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THE REFORM OF THE DISPUTE SETTLEMENT SYSTEM OF THE WTO[1]

By Durval de Noronha Goyos Jr.[2]

Introduction

This paper has been divided in the following manner:

a) Section 1: The Rules of Dispute Settlement at the World Trade Organization;
b) Section 2: Structural Failures of the Dispute Settlement System of the WTO;
c) Section 3: Operational Vices of the Dispute Settlement System of the WTO;
d) Section 4: The System at work: Case Law or Usurpation of Rights?; and
e) Section 5: The Reform of the Dispute Settlement System of the WTO.

Section 1:
THE RULES OF DISPUTE SETTLEMENT AT THE WORLD TRADE ORGANIZATION

[1] Text of the paper prepared for the presentation at the International Conference on Economic Development and Fair Trade, Tsinghua University, Beijing, China. The text is an abridged version of the chapters 3 to 7 of the book "Arbitration in the World Trade Organization", by Durval de Noronha Goyos Jr., Legal Observer, Inc., Miami, 2003. Copyright by Durval de Noronha Goyos Jr.

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Legal Nature, Principles and Jurisdiction

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) confines the jurisdiction of the system to the members of the WTO with respect to the consultation and settlement of disputes under the following agreements or any combination thereto[3]:

Jurisdiction of the DSU

(a) Agreement Establishing the World Trade Organization.
(b) Multilateral Trade Agreements:
  (i) Multilateral Agreement on Trade in Goods;
  (ii) General Agreement on Trade in Services;
  (iii) Agreement on Trade-Related Aspects of Intellectual Property Rights; and
  (iv) Understanding the Rules and Procedures Governing the Settlement of Disputes.
(c) Plurilateral Trade Agreements:
  (i) Agreement on Trade in Civil Aircraft;
  (ii) Agreement on Government Procurement;
  (iii) International Dairy Agreement; and
  (iv) International Bovine Meat Agreement.

The rules and procedures of the DSU are applied together with such special or additional norms to be employed and observed as a result of the apposite dispositions of the following agreements:

Special Norms for Dispute Settlement

[3] DSU Art. 1.1.

AGREEMENT	NORMS
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2.
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through to 8.12.
Agreement on Technical Barriers to Trade	14.2 through to 14.4, Annex 2.
Agreement on Implementation of Article VI of GATT 1994	17.4 thorough to 17.7.
Agreement on Implementation of Article VII of GATT 1994	19.3 through to 19.5, Annex II.2(f), 3, 9, 21.
Agreement on Subsidies and Countervaling Measures	4.2 through to 4.12, 6.6, 7.2 through to 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V.
General Agreement on Trade in Services	XXII:3, XXIII:3.
Annex on Financial Services	4.
Annex on Air Transport Services	4.
Decision on Certain Dispute Settlement Procedures for the GATS	1 through to 5.

In case eventual antinomies cause a conflict of the rules and procedures of the DSU with any special and/or additional norm, the special and/or additional rules shall prevail. The general interpretative note to Annex 1A is to the effect that: '[I]n the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization, the provision of the other agreement shall prevail to the extent of the conflict'.

Thus, in the event that there is a conflict of rules and procedures deriving from more than one agreement, in one single dispute, and the parties thereto cannot come to a mutually satisfactory understanding within 20 days of the establishment of a panel, then the Chairman of the Dispute Settlement Body (DSB) will decide the matter within 10 days after the request by one of the parties[4]. Furthermore, as very pertinently observed by Chakravarthi Raghavan, '[w]hile the annexed WTO agreements were presented as a package of agreements all of which had to be accepted by everyone, there was no indication or statement that the obligations under GATT 1994, the General Agreement on

[4] DSU Art. 1.2.

Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) were cumulative or in any way hierarchical[5]'.

Other limits on the jurisdiction of the dispute settlement system of the WTO exist in addition to the subject *ratione materiae*, circumscribed by the agreements listed above. These are with respect to its competence. The DSB's powers are to 'preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[6]' In addition, 'recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[7]' This provision is again repeated in connection with the specific jurisdictional powers of both panel and the Appellate Body, in the following terms: 'In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.[8]'

Such limitations ensure, on the one hand, that the dispute settlement system of the WTO is subordinate to customary rules on interpretation of public international law. In addition, on the other hand, they prevent the DSB from creating new obligations for the members of the organisation or, in any way, diminishing their respective rights. In other words, the dispute settlement system of the WTO cannot create new obligations for Member-States. Such power is reserved for new treaties only. On both grounds, 'case law' is therefore explicitly disallowed in the system, in a manner similar to international law in general and to municipal law in civil jurisdictions, where the legislative activity by national courts is prohibited. This point soon became a matter of great contention and acrimony within the multilateral trade system in view of the attempts by hegemonic powers to create new obligations for and abrogate rights of developing countries by means of a clear manipulation of the DSB, justified by the specious argument that 'case law' is in the making.

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[5] C. Raghavan, *The World Trade Organization and its Dispute Settlement System: Tilting the Balance Against the South* (Third World Network, Malaysia, 2000), p. 11.
[6] DSU Art. 3.2.
[7] DSU Art. 3.2., *in fine*.
[8] DSU Art. 19.2.

The legal nature of the system is defined in the DSU in the following manner: '[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute[9]' '(*sic*)'. To complicate matters further, the DSU goes on to state that '[I]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all members will engage in these procedures in good faith in an effort to resolve the dispute[10]'. The DSU thus would appear, at least from a technical juridical perspective, to eschew an adversarial nature for its arbitration system, and to rely instead on the diplomatic tone that was already the inspiration behind the structure of the dispute settlement mechanism of the old GATT.

All judicial systems in the world are based on the adversary model. This is therefore so in common law jurisdictions as well as in the civil code systems. Moreover, this has been so since early Roman law, dating back to 300 BC when it was already recognised that the beginning of the process was the *litis contestatio* and that, in its absence, the issue would not be joined and thus no law suit would be formed[11]. It is the foundation of the rule of law that the 'contradiction' is established, before due process of law is formed. This principle, upholding the right of defence, ensures the negation of unilateralism, arbitrary action and, ultimately, tyranny.

Because the inspiration behind the DSU was diplomatic, rather than legal, the juridicity of the system was irremediably compromised to the extent that, from a scientific perspective, it is impossible to understand many of the principles and rules, and thus it is not in a position to present itself as a jurisdictional structure capable of dealing with the subject matters justly and fairly. In fact, the meaning of "not to be intended as a contentious act" should be that the procedure is of a diplomatic rather than of a jurisdictional nature. The expression does not mean that the right of defence is not allowed at large, with the exception of third parties' rights, but rather that it is admitted in a process which is not of a legal nature.

From the perspective of this strategic choice, we have as necessary corollaries sundry other failures of the system, including many of a lexical nature, prevent it from

[9] DSU Art. 3.7.
[10] DSU Art. 3.10
[11] A. Borkowski, *Textbook on Roman Law* (2nd edition, Blackstone Press Limited, London, 1997), p. 69.

being justiciable. Thus, the legal nature of the dispute settlement mechanism of the WTO is of a '*quasi*-judicial' system. At this point, it is very appropriate to evoke the lexical lesson of the Spanish philosopher, Ortega y Gasset to the effect that ' "*quasi"* is the word for absence[12]'.

As a result, the stated objective of the system is not the prevalence of justice and fairness, based on international law, by means of judicial orders with powers of sanction, but rather of '[a]chieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements[13].' Rather than a sentence, a decision under the system is a 'recommendation' or a ruling. Relief, enforcement or implementation of the 'recommendations' became, as a result, effete and often ineffective. This is so because the system strives firstly for the removal of the measures in question, but if that remedy is not to the liking of the disconfited party, a form of compensation should be established by common agreement between both parties. In case the latter is not possible, there will be the possibility of 'suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis *vis-à-vis* the other Member, subject to authorisation by the DSB of such measures[14].'

Administration

The DSU established the DSB with the mission of administering its rules and procedures, including the mechanisms of consultations and dispute settlement, unless otherwise provided by special provisions. Thus, the DSB is empowered to establish panels and adopt awards, as well as to authorise the eventual suspension of concessions as the form of relief allowed in accordance with the terms of the DSU[15]. The DSB meets as often as is necessary to exercise its functions[16], which is normally once a month. The DSB is not a technical, but rather a diplomatic body, presided over by the head of one of the missions accredited before the WTO.

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[12] Ortega y Gasset, Obras Completas, *apud Diccionario de Citas* (2ª editión, Editorial Noesis, Madrid), p. 479. Translation from the Spanish into the English language by the Author.
[13] DSU Art. 3.4.
[14] DSU Art. 3.7.
[15] DSU Art. 2.1.
[16] DSU Art. 2.3.

Therefore, the DSB relies on the WTO Secretariat, and particularly on its Legal Affairs Division for operational matters at hand, including all the administration having to do with the works of panels, including the support structure for the panellists. Accordingly, '[t]he principal mission of the Legal Affairs Division is to provide legal advice and information to WTO dispute settlement panels, other WTO bodies, WTO members and the WTO Secretariat. The divisions responsibilities include providing timely secretarial and technical support and assistance on legal, historical and procedural aspects of disputes to WTO dispute settlement panels; providing regular legal advice to the Secretariat, and in particular to the Dispute Settlement Body and its Chairman, on interpretation of the DSU, WTO agreements and on other legal issues ...[17]'.

Effective power in the DSB lies, therefore with the Legal Affairs Division, whose members have been selected with ethnocentric and political criteria, without transparency, and whose activities have been accused of undue interference with panel works. The position of head of the DSB, by contrast, has become only little more than decorative. Accordingly, the adoption of panel reports by the DSB[18] is only ceremonial, as refusal would require the concurrence of the prevailing party.

Consultations and Conciliation

The DSU requires a Member-State to consult with another WTO Member in connection with any matter involving any factual repercussion of any aspect of law regulated by the Treaties of the Uruguay Round in the latter's territory[19]. Unless it is otherwise mutually agreed, the respondent Member-State will reply to the request within 10 days and shall enter consultations 'in good faith' within a period of no more than 30 days after the date of the receipt of the request. In the event that consultations fail, then the applying Member-State will have automatic leave to request the establishment of a panel[20], to be effected by means of a formal application.

All requests for consultation will be made in writing with the apposite factual and relevant legal fundaments are to be notified to the DSB and other relevant bodies by the

[17] www.wto.org/english/the wto_e/secre_e/div_e.htm. See also DSU Art 27.1.
[18] DSU Art. 2.1.
[19] DSU Art. 4.2.
[20] DSU Art. 4.3.

applicant Member-State[21]. Consultations are to be confidential[22], which has been widely criticised as it is a condition that adds to the lack of transparency of the system, as well as subjecting developing countries to the possibility of unrestrained pressure from developed countries in the process. Those trade negotiators from developing countries who have participated in consultations find completely unrealistic the DSU provision to the effect that 'during consultations Members should give special attention to the particular problems and interests of developing country members[23].'

In the event that consultations fail to resolve the dispute within 60 days after the receipt of the relevant request, then the applicant may request the formation of a panel, under the DSU rules[24]. In the case that a third party Member-State has a substantial interest in consultations under way, this Member-State may apply, in writing and with its reasons, to join them. The respondent Member-State will then take a view on the pertinence of such request, within the timeframe of 10 days from receipt of the respective application thereof[25].

On the other hand, good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to a dispute so agree[26]. This possibility has not proven popular in the almost eight years since the inception of the WTO, but it is nevertheless traditional in diplomatic relations and thus has been replicated in the DSU. The respective proceedings are confidential and nothing can prevent any of the parties thereto resorting to the establishment of a panel[27]. The use of good offices, conciliation and mediation may also be requested during the proceedings of a panel, which may or may not be suspended for the period when they are taking place[28].

Panel Procedures

[21] DSU Art. 4.4.
[22] DSU Art. 4.6.
[23] DSU Art. 4.10.
[24] DSU Art. 4.7.
[25] DSU Art. 4.11.
[26] DSU Art. 5.1.
[27] DSU Art. 5.2.
[28] DSU Art. 5.3. and 5.5.

