system: the Ministry of Foreign Affairs (Ministério das Relações Exteriores – MRE) and the Ministry of Development, Industry and Foreign Trade (Ministério do Desenvolvimento, Indústria e Comércio Exterior- MDIC). Within these ministries respectively two institutions stood out: the General Coordination of Litigation (Coordenadoria Geral de Contenciosos – CGC) and the Chamber of Foreign Trade (Câmara de Comércio Exterior – CAMEX).

It is of utmost relevance to emphasize that a recent “Provisional Measure” published in the first day of the interim government of Michel Temer (May 12th 2016) has changed the governance structure of decision-making in external trade, as CAMEX was transferred to the command of Presidency, a measure that in fact restore the original design of this body.¹⁸

Created in Fernando Henrique Cardoso government, as a substitute for CACEX (Carteira de Comércio Exterior do Banco do Brasil) – extinguished during Fernando Collor government (RAMOS, 2008, p. 17), CAMEX was established with the mission to “*formulate policies and coordinate activities related to foreign trade in goods and services.*”¹⁹

Initially created as a body of Council of Government connected to the Presidency, the original design of CAMEX has changed over the years. Over the past two decades, several reforms were implemented in its competences, composition, powers and structure alternately tending

14 The “institutionalization” described was materialized through Resolution No. 63 of CAMEX, 28 October 2009, establishing the Technical Working Group (WG), created with the intent to “*identify, assess and formulate proposals for implementation of authorized countermeasures, as decisions of the arbitrators expressed in WT documents / DS267 / ARB / 1 and WT / DS267 / ARB2 WTO*”, with such proposals subject to the Council of Ministers of CAMEX. Article 1º. CAMEX.

15 These acts were published as CAMEX Resolutions, such as the preliminar list of products published as Annex to Resolution 74/2009 of CAMEX, which also established public consultation with the intent to review the content of list, which originally contained 222 tariff items.

16 The Working Group acted inspired by the experience of other WTO members, particularly in the path followed by the European Union to retaliate the United States in case *United States — Tax Treatment for “Foreign Sales Corporations”* (DS 108). This procedure was, in general, a model for the Brazilian retaliation, as the Working Group defined that the retaliation implementation should be widely discussed by sectors of Brazilian society and economy. The following steps would be adopted: (i) preliminary list of products, (ii) public consultation, (iii) consideration of comments detailed in the consultation; (iv) preparation of the final list. The comments from interested parties should be sent in writing and digitally. There was significant participation of different sectors and groups of Brazilian society (more than 700 memorials), which allowed the working group to cope with less obvious dimensions of the potential consequences of the measure as drafted. In the words of diplomat involved in the process, “*the use of public consultation, as well as enhancing mechanisms of transparency and participation of society, it was confirmed as a valuable tool for the process.*” (SCHMIDT, 2013, p.640).

17 Aiming to legitimize the measures in the Brazilian legal system, was enacted the Provisional Measure 482/10, subsequently converted into Law 12270/10. Medida Provisória 482, February 10th 2010, converted in law n 12270/10. Available at: < http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12270.htm>.

18 Decree No. 1,386, of February 6, 1995.

19 Medida Provisória 726, May 12th 2016. Available at: < http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Mpv/mpv726.htm>.

to weaken or strengthen the CAMEX as an institution responsible for the formulation and/or implementation of trade policies (FERNANDES, 2010, p. 77). One of the most significant changes occurred exactly when, months after the creation of MDIC, CAMEX was institutionally linked to this Ministry – a fact interpreted as a cause for structural fragility (BONELLI, 2001; RAMOS, 2008).

The displacement of this organ from the Presidency for one of the Ministries involved in decision-making on external trade policy may have made CAMEX an “ambiguous” institution, as its formal function of supraministerial coordination was undermined while being organically connected to one of the bodies that should be submitted to its coordination (VEIGA, IGLESIAS, 2002, p. 61; VEIGA, 2007, p. 152; FERNANDES, 2010, p. 86). Although the permanence of this recent structural restoration is uncertain and there may theoretically be a potential benefit, possible effects of this choice are yet to be observed and interpreted.

