#### ARBITRATION IN THE WTO<sup>1</sup>

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#### 1.- INTERNATIONAL LAW - NATURE

<u>Concept today</u> - International law should be understood as the system of treaties and norms governing international relations between sovereign states, as well as creating obligations of varied natures to its subjects and certain organizations, such as the UN and the ICJ.

Traditional concept excludes individuals and juridical persons.

## **Tendency**

<u>International disputes</u> - Dispute is a disagreement of fact or law between two or more parties.

Municipal Law

Private international law

Public international law

#### Sources of law

Article 38 statute of the ICJ:

- a) international conventions.
- b) international custom, as evidence of a general practice accepted as law.

<sup>&</sup>lt;sup>1</sup> Notes for the presentation made on October 20, 2003m at the Law School of the Fudan University, Shanghai, People's Republic of China.

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- c) general principles of law recognised by civilised nations.
- d) subject to article 59, decisions and legal doctrine.
- e) Ex aequo et bono Article 59 The Decision of the ICJ has no binding force except between the parties in respect to a particular case.

#### Vienna Convention

- 26 Pacta sunt servanda and the principle of good faith in international agreements
- 27 Sovereign state cannot invoke its internal law as an international legal justification for failing to perform its obligations under a treaty.

### Hierarchy of treaties

rationae personae

intrinsic superiority intrinsic inferiority

rationae materiae

History of the System

### 2.- EXPERIENCE OF THE DSB

From January 1 1995

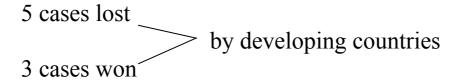
220 cases to January 2001

consultations	116
definitive decisions	51
settled or inactive	39
under way	14

51 cases

3 developing against developing 17 developed as plaintiffs against developing 8 developing as plaintiffs against developed 23 developed against developed

of the 8 cases developing as plaintiffs against developed



of the 23 cases developed countries as plaintiffs 16 cases lost by developing countries 6 cases balanced result 1 case won by a developing country

### 3.- STRUCTURAL FAILURES

### Legal Nature

In general adversarial or contradictory in the WTO diplomatic "not contentions" objective "to secure a positive solution to the dispute".

Recommendations rather than rulings

Terminology

Ad-hoc Panel

Procedural Lacunae

Bobbio: incomplete - incoherent

Lacunae - *déni de justice* or *non liquet* (judicial economy)

- moot
- preliminary issues: excess of jurisdiction conflict of treaties *locus standi*
- evidence
- burden of proof
- participation of lawyers
- joinder of defendants
- joinder of plaintiffs
- remand

# Other problems

Execution { removal compensation retaliation not self-executing

Standard of review

Confidentiality - consultations

governance - democratic

controls

Amicus Curiae

#### 4.- OPERATIONAL VICES

Secretariat Scope DSU 3.2.

- The ruling of the DSB cannot add to or diminish the rights and obligations under the covered agreements.
- To preserve rights and obligations of member in accordance with international law

In practice case law "stare decisis"

### **Derogation**

India Indonesia Brazil

Amicus Curiae
Burden of Proof
Lawyers

Standard of Review (from dumping to safeguards)
Judicial economy (déni de justice) - India
Promise as execution (USA) 301
Duty of Co-operation (Canada)
Leather (Australia)

#### Reform of the DSU

- 1) Consultations
- 2) Panel Procedures
- 3) AB Procedures
- 4) Implementation and relief

- 5) Case law
- 6) Developing countries7) Third Parties and *Amicus Curiae*