A panel will be established upon the request in writing of a Member-State of the WTO, after failure of consultations, in accordance with the system described above. The panel will be established at the DSB meeting following that at which the request first appears on the agenda[29]. The petition will indicate the particulars of the consultations, the measures at stake and provide a summary of the legal basis of the claim, the *causa petendi*, with an indication of a special *petitum* (terms of reference), should this be the case[30]. If there are no special terms, the standard terms of reference will apply, in the following manner:

> [Indent] '[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)[31].'

Of course, the standard format always falls short of the wishes or requirements of the complainant Member-State, and thus a special format of terms of reference will be suggested. In case the opposing party disagrees with the suggestion, then the matter will be submitted to the Chairman of the DSB, who will suggest his version[32], with the helpful insight and expert drafting of the Legal Affairs Division. Thus, the dispute settlement mechanism may prevent the complainant from establishing independently what is the precise *petitum*, the object of the cause the Member-State in question in presenting. If the notion of the *petitum* has always been difficult to determine in international law[33], the DSU made the task impossible with the creation of the idiosyncratic, often faulty and unnecessary mechanism of the imposition of the terms of reference by the Chairman of the DSB.

A Panel is composed of three arbitrators, unless the parties in question agree to a number of five, 10 days before the date of its respective establishment[34]. Arbitrators, or

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[29] DSU Art. 6.1. and 6.2.
[30] DSU Art. 6.2.
[31] DSU Art. 7.1.
[32] DSU Art. 7.3.
[33] L. N. C. Brant, *A Autoridade da Coisa Julgada ...*, *opere citato*, p. 153.
[34] DSU Art. 8.5.

'panellists' in WTO jargon, are 'well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a member[35].' The Secretariat of the WTO, normally in practice through the person of the Director of the Legal Affairs Division, proposes the nominations for dispute settlement panels. The Member-States who are parties to the dispute shall abstain from opposition to the nominations, unless there are compelling grounds to do so[36]. In some cases, negotiations with the Secretariat must be carried out in order to find a consensual name agreed by both parties.

If the parties to a given dispute do not agree on the persons of the arbitrators within 20 days of the establishment of a panel, 'the Director-General, in consultation with the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate ... [37]' The time period allowed to the Director-General for such action is of 10 days[38]. Panellists thus serve on an *ad-hoc* basis and do not have any individual support structure of their own, relying on the ubiquitous Secretariat instead. Panellists´ expenses, including travel and subsistence allowance, are provided for by the WTO[39] and are thoroughly inadequate to ensure independence and efficiency.

In spite of the fact that the DSU determines that panel members should be selected with a view to ensuring their independence, having a diverse background and a wide spectrum of experience[40], the history of panel selection indicates that more than 85 per cent of WTO arbitrators were current or former government officials in that area of trade. According to William J. Davey, there have been 92 panellist positions filled under the DSU. 'Panellists are overwhelmingly current or former government officials with trade policy experience (80/92). Most panellists have previously served on a GATT or WTO panel (51/92). Relatively few have had Secretariat experience (5/92) or are 'academics'

[35] DSU Art. 8.1.
[36] DSU Art. 8.6.
[37] DSU Art. 8.7.
[38] DSU Art. 8.7, *in fine*.
[39] DSU Art. 8.11.
[40] DSU Art. 8.2.

(19/92). Indeed among the 19 counted as academic, 9 have also had significant governmental experience.[41]' We shall examine below how the selection of arbitrators affects the operation of the dispute settlement mechanism of the WTO.

When a dispute involves a Member-State which is a developing country against a developed country Member-State, then the first may, if it so wishes, to require the inclusion of at least one arbitrator from another developing country Member[42]. Normally, developing-country panellists are selected from diplomats accredited with their respective missions to the WTO, in Geneva, and with close personal relations to members of the Secretariat and its Legal Affairs Division. Almost never developing countries provide academics, judges or lawyers for WTO dispute settlement panels. Brazil, for instance, provided panellists for 11 different WTO arbitration cases and, in all matters, the panellists were government officials, every one of them a diplomat serving at the mission in Geneva, with the exception of one, a trade officer based in Rio de Janeiro. In common, they had a complete lack of legal experience, maintained personal relationships with members of the Legal Division of the Secretariat and had very little time available for the panels. Four of the cases in which they were involved counted amongst the most controversial ever in the history of the WTO dispute settlement system.

A joinder of plaintiffs, treated in WTO patois as 'multiple complainants' is expressly admitted, 'whenever feasible[43]', when a jurisdictional decision is sought by the establishment of a panel on exactly the same subject matter. That means that the requests of two or more Member-States must be contemporaneous. If one of the parties so requests, there will be two separate reports issued by the same panel. The filings of each of the complainants will be available to the other[44]. The DSU fails to allow the same right with respect to the filings of the defendant (respondent) as it does with respect to those of each of the complainants. In the case where more than one panel is established to examine related matters, '[t]o the greatest extent possible the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes

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[41] W. J. Davey, in *Free World Trade and the European Union*, *opere citato*, p. 57.
[42] DSU Art. 8.10.
[43] DSU Art. 9.1.
[44] DSU Art. 9.2.

shall be harmonised[45].' This *quasi*-norm of a rather wistful nature is unrealistic in practice as it lacks proper legal command. A joinder of defendants is disallowed under the DSU.

When is a 'party' not a party? A 'party' is not a party when it is a 'third party' under the DSU, where Member-States are permitted to make certain 'submissions' to a panel established with a view to resolving a dispute between two or more other Member-States. The 'third-party' will then 'have an opportunity to be heard[46].' A 'third party' may not appeal, however, and any award granted to any party under the panel in question will not benefit such 'third party' directly or indirectly. Notwithstanding such an intervention, the 'third party' may ultimately become a proper party if it decides to request the establishment of a specific and separate panel to review the matter at hand, in what affects its interests[47].

As is well observed by Covelli and Sharma, '[F]or Members that simply have something to say to a panel or the Appellate Body, these rights are normally adequate enough for their interests. They can learn the initial arguments of the parties and submit arguments and evidence to support, rebut, or add a different interpretation to them. The third party has the chance to influence the outcome without being bound by the result. For members with much more at stake, however, these procedures are inadequate.[48]' The system in practice has achieved the otherwise unimaginable feat of making this thoroughly unsatisfactory procedure even worse. Accordingly, the Appellate Body of the WTO allowed third parties that had not reserved their respective rights to attend 'oral hearings' and to participate as 'passive observers'[49] '(sic)'.

Cross-complaints are not admitted in the dispute settlement system of the WTO, as a result of the following rule: '[I]t is understood that complaints and counter-complaints in regard to distinct matters should not be linked [50]'. Thus, it is not only very much possible, but it has already occurred in a dispute involving Brazil and Canada on subsidies to the

[45] DSU Art. 9.3.
[46] DSU Art. 10.2.
[47] DSU Art. 10.4.
[48] N. Covelli; R. Sharma, 'Proposals for Reform of the WTO Settlement Understanding in Respect of Third Parties' (volume 9, January 2003) in *International Trade Law and Regulation*, issue 1, p. 1.
[49] *Argentina – Safeguard Measures on Imports of Footwear, complaint by the EC (WT/DS121/AB/R).*
[50] DSU Art. 3.10.

aeronautical industry[51], that for analogous claims between the same parties, two or more distinct panels are established, with different terms of reference, varied rules of evidence and producing divergent decisions[52].

Panel procedures under the DSU are at the same time vague and flexible. In practice, they may also be idiosyncratic. '[P]anel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process'.[53] 'Whenever possible' within one week after the definition of the terms of reference, the panel shall establish a precise timetable for the panel process[54], allowing for sufficient time for the parties to prepare their submissions[55]. Parties 'should respect those deadlines'[56], but failure to do so carries no sanction. In establishing a timetable for a given dispute, the panel will take into consideration the model proposed in the DSU[57].

The deliberations of the panel and the documents submitted to it are confidential[58], but the Member-States involved in a dispute may release statements of their own to the public. The confidentiality of the system has been addressed as one of the main factors affecting its transparency and credibility. In the recent past, some countries, such as the USA, have made available to the public the respective filings of the parties of WTO panels in which that country has been involved. Most other countries, however, fail to do so. This failure affects adversely democratic controls of municipal law and governance in general.

Before the first 'substantive meeting[59]' (sic), the parties to a case of dispute settlement before a WTO panel will file a written brief (submission) with a statement of the facts and arguments[60]. At the first meeting, the parties thereto will make a presentation of their cases, the complaining party being the first to do so, followed by the rejoinder of the respondent[61]. Third parties may also participate in the first meeting and are entitled to

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[51] *Brazil - Export Financing Programme for Aircraft (WT/DS46) and Canada - Measures Affecting the Export of Civil Aircraft (WT/DS70).*
[52] D. de Noronha Goyos jr., 'The Treat Posed by the World Trade Organization to Developing Countries' (volume 35, March 2002) *The Comparative and International Law Journal of Southern Africa*, Institute of Foreign and Comparative Law of the University of South Africa, number 1, p. 54.
[53] DSU Art. 12.2.
[54] DSU Art. 12.3.
[55] DSU Art. 12.4.
[56] DSU Art. 12.4.
[57] Appendix 3.
[58] Appendix 3, Article 3, combined with DSU Art. 14.1.
[59] Note that there are no 'adjective meetings' in the dispute resolution system.
[60] Appendix 3, Article 4.
[61] Appendix 3, Article 5.

receive copies of the briefs. The views of the third parties, however, will be presented in a special session convened for that specific purpose[62]. Formal rebuttals will be made in the second substantive meeting. The respondent ('the party complained against') will be the first to present its position, followed by the complaining party[63]. A written version of the oral arguments shall be filed by the parties with the panel[64]. The panel may pose queries to any of the parties at any time, either orally, during the hearings, or in writing[65].

In the event of a failure to settle ('develop a mutually satisfactory solution') during the course of the proceedings, the panel will present its award ('findings') to the DSB, containing the matters of fact, the applicability of the relevant provisions of the treaties and the basic rationale supporting the decision ("recommendation")[66]. The drafting of the reports will be effected without the presence of the parties to the dispute and based on the facts of record[67]. Individual opinions by arbitrators will remain anonymous and dissenting opinions are allowed[68]. The whole panel proceedings shall not, '[a]s a general rule' '(sic)', exceed six months. In cases of urgency, the tentative timeframe will be reduced by half[69]. In cases where the timeframe is likely to be exceeded, the panel will have to advise the DSB in writing, with an explanation of motives. There will be then an additional period of 3 months[70]. A suspension of proceedings is possible upon the request of the complainant, for a period not to exceed 12 months[71]. After this period, the authority of the specific panel will lapse.

The DSU has a travesty of rules of evidence with the usual misnomer of '[r]ight to seek information[72]' applicable to the institute. Panels are allowed '[t]o seek information and technical advice from any individual or body it deems appropriate[73].' Therefore, panels in similar manner to courts in civil law jurisdictions may rely on their own means of seeking evidence, but contrary to the structure of civil procedure laws, the DSU norms treats this most relevant part of law *en passant*. If the panel decides to seek evidence in the

[62] Appendix 3, Article 6.
[63] Appendix 3, Article 7.
[64] Appendix 3, Article 9.
[65] Appendix 3, Article 8.
[66] DSU Art. 12.7.
[67] DSU Art. 14.2.
[68] DSU Art. 14.3.
[69] DSU Art. 12.8.
[70] DSU Art. 12.9.
[71] DSU Art. 12.12
[72] DSU Art. 13.
[73] DSU Art. 13.1.

territory of a Member-State, it will have to advise this particular Member. The confidentiality of evidence provided in that basis will be respected and will not be released without the authorisation of the respective source[74].

In addition, panels may request a technical report in writing from a special expert review group composed of those of adequate professional experience and standing in the relevant area[75]. This report is of an advisory nature only[76]. Neither citizens nor governmental officials of the Member-States involved in the dispute may be members of the expert review group. A draft of the report will be submitted for comments before it is officially delivered[77]. The parties to a dispute are entitled to all information made available by an expert review group, unless it is of a confidential nature[78].

