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DISPUTE SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANISATION AND DEVELOPING COUNTRIES[1].

by Durval de Noronha Goyos jr.[2]

1. - INTRODUCTION

1.1. - The enormous crisis of credibility that has been affecting the World Trade Organisation (WTO) since its inception is a result of the generalised perception, from the developing countries as well as from the more representative segments of the world's civil society, that it works to favour, explicitly, the commercial interests of the main economic powers and its multinational companies. In fact, in the years that followed the foundation of the WTO in 1995, the developing countries had a decreasing participation in world trade and the prospect of deep financial difficulties still threatens them. The traditional areas of commerce, the agricultural and textile sectors are still excluded from the multilateral system of exchanges. The volume of subsides granted by the main trade partners were increased[3] and so doing continued to disseminate misery around the world. On the other hand, the dispute settlement system of the WTO which carried great expectations for the prevalence of the rule of law in international commercial relations, miserably failed in its objectives and constituted a vehicle of oppression and denial of the rights of the developing countries.

The objective of my presentation is to analyse the rules and the working of the dispute settlement system of WTO precisely. Therefore I divided this speech as follows:

i) This Introduction;
ii) History of the Dispute Settlement Negotiations at the Uruguay Round of GATT;
iii) Procedural Rules of the Dispute Settlement System of the WTO;
iv) Institutional and Procedural Failures of the System;

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[1] Text of the speech presented as per invitation of the Law School of the University of Lisbon, November 6, 2000. Lisbon, Portugal.

[2] Member of the Brazilian and Portuguese Bars, Senior partner of Noronha-Advogados. Professor on the post graduation on International Trade Law, at University Cândido Mendes, Rio de Janeiro. Arbiter of the World Trade Organisation.

[3] In 1999 alone, the amount of agricultural subsides between the OECD countries was increased by approximately 3%. The subsided revenue of farmers was increased from 31% in 1997 to 40% in 1999. The consumer pays two thirds of the subsidies account and farmers receive two thirds more than they would receive if at free market prices.

v) Operational Failures of the System;
vi) The Developing Countries in the Dispute Settlement System of WTO;
vii) and Conclusions.

2. - HISTORY OF THE DISPUTE SETTLEMENT NEGOTIATIONS ON THE URUGUAY ROUND OF GATT.

2.1. - The Dispute Settlement System of the General Agreement on Trade and Tariffs (GATT), signed in 1947, worked since its inception until the end of the sixties, mostly as a conciliation forum rather than an arbitration mechanism. Subsequently, in 1979, the practices which were developed were codified and the system acquired the proper status of arbitration. In 1989, during the Uruguay Round, the right to demand the constitution of a panel and a procedure which would allow the appointment of arbitrators by the General Director was recognised.

2.2. - The Dispute Settlement System was completely demoralised when the Uruguay Round was launched. The systemic failures were multiple, although the unanimous claims collapsed over the possibility of blocking the installing an arbitrate panel and the lack of feasibility of the arbitral award. In fact, the deficiency of the system was the permission granted to the contracting parties to ignore it, after it had submitted the installation of arbitration panels for the consent of the defendant. In other cases, the country judged guilty would ignore, block or procrastinate the implementation of the arbitral award. Other problems pointed out refer to procedural failures and delay on the arbitration procedures.[4]

2.3. - The United States of America (USA) and the European Union (EU) were the great and notorious trespassers (particularly the first one) of the failure of the system, what did not prevent them, at the same time, to act as its main critics. In the system of GATT, the practice of attempting to settle the disputes unilaterally was equally serious once it constitutes conduct which is absolutely prohibited by the rules applicable to the multilateral trade. The great champion of this distortion of the rule of law was the United States, with the creation of the Super 301 of The Bus Law of Commerce and Competition of 1988 arrangement. In the USA the official prevailing position is that “unilateral action is also an important catalyst to international action” and a president, George Bush took it upon himself to announce the refusal of his country to comply with an arbitration award of GATT.[5]

2.4. - Some developed countries, mainly Japan, together with the developing countries, became victims of the diverse unilateral measures, through which the USA obtained trade advantages with the infamous *agreements on voluntary contention*, or upon compensatory tariffs which made access of competitive products in the international scene to its domestic market impossible. Mainly the abuse of the juridical order of GATT led Japan to be the first country after the USA to ask for the implementation of a new round of