With specific regard to decision-making related to the participation of Brazil in the WTO dispute settlement system, CAMEX is formally consulted by the CGC-MRE before taking any significant step. However, beyond the difficulties of CAMEX to perform its functions, or even in the light of these difficulties, there is a perception that in WTO’s dispute settlement issues the position of MRE prevails (RAMANZINI JUNIOR, 2012; BENJAMIN, 2013; ARBIX, 2008).

It is not about an undesirability of the management of these decisions by CGC MRE, which has notably a technical knowledge about Brazil’s role in the dispute settlement system of the WTO. What scholars highlight is the recognition that, in this theme, the CAMEX is “*relegated to the background, submitting the decisions to forums not provided institutionally and not open to participation of civil society.*” (ARBIX, 2008, p. 666).

Moreover, the longtime primacy of the Executive Branch on the subject of construction of foreign trade policies (FARIAS, 2012) and the absence of effective participation of the National Congress in Brazil, makes the bureaucratic apparatus predominant in the formulation of these measures, which are defined with reduced transparency.

There are for example significant differences between the Brazilian legal culture on this subject and the role played by the US Congress in decision-making, consistent with the institutional structure of the definition of foreign trade policies by the US, in which the USTR is included as an agency of the executive branch, but with close ties to the legislative branch (RAMOS, 2010).

In this context, it is highlighted the need in the Brazilian system to develop mechanisms for transparency and institutionalized participation of civil society in order to inform the perception of the public agent on the public interest to be pursued (VEIGA, 2007).

Additionally, one should not undermine the variety of topics submitted to the dispute settlement system of the WTO and, therefore, that may be subject of a measure of implementation. Thus, different from GATT, WTO includes a thematic diversity in their agreements, which requires a careful balance of multiple interests involved in filling the discretionary space given to members for implementation.

Discretionarity and democratic principles enshrined in Brazilian Constitution

Albeit under the perspective of the WTO dispute settlement system having discretionarity to choose how to implement its decisions – although this is not a limitless space –, under the Brazilian domestic legal perspective this discretionarity of selection of implementing paths must be filled having the public interest and the constitutional principles of public administration as its unremovable limits (MAURER, 2006). That is, if from the perspective of the multilateral trading system, what matters is only the result, through the lens of domestic legal system should also evaluate the path chosen.

This is because implementation process of WTO Dispute Settlement System decisions in Brazil, and their respective acts, should be envisioned as a double object. It is simultaneously a measure of Brazilian foreign policy and a measure of public policy – and thus an administrative activity *latu sensu* which should be legally and legitimately grounded (FREITAS, 2013).

While it is undeniable knowledge of MRE in the subject, we must remember that the implementation of such a decision at the domestic level – with a potential impact on public policies of different subjects – involves a much wider spectrum of recipients and therefore attention should be given for the development of mechanisms for participation of different sectors of Brazilian society, in order to disclose the various and opposing interests in this situation (SPECIE, 2008).

Thus, the discretionarity of the Executive Branch in the definition of implementation processes and measures, embodied by the conduction of the CGC-MRE, cannot be confused with total freedom of choice, detached from principles of public administration, and public interest that should guide decision-making by public agents.

In what regards to the control of public administration, foreign policy is not exempt from this control, based on principles of public administration set out in the chapeau of Article 37 of Brazilian Constitution,²⁰ although its implementation requires deeper reflections. Among the explicit principles, deserves further comment the principle of publicity, which leads to the requirement of transparency, as corollaries of democracy participation.

The principle of transparency, erected by Kant to the classification of “*transcendental principle*” (LAFER, 1987-1989, p. 110), should permeate “*all sectors and all areas of administrative activity*” (MEDAUAR, 2011, p. 137), with fundamental importance in the democratic rule of law. Inserted in the conception of democratic rule of law, the principle of publicity is manifested not only in its formal dimension – connected to the disclosure of information- but mostly should be projected in the material aspect of promotion of access by all interested in formulation, implementation and evaluation of administrative activities.