Indeed on its own, the absence of appropriate evidencial rules in the DSU most seriously compromises the whole edifice of the dispute settlement system of the WTO. As commented by Prof. Howse, '[t]here are few formal rules of evidence or fact-finding procedure embedded in the WTO Dispute Settlement Understanding. Panels are required to make "an objective assessment of the facts" and are empowered to solicit expert opinions and testimony, but the rules of evidence and fact finding that typify domestic litigation are simply not there[79]'.

There is an 'interim review stage' following the filing of the written briefs and the hearing in which arguments are presented orally[80]. This will initially deal with the descriptive part of the case at hand, including a detailed description of the facts and of the legal arguments[81]. Accordingly, the panel will submit this draft for comments by the parties to the dispute[82]. In a second stage, after the comments are received and considered, the panel will then issue an interim report to the parties, including not only the descriptive part duly amended with the arguments presented in the first phase of the review, but also

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[74] DSU Art. 13.1.
[75] DSU Art. 13.4 combined with Art. 2 of Appendix 4.
[76] Appendix 4, Art. 6, *in fine*.
[77] Appendix 4, Art. 6.
[78] Appendix 4, Articles 4 and 5.
[79] R. Howse, 'WTO Dispute Settlement: Is the New "Rules-Based" Approach Working?' <www.gov.on.ca/OMAFRA/english/policy/SeminarSeries/HowseSpeech.html>.
[80] DSU Art. 15.
[81] DSU Art. 15.1.
[82] DSU Art. 15.2.

the panel's award ('findings and conclusions')[83]. Within a given period allowed by the panel, the parties may ask for clarification and/or review of precise aspects of the interim report, and a special hearing may be applied for in connection therewith.

The adoption of the awards ('panel reports') will not be considered by the DSB until 20 days after it has been intimated ('circulated') to the parties to the dispute[84], so as to allow them to duly consider the terms thereof. In the event that any of the parties to the dispute has an objection to the publication of the report, it will have to make it at least 10 days before the relevant DSB meeting[85]. The parties to the dispute may participate in the DSB meeting that is to consider the adoption of the respective panel report and to express their views, if they so wish[86]. Within 60 days of the intimation ('circulation') of the terms of the award, this will be adopted at a DSB meeting, unless one of the parties formally notifies the DSB of its decision to appeal, or if the DSB decides by consensus not to adopt the report[87]. This rule is also called the 'negative consensus', which would require the prevalent party in the dispute to waive its rights in the award, in order to prevent the automaticity of its adoption by the DSB, a most unlikely event.

[83] DSU Art. 15.2 and 15.3.
[84] DSU Art. 16.1.
[85] DSU Art. 16.2
[86] DSU Art. 16.3
[87] DSU Art. 16.4.

Appellate Review

In contrast to the first instance panel *ad-hoc* system, the WTO has a standing Appellate Body (AB) composed of 7 panellists, who hear cases on appeal from the first instance of the dispute settlement mechanism, in groups of three (a 'division'), serving in rotation.[88] Divisions are chaired by a 'presiding member', whose responsibilities are:

(a) co-ordinating the overall conduct of the appeal proceeding;
(b) chairing all hearings; and
(c) co-ordinating the drafting of the appellate report[89] .

Members of the AB are appointed by the DSB for a period of 4 years. Each arbitrator may be re-appointed once. Vacancies are filled as they occur, for the remainder of the original term of the replaced arbitrator[90]. The profile of members of the AB should be '[p]ersons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'. In addition, they should be unaffiliated with any government, but should be representative of the membership of the WTO[91]. The appointment of members of the DSB has in practice, however, shown a substantial interference from the USA, as we will see below.

Only parties to a dispute may appeal a panel report. This excludes third parties[92]. They, however, may present written briefs to the AB on those matters in which they have notified a substantial interest to the DSB[93]. 'As a general rule', the AB proceedings are not to exceed 60 days[94], but in practice more often do. In this case, the AB will advise in writing the DSB with a new estimate for the conclusion of the matter and the issue of the apposite award. This new estimate, however, is in theory required to observe the maximum term of 90 days[95], but then reality is another matter and in practice this term has become quite flexible and is accordingly often exceeded.

[88] DSU Art. 17.1.
[89] AB Rule VII (1 and 2).
[90] DSU Art. 17.2.
[91] DSU Art. 17.3.
[92] DSU Art. 17.4.
[93] DSU Art. 17.4, *in fine*.
[94] DSU Art. 17.5.
[95] DSU Art. 17.5, *in fine*.

Appeals are limited to issues of law and are not allowed to address issues of fact[96]. The AB, in entertaining an appeal, may uphold, reverse or modify the 'findings and conclusions' of the panel of first instance[97]. There are absolutely no specific or general provisions of any kind regarding either remand authority on the part of the AB or procedural rules allowing such indispensable mechanism in disputes. This absence is particularly felt in the DSU because the rules on evidence are deplorably inadequate, as we have already seen and will examine below.

The AB has a Secretariat, whose choice of members, leadership and functions have become the object of much criticism and some contention, as will be analysed further below. A party wishing to appeal will notify in writing the AB Secretariat of its intention to do so, with the following contents:

(a) the title of the panel report being appealed;
(b) the identification of the appellant;
(c) particulars of the appellant and of the appellee; and
(d) a summary of the legal arguments on which the appeal is based[98].

[96] DSU Art. 17.6.
[97] DSU Art. 17.13.
[98] AB Rule XX(2).

Within 10 days of the notification of appeal, the appellant will file its brief ('submission') indicating the precise fundamentals of law vis-à-vis the affected agreements and other relevant legal sources, as well as the nature of the decision being sought[99]. In the case where there is another party to the dispute, this Member may appeal within 15 days of the Notice of Appeal, in the same format as applicable to the original appellant. On the other hand, the appellee will present its rejoinder ('submission') no longer than 25 days after the notification of appeal. That document will indicate the relevant legal arguments in connection with the panel's award and with the position of the appellant, indicating '[a]n acceptance of, or opposition to, each ground set out in the appellant's submission.' In addition, the appellant will indicate the nature of the decision being sought[100]. Third participants will file a brief indicating their intention of participating within 25 days after the Notice of Appeal[101], which is exactly the same period allowed for the appellees, which may adversely affect their arguments.

There will be an 'oral hearing' '(*sic*)', as 'a general rule', 30 days after Notice of Appeal[102]. This timeframe, as with the others referred to supra, are merely tentative, as in any case, the division in charge of the procedure will draw up a specific 'working schedule' with the determination of the specific periods applicable to the instant matter[103]. At any time during the appellate proceeding, the division may pose queries, either verbally or in writing, to the parties[104]. This occurs particularly, but not only, during the hearings. Any such responses in writing will be made available to the opposing parties[105].

The failure of a party to appear or to meet a deadline or to file a required paper may or may not result in the dismissal of the appeal. It will rather be treated on an *ad-hoc* basis, the nature of which is left at the entire and absolute discretion of the AB, without any regulation or standards at all. Thus, '[w]here a participant '(*sic*)' fails to file a submission '(*sic*)' within the required time periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate[106].' *Ex-parte* communications are not

[99] AB Rule XXI (1 and 2).
[100] AB Rule XXII (1 and 2).
[101] AB Rule XXIV.
[102] AB Rule XXVII.
[103] AB Rule XXVI.
[104] AB Rule XXVIII.
[105] AB Rule XXVIII (2) .
[106] AB Rule XXIX.

allowed. Accordingly, neither appellate panellists nor other arbiters in the AB are allowed to discuss any aspects of the matter at stake with any 'participant' or 'third participant'[107]. Appeals or settlements may be withdrawn at any time by means of a notification to the AB.[108] The proceedings of the AB are confidential and the awards are to be '[d]rafted without the presence of the parties to the dispute and in the light of the information provided and the statements made[109]'.

Unfortunately, the DSU has failed to formulate a rule providing that the preparation of the AB´s draft award must be made by the appellate arbiters themselves. This omission is of great relevance in view of the practice which has evolved within the dispute settlement system of the WTO of often having 'nominee' panellists. In addition, the rule would be of great importance as there are different criteria for the selection of appellate arbiters and officials of the AB Secretariat and those of the Legal Affairs Division of the WTO Secretariat. The dispute settlement mechanism of the WTO does not contemplate a role for legal clerks. Even if it did, it would be questionable whether members of the Legal Affairs Division would be the most appropriate clerks. Opinions expressed in the AB report by appellate arbiters ('[i]ndividuals serving on the Appellate Body') shall be anonymous[110].

The awards or 'recommendations' address the matter of whether or not a given measure of municipal law by a Member-State is compatible with the WTO Agreements. In case the decision is affirmative, then the panel or the AB will recommend that this measure is brought into conformity with the affected agreement. The panel or AB may, and often do, suggest ways in which implementation is to be effected[111]. As indicated *ut supra*, the recommendation '[c]annot add to or diminish the rights and obligations provided in the covered agreements[112]', but it often does, as we shall examine.

Compliance with WTO Rulings

[107] DSU Art. 18.1 and 18.2. See also AB Rule XIX (1, 2 and 3).
[108] AB Rule XXX (1 and 2).
[109] DSU Art. 17.10.
[110] DSU Art. 17.11.
[111] DSU Art. 19.1.
[112] DSU Art. 19.2.

'[P]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.[113]' However, as very well observed by Brendan P. McGivern, '[D]SB rulings are not self-executing. It remains up to each defending party – a sovereign government – to choose how, and even if, it will implement the ruling[114].' The discomfited party will have to inform the DSB at a meeting to be held not later than 30 days after the adoption of the report of its intentions with respect to compliance with the ruling in question[115]. In case immediate compliance is impracticable, the Member-State in question will have a 'reasonable period' within which to do so.

A reasonable period of time shall be:

(a) the period proposed by the Member-State in question, provided it is approved by the DSB; or, failing which,

(b) the period agreed to by the parties, not later than 45 after the adoption of the ruling; or,

(c) a period of time determined through binding arbitration within 90 days after the adoption date, which period is to be hoped to be no longer than 15 months after the date of the adoption of the AB report. 'However, that time may be shorter or longer, depending on the particular circumstances'[116] '(*sic*)'.

In cases where disputes arise on implementation issues of a report, then the matter will be decided by recourse to the same dispute settlement mechanism, whenever possible to the same panel, but with a timeframe for decision of 90 days after jurisdiction is sought on the matter[117]. Should the withdrawal of the illegal measure by the discomfited party fail, then the other remedies of the DSU will become applicable, namely 'compensation' or, at last resort, retaliation, in conformity with what has already been explained above. 'Compensation' must not be understood within its lexical meaning, for in the dispute settlement mechanism of the WTO it is yet another unfortunate misnomer. In reality, 'compensation' means the mutually agreed suspension of a trade concession that had been

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[113] DSU Art. 21.1.
[114] B. P. McGivern, 'Seeking Compliance with WTO Rulings: Theory, Practice and Alternatives' (volume 36), *The International Lawyer*, number 1, p. 142.
[115] DSU Art. 21.3.
[116] DSU Art. 21.3, *in fine*.
[117] DSU Art. 21.5.

made by the prevalent party to the defeated one, in an amount equivalent to that of the damage suffered by the former's industry in connection with the dispute object of the original WTO ruling[118].

In case there is a failure in reaching a mutually agreed solution to the problem and a 'compensation' is not possible, then retaliation would be applicable, in which case the prevailing party would invoke its rights under the DSU[119]. Retaliation is the unilateral suspension of a trade concession by the prevalent party with a view to compensating for the damage suffered by its industry by means of an illegal measure adopted by the discomfited party. The following principles apply for the suspension of concessions:

(a) the suspension should apply to the same sector that was affected by the illegal measure;

(b) if that is not possible, then other sectors in the same agreement would be chosen; or

(c) if that is not practicable, then the suspension of concessions could affect other agreements.

The prevailing party will have to request authorisation from the DSB in order to retaliate[120]. The retaliation must be authorised by the DSB, who will ensure that it is equivalent to the level of 'nullification or impairment' and permitted under the relevant agreements[121]. The retaliation is of a temporary nature and should only be applied for as long the illegal measure remains in place in the municipal legal order of the discomfited party[122]. Of course, this system of relief is extremely imperfect in that rather than inducing compliance, it resorts to the punishment of the healthy part of the current of bi-lateral trade between the affected Member-States. It is also extremely unjust to the affected parties of municipal trade law.