[4] S. “A OMC E OS TRATADOS DA RODADA URUGUAI”, by Durval de Noronha Goyos Jr., Observador Legal, São Paulo, 1995, page 142.
[5] S. “A OMC E OS TRATADOS DA RODADA URUGUAI”, page 143 and 144.

negotiations of the system, which was subsequently named the Uruguay Round. Japan wanted the increase of juridicity of the system.[6]

2.5. - In its turn, the developing countries, the main victims of the established abuse of unilateralism and in the observance of the law, though refusing to include the so called new areas, while the traditional trade did not become to make part of the multilateral system of commerce, supported the reform of the dispute settlement system and the increase of judiciary in the scope of GATT. As usual in international negotiations, the USA manipulated the Japanese initiative for their own benefit.[7] They intended to influence the reformulation of the system, so that its effectiveness could be increased in the same way they kept their own rule of law which includes all the unilateral arsenal, situated in a privileged position in the hierarchical order of the laws. Thus, the USA could not only execute the most favourable decisions with its trade partners but also neutralise adverse decisions with the unilateral instrument as long as they are one of the biggest world markets and a super power.

2.6. - Some North American authors intend to play down the failure of the system of GATT in the following terms: "The mechanism was unique. It was also a failure, because in part of the difficult initial period of GATT. Anyway, such proceedings worked better then expected, and it may be alleged it worked better then the International Court of Justice"[8] It seems to be a axiomatic observation for those who face the working of the system through the ethnocentric prospect of the country that has benefited most through of its inefficiency.

3. - PROCEDURAL RULES OF THE DISPUTE SETTLEMENT SYSTEM OF WTO.

3.1. - The first step of the dispute settlement system is the formal pleading of consultations from one member to another.[9] The right of action belongs to the sovereign member states of the WTO. In the same way, the jurisdiction of the system affects the sovereign states, excluding individuals and private corporate bodies. The formal pleading of consultations is communicated to the Dispute Settlement Body (DSB). The notified member has 10 days to answer the pleading and shall enter into consultations within a period of no more than 30 days after the date of receipt of the request with a view to reach a mutually satisfactory solution. In case of the failure of the mechanism, of the notified member, or whether the results of the consultations are not productive, the prejudiced member may request the formation of an arbitration panel.

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[6] S. "ESSAYS ON INTERNATIONAL LAW", by Durval de Noronha Goyos jr., Observador Legal, São Paulo, pages 45 and 46.

[7] S. for example, deposition of USA Commerce Representing under the Senate Subcomission of Commerce: "In the Uruguay Round negotiations, Congress made a more effective GATT dispute settlement system a principal U.S. negotiating objective." US INTERESTS AND EXPERIENCE IN THE WTO DISPUTE SETTLEMENT SYSTEM, testimony of Ambassador Charlene Barshefsky, June 20, 2000.

[8] For example, John H Jackson "WTO constitutional problems: dispute settlement and decision making", in Amicus Curiae, number 24, February, 2000.

[9] S. Article 4 of the Understanding of Rules and Procedures Governing the Settlement of Disputes.

3.2. - Once the installation of a panel is requested, DSB shall facilitate its formation, unless there is a consensual contrary decision, this provision inverted the prevailing situation on GATT. Any interested third member state in a specific dispute may be heard by the respective panel, without being considered a party in the process, because, unfortunately, the dispute settlement system did not foresee the joinder of parties.[10] As a compensation, the statements presented by interested thirds shall be taken into consideration in the determination of the arbitration award. In the idiosyncratic system of the WTO, the co-ordinator of DSB is in charge of defining the object of the action, called a "reference term"[11], based on the bill of complaint. In practice, however, this function has been delegated to the WTO Secretary, which has given rise to much criticism, which will be shown ahead.