20 Brasil, *Constituição da República Federativa do Brasil de 1988*. “Art. 37. The direct and indirect public administration of any of the powers of the Union, the States, the Federal District and the Cities will abide by the principles of legality, impersonality, morality, publicity and efficiency and also the following: (...)”

continuação

It is the respect for publicity and transparency that gives individuals the ability to control and participate in decision-making, with a view of approximation between state governance structures and individuals in society. They should be noted not only as conditions of legality for administrative activity, but also as commitments to its legitimacy by permitting democratic participation in its decision processes (MOREIRA NETO, 2006, MIRAGEM, 2011).

In their very essence, transparency and publicity are vectors that must also permeate contemporary diplomacy, in order to update it to the concepts of democracy, participation and public interest. As states Celso Lafer:

Democracy is a form of government that seeks to integrate the two meanings [of public], assuming that the public interest must of collective acknowledgement. That is why it has as its rule the public exercise of the common power. Hence the importance of the issue of transparency of power, as a democratic instrument of control 'ex parte populi' over government. Transparency of power is correlated with the freedom of opinion and expression, which requires the right to seek, receive and impart information, enshrined in Article XIX of the Universal Declaration of Human Rights of 1948. These rights objectives to guarantee an equal participation of citizens in public sphere. It has, as a philosophical foundation, the Kantian *sapere aude* because the public use of reason itself, which entails the illustration and the majority of men, asks an accurate and honest information, available to all, without which there are subjects but not citizens. For this reason, on the work of the Kantian legacy, as the decisions are made in a democracy, the principle of visibility of power is constitutive. Allows the information without which all can not form a proper opinion on the management of the common thing to thus exercise its power of participation and control. Hence the conclusion: in a democracy publicity is the rule and secrecy is the exception [...] (LAFER, 1987-1989, p. 109)

Thus, the necessity of "*public exercise of common power*" demands a different approach to the implementation of WTO dispute settlement decisions in Brazil (DALLARI, 1994).

Furthermore, the 1988 Federal Constitution expressed its commitment to the peaceful settlement of disputes²¹ and thus to international rule of law.²² If on the one hand the Brazilian Federal Constitution is silent in international matters and with regard to this specific subject, on the other hand the Brazilian Charter establishes a performance program for its organs and agents, through ideologically oriented objectives and general principles. This is the context for

21 Brasil, *Constituição da República Federativa do Brasil de 1988*. Preâmbulo. "We, representatives of the Brazilian people, gathered in the National Constituent Assembly to institute a democratic state, to ensure the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralistic and unprejudiced society founded on social harmony and committed, internally and internationally, to the peaceful settlement of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil"

22 Brasil, *Constituição da República Federativa do Brasil de 1988*. "Art. 4. The Federative Republic of Brazil is governed in its international relations by the following principles: I – national independence; II – prevalence of human rights; III – self-determination; IV – nonintervention; V – equality among States; VI – defense of peace; VII – peaceful settlement of conflicts; VIII – repudiation of terrorism and racism; IX – cooperation among peoples for the progress of humanity; X – granting of political asylum".

understanding the true scope of the principles envisioned by the Brazilian constituent for the conduct of foreign policy in the pursuit of achieving the values of development and democracy, on the domestic front, and the rule of law, peaceful coexistence, international cooperation and the defence of national interest in the external perspective (ALMEIDA, 1987-1989; LAFER, 2005).

The definition of public interest – or of national interest- is a complex task in all state practice areas, given the pluralistic character of contemporary societies. This definition requires reinforced care in the subject under analysis, as it is naturally permeable to private interests, which, however, enjoy different powers of influence. Although the public interest may coincide with particular interests, this reinforced attention in identifying the first one can be achieved through the institutionalization of consultation mechanisms open to different economic and social groups involved (MAURER, 2006, p.5).

It would be illusory and innocuous to suppose a complete separation between the public interest and the various private interests in Brazil's participation in the WTO dispute settlement system, since, by the very nature of commercial disputes, it is natural that a member seeks to defend the position of economically relevant domestic groups.²³

However, at the time of implementation of decisions, the interest of several domestic economic groups may conflict, and other issues that not only the trade may be involved, such as public health and the environment, and thus public agents must consider these complexities and the consideration of multiple perspectives.