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[118] DSU Art. 22.1 combined with Art. 22.4.
[119] DSU Art. 22.2.
[120] DSU Art. 22.3.e.
[121] DSU Art. 22.4 and 5.
[122] DSU Art. 22.8.

In case the discomfited party objects to the level of the suspension of concessions, or complains about the method of calculation, then the DSB will refer the matter to 'arbitration'[123]. This arbitration may or may not be submitted to the original panel. In the highly likely circumstance that the original panel is unavailable to convene, then the Director-General, assisted by the ubiquitous Secretariat and its Legal Division, will refer the matter to a specially appointed 'arbitrator'. This arbitrator shall not examine the nature of the concessions or other obligations to be suspended, but shall rather determine whether they are compatible with the damages suffered by the prevailing party in the dispute, and allowed under the relevant agreement[124]. In addition, the 'arbitrator' may be requested to examine whether the principles and procedures of Article 22.3 of the DSU have been observed.

The whole process is required to take no longer than 60 days. The parties must accept the arbitrator's decisions as final[125]. The DSB will be promptly informed of the relevant decision and, upon request, will grant authorisation to suspend concessions or other obligations, whenever the application made by the prevailing party is consistent with the apposite decision.

Special Rules for Developing Countries

The DSU has a number of norms with respect to special legal treatment for developing countries, most of which are of rhetorical value only. In this, the DSU follows GATT's tradition of hortatory rules, as we saw in **GATT's Principles and Structure** above. Thus, special rules for developing countries appear in the DSU in Articles 3.12; 4.10; 8.10; 12.10; 12.11; 21.1; 21.7; 21.8; 24 and 27.2. Article 3.12 offers the alternative for developing countries to resort to a shortened procedure for dispute settlement that was established by the GATT in 1966[126]. This faculty has never been used by any developing country in the history of the WTO. On the other hand, Article 4.10 provides a principle which very sadly is not taken seriously in practice, because of the lack of effective legal instruments and sanctions to uphold it, *i.e.* '[D]uring the consultations Members should give special attention to the particular problems and interests of developing country

[123] DSU Art. 22.6.
[124] DSU Art. 22.7.
[125] DSU Art. 22.7.
[126] Decision of 5 April 1966 (BISD 14/S/18).

Members.' Of course, confidentiality of the consultation mechanism plays an important part in the ineffectiveness of this provision, because developing countries cannot enforce it on a bilateral meeting with the great economic powers.

Again respecting consultations, Article 12.10 allows for an extension of the periods established by the DSU[127], to be decided by the Chairman of the DSB after consultations with the parties. To date, this has not occurred. Article 8.10 allows developing countries the possibility of requiring that at least one panellist of a similar developing country background be appointed for a matter in which that country is involved before the DSB of the WTO. This provision is normally observed. A very eloquent example of the treatment given in practice to developing countries by the DSB can be found in the history of Article 12.11, which determines the form that awards should specifically indicate how account has been taken of the relevant provisions (on differential and more-favourable treatment for developing countries) that have been raised by them during the arbitration procedures. However, '[n]o panel report has explicitly cited this particular provision[128]'.

In the fundamental issue of implementation, there are specific norms for developing countries in articles 21.2, 21.7 and 21.8. The first of those rules is of a declaratory nature only, establishing that '[P]articular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement[129]'. However, Article 21.7 allows the DSB to consider further action with respect to relief, which is difficult to implement in view of the regulatory nightmare of the treatment of the matter and thus has never been considered in the history of the WTO. On the other hand, Article 21.8 allows for mitigating relief in cases where developing countries have been discomfited in WTO disputes. Here again, this possibility has never been implemented in any case.

Article 27.2 allows the possibility for developing countries to ask for the provision of additional legal advice in connection with matters before the dispute settlement mechanism of the WTO. In view of the multiple possibilities of conflicts of interest and the lack of a dedicated section in the Legal Affairs Division of the Secretariat, as explained

[127] DSU Art. 4.7 and 4.8.
[128] 'Issues Regarding the Review of the WTO Dispute Settlement Mechanism' (February 1999), *South Centre*.
[129] DSU Art. 21.2.

below, it is very fortunate that, to date, no developing country has availed itself of this very questionable facility. Lastly, Article 24 deals with special treatment of the least developed countries before the DSB. These countries have yet to make their first appearance in the dispute settlement mechanism.

Section 2
STRUCTURAL FAILURES OF THE DISPUTE SETTLEMENT SYSTEM OF THE WTO.

Unjusticiability of the System

According to Collier*,* '[a] dispute is said to be justiciable if, at first, a specific disagreement exists, and secondly, that disagreement is of a kind which can be resolved by the application of rules of law by judicial (including arbitral) processes[130]'. However, the dispute settlement mechanism of the WTO is rather a system for the diplomatic adjustment of divergences between states, with a view to finding, whenever possible and convenient, equitable solutions. Accordingly, the nature of the system is defined as '[t]he aim of the dispute settlement mechanism is to secure a positive solution to the dispute[131]' '(*sic*)*'* and that '[t]he use of the dispute settlement procedures should not be intended as contentious acts...[132]' '(*sic*)*'*.

Thus, because the inspiration behind the DSU was diplomatic, rather than legal, the juridicity of the system was irremediably compromised to the extent that, from a scientific perspective, it is impossible to understand many of the principles and rules. Accordingly, the mechanism is not capable of addressing the matters brought to it in a fair, just and efficient manner. As a result, the terminology is inadequate, many fundamental institutions, such as evidence, are amiss and many others have been structured in a faulty manner. The system has no effective sanctions and can only offer a highly defective means of relief. We shall try to address those problems in the following topics.

Terminology and the Lexical Disaster of the DSU

[130] J. Collier; V. Lowe, *opere citato*. See note 7 above.
[131] DSU Art. 3.7. See **Legal Nature, Principles and Jurisdiction** above.
[132] DSU Art. 3.10. See **Legal Nature, Principles and Jurisdiction** above.

Because of its diplomatic, rather than legal inspiration, the dispute settlement system of the WTO eschewed a rich heritage of legal terminology, shared internationally, in favour of a very idiosyncratic argot and some plain confusing and, at times, colloquial language. Semantics, of course, play a very important part in law, be it municipal or international. Laws, as well as treaties, should be transparently clear so that it can be understood by its respective subjects, in the first place, and by courts, when they need to apply the apposite rules. In the case of international law in general, and of the WTO Agreements in particular, this is even more necessary, as treaties, as well as decisions taken in international *fora* need to be implemented by municipal law.

Therefore, if argot is used rather than appropriate language, there is a wide berth not only for confusion, but also a margin made possible for deliberate tergiversation and/or outright default. John A. Ragosta attributes the origin of these habits to diplomatic requirements: '[t]his arcane form of drafting was for diplomatic reasons (so as not to offend the sensibilities of government trade lawyers ... '[133]. In the WTO system, this idiosyncratic terminology appears not only in the DSU, but also in the operation, decisions and rulings of the DSB.

The scope for confusion is such that in the WTO system, a 'measure' in the diplomatic argot may be either a measure or a remedy. A 'third party' is not a third party, but may be a 'third participant'. A 'decision' may not be a decision[134], and a 'submission' may be a brief, may be a rejoinder, may be a petition, may be a summary and may be a rebutter[135]. 'Right to seek information' is evidence, but only up to a point. Settlement in WTO argot is '[t]he development of a mutually satisfactory solution'. 'Practice' can mean jurisprudence, as well as practice, but often proves to be usurpation of rights. A 'Member' may mean a Member-State; a party to the proceedings or a panellist. It has been appropriately noted that "the WTO agreements are perhaps the only international treaty couched in such a non-legal language[136]."

[133] J. A. Ragosta, *Unmasking the WTO: Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"*.

[134] As decided by the AB in *Japan – Taxes on Alcoholic Beverages, complaint by the EC (WT/DS8), complaint by Canada (WT/DS10) and complaint by the USA (WT/DS11).*

[135] D. de Noronha Goyos jr., 'The Threat Posed by the World Trade Organization ...', *opere citato*, p. 54.

[136] M. Khor, *WTO Dispute System Tilting the Balance Against South*, *Southern and Eastern African Trade Information and Negotiations Initiative* (2000), p. 2.

Glossary of WTO's Legal Terminology

English language	***WTO jargon***
Action at law	*Complaint*
Appellate arbiter	*Member*
Appreciation of appeal	*Reconsideration*
Arbiter	*Panellist*
Award	*Report*
Case	*Complaint; dispute*
Court	*Panel*
Decision	*Recommendation; findings*
Defendant	*Respondent part*
Derogation	*Prejudice*
Evidence	*Right to seek information*
Execution proceeding	*Implementation*
Filing	*Deposit*
Hearing	*Substantive meeting*
Hearing	*Oral trial*
Intimation	*Circulation*
Joinder of defendants	*Multiple respondents*
Joinder of plaintiffs	*Multiple complainants*
Jurisdiction	*Coverage*
Jurisprudence	*Practice*
Leading	*Submission*
Object of the action	*Reference term*
Petition	*Submission*
Plaintiff	*Complainant*
Plea	*Formal Complaint*
Procedure	*Working Procedure*
Rejoinder	*Submission*
Remedies	*Measures*
Repeal	*Nullification*
Response	*Submission*
Revocation	*Compensation*
Session	*Substantive meeting*
Settlement	*Development of a mutually satisfactory solution*

***Ad-hoc* Panels and their Vulnerability**

As we have seen above, the DSU has a system of *ad-hoc* panellists who are appointed by the Secretariat of the WTO through its Legal Affairs Division. There is no

independent infrastructure for the panellists, who must depend on the Secretariat for legal support, which may affect their independence. Panellists are not remunerated in accordance with their necessary qualifications to decide on the arcane cases brought before the DSB, which limits very much the choice of arbiters to people who live in Geneva and perceive salaries from other positions. This situation adds to the lack to independence of panellists and raises some matters of concern as to conflicts of interests.

The lack of a standing body of panellists also bring some very complex issues like the impossibility of having the same panel examining connected issues, such as in the case of a third party deciding to request the establishment of a proper panel to examine its complaint[137]. Of course, this is compounded by the impossibility of having cross-complaints or counterclaims in the dispute settlement mechanism of the WTO[138]. To aggravate matters further and add to the massive potential confusion, because the terms of reference of a case are given by the Secretariat of the WTO through its legal division, the possibility arises that identical cases brought by different Member-States against a single country are transformed into different matters, brought to distinct panels, and even attract different or, worse, contradictory decisions[139]. In addition, the system puts at risk the convenience of having the same panel in charge of the examination of implementation issues, as suggested by the DSU[140].

Procedural *Lacunae* in the DSU

Norberto Bobbio teaches that a system may be ‘incoherent’ when it has both the norm that allows a given deportment as well as the one that prohibits it[141]. Furthermore, Bobbio calls a system ‘incomplete’ when it has neither the norm that prohibits nor the one that permits. We have seen above that the dispute settlement mechanism of the WTO is both incomplete and incoherent. In view, however, of the incomplete nature of the DSU, the DSB can only judge the case entertained by it in accordance with a norm belonging to the system, bearing in mind the precepts of international law in general, as well as, in particular, the norms of Articles 3, 1 and 2, combined with article 19.2 of the DSU.

[137] DSU Art. 10.4.
[138] DSU Art. 3.10.
[139] D. de Noronha Goyos jr., ‘The Threat Posed by the WTO ... ’, *opere citato*, p. 54.
[140] DSU Art. 21.5.
[141] N. Bobbio, *Teoria dell’Ordinamento Giuridico*, *opere citato*, p. 116.

It is thus here that we find the first important procedural omission in the DSU, *id est* the lack of the apposite regulation of the situation of *non-liquet* or *déni de justice*. This particular *lacuna* became relevant in several cases brought before the DSB, but in the case *US – Imports of Woven Wool Shirts and Blouses from India* prompted the unwarranted and illegal creation by the AB of the bizarre institute of "judicial economy".