3.3. - The panel deliberations shall be confidential.[12] The reports of the panels shall be drafted behind closed doors. The parties directly involved in the dispute and the interested third member states, which do not have the right to appeal, are permitted to be present.[13] The panel deliberations as well as the petitions and statements of facts presented shall be confidential.[14] The panels set the time for the production of the statements of facts of the parties, depending on the case.[15] The arbitration awards are drafted without the parties.[16] Individual opinions of the arbiter are anonymous and when in the minority, shall be excluded from the report.[17] "Ex parte" or "inaudita altera pars" petitions are not admitted.[18] Procedural rules of the system do not accept preliminary challenges; do not permit counter-complaints; reject the passive joinder of parties; and misunderstand the treatment of active joinder of parties.[19] In the system, there is no virtual or physical process, like a folder of the case, as happens in judicial or arbitration processes in all over the world.

3.4. - As the system was conceived by diplomatic agents not by jurists, it is ridden with procedural failures, caused by the imprecise semantic of diplomacy, with euphemisms that, by contradiction, represent a serious obstacle to the administration of justice. The following semantic problems are pointed out in order to remember some examples of the serious procedural problems of the system.

GLOSSARY OF LEGAL TERMS IN THE WTO PROCESS

Action at law -	Claim.
Appreciation of appeal -	Reconsideration
Arbiter -	Panellist
Author -	Complainant

[10] The joinder of plaintiffs is permitted only when it is a conjunct reclamation. The joinder of defendants is not permitted.
[11] S. article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[12] S. article 14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[13] S. article 17 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[14] S. item 3 of Appendix 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[15] S. article 12 (6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[16] S. article 14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[17] Ditto.
[18] S. article 18 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[19] S. note 10.

Initial trial -	Substantial meeting
Plea -	Formal
Court -	Panel
Case -	Complaint; dispute
Oral debate -	Oral trial
Decision -	Recommendation
Derogation -	Prejudice
Initial -	Submission
Jurisprudence -	Practice
Award -	Report
Object of the action -	Reference term
Petition -	Submission
Execution proceeding -	Implementation
Internal regulation -	Working Procedure
Response -	Submission
Defendant -	Respondent part
Repeal -	Nullification
Session -	Substantive meeting
Rejoinder -	Submission

3.5. - The arbitration panels shall be composed of 3 or 5 arbiters selected from the WTO arbiter's list, who cannot be a national of the states involved in the dispute and shall perform independently of the interests of their own countries. In the case of a lack of consensus in the choice, the General Director shall make up composition of the panel. The panel has the right to obtain information or technical opinions from any individual or body under its jurisdiction. Panel deliberations shall be confidential and the reports of panels shall be drafted without the presence of the parties. The panel shall present its award within a period of no more than 6 months. The question of adoption of the arbitration award has also been radically modified. In the WTO system, the award is automatically approved, taking effect within 60 days, from its communication to the parties unless a consensual decision rejects it, or one of the parties appeals the decision.

3.6. - The appeals process is also a new possibility within the scope of the WTO. The appellate body is composed by 7 nominee arbiters and each appellate panel shall have 3 arbiters, what is so called in joint of "division". There are no provisions of the DSU about full meetings of the appellate body arbiters. The proceedings may not exceed 60 days, and the arbitration award has to take into account all the points alleged by the appellant. The adoption of the appellate report is automatic, as happens in the lower court. Whether the defeated member refuses to follow the recommendations or not, the prevailing party may request compensation, through the suspension of concessions and/or the creation of compensatory measures that burdens the defeated member export. Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires, however, before any unilateral initiative in this respect, that the parties shall make an effort in order to agree on the definition of compensation.

3.7. - The arbiters of the WTO in lower and higher courts work "ad-hoc", in non-permanent basis. Frequently, they do not reside in Geneva, the headquarters of the

WTO, and do not have any support infrastructure to their activities. So that they may use the technical support and assistance of the Secretariat "on the legal, historical and procedural aspects"[20] of the matters. The nature of this "support" also became the object of acrimonious critics, which will be analysed below.

3.8. - One would want to attribute to the arbitration award of the WTO the legal nature of an opinion since it only acquires legal effectiveness legally ratified by the Dispute Settlement Body.[21] This would be a mistaken interpretation. The ratification by the DSB will not occur if the prevailing party abandons the conferred right or if there will be an appeal, which implies that the award has exactly the same meaning as the adjudication, since the previous right was declaratory, composing a suit in response of the complainant's petition, resolving the conflict of interest evident in the dispute. In the same way, others describe the dispute resolution system as a "diplomatic political process"[22], which means that, in the Marrakech treaties, the renunciation of the judiciary and the due process of law may have taken place, and this was not the case.