Possible solutions to democracy gap: the desirability to establish a legal framework on the implementation of WTO decision in Brazil

As a result of the discussions held throughout the paper, we believe it is urgent to establish a legal framework to increase transparency and predictability in defining the manner to implement decisions of the WTO Dispute Settlement System in Brazil. This framework would not stifle the necessary space of manoeuvre of the Executive branch in the construction of continuity between policies, but would allow a democratic progress in filling this space, by promoting greater transparency, legitimacy and control of the organs of the Brazilian government.

The existing model of relationship between economic groups and the *de facto* bodies responsible for decisions related to the participation of Brazil in WTO dispute settlement system, allied to the informal character of the concrete participation of these sectors, tends to favour more institutionalized and dominant demands. These better organized demands, however, not necessarily reflect all shades of legitimate interests to be protected by the Brazilian government and are not necessarily identified with the public interest, which should be the guide in decision-making in public administration.

²³ This entanglement is such that in Brazil, in most cases, the national economic group is interested who has borne the financial cost of the demands of filing (SHAFFER; SANCHEZ; ROSENBERG, 2008).

The perception of the public interest from the diversity of interests that are expressed within the Brazilian State may not be so clear or polarized, given the complexity of the themes influenced by the multilateral trading system. Although such complexity has not yet manifested itself intensely in both cases requiring an implementation measure of Brazil, one cannot restrict the possibility of future claims against the country in the WTO managing diverging interests at the time of implementation.^{24, 25}

Furthermore, it is not possible to state that all the measures taken by the Brazilian government – and by any government in the “real world” – always reflects a democratically constructed consensus, or necessarily promote the public interest of its respective society.

It is well known that the public interest is not characterized as such by being emanated from an administrative authority, since many times these act do dismiss this interest (MELLO, 2014). Thus, when such measures are challenged under the WTO Dispute Settlement System, and arrives the moment of implementation of its decision, the choose of the path for this implementation can serve as an opportunity for discussion of convenience and opportunity of the original measure. That is to say: even when the concrete specifics of the decision of the WTO Dispute Settlement System allow the maintenance of the measure with adjustments, this maintenance would not necessarily be the best choice under the perspective of public interest to the Brazilian society.

From this reflection, it is possible to foreseen multiple benefits of establishing a general legal framework for the implementation of decisions. The first advantage, thus, occurs in increasing the predictability and legal certainty. In addition, the legislative provisions of institutionalized manifestation and participation by stakeholders gives legitimacy to the implementation measure chosen by Brazilian government. It is not about ensuring that all groups will have their interests upheld by the procedure, which would be impossible, but to ensure that such perspectives will be considered in the arbitration of the decision guided by the public interest.

In this context, it is proposed the creation of a general legal framework for the implementation of the WTO dispute settlement decisions, resolving ambiguities, and balancing the flexibility that must necessarily exist to the transparency and the possibility of involvement of stakeholders.

24 In the case *Brazil — Export Financing Programme for Aircraft*, one can say that the discretionary space regarding the implementation path was restricted since, recognized the inconsistency of one aspect of PROEX, Brazilian government could choose between the options of: (a) extinguish the subsidies to the sector; or (b) modify the element inconsistent with the multilateral rules, maintaining the subsidies. The Brazilian government opted for the maintenance of the program, given the strategic nature of the sector, and even the symbolism of the success of the national company competitive in a high-tech sector. There wasn't, then, a need for questioning about what would be the national interest in the situation.