As a matter of fact, the question was very clearly raised by the pre-eminent Judge John Toulmin QC, "are there circumstances in which a panel should be able to decide cases on preliminary issues?[142]" However, the *non-liquet* is by no means the only preliminary issue at stake. The all important matter of conflict of treaties has failed to be adequately addressed in the DSB, for lack of the appropriate legal treatment in the DSU, which brought some highly detrimental consequences for developing countries, such as in the cases of *Brazil – Export Financing Programme for Aircraft[143], complaint by Canada*; *Indonesia – Certain Measures Affecting the Automobile Industry[144], complaint by the US, the EC and Japan*; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products[145], complaint by the US*; and *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items[146], complaint by the US*. Such conflicts also occur in matters pertaining to specific environment treaties, intellectual property agreements and health conventions. As the scope of the WTO has increased, so has the potential conflict with other treaties[147]. Likewise, the fundamental issue of excess of jurisdiction, by which a Member-State could refuse to submit itself to the DSB on a given issue, has not been confronted at all. The effects of a defence on excess of jurisdiction may be similar to what could evolve from an argument on conflict of treaties.

Furthermore, the dispute settlement system of the WTO does not allow for the participation of counsel, which also prompted the unwarranted and illegal action on the part of the DSB, with a view to regulate the matter. Lawyers are, of course, indispensable in any judicial system, of which they are an integral part. It is only natural that

[142] Lampreia, Noronha, Baena Soares and Toulmin, *O Direito do Comércio Internacional* (Legal Observer, São Paulo/Miami, 1997), p. 34.
[143] WT/DS46
[144] WT/DS 54, 55, 59 and WT/DS64/R.
[145] WT/DS90/1.
[146] WT/DS56/AB.
[147] D. de Noronha Goyos jr, 'Revising the Dispute Settlement Understanding of the World Trade Organization' (June 1999) <www.noronhaadvogados.com.br>.

Member-States resort to the advice of legal counsel and that lawyers should participate actively in the panel process. Accordingly, the American Bar Association (ABA) adopted a resolution supporting the use of private counsel by parties in the WTO dispute settlement system[148]. Here too the AB encroached onto the rights of the Member-States by means of an attempted, if wayward, regulation of the matter.

Another important *lacuna* pertains to dispositions on interlocutory applications, which can be of utmost importance in addressing situations when there is a grave and imminent danger of serious an irreversible damage. This is often the result in dumping cases, when a rapid jurisdictional protection may prove to be essential. Such a shortcoming has become widely recognised and, in typical WTO fashion, there are some quite extraordinary initiatives for addressing the problem by means of a 'short-track' '(*sic*)' shortcut mechanism to be created within the dispute resolution system. Judging by the terminology alone, one would not give much hope to the initiative.

As we have seen above, the joinder of defendants is expressly disallowed, as long as the joinder of plaintiffs is highly defective, with the disparate creation of the 'third-party and/or third participant' figure. In the first place, there is no automaticity in this *ersatz* institute, as the respondent may exclude a third-party from the consultation phase of the procedure[149]. '[I]t is also difficult to understand why third parties have a limited role before panels, while they may fully participate in the appellate procedure[150]', as is well noted by Jansen. Such failures, compounded with others, such as the lack of an institute allowing and regulating cross complains, redound in a multiplicity of panels, potentially with different arbitrators as distinct terms of reference. Panels have, but only to a point, attempted to correct many omissions by rulings and have failed miserably at it, only to make matters worse in procedures as well as in the violation of the rights of Member-States under Articles 3.2 and 19.2 of the DSU.

In addition, the AB permitted, contrary to the dispositions of the DSU, *amicus curiae* limited participation in the dispute settlement system of the WTO, with the right to file briefs, creating much acrimony amongst developing countries, besides adding to the

[148] *American Bar Association Recommendation and Report* (number 118 A, adopted in 1998).
[149] DSU Article 4.11.
[150] B. Jansen, 'Selected Problem Areas in the Course of a Dispute Settlement Procedure', in *Free World Trade and the European Union*, *opere citato*, p. 61.

confusion of the matter of third-parties in the process, as we will examine in greater depth in below. Consequently, as suggested by Covelli and Sharma, ‘the best solution would be to do away with the concept of third parties entirely as it exists now. It ought to be replaced by procedures that work, such as those commonly found in the world’s major legal systems and the International Court of Justice[151]’.

The lack of any specific procedural regulation with respect to *locus standi* has already had some considerable problematic repercussions in DSB history, with the unwarranted creation of wayward law by the AB, favouring the USA in the Third Banana Panel, to the detriment of the EU, as we will see below. This is, of course, a matter that with the appropriate judicial procedure could be decided as a preliminary issue, without going all the way to the AB, with the consequent delays and costs involved. As to the matter of costs, the dispute settlement system of the WTO fails to provide for the payment of costs and expenses due by the discomfited to the prevailing party. This omission hurts developing countries more because of the high cost of disputes and is the object of many of their proposals for the reform of the dispute settlement mechanism of the WTO.

Similarly, the absence of access to the dispute settlement mechanism by subjects of private law is also detrimental to the effectiveness of the system. Almost invariably always, Member-States advocate interests of subjects of private law before the DSB. This situation occurs with an ever-present conflict of interest, because there are always opposing views of a commercial, social or political nature in the internal affairs of a given country, with respect to a given international trade conflict. This is so because international trade disputes are always multi-faceted from a political and economic perspective of a Member-State. It would be best to allow the parties to activate themselves directly the mechanism, at their expense and risk. Of course, nothing should prevent the governments of affected Member-States from acting individually or in conjunction with the affected domestic industry or juridical person or even an individual.

The DSU does not authorise the AB to remand a case to the panel that heard it originally, but only allows the AB to uphold, modify or reverse the ruling of first instance[152]. The lack of remand authority is not only peculiar but unprecedented in judicial

[151] N. Covelli ; R. Sharma, ‘Proposals for Reform of the WTO Dispute ... ’, *opere citato* , p. 2.
[152] See DSU Art. 17.3.

systems in general. As we observed above, this situation is particularly felt in the system because the rules of evidence are deplorably inadequate. In any event, the authority to remand would certainly be incompatible with the present system of *ad-hoc* panels, because the original first instance panel would not be there to handle the matter. In that case, as very aptly asked by Bhala, 'to what body – the same panel or a different one – ought a remand order be directed?[153]'

Nevertheless, as well observed by Vermust and Grafsma, '[t]he absence of power to remand is a general systemic problem, especially some of the Panels have displayed a tendency to invoke "judicial economy" to refrain from addressing all claims. The problem is exacerbated in commercial defence cases that are highly factual and often involve multiple and alternative claims[154]'. As a result, here again the AB reacted to this chaotic regulation by attempting to legislate, in violation of its jurisdictional powers and derogating illegally rights of the Member-States.

We have analysed above the nature of the rules of evidence of the dispute settlement mechanism of the WTO. Judge Toulmin had already asked in early 1997: '[I]s there a sufficient machinery for fact finding?[155]' In this area as well, the AB reacted to the ineptitude of the norms of evidence and has consistently, and illegally, tried to create law, encroaching onto the rights of the Member-States, with no major technical improvements and grave consequences to the credibility of the system. Among the innovations presented by the AB as a result of the systemic omissions in the area of rules of evidence, we can mention the matter of the 'burden of proof', a failed attempt to re-invent the wheel.

We already had the opportunity to examine the structure of the relief system of the multilateral trade system and analysed enough elements to discern that the WTO treaties do not specifically conform with the classic definition of legal norm, in the sense that "its execution be guaranteed by an external and institutionalised sanction[156]". We saw that the main objective of the system is the withdrawal of the illegal measure, but that is unenforceable and compliance depends on the sovereign will of the discomfited party. If

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[153] R. Bhala, 'WTO Dispute Settlement and Austin's Positivism: a Primer on the Intersection' (volume 9, January 2003) *International Trade Law and Regulation*, issue 1, p. 18.
[154] E. Vermulst; F. Graafsma, *WTO Disputes ...* , *opere citato*, p. 83.
[155] Judge John Toulmin QC CMG, 'Direito do Comércio Internacional', *opere citato*, p. 34.
[156] Norberto Bobbio, 'Teoria dell'Ordinamento Giuridico', *opere citato*, p. 27. Translated into English by the Author.

this fails, the parties may negotiate a mutually agreeable format regarding the suspension of some trade concessions made by one to the other.

That again is not self-executing, as it depends on an agreement between two or more Member-States. Accordingly, the ultimate WTO sanction is retaliation, which as we saw earlier[157] is non-specific and normally affects the healthy current of trade between the affected parties. As very well noted by Brendam P. Mc.Givern, '[t]he automatic adoption of panel and Appellate Body reports, and the automatic approval of retaliation requests, are no guarantee of automatic compliance[158]'.

In addition, Article 21.5 of the DSU is absolutely silent as to the procedures required for the establishment of a compliance panel. As very aptly asked by Sylvia A. Rhodes, '[w]ho constitutes the compliance panel? Are consultations required before a party can request a compliance panel? Can the report be appealed? Can the panel determine whether compliance measures create new violations? In sum, the procedures of Article 21.5. and the scope of review are not clear[159]'. These omissions have in practice made it difficult, if not impossible, to determine when a Member-State may start with retaliation proceedings against the offending or discomfited party, when the latter argues that implementation has effectively taken place. This situation appeared in *EC – Bananas – Regime for the Importation, Sale and Distribution of Bananas, complaint by Ecuador, Guatemala, Honduras, Mexico and the USA*[160], where the question that arose was a very basic one: '[w]ho determines non-compliance?'[161].

Confidentiality and Transparency

Confidentiality is a *leitmotiv* in the dispute settlement mechanism of the WTO. This is very much so because of the predominantly diplomatic nature of the system, as opposed to the public character of proceedings required by judicial processes. John A. Ragosta observes well that '[t]he lack of transparency in WTO's dispute settlement proceedings originates in the old tension between the diplomatic model of dispute settlement based on

[157] See **Compliance with WTO Rulings** above.
[158] B. P. McGivern, 'Seeking Compliance with WTO ... ', *opere citato*, p. 157.
[159] S. A. Rhodes, 'The Article 21.5/22 Problem: Clarification Through Bilateral Agreements?' (volume 3, September 2000) *Journal of International Economic Law*, number 3, p. 554.
[160] WT/DS/27/AB/R.
[161] S. A. Rhodes, 'The Article ... ', *opere citato*, p. 555.

mediation and the juridical model. WTO's dispute settlement procedures evolved out of a diplomatic environment where compromise was encouraged and confidentiality, essential in diplomacy, could be justified. But a proceeding before the WTO dispute settlement panel is litigation, not diplomacy [162]'.

Confidentiality appears initially in the DSU with respect to consultations: '[C]onsultations shall be confidential ... [163]'' Once a panel is established in the DSB, '[d]eliberations shall be confidential [164]'. In cases where there is an appellate review of a matter, there too '[t]he proceedings of the Appellate Body shall be confidential[165]'. Accordingly, the Working Procedures of the DSB reaffirms those rules and extend them in the sense that 'Members shall treat as confidential information submitted by another Member to the panel which that member has designated as confidential[166]'. This norm is applicable to any briefs ('submissions') filed by any of the parties in connection with a matter before the DSB. However, a party may, if it so wishes, disclose '[s]tatements of its own positions to the public[167]'. Expert review groups are also obliged to respect information of a confidential nature[168].

This obsession with the *sub rosa* briefs has been rightly accused of constituting one of the problems of the lack of transparency of the dispute settlement mechanism of the WTO, in which it makes democratic controls of governments more difficult by legislative powers domestically, as well as by civil societies. As noted by Bernhard Jansen, '[t]his situation causes misunderstandings and distrust between members of the organisation and *vis-à-vis* the public at large[169]'. Worse, the lack of transparency subjects developing countries to enormous pressures from developed countries in the consultation phases of the dispute settlement mechanism. Approximately 50 per cent of matters brought before the DSB are resolved during consultations. The arguments used by developed countries against developing Member-States during those consultations are not often of a legal nature, but rather more commonly of a commercial or financial one, with threats being an eminent and only too frequent element of the process.

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[162] J. A. Ragosta, *Unmasking the WTO ...* , *opere citato*, p. 15.
[163] DSU Art. 4.6.
[164] DSU Art. 14.1
[165] DSU Art. 17.10
[166] Appendix 3, Art. 3.
[167] Appendix 3, Art. 3.
[168] Appendix 4, Art. 5.
[169] B. Jansen, 'Selected Problems ... ', *opere citato*, p. 61.