3.9. - The chronology of the WTO arbitration panels workings is demonstrated as follows:

SCHEDULE OF THE CHRONOLOGICAL PROPOSAL FOR THE WORK OF THE LOWER COURT PANEL:

a) Receipt of the first written submission of the parties:

(1) complaining party ..... 3 to 6 weeks
(2) defendant party ..... 2 to 3 weeks

b) Day, hour and place of the first substantive meeting with the parties; session of the third interested ..... 1 to 2 weeks

c) Receipt of the written pleas of the parties ..... 1 to 3 weeks

d) Day, hour and place of the first substantive meeting with the parties ..... 1 to 2 weeks

e) Issue of the descriptive party of the award to the parties ..... 2 weeks

f) Receipt of the comments of the parties to the descriptive party of the award to the parties ..... 2 weeks

g) Issue of the preliminary award, including

[20] S. article 27 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[21] S. "A OMC E A REGULAMENTAÇÃO DO COMÉRCIO INTERNACIONAL", by Celso Lafer, Porto Alegre, 1998, page 125.
[22] S. "A OMC E A REGULAMENTAÇÃO DO COMÉRCIO INTERNACIONAL", by Celso Lafer, Porto Alegre, 1998, pages 127 and following.

the arguments and conclusions to the parties ..... 2 to 4 weeks

h) Period for the party to request revision
of party of the award .....1 week

i) Period of revision for the panel, including
possible additional meeting with the parties ..... 2 weeks

j) Issue of final award to the dispute parties ..... 2 weeks

k) Circulation of the final award to the members ..... 3 weeks

APPEAL SCHEDULE:

Day
Appeal notice 0
Appellant submission 10
Other appellant submission 15
Appellee submission 25
Oral preliminary hearing (sic) 30
Appeal award circulation ..... 60 a 90
ORD meeting for adoption ..... 90 a 120

4. - INSTITUTIONAL AND PROCEDURAL FAILURES OF THE SYSTEM.

4.1. - One can not claim to be surprised because of the organic failure of a system created for the judgement of matters related to international trade law, without paying attention to the legal structures or to the experience in the legal proceedings through millions of years. The product of a crazy daydream of the head in the clouds diplomacy, it was thought that a dispute settlement system would be created without a litigious system, it is not a surprise that the system has turned out to be incapable to comply effectively with its objectives.[23]

4.2. - The first traditional principle of the due process of law violated by the WTO dispute settlement system is publicity. This failure results from the lack of transparency in the action of governments making the democratic control of its actions impossible as well as frustrating the verification of the responsibilities, including criminal, of its agents. Some countries, such as the USA reacted to the problem by not only making its petitions publicly available after presented, but also asking opinions about relevant themes.[24] It is however a minority position.

4.3. - The transparency of the activities of the bureaucrats of the legal sector of the secretariat is also absent. The WTO refuses to put in writing its respective national composition, although it is clear that the format is marked by ethnocentrism. In practice the action of this anonymous and surreptitious bureaucracy has been revealed as

[23] S. "ESSAYS ON INTERNATIONAL LAW", op. Cit., page 54.
[24] S. "US INTERESTS AND EXPERIENCE IN THE WTO DISPUTE SETTLEMENT SYSTEM", op. cit.

fundamental on the selection of arbiters, on the definition of the terms of reference (object of the action); on the presentation of legal and jurisprudential subsidies and also on the drafting of the decisions. One can say the decisions of the panels are not independent anymore because of the influences of the secretariat.[25] In fact it is suspect whether at least one of dozens of decisions of the WTO Dispute Settlement System pay heed to the requirement of independence applicable to the judiciary existing in democratic societies.

4.4. - Another of the main failures of the system is, as already mentioned, the prohibition of the joinder of parties. It results in the installation of one panel for the claim of one party, and in another one, with different arbiters for the claim of the other party, in a connected matter and obviously with the same parts. This situation makes it feasible, in theory that the awards of both panels may be different and even contradictory promoting imbalance. The possibility that such an unusual and unfair situation occurs is not far fetched since in the short existence of the WTO we had an important example in the cases Canada vs. Brazil and Brazil vs. Canada, which are going to be commented on in the following chapter of this presentation.