25 For the case *Brazil — Measures Affecting Imports of Retreaded Tyres*, the multiplicity of interests manifested in a more evident way, with certain polarization between economic agents interested in import of retreaded tires and sectors of civil society, legitimately concerned about public health and the protection of environment. In the latter case, although there was such polarization, again there was not an intensive questioning of the definition of public interest to be protected in the implementation of the decision. Given the different nature of the interests that arised, one can recognize a clear predominance of the second group as coincident and in a way the voicer of primary interests of the Brazilian government with the establishment of the challenged measure. Precisely because the measure of restriction originally was founded on legitimate interest of protecting public health and the environment, there was consistency in the maintenance of the measure. Therefore, as the protection of the environment and human health can be found in constitutional provisions, the situation offered a limit to the discretionarity in the definition of the measure.

Such legislation should outline a procedure for the definition of the implementation measure, which would be its ultimate finality. By predicting an ordered set of steps, transparency would be increased and the participation of civil society and economic groups with an interest in implementation could be institutionalized, well as means of cooperation between the public authorities could be formalized.

In general, we envisage that the steps of this procedure might be outlined in several stages, as we suggest:

- (i) Official Publication of the decision of the WTO Dispute Settlement System (decision of the DSB and the panel report and/or the Appellate Body adopted), by presidential decree;
- (ii) Creation of a Technical Group under CAMEX, with the participation of relevant ministries to the subject of the decision, representatives of civil society organizations and major economic groups involved in the issue, and coordinated by a representative of CGC-MRE;
- (iii) Consultation with the Legal Department of the MRE, the Attorney General's Office and the Federal Public Ministry (the latter body, in the case of the implementation involved a theme that may be relevant);
- (iv) Wide publicity, by the Technical Group, of the opinions expressed by these bodies;
- (v) Opening of consultations to submit written contributions and public hearings about the decision and possible paths of implementation;
- (vi) Assessment of contributions received in consultation and hearings held by the Technical Group and discussions on possible ways to implement the decision;
- (vii) Preparation of a report explaining the possible paths of implementing the decision, and potential legal, political and economic consequences envisaged with respective adoption;
- (viii) Presentation of the report to the members of the Council of Ministers of CAMEX, which will vote and choose the means to implement the decision;
- (ix) The decision of the CAMEX Publication determining the means chosen for implementation, through Resolution.

Some of these steps suggested would remedy the absence of formal reception of the decision as a legal document in Brazilian legal system, while others are inspired on the basic stages of participation on the construction of the implementation of the Brazilian right to retaliate against USA, as mentioned in the paper.

Conclusion

Implementation of decisions of the WTO Dispute Settlement System offers a unique opportunity for democratic States to problematize, discuss and build their measures in the light of the participation of private sector and civil society. Moreover, even within the private

sector, there is a natural conflict between visions, since the economic agents are affected very differently by an implementation path, that may benefit some and harm others, while the choice of another implementation path could reverse these results.

The differences are natural, beneficial and even essential to a democracy. And the Executive branch is responsible for the very balance of these differences in decision-making and in defining government strategies, not being the intention of the regulatory framework proposed to replace the role of decision-making bodies in the implementation.

What is pursued, nevertheless, is an implementation in a more transparent and participatory way, with political choices being made closer to the Brazilian society and its complex and multiple interests. Moreover, the establishment of a legal procedural framework for implementing WTO dispute settlement decisions in Brazil would increase legal security and predictability regarding future cases and challenges.

Therefore, in a prospective manner, with these steps suggested for a procedure defining the implementation path we believe that a more democratic and inclusive procedure could be drawn regarding the definition of the path to implement WTO dispute settlement decisions in Brazil. Through this procedure, international rule of law and public sphere can meet reinforcing democratic values internationally and domestically.