Thus, some concessions made by developing countries are only known to the respective legislative power and domestic public opinion by means of resorting to information made available by developed countries to their internal public, very often in vainglorious tones. The testimony made by Ambassador Charlene Barshefsky, United States Trade Representative (USTR) to the US Senate indicated that, up to June 20, 2000, the USA had been involved in 26 cases before the WTO's dispute settlement mechanism. Out of those 28 matters, the USA prevailed in 12 cases through consultations and in 11 by panel rulings[170]. According to Ambassador Barshefsky, the USA had been discomfited in only three matters via panel findings. This testimony indicates very convincingly that the most effective way for a large economy to prevail is through consultations, where the success rate is 100 per cent, as opposed 78 per cent in panels.

By contrast, from the perspective of developing countries, the worst phase of the dispute settlement process undoubtedly is the consultations. In the 12 victories the USA had in the consultation procedures mentioned above, 6 were against developing countries. In one particular case mentioned by Ambassador Barshefsky, *Brazil: Certain Measures Affecting Trade and Investment in the Automotive Sector complaint by the US*[171], the Brazilian government agreed to compensate the USA for regional benefits granted to Ford Motor Co. [172] *'(sic)'*. Brazilian Congress was never informed by the current administration about the nature of the concessions made in the Geneva consultations, nor for that matter was domestic public opinion. Therefore, because of the lack of publicity of proceedings, threats by developed countries to developing ones are an integral and customary part of the process. Unsurprisingly, developing countries often yield and succumb.

In fairness, it must be said that the USA has been more transparent than most countries with respect to the making accessible to the public documents and briefs filed by that country before a WTO panel. In connection with a reform of the DSU, Canada has proposed a greater transparency of the DSB process, by means of making all hearings

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[170] C. Barshefsky, 'US Interests and Experience in the WTO Dispute Settlement System' (June 20, 2000) *Testimony of Ambassador Charlene Barshefsky*, US Trade Representative, Trade Subcommittee of the Senate Committee on Finance, Washington, DC.

[171] WT/DS65.

[172] 'US Interests and Experience ... ', *opere citato*.

open to the public, with the exception of those where confidential information is discussed[173]. Similarly, the USA has proposed that the WTO should allow public observers in all panel and AB meetings, excluding only the confidential aspects[174]. However, countries have so far failed to suggest the transparency of the consultation phase.

On the subject of transparency, the matter of the selection of members of the DSB and of the Legal Affairs Division and the secretariat of the AB is nothing short of scandalous. During the negotiations for the formation of the AB in 1995, the USA and the EU both wanted to have 2 each of the 7 members. At last, the EU agreed to one, but the USA demanded and got the appointment of an American national to head the Legal Affairs Division and a Canadian national to lead the secretariat of the AB[175]. In addition, the USA was given the privilege of vetoing some of the candidates for the position of arbitrators of the AB[176]. When the Canadian national resigned, roughly six years later, Canada staked a claim to the post of the director of the AB secretariat, based on the argument that when the AB was constituted, and a US nominee was appointed, Canada had obtained a consensus for the position of head of the AB secretariat[177]. Any argument would of course do in order to justify maintaining such powerful position at the heart of the manipulation process of the system.

Section 3
OPERATIONAL VICES OF THE DISPUTE SETTLEMENT SYSTEM OF THE WTO.

The Use of the Secretariat of the WTO for the Manipulation of the System

As we had the opportunity to comment above, the main mission of the Legal Affairs Division of the Secretariat is to provide legal advice and information to WTO

[173] 'Canadian Proposal for WTO Dispute Process Would Improve Business Data Confidentiality' (volume 20, January 30, 2003) *International Trade Reporter*, number 5, p. 209.
[174] 'Developing Countries Seek to the Level Playing Field through Reform of Dispute Settlement Rules' (September 2002) *Bridges*, year 6, number 8, p. 12.
[175] C. Raghavan, 'Appellate Body Deadlock Continues at WTO' (October 31, 1995) <www.sunonline.org/trade/process/followup/1995>, item 04.
[176] C. Raghavan, 'WTO Establishes Appellate Body' (November 30, 1995) <www.sunonline.org/trade/process/followup/1995>, item 10.
[177] C. Raghavan, 'WTO Appellate Body Secretariat Director Forced Out?' (March 19, 2001) <www.twnside.org.sg/title/director.htm>.

panels, bodies and members. That includes 'providing timely secretarial and technical support and assistance on legal, historical and procedural aspects of disputes to WTO dispute settlement panels; providing regular legal advice to the Secretariat, and in particular to the Dispute Settlement Body and its Chairman, on interpretation of the DSU, WTO agreements and on other legal issues ... [178]'. In practice, the Legal Affairs Division also has the power to select panellists and to define the terms of reference of disputes brought before the dispute settlement system of the WTO. On this latter subject, the variable norms for terms, which allow panels to establish at their discretion different *terminus ad quem*, according to the party and, on a case-by-case basis, is a source of procedural instability that may lead to serious injustice[179].

The main trade powers soon identified the Legal Affairs Division of the Secretariat as one of the most important strategic positions within the multilateral organisation, and proceeded to staff it with their political appointees, normally individuals with a profile of having to one degree or another a past of governmental careers. The Division was also given a marked ethnocentric composition, with a predominance of leadership by lawyers from the USA and Canada, countries with many similarities in their municipal legal order. The AB has its own secretariat, with the very same vices. Whilst hegemonic trade powers have staffed the Legal Affairs Division, the undisputed source of effective power within the system, with their own governmental officials, it was allowed that developing countries appoint the chairmen of the largely decorative DSB, normally very busy and accommodating heads of mission.

This idiosyncratic composition and grotesque leadership has unsurprisingly played an enormous importance in the nature of the legal advice rendered and in the workings of the DSB, which was characterised by a substantial reliance on concepts of local domestic law, to the detriment of international law. The situation became so vexatious to the WTO that its Secretariat refused in writing to present a list giving the nationalities of the officials of the Legal Affairs Division. In answer to a direct query posed by the Author, Paul Rolian, director of the personnel division wrote: '[T]he only information that I can give you is that there are at present one director, nine professional and three support staff in the

[178] DSU Art. 27.1. See also note 75 *supra*.
[179] D. de Noronha Goyos jr., 'Revising the Dispute Settlement Understanding of the World Trade Organization' (June 1999) <www.noronhaadvogados.com.br>.

Legal Division. There is no functional distribution of work. I am afraid I am unable to divulge the nationalities of these staff members but as for the whole secretariat, we have an obligation to ensure geographical diversity[180].' *'(sic)'* In addition, a matter of conflict of interests pertaining to officials of the Secretariat arises with respect to nationality, when their country is involved in a process, affiliations or former affiliations with their respective governments. As a matter of fact, officials of the Legal Affairs Division of the Secretariat have not recused themselves in cases where their countries of origin have been involved.

The nefarious influence of the Legal Affairs Division has been felt in the selection of panellists, with respect to undue influence and pressures over panellists, in decision drafting, and in the 'case law' approach to disputes, all for the benefit of the hegemonic countries of origin of its leadership, and this to the detriment of the vast majority of Member-States and of international law. As we saw earlier, almost 90 per cent of panellists are former governmental officials in the area of trade. Many were serving diplomats in their countries` missions in Geneva before the WTO and with personal connections with officials of the Legal Division Affairs of the Secretariat. A number of those *ad-hoc* panellists have other privileged sources of occupation and remuneration, many of whom are otherwise busy people, like diplomats accredited to the Missions. Because many of them are diplomats, their ethical values are frequently inconsistent with those basic standards necessary for acting in any juridical function.

In any event, panellists are often susceptible to influence to the point of accepting drafted decisions by the Legal Affairs Division. Pierre Pescatore observed very aptly: '[T]his remains the impression conveyed by the current panel reports, many of which are too skilfully constructed to be the expression of a panel's candid opinion[181]'. Chakravarthi Raghavan has reported that when some panellists tried to retain their independence from undue influence from the Secretariat, '[t]he secretariat often asked them why they wanted to do so, since they would not be there to defend their views! And there was the implied "threat" that they would never have a chance to serve on another panel[182]'. The vulnerability of the panellists is made very much worse as a result of the fact that panels

[180] P. Rolian, *Letter of the WTO Personnel Division* (May 27, 1999).
[181] P. Pescatore, 'Free World Trade and the EU', *opere citato*, p. 15.
[182] C. Raghavan, *The World Trade Organization and its ...*, *opere citato*, p. 25.

have no independent structure of their own, which makes them entirely dependent on the support offered by the Legal Affairs Division of the Secretariat.

Accordingly, '[t]rade diplomats, closely following the trade disputes and some of the controversial rulings of the AB, have generally tended to attribute them to the secretariat and its "guiding hand"[183]'. In some cases, entire sections of a ruling appeared in another decision of a distinct panel, established with a view to examine a separate matter involving other countries and with different panellists. This preposterous situation led Raghavan to observe that '[a]t present, the WTO secretariat in effect has become party to the disputes, and a partisan one at that[184]'. In view of such developments, it is a matter of grave doubt whether any of the dozens of rulings of the DS conform to the criteria of independence applicable to the jurisdictional activity existing in democratic societies[185].

Section 4
THE SYSTEM AT WORK: CASE LAW OR USURPATION OF RIGHTS ?

International Law Rejects the Concept of 'Case Law'.

International law does not recognise the principle of the '*stare decisis'* doctrine or case law. That means that a decision of an international tribunal has no binding force except between the parties involved in one particular dispute. This principle is adopted by Article 59 of the Statues of the ICJ. In addition, Article 38 of the Statutes of the ICJ lists the sources of international law in a hierarchical order, putting at the top the international conventions establishing rules expressly recognised by the contesting States. Subsidiarily, the Convention lists international custom, but only as evidence of a general practice accepted by law. After that, there are the general principles of law recognised by civilised nations. Lastly, '[s]ubject to the provisions of Article 58[186], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. This last provision mean that judicial decisions, international or domestic, as well as the teachings of legal scholars may be of

[183] C. Raghavan, 'WTO Appellate Body Secretariat Director Forced Out?' (March 19, 2001) <www.twnside.org.sg/title/director.htm>.
[184] C. Raghavan, *The World Trade Organization and its....*, *opere citato*, p. 26.
[185] D. de Noronha Goyos jr., 'O Sistema de Resolução de Disputas da Organização Mundial do Comércio' (Volume 6, 2001) *Revista de Economia e Direito*, Universidade Autónoma de Lisboa, number 2, p. 154.
[186] Article 38 (d) of the Statutes of the ICJ.

assistance for the formation of the conviction, opinion or decision of an international tribunal. Thus, it appears eminently clear that the Statutes of the ICJ do not recognise decisions of an international tribunal as law, unless between the parties in a given specific case.

Similarly, as we have examined above, The DSU reads that the DSB's powers are 'to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law[187]'. This provision is again repeated in the DSU in connection with the jurisdictional powers of both panel and AB[188]. Those provisions mean that the DSU accepts an intrinsic hierarchical inferiority to the Convention and to the Statutes of the ICJ, and therefore its norms are *lex inferior* to those that are the object of the latter treaties. They also mean, very importantly, that the '*stare decisis'* doctrine is also explicitly rejected by the dispute settlement system of the WTO.

However, within the ambit of the Legal Affairs Division of the WTO, the not only unfounded but also bizarre and grotesque doctrine has evolved to the effect that all those sources of law itemised by Art. 38 of the Statutes of the ICJ are on the same hierarchical level, which would authorise the DSB to create law based on its customs, decisions and even legal doctrine. Officials of that division advise panellists on the "consistent case law of the WTO". None dares to publish it, as the dispute settlement system of the WTO lacks even a very basic docketing system. However, some authors have given support to this aberration. It is hardly surprising, but the former Canadian national who headed the secretariat of the AB for roughly 6 years since its inception[189], wrote recently that '[I]n any legal system, including international systems, law is typically made in two ways: either through negotiation of specific treaty language (or legislation in a domestic system) and through the development of case law. The same is true in the WTO dispute settlement system[190]'.