4.5. - A similar situation of different or conflicting decisions in the same case may occur in circumstances of joinder of plaintiffs when different panels are formed for the joint parties or groups of them. The problem may be aggravated by the lack of fixed terms on the length of time established for each panel, which brings about procedural instability. In the same way the definition of the so called "reference terms" is worrying because of its potential to aggravate the failures of the system because in theory it may be different to connected cases. Thus, in the WTO Dispute Settlement System it is possible that the same case may have two or three different panels, two or three different reference terms, and two or three divergent decisions.

4.6. - Another failure of the system refers to its omission in dealing with preliminary matters, such as for example, the relevance of the conflicts between treaties. Pursuant to the lessons of the major British specialist in international law, "there are circumstances when a panel should be able to resolve the disputes, resolving the cases preliminarily"[26]. In fact, there are matters, such as the conflict of international treaties that justify preliminary decision. Such conflicts occur, for example, in issues affecting the rights assured to developing countries who are signatories to the transitory clause of the International Monetary Fund treaty and the obligations flowing from of the Uruguay Round. Unfortunately this hypothesis is already a reality as it has caused serious damages to developing countries such as Argentina, Korea, Indonesia, India and Brazil as will be noted in the following chapter of this presentation.

4.7. - The matter of producing evidence, which is essential in any litigation, received marginal attention in the regulation of the system, and was superficially treated in article

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[25] S. "DISPUTE SETTLEMENT UNDERSTANDING OF WTO CRITICIZED BY THIRD WORLD", in WTOWATCH.org. 26 September, 2000.

[26] John Toulmin QC CMG, ex president of the European Union Council of Bars, presently judge on the High Court of Justice, in England and Gales, in "O DIREITO DO COMÉRCIO INTERNACIONAL", by Lampreia, Noronha, Baena Soares, Toulmin et al, Observador Legal, São Paulo, 1997, page 19 and following.

13 of the DSU that basically refers to technical examinations. Since the arrangements related to evidence in the process are a failure, the discussion on the burden on proof becomes relevant in the matters presented to the WTO Dispute Settlement System. The lack of a physical or even virtual process makes the work of the arbiters more difficult and undetermines the transparency of the system.

4.8. - In relation to the appellate body, changes to create procedural rules that would make it more efficient and allowing it to work as a instrument of the affirmation of the legal order are really important. For example, it must be prescribed that the court of second instance resolves only matters of law and not matters of fact. This way, the system of producing evidence in the lower court will be improved. In the same way, the tendency to legislate of the appellate body will be restrained, since the WTO members do not abrogate their sovereignty in the conclusion of international treaties, but only submit themselves to the arbitration of specific matters of fact with delimited sanctions in multilateral agreements.

4.9. - Finally, the matter of execution of the awards also demands a procedural format that eliminates all the problems caused by the working of the WTO dispute settlement system. In a few cases, like the famous banana matter between EU and USA, and also in the dispute in the aircraft industry between Brazil and Canada, the implementation of the awards resulted new arbitration panels. The failures in this delicate execution area may make the process not only turning around, but also accelerate the creation of unilateral measures for the arbitrary exercise of the very conception of the result of an arbitration, as was recently done by USA[27].

5. - OPERATIONAL FAILURES OF THE SYSTEM

5.1. - As we have seen, since the flawed procedural structure of DSU compromises its legality and since the lack of transparency of the system allows the action of a small group of bureaucrats of the legal department of the secretariat, of ethnocentric make up and manipulated by the main commercial powers, to distort the legal order and to turn the WTO Dispute Settlement System into a tragic caricature. The bizarre structure of the system allowed, in the five years of its operations serious distortions and their injustices against developing countries and their miserable populations as examined ahead.