Bibliography

- Abi-saab, Georges. 'The Normalization of International Adjudication: Convergence and Divergencies'. *NYU Journal of International Law and Politics*, vol. 43 ((2010-2011): 1-43.
- Almeida, Paulo Roberto de. 'Relações Internacionais e Interesse Nacional: As Relações Econômicas do Brasil e a Ordem Constitucional' (1987-1989) *Boletim da Sociedade Brasileira de Direito Internacional*, v. 108.
- Amaral Júnior, Alberto do. *A Solução de Controvérsias na OMC*. São Paulo: Atlas, 2008.
- Andrade, Luciano Mazza de. 'O contencioso do algodão: o desafio da implementação'. Daniela Arruda Benjamin (ed.), 85-112, *O Sistema de Solução de Controvérsias da OMC: uma perspectiva brasileira*. Brasília: FUNAG, 2013.
- Arbix, Daniel A. 'Contenciosos brasileiros na OMC: pauta comercial, política e instituições' (2008) *Contexto Internacional*.
- Barnett, Mark A. 'The United States Court of International Trade in the Middle-International Tribunals: An Overview'. *Tulane Journal of International & Comparative Law*, vol. 19 (2010-2011): 421-432.
- Barroso, Luís Roberto. A Ordem Econômica Constitucional e os Limites à Atuação Estatal no Controle de Preços. In: *Temas de Direito Constitucional*. Tomo II. Rio de Janeiro: Renovar, 2009.
- Benjamin, Daniela Arruda. 'A aplicação interna das decisões do Órgão de Solução de Controvérsias da OMC na prática'. Daniela Arruda Benjamin (ed.), *O Sistema de Solução de Controvérsias da OMC: uma perspectiva brasileira*. Brasília: FUNAG, 2013.

- Bonelli, Regis. 'Políticas de competitividade industrial no Brasil – 1995/2000'. Texto para discussão IPEA, 810 (2001).
- Cameron, James; Gray, v. 'Principles of International Law in the WTO Dispute Settlement Body' (2001) *International and Comparative Law Quarterly*.
- Croome, John. *Reshaping the World Trading System: A history of the Uruguay Round* (2nd ed., 1998) <<http://www.hse.ru/data/2011/12/05/1271919456/Reshaping%20e.pdf>> accessed on: 10 mar. 2016.
- Dallari, Pedro Bohomoletz de Abreu. *Constituição e os Tratados Internacionais*. São Paulo: Saraiva, 2003.
- Dallari, Pedro Bohomoletz de Abreu Dallari. *Constituição e Relações Exteriores*. São Paulo: Saraiva, 1994.
- Davey, William J. 'Compliance Problems in WTO Dispute Settlement'. *Cornell International Law Journal*, vol. 42 (2009): 119-128.
- Davey, William J. 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions'. *RIETI Discussion Paper Series*, n. 05-E-013 (2005).
- Farias, Rogério de Souza. *Industriais, Economistas e Diplomatas: O Brasil e as negociações comerciais multilaterais (1946 – 1967)* (PHD Thesis, Universidade de Brasília, 2012).
- Fernandes, Ivan Filipe de Almeida Lopes. *Burocracia e Política: a construção institucional da política comercial brasileira pós – abertura econômica*. (Master Dissertation, Universidade de São Paulo, 2010).
- Freitas, Juarez. *O Controle dos Atos Administrativos e os princípios fundamentais*. São Paulo: Malheiros Editores, 2013.
- Gabsch, Rodrigo D'Araujo. *Aprovação de tratados internacionais pelo Brasil: possíveis opções para acelerar o seu processo*. Brasília: FUNAG, 2010.
- Grimmett, Jeanne J. *World Trade Organization (WTO) decisions and their effect in U.S. law*. Washington, DC: Congressional Research Service, 2011. Available at: <http://digitalcommons.ilr.cornell.edu/key_workplace/807>.
- Jackson, John. 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to Buy Out?' (2004) *American Journal of International Law*, vol. 109.
- Jackson, John. *Sovereignty, the WTO and Changing Fundamentals of International Law*. Cambridge: Cambridge University Press, 2006.
- Lafer, Celso. 'Diplomacia e Transparência: o Arquivo do Itamaraty' (1987-1989) *Boletim da Sociedade Brasileira de Direito Internacional*, vol. 108.
- Lafer, Celso. 'O Sistema de Solução de Controvérsias da Organização Mundial do Comércio' in Paulo Borba Casella; Araminta de Mercadante (eds), *Guerra comercial ou integração mundial pelo comércio?: a OMC e o Brasil*. São Paulo: LTr, 1998.
- Matsushita, Mitsuo; Mavroidis, Petros C.; Schoenbaum, Thomas J. *The World Trade Organization: Law, Practice, and Policy*. Oxford: Oxford University Press, 2006.
- Mavroidis, Petros. 'Outsourcing of Law? WTO Law as Practiced By WTO Courts' (2008) *American Journal of International Law*, vol. 421.
- Maurer, Hartmut. *Direito Administrativo Geral*. São Paulo: Manole, 2006.
- Medauar, Odete. *Direito Administrativo Moderno*. São Paulo: Editora RT, 2011.