[187] DSU Art. 3.2.
[188] DSU Art. 19.2.
[189] See **Confidentiality and Transparency** above.
[190] D. P. Steger, 'The Appellate Body and its Contribution to WTO Dispute Settlement', in *The Political Economy of International Trade Law* (edited by Daniel Kennedy and James Southwick, Cambridge University Press, 2002), p. 483.

Thus, in view of the very extensive *lacunae* and other structural failures of the DSU, and of the idiosyncratic deportment of the Legal Affairs Division of the Secretariat, the DSB has been extensively involved in the 'creation of international law', without any legal basis or jurisdiction for it and, not coincidentally, to the consistent detriment of developing countries. As very well observed by Ragosta, 'panel "law making" raises serious concerns in an international legal regime when substantive norms remain far from clear (take one look at the TRIPS code) and in which sovereign bodies continue to be the participants'[191]. However, that is not the only problem, as the DSB has also been actively involved in the derogation of rights recognised by other international conventions, some of them of higher hierarchical nature than the WTO treaties.

The AB having had the opportunity to clarify the matter, decided in *Japan – Taxes on Alcoholic Beverages, complaints by the EC, Canada and the USA*[192], with its proverbial lack of clarity and constant use of inadequate language that '[p]anel decisions are an important part of the GATT *acquis*..., should be taken into account where they are relevant to any dispute, however they are not binding, except with respect to resolving the particular dispute between the parties to that dispute' '(*sic*)'.

The System as a Means of Derogation of Rights.

Derogation of developing countries' rights recognised by other international conventions took place very often in the history of the dispute settlement system of the WTO. These frequently had to do with recognised rights under the Treaty of the International Monetary Fund[193] (IMF Treaty). That was the case, for example, in the matters of *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*[194], *Brazil – Export Financing Programme for Aircraft*[195], and *Indonesia – Certain Measures Affecting the Automobile Industry.* In *India – Quantitative Restrictions*, the apposite award derogated balance of payment emergency provisions applicable to developing countries signatories of the transitory arrangements of the IMF Treaty, by which exchange controls are administered. The first instance panel was presided

[191] J. A. Ragosta, *Unmasking the WTO ...* , *opere citato*, p. 7.
[192] WT/DS 8, 10 and 11.
[193] Entered into force on December 27, 1945.
[194] WT/DS90/1.
[195] WT/DS46.

over by a Brazilian diplomat, the then head of the mission[196], and the award was accused in India of having been written by the Legal Affairs Division[197].

A dangerous precedent had been established, but it would not have affected other developing countries if the DSB had adhered to the rules and regulations of the DSU to the effect that a decision will only apply to the parties of a dispute. As that is not the case, Brazil was the second large developing country to suffer derogation of its rights under the IMF treaty, in *Brazil – Export Financing Programme for Aircraft*. Brazil was a developing country administering exchange controls in the terms permitted by the transitory clause[198] of the IMF Treaty. As a direct corollary of the administration of exchange controls, Brazilian companies had enormous difficulties in accessing the international voluntary financial markets and did so only at prohibitive financial terms sometimes 300 per cent over and above the thresholds of interest rates paid by their competitors in developed countries.

The Brazilian export financing programme, PROEX, had been created as a part of a structure established as a result of no fewer than 18 agreements with the IMF. PROEX equalised interest rates so that the local companies would pay the same as their competitors. PROEX was puny, disbursing less than US$ 1 billion for equalisation purposes, a drop in the ocean of more than US$ 550 billion of export credits disbursed by developed countries. The corresponding appellate panel award found the programme illegal and, as a result, Brazil was put in the most unenviable position of being the only country amongst the world's 9 largest economies without an export financing programme[199].

Similarly, in *Indonesia – Certain Measures Affecting the Automobile Industry*[200] the award of the DSB brought about an extensive, unauthorised and *contra legem* interpretation of the TRIMS Agreement creating a new obligation for Indonesia that impeded its sovereign capacity to assist nascent industries and to formulate developing

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[196] Ambassador Celso Lafer.
[197] D. de Noronha Goyos jr, 'O PROEX e as "Vitórias" do Brasil na OMC' (October 10, 2001) *Speech given at the UNIBERO*, São Paulo, Brazil <www.noronhaadvogados.com.br>.
[198] Article XIV of the IMF Agreement.
[199] D. de Noronha Goyos jr., Gabriel, Carvalho e Negrini, *Tratado de Defesa Comercial: Antidumping, Compensatórias e Salvaguardas* (Legal Observer, São Paulo/Miami, 2003), p. 79.
[200] WT/DS55.

policies, all recognised under the IMF Treaty and the Charter of the UN[201]. Thus, the panel found in favour of the US, the EU and Japan. The evidence used to substantiate the 'impairment and nullification' were newspaper cuttings provided by companies such as Ford Motor Co.

In all those cases, a preliminary argument could have been made as to the lack of jurisdiction, which derives from a conflict of treaties. The lack of procedural treatment of preliminary issues in the DSU makes the situation more difficult to be approached.

***Imbroglio* on Preliminary Issues.**

On the other hand, the lack of provisions for decision on preliminary issues, as discussed above[202], has brought about the creation of law in the areas of *locus standi*, *non-liquet,* 'judicial economy', mootness and lack of jurisdiction. The lack of appropriate provisions for the determination of the legitimacy of a party in a dispute, *locus standi*, and the omission of powers and rules for a decision thereof on a preliminary basis was felt in the case *European Communities – Regime for the Importation, Sale and Distribution of Bananas*[203], in which the USA sought to be a party to the dispute, even though it had never produced or exported bananas and thus could not possibly have suffered any 'nullification or impairment' of its rights under the WTO treaties. The panel rejected the EU's arguments to the effect that, in accordance with general principles of procedural law, the USA had no material interest in the dispute. The panel thus proceeded to accept the legitimacy of the USA as a party in the case and, when a determination was made as to the value of the 'damages' the USA had suffered, it took into consideration those of a private company, Chiquita, operating in third countries other than the USA. An aberration of the kind in any municipal court of law would not be tolerated.

It is curious how a diplomatic and *quasi*-judicial body such as the DSB could develop a doctrine of 'judicial economy', a euphemism which was used in order to justify the *déni de justice.* In municipal law, a judgement must be issued to all questions brought before a court and the judge must issue that judgement based in a norm that is part of the

[201] See, for instance, Article 55 of the Charter of the United Nations.
[202] In **The System as a Means of Derogation of Rights**.
[203] WT/DS27/R.

system[204]. In the DSB, we have seen that an award may be issued lacking one or both prerequisites. This 'precedent' was created to the detriment of a developing country, India, in the matter *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses complaint by India*[205]. In this matter, the relevant panel decided that 'a Panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute[206]'. It happens that one of the points deemed unworthy of consideration by the panel was an alleged backdating of the measures at stake.

In another matter, *European Communities – Measures Affecting Importation of Certain Poultry Products, complaint by Brazil*[207], the DSB failed to examine the matter of a conflict of treaties, when the issue of hierarchy of treaties was at stake, as the multilateral norms were affected by a bilateral treaty on oilseeds between the EU and Brazil. As was well observed by Pierre Pescatore, ' "judicial economy" is an unnecessary concept when it applies at the level of the definition of legal issues and the choice of legal arguments. It becomes dangerous whenever it serves, as seems to be the case in the Shirts and Blouses case, to shirk a claim raised by a party[208]'.

When a WTO panel had the opportunity of examining a matter of temporal conflict of laws, as in the matter *Brazil – Measures Affecting Desiccated Coconut, complaint by the Philippines* [209], a complete disaster ensued. This case was based on a complaint by the Philippines to the effect that Brazil's imposition of countervailing duties on desiccated coconut was inconsistent with the WTO rules. Brazil argued that the WTO agreements did not apply to countervailing duties initiated prior to the date of entry into force of the WTO Agreements. As the DSU has no mechanisms for preliminary issues, the panel had to decide at the end of the procedure for the substantive arguments, after these had been duly presented. Then the panel decided on the basis of *non-liquet* with respect to the preliminary issue of the temporal conflict of norms, which was up-held by the AB.

[204] N. Bobbio, *Teoria dell'Ordinamento Giuridico*, *opere citato*, p. 118.
[205] WT/DS33.
[206] Appellate Body Report on WT/DS33, adopted on May 23, 1997, p. 19.
[207] WT/DS69.
[208] P. Pescatore, 'Free World Trade and the EU – The Reconciliation of Interests and the Revision of Dispute Resolution Procedures in the Framework of the WTO', in *Free World Trade ...*, *opere citato* , p. 20.
[209] WT/DS22.

Lastly, the argument of mootness, when an action does not or no longer presents a justiciable controversy for lack of a legally cognisable interest in its outcome, is one that could have been extensively used in the history of the dispute resolution system of the WTO, for the very same reasons found in the domestic jurisdictional instances.

Third Parties and the *Amicus Curiae*

The lack in the DSU of appropriate procedural norms to govern the institutes of the joinder of plaintiffs and evidence, as previously indicated, have not only prevented the dispute resolution system from functioning properly, but also gave a pretext for a bizarre, idiosyncratic and unwarranted practice to be developed. Accordingly, panels have not only created 'law', but have also created inconsistent procedural norms, all without legal authority.

Thus, on occasion, panels have allowed third parties to have 'more expansive rights[210]' and thus to follow the entire proceedings, in the case *European Communities – Regime for the Importation, Sale and Distribution of Bananas*[211]. In a different matter, *European Communities – Measures Affecting Meat and Meat Products (Hormones*), complaint by the US and Canada[212], a panel granted 'extended third parties' rights', to the USA who had already a distinct panel on the same subject[213]. The AB even found this particular practice '[e]nsuring to all parties due process of law[214]' '(*sic*)'. As mentioned above, the creativity of the AB went insofar as to erect the monstrously byzantine figure of the 'passive observers', interested parties who may be present in the hearings, but without making oral arguments or presentations[215]. These fall in two categories: that of '[v]oluntary passive observers', who apply for this status, and that of 'invited passive observers', who are invited by the DSB to attend a hearing.

As already indicated above, panels are allowed 'to seek information and technical advice from any individual or body it deems appropriate[216]'. Similarly, the Statutes of the

[210] WT/DS27.
[211] WT/DS27.
[212] WT/DS26 WT/DS48.
[213] N. Covelli; R. Sharma, 'Proposals for Reform of the WTO ... ', *opere citato*, p. 2.
[214] WT/DS48.
[215] In the matter of *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56.
[216] DSU, Art. 13.1.

ICJ read: '[T]he Court may, at any time, entrust any individual body, bureau, commission, or other organisation that it may select, with the task of carrying out an inquiry or giving an expert opinion[217]'. As mentioned above, panels similarly to courts in civil law jurisdictions and to the ICJ may rely on their own means of seeking evidence. Many US lawyers, obnubilated by the dense fog of the back-garden *Weltanschauung,* have difficulties in understanding the role of a court seeking evidence on its own and confound this with the institute of the '*amicus curiae'*, as it exists in the USA. In that country, the *amicus curiae* volunteers information to a court, without being a direct party to a suit, with a view to protecting his/its interests. Therefore, the right of a court or panel to seek information and the right for an *amicus curiae* to volunteer information as a third party are totally different things.

The DSU does not contemplate the participation of *amicus curiae* in panels. However, the AB ruled in the matter *United States – Import Prohibition of Certain Shrimp and Shrimp Products, complaint by India, Malaysia, Pakistan and Thailand*[218] that it had a 'discretionary authority' to accept *amicus curiae* participation and briefs in panels. By doing so, the AB created a norm illegally and, at the same time, usurped the rights of the Member-States of the WTO, who have reserved the rights of modifying as well as of interpreting the DSU. This situation was complicated further by the quite extraordinary authorisation given by the AB for parties in disputes to submit *amicus*' briefs as if they were the parties' own[219], which totally de-characterises the institute whilst creating a travesty of a joinder of parties.