5.2. - Two cases in particular, did not only mark a defeat of dramatic strategic proportions towards developing countries, but also an illegal derogation of the rights flowing from another international treaty, the International Monetary Fund's, of potential devastating economic and social consequences. The International Monetary Fund treaty admits financial and commercial restrictions caused by situation of a crisis on the balance of payments. Such restrictions were allowed by the Understanding on Dispositions related to the Balance of Payments of GATT 1994. In both matters the ORD derogated such rights. The cases involved on the one hand India, sued by the USA, and on the other

[27] In 18 May, 2000, upon the so-called "Africa Trade Bill" pursuant "US, EU REJECT COMPROMISE PROPOSAL BY JAPAN ON REFORM OF WTO RULES", in International Trade Reporter, 12 October, 2000, pages 1542 and 1543.

hand Brazil, sued by Canada. It is not clear why India and Brazil accepted the WTO jurisdiction in those matters.

5.3. - In the first case, initiated by the USA against India, concerns quantitative restrictions imposed by India for the import of approximately 2.700 agricultural products, textiles and industrials that for the authors would be inconsistent with the relevant arrangements of the Agricultural Agreement and the Agreement on Import Licensing. India based its defeat using as main argument the fact that it was a signatory to the transitory clause of the International Monetary Fund treaty, and administrated as allowed by that treaty exchange, controls and international financial flows, in function of the imbalance of the balance of payments. In addition, the treaties of Uruguay Round admitted such situation. Specifically, India alleged that its quantitative restrictions were a direct result of the mechanism of administration of the balance of payments. The lower panel, presided by a Brazilian[28] scandalously gave a "contra legem" in favour of the USA. The decision was confirmed on second instance.

5.4. - The second of the cases referred to, regards the illegal subsides to the Brazilian Aircraft Industry, because of the Export Financing Program (PROEX) maintained by Brazil. As alleged by Canada, the equalisation of the interest rates of PROEX through which the Brazilian Government paid the difference between the financing costs of the national aircraft company (EMBRAER) and the costs of finances in the international markets for companies of developed countries. Also, this situation of unfavourable conditions of caption is recognised by the International Monetary Fund treaty, because Brazil was on occasion a signatory of the transitory clause. Equally, the specificity is recognised by the Uruguay Round treaties. Although Brazil did not use the argument, maybe because its Ambassador on WTO was the president of the panel in the USA vs. India case. Thus Brazil's clumsy defence leaded the country to the biggest defeat ever suffered by any nation under WTO, being obliged to compose concessions to Canada of approximately US$ 1.5 billion.

5.5. - Amongst the bizarre decisions of the ORD is the one regarding the alleged subsidies practised by Australia to the manufacturing of leather seats for the automotive sector[29]. The panel determined that the Australian Industry should gave back the amounts owned because of illegal subsides. It is known that private parties have no right of action under WTO. It is also known that in the due legal process no one is obliged to do or not to do anything except if the determination came about as a result of the law and that a condemning verdict cannot be against someone who is not part of the process. Similarly, the appellate body of ORD decided, in the case of shrimps instituted by India against the USA that a "amicus curiae" in the DSU process was admissible, without legal provisions or rules of proceeding[30].

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[28] Ambassor Celso Lafer.

[29] International Trade Reporter, vol. 17, number 7, 17 February 2000, "COUNTRIES BLAST PANEL RULING ON AUSTRALIAN LEATHER SUBSIDES", pages 259 and 260.

[30] USA – Prohibition on the import of shrimps and certain shrimp derived products, India, Malaysia, Paquistan and Thailand reclamation (WT\DS58).

5.6. - Another bizarre situation occurred when the EU sued the USA on the north-american unilateral arsenal, incorporated in section 301 of the flagrantly illegal Act of Commerce. A panel decided that the mentioned referred law was inconsistent with the WTO rules, but did not sanction the illegal conduct based on the promises of USA to not apply the law in contravention the mentioned rules![31] The USA, immediately, boasted with the victory alleging that the panel's decision recognised the legality of the domestic legislation[32]. In the case of Korea against USA about governmental purchases, a panel decided that it was competent to judge the matter of mistakes in the negotiation of international treaties[33]! Even worse, in the third case, regarding the discrimination imposed by the EU against import of bananas from Latin America, the right of action by the USA, a country that does not export bananas[34], was recognised.

5.7. - The tragicomic characteristics related in this chapter would be less serious if the system had not decided, the majority of cases, against developing countries, as set out in the next segment.