- Menezes, Wagner. *A Jurisdicionalização do Direito Internacional: Conflitos de Competência entre Tribunais Internacionais, sua prevenção e resolução*. ("Professorship Thesis" – Tese de Livre Docência, Universidade de São Paulo, 2011).
- Miragem, Bruno. *'A nova administração pública e o direito administrativo'*. São Paulo: Revista dos Tribunais, 2011.
- Moreira Neto, Diogo de Figueiredo. Princípios informativos e interpretativos do direito administrativo, in: Moreira Neto, Diogo de Figueiredo, *Mutações do Direito Público*. Rio de Janeiro: Editora Renovar, 2006.
- Petersmann, Ernst-Ulrich. *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*. London: Kluwer Law International, 1997.
- Ramanzini Júnior, Haroldo. *O Brasil e as Negociações no Sistema GATT/OMC: Uma Análise da Rodada Uruguai e da Rodada Doha* (PHD Thesis, Universidade de São Paulo, 2012).
- Ramos, Guilherme Cantarino da Costa Ramos. *Comércio Internacional, Política Comercial Brasileira e a Atuação da Câmara da Comércio Exterior (CAMEX) na Condução das Políticas para o Setor*. (Master Dissertation, Fundação Getúlio Vargas, 2008).
- Romano, Cesare. 'A Taxonomy of International Rule of Law Institutions' (2011) *Journal of International Dispute Settlement*, vol. 241.
- Schmidt, Luiz Felipe Flores. 'A construção da retaliação brasileira no caso algodão: os desafios do pioneirismo'. In: Daniela Arruda Benjamin (ed.), 629-648, *O Sistema de Solução de Controvérsias da OMC: uma perspectiva brasileira*. Brasília: FUNAG, 2013.
- Shaffer, Gregory; Ratton Sanchez, Michelle; Rosenberg, Barbara. 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success'. *Cornell International Law Journal*, vol. 383 (2008).
- Spécie, Priscila. *Política Externa e Democracia: Reflexões sobre o acesso à informação na política externa brasileira a partir da inserção da temática ambiental no caso dos pneus entre o Mercosul e a OMC*. (Master's Degree Dissertation, Universidade de São Paulo, 2008).
- Van Den Bossche, Peter; Zdouc, Werner. *The Law and Policy of the World Trade Organization*. Cambridge: Cambridge University Press, 2013.
- Veiga, Pedro da Motta. 'Política Comercial no Brasil: características, condicionantes domésticos e policy-making', in ICONE, FIPE e DFID (Eds) *Políticas comerciais comparadas: desempenho e modelos organizacionais*. São Paulo: Singular, 2007.
- Veiga, Pedro da Motta. Iglesias, Roberto Magno. 'A institucionalidade da política brasileira de comércio exterior.' In: Castelat, A.; Markwald, R. Pereira, L. V. (Org.). *O desafio das exportações*, 51-96. Rio de Janeiro: BNDES, 2002. Available at: < http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/livro_desafio/Relatorio-03.pdf>. Villar, Pilar C.; Ribeiro, Wagner C. "The Agreement on the Guarani Aquifer: a new paradigm for transboundary groundwater management?" *Water International*, v.36, no 5 (2011): 646-660.
- World Bank. *Environmental Protection and Sustainable Development of the Guarani Aquifer System Project*. Washington: The World Bank, 2009.
- Wounter, Patricia. *Derecho Internacional: Facilitando la cooperación transfronteriza del agua*. Background Paper no 17. Estocolmo: Global Water Partnership, Comité Técnico (TEC), 2013.