6. - DEVELOPING COUNTRIES CONFRONTING THE WTO DISPUTE SETTLEMENT SYSTEM.

6.1. - In the words of Cicero: "Cui bono?"[35]. Who takes benefits from the system? I can categorically confirm that it is developed countries and their interests and particularly the USA. Of the 31 cases decides by the appellate body of the WTO[36], 18 were pertinent to conflicts between developing and developed countries. Of these 18 cases, developed countries prevailed in 13, more than two thirds, and developing countries only in 4, two of which were refused to be implemented[37]. These surveys exclude concessions obtained in agreements without use from the dispute settlement system. The number of defeats for developing countries would have been even higher. A typical case is of the automotive industry in Brazil, in which the north-american companies, with diplomatic support for its representatives, required a policy of national content from the government of the country. Once the claims were accepted, the USA started to work on extracting additional advantages to compensate for the advantages its companies had already achieved! And still vainglorying itself for its own opportunism[38].

6.2. - Of all the developing countries, Brazil was the champion of defeats in the WTO dispute settlement system, accounting for defeats in cases in which they have been involved with developed countries, without counting the humiliating agreement made in

[31] See "WTO'S DEFECTIVE DISPUTE SETTLEMENT PROCESS, by B. L. Das, in The Hindu, Nova Delhi, 6 July, 2000.
[32] S. "US TRADE INTERESTS AND EXPERIENCE IN THE DISPUTE SETTLEMENT SYSTEM", op. cit.
[33] See "WTO'S DEFECTIVE DISPUTE SETTLEMENT PROCESS, op. cit.
[34] See "III DEVELOPING COUNTRIES AND THE DISPUTE SETTLEMENT MECHANISM UNDER THE WTO", in www.southcentre.org.
[35] S. "Pro Roscio merino", c.84 and also "Pro Milone", c.12, s. 32.
[36] Until 1 February, 2000.
[37] S. "O COMÉRCIO INTERNACIONAL NO MUNDO GLOBALIZADO E O SISTEM DE RESOLUÇÃO DE DISPUTAS DA OMC", by Durval de Noronha Goyos jr. In www.noronhaadvogados.com.br . Text of the lecture presented during the Legal Week of the Academic Centre Ruy Barbosa of the Faculty of Law Cândido Mendes, at Rio de Janeiro, in 13 September, 2000. To be published by the Rebista del Colegio de Abogados, Buens Aires, Argentina.
[38] S. "US INTERESTS AND EXPERIENCE IN THE WTO DISPUTE SETTLEMENT SYSTEM", op. cit.

the automotive industry, mentioned earlier. India suffered equally with three defeats and no victories; Korea with two defeats and an inefficient victory; and Argentina, with two defeats and no victory. However, it is important to note that the majority of defeats have potentially devastating strategic repercussions. One of the defeats suffered by Argentina, Brazil, Korea, India and Indonesia relates to the derogation of fundamental rights of the developing countries, assured by the international legal order, and which comes from the International Monetary Fund treaty as well as from the Uruguay Round treaties.

6.3. - The USA prevailed in 23 of the 25 cases in which they were involved in the WTO dispute settlement mechanism, although they are the only country that has adopted the DSU with a safeguard of its prevailing internal legal system, which has the most abusive and illegal infamous arsenal of unilateral trade measures, of all the 137 members of the multilateral system of trade. This number excludes the 12 cases in which USA prevailed as a result of the consultation process[39], to which has never acceded. This results in a figure greater than 90%! Any lawyer with minimal competence knows that in matters of bilateral obligations, the medium average is lower and not even in cases of unilateral obligations, can success rate of 90% be expected.

6.4. - And what is the reaction of the developing countries to all this? According to the USA, the DSU allows it to confirm its rights, and protect its interests more efficiently then ever before [40]. The European Union confirms that the DSU "is one of the main results of Uruguay Round" and that the ORD "is one central element to assure stability and predictibility to the multilateral system"[41]. The cynicism of such rhetoric, in view of the terrifying scenario exposed, is similar to the reasoning used by Disraeli in order to justify heroin smuggling to China, by the United Kingdom, USA and Holland[42].

6.5. - This situation of contempt for the legal order and rule of law in international relations in order to make feasible the complete and efficient exploitation of the developing countries is completely unjustified, at least to the third millennium doctrine. After all, if the system were as reliable as the proponents want us to believe, the use of the principal agents of information and espionage of the first world would be necessary in the attendance of the work of the ORD. The sad reality is that, at the WTO, the wretched countries of today have less of a chance to prevail than the unfortunate souls handed over to the Holy Inquisition.

6.6. - The general perception of this fact in international public opinion, in spite of the strong propaganda campaign advanced by certain developed countries, contributed to the dramatic loss of credibility of WTO discussed in the beginning of this presentation. A preliminary report of the Human Rights Commission of the United Nations (UN) affirmed that "to some sectors of humanity, particularly the poor countries of the southern

[39] Australia, Brazil, Korea, Philippines, Greece, Hungrier, Japan, Paquistan, Portugal, Sweden, Turkey and the European Union.
[40] S. "US INTERESTS AND EXPERIENCE IN THE WO DISPUTE SETTLEMENT SYSTEM", op. cit.
[41] "Discussion Paper from the European Communities: review of the Dispute Settlement Understanding", Brussels, 21 October, 1998.
[42] S. "COMERCIO INTERNACIONAL NO MUNDO GLOBALIZADO E O SISTEMA DE RESOLUÇÃO DE DISPUTAS DA OMC", op. cit.

hemisphere, the WTO became a nightmare"[43]. Today no country wants to host the next ministerial meeting of the organisation, after the round of Seattle, in the USA.

6.7. - In addition to the failure of the WTO judgements it must be added that in the five years following the foundation of the organism, the world's prosperity was more than ever restricted to the developed countries, particularly the USA and the EU[44]. At the same time, the developing countries were the victims of an enormous international financial volatility crisis, decreasing export; a dramatic reduction of prices and agricultural products and other basic products; a general economic crisis and lack of hope. According to the numbers of the WTO[45], Asia and Latin America had the worse performance on the trade of goods in the four years following 1995 than in the preceding period. More than 30% after 1998[46]. Thus, the WTO using the words of Caius, became the "damnosa hereditas" of GATT, in a game of marked cards where, behind the typical legal system a system created and administered to promote hegemony and prosperity of a few is hidden, at the expense of many.

7. - CONCLUSIONS.

7.1. - Even a scandal in the propositions described previously may promote progress if strong actions are taken from the notion that all humanity will loose if this abusive situation prevails. In the words of Benedetto Croce: "Oportet ut scandala eveniant; e questo vuol dire que anche lo scandalo, lo scandalo dello sposito e della bestemmia offensiva della conscienza umana, é o avanzamento"[47]. On the contrary, we will reach the sad conclusion of Gandhi that the label is not important when misery is the same. The notion of a scandal implies the certainty that the WTO dispute settlement system has completely failed and needs a serious reformulation.

7.2. - Although the reforms of DSU and ORD, to be efficient cannot be done in isolation but inside the context of the great revision of the general review of the WTO and the Uruguay Round treaties. In this sense, we agree with the above mentioned preliminary report of the UN Human Rights Commission when it asks for "a critical analysis of the possibility of the WTO to promote equal benefits to poor and rich countries"[48] so that the rules of globalisation answer to human needs and do not "reflect on an agenda that promotes the dominant corporativist interests, that monopolise the international market[49]".

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[43] "A OMC É O PESADELO DOS POBRES, www.cartamaior.com.br, 18 August, 2000.
[44] S. "COMERCIO INTERNACIONAL NO MUNDO GLOBALIZADO E O SISTEMA DE RESOLUÇÃO DE DISPUTAS DA OMC", op. cit.
[45] WTO Press Communicate number 125 from 16 April, 1999.
[46] "TERIOA E STORIA DELLA STORIOGRAFIA", Benedetto Croce, Adelphi Edizione, 1989, Milan, page 336.
[47] "TEORIA E STORIA DELLA STORIOGRAFIA", Benedetto Croce, Adelphi Edizione, 1989, Milan, page 336.
[48] "A OMC É O PESADELO DOS POBRES", op. cit.
[49] "A OMC É O PESADELO DOS POBRES", op. cit.