The AB tried to expand the ruling by issuing a procedure to govern the matter of 'friend-of-court' briefs, to a very acrimonious reaction from developing countries. Developing countries argued in the DSB meeting of November 6 1998 that, according to Article IX of the Marrakesh Agreement, only the Ministerial Conference and the WTO General Council have the exclusive authority to interpret the WTO agreements. This position can also be understood on grounds that the permission of *amicus curie* in the WTO process is tantamount to allowing private parties without rights of action to have a role in the dispute settlement system, via the back door. Whilst one day conferring rights

[217] Art. 50.
[218] WT/DS58.
[219] WT/DS58

of action to legitimate private entities may be a natural development of the system, it seems eminently clear that today's rules do not allow this development, much less this bizarre concept. The General Council disallowed the initiative of the AB and advised 'extreme caution' on the matter of *amicus* briefs[220].

Technically, under the present procedural rules of the DSU, the acceptability of the institute *amicus curiae* is both unwarranted and a controversy of great proportions. Politically, it is a matter on which no consensus can be obtained at the moment among the WTO Member-States. In practice, it is a matter of fact that non-governmental organisations (NGOs) can very easily be formed and/or co-opted by vested interests and developing countries have had a very bad history of co-existence with those entities, albeit there are many, even if in minority, that enjoy well-deserved credibility. Thus, in some instances, NGOs specially co-opted have acted against the interests of developing countries in multilateral matters. Should the institute of the *amicus curiae* set roots, it is to be feared that the use of NGOs will be institutionalised by developed countries, with a view of convincing international public opinion of the merits of their positions.

The 'Burden of Proof' Question.

We have seen above how the DSU norms are a travesty of rules of evidence. Such omissions resulted *inter alia* in repeated emphasis in DSB procedures, as well as in awards, in varied elaboration on the so-called 'burden of proof' issue. In proper judicial systems, although as we have seen above not the case of the WTO dispute settlement system, principles like '*actori incumbit probatio'* are fully recognised, as well as the respective exceptions, such as '*reus in excipiendo fit actor'*. The DSU, however, authorises an exception in Article 3.8, without firstly erecting the principle. Article 3.8 establishes a presumption, 'considered *prima facie* to constitute', in favour of a 'nullification or impairment' in cases '[w]here there is an infringement of the obligations assumed under a covered agreement'.

Therefore, matters pertaining to evidence had to be decided upon by the panels and AB, again without the proper legal authority to do so. Accordingly, the principle '*actori*

[220] 'US Official Backs WTO *Amicus* Briefs as Promoting Transparency, Legitimacy' (September 19, 2002) *International Trade Reporter*, p. 1.588, 1.589.

incumbit probatio' was accepted in the matter *US – Imports of Woven Wool Shirts and Blouses from India*[221]. However, the treatment of the exceptions became more idiosyncratic. For instance, in *Indonesia – Certain Measures Affecting the Automobile Industry*[222], the decision did not recognise the developing country's exceptions as to development policies, as it should have. In the *European Communities – Measures Affecting Meat and Meat Products (Hormones)*[223], the first-instance panel innovated in the legal order by determining on a bizarre reversal of the 'burden of proof'. This was repelled in the AB, but the appellate instance could not avoid the temptation of creating its own legal theory in accepting a *prima facie* case (*sic*) as enough merit for prevalence.

The wayward and idiosyncratic movement of the DSB through the DSU's muddy rules of evidence can be evidenced by the so-called rule of collaboration, established in favour of a developed country (the USA) against a developing country (Argentina): 'Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession[224]. But the matter of course changed, when a developing country (Brazil) faced a developed country (Canada), in *Canada – Measures Affecting the Export of Civilian Aircraft, complaint by Brazil*[225], where Canada refused to collaborate with the dispute resolution system in providing detailed information on its subsidies programme, Canada Account. As a result, there was no reference in order to determine if the measure had effectively withdrawn by Canada, as decided by the AB. Brazil protested that Canada had not implemented the recommendation, but lost because it could not prove otherwise[226].

The Subjection of International to Municipal Law: The Singularity of the 'Standard of Review'.

During the negotiations of the Uruguay Round of the GATT, one of the main negotiation objectives of the USA was the intact maintenance of its unilateral arsenal, particularly the anti-dumping legislation. Thus, in the course of the talks on the draft

[221] WT/DS33.
[222] WT/DS/55.
[223] WT/DS/26.
[224] WT/DS/56.
[225] WT/DS70/R.
[226] M. Clough, 'Subsidies and the WTO Jurisprudence' (2002) *International Trade Law and Regulation*, issue 4, p. 115.

anti-dumping code, the USA dictated that the DSB should not be empowered to review the findings, rulings and determinations of its domestic international trade agencies, both in matters of fact, as well as in those of law. A specious and sophistic legal basis for this devastating blow to juridicity was found in the precedents of the US Supreme Court[227] of no relevance whatsoever to international law. A suitable diplomatic euphemism was then needed to denominate this aberration, now treated most seriously as not only a legal institute, but as a pillar of the dispute settlement system of the WTO. Somebody came up with the denomination 'standard of review'. That was good enough for the intended purposes!

Thus, with respect to matters of legal interpretation, the WTO Anti-dumping Code reads: 'the panel shall interpret the relevant provision of the Agreement in accordance with customary rules of public international law. When the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests on one of those permissible interpretations[228].' Any 'permissible interpretation' will, of course, be a permissible one. Lawyers are paid to come up with those interpretations.

In connection with the treatment of a factual determination made by a national authority, the Anti-dumping Code reads: '[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[229]'. For practical purposes, even with this appalling drafting, the meaning is clear to the effect that the dispute settlement system is to defer to the domestic anti-dumping authority.

As a result, the dispute settlement mechanism is prevented from examining both basis aspects of litigation: the matters of fact and law in anti-dumping cases. Furthermore, it should defer to the national authorities and refrain from analysing *de novo* a question already decided. As very aptly put by Pierre Pescatore, '[T]he consideration of these

[227] The so-called '*Chevron Doctrine*'. *Chevron USA vs. National Resources Defense Council. 467 US 837* (1984)
[228] Art. 17.6 (ii)
[229] Art. 17.6. (i).

factors reveals the true significance of the rule of Article 17.6 (dumping), which is a blatant derogation not only to the standard of objectivity, but also to the equality of the parties to a dispute, as the provision just quoted is designed to favour *a priori*, in case of pretended dumping, protectionism against free trade ...[230]'. The standard of review principle does not apply to subsidies or to safeguards, even if some hegemonic trade partners do not seem very happy with this limitation.

The disparate institute of the 'standard of review' is not, however, without its defenders, to be found amongst those who believe that the dispute settlement mechanism of the WTO should maintain a more 'diplomatic' than a legal nature. The renowned US Professor, John H. Jackson, for instance, has argued that '[I]ndeed, perhaps all that is required is that panels (including appellate panels) perceive and show sensitivity towards the issues involved when an international body reviews the legal appropriateness of national government authorities' actions. In this connection, panels should keep the relevant purposes, strengths and limitations of their institution in mind[231]'. Professor Jackson then goes on to remind us of the facts of life of raw power when he warns: 'More generally, panels should keep in mind that a broad-based, multilateral, international institution must contend with a wide variety of legal, political and cultural values, which counsel in favour of caution towards interpreting treaty obligations in a way that may be appropriate to one society but not to other participants[232]'.

As in so many other areas, attempts have been made by both the EU and the USA to extend, via the dispute settlement system, the scope of the hapless dispositions. That occurred in the case *US – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*[233] *complaint by Costa Rica*, in which the USA tried, with success, to expand the standard of review criterion to safeguards, even if it lost the case itself. The EU sought to use the expanded argument in the *European Communities – Measures Affecting Meat and Meat Products (Hormones)*[234]. As usual, panels had treated the matter in the usual wayward approach. In *United States – Restrictions on Imports of Cotton and Man-Made*

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[230] P. Pescatore, 'Free World Trade and the European.....', *opere citato*, p. 17.
[231] J. H. Jackson, *The Jurisprudence of the GATT and the WTO* (Cambridge University Press, United Kingdom, 2000), p. 160.
[232] J. H. Jackson, *The Jurisprudence of GATT and the WTO*, *opere citato*, p. 160.
[233] WT/DS24/R.
[234] WT/DS26.

Fibre Underwear[235], a case brought by Costa Rica, a country with a small population and a very small participation in international trade, against the USA, the panel found in favour of Costa Rica, but established criteria for the 'objective assessment of facts': (a) verification on whether the national authorities had examined all relevant facts before them, including facts which might detract from their determination; (b) whether adequate explanation had been provided of how the facts as a whole supported the determination; and (c) whether the determination made was consistent with the Member's international obligations.

With the precedent conveniently established in favour of a small economy, then it was ready to be used against substantial interests in other developing countries. Thus, in *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*[236], for instance the AB decided against Argentina, and in favour of the USA, establishing certain criteria for the objective review of the matter at stake not found in Article 11 of the DSU.

Is it Remand Alone that is Missing?

As mentioned above, the dispute settlement system does not contemplate the power of the AB to remand a case to the panel that heard it originally, but rather only allows the AB to uphold, modify or reserve the ruling of first instance[237]. On the other hand, the DSU does not explicitly disallow the remand authority. However, the remand authority requires complementary procedural rules, without which the mechanism is not feasible. In the case of the WTO, in particular, a major problem would have to deal with the stark reality that the panel of first instance, because of its non-permanent and *ad-hoc* basis, will not probably be available for the AB to remand a case to it, should the situation arise. It may never be available, in its original format. Then, how to deal with the situation? There are no rules in the DSU for the establishment of a new panel to handle a remand case from the AB. Therefore, the remand of a case is not feasible in the dispute settlement system of the WTO.

[235] WR/DS24.
[236] WT/DS56.
[237] DSU Art. 17.3.

Remand authority would be of fundamental importance to deal with matters of law at large, but particularly with respect to questions of fact, in view of the enormous omissions of the system in the area of evidence, as already observed. A noteworthy case to illustrate the multiple failures of the system, compounded with the matter of remand authority is *United States – Standards for Reformulated and Conventional Gasoline*, complaints by Venezuela[238] and Brazil[239]. This case dealt with the discrimination imposed by the US to foreign refiners within the ambit of its 1990 Clean Air Act, as regulated by the US Environmental Protection Agency (EPA).

Venezuela and Brazil argued a violation of the Agreement on Technical Barriers to Trade (TBT Agreement) by the USA, in view of the discriminatory regulatory standards of the EPA. On the other hand, the USA argued the exception of Article XX (g) of GATT 1947, to the effect that nothing in the multilateral legal order shall be construed to prevent the adoption or enforcement of measures '[r]elating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The panel of first instance, based on the appalling concept of 'judicial economy', failed to examine the argument of a violation to the TBT Agreement.

The panel, however, decided that the measure at stake did not qualify for the exception of Article XX (g). The USA appealed on the Article XX (g) ruling. Ineptly, Brazil and Venezuela failed to appeal on the TBT argument. The AB, on its turn, failed to remand the matter to the first instance panel to decide on the TBT argument and chose instead to uphold the first instance panel's decision, albeit on totally different grounds. Brazil and Venezuela hailed a theoretical victory to their respective internal markets. However, the USTR presented the decision to her legislators in a different, albeit more realistic light: '[I]n that case, the WTO Appellate Body took a broad view of the WTO's exception for conservation measures, thus affirming that clean air is an exhaustible natural resource covered by that exception. The WTO ruling recognised the U.S. right to impose special enforcement requirements on foreign refiners that sought treatment equivalent to U.S. refiners. The ability of the United States to achieve the environmental objective of that regulation was never in question, and EPA was able to issue a revised regulation that

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[238] WT/DS2.

[239] WT/DS2.

fully met its commitment to protect health and the environment while meeting U.S. obligations under the WTO. No changes were made to the Clean Air Act[240]'.

In related matters of error of law or fact, the AB took different views. Accordingly, in *United States – Measures Affecting Imports of Woven Wool Shirts from India*[241], the AB found that '[t]he panel needs only address those claims which must be addressed in order to resolve the matter in issue in the dispute'. We must not forget, at this point, that this inability to remand a case was at least the ostensive reason for the development of the 'judicial economy' concept or the institutionalisation of the *déni de justice* in the dispute settlement system of the WTO.

Compliance and Implementation

In the case Brazil – Aircraft[242], Canada was authorised to suspend concessions to Brazil in a very large amount, following Brazil's failure to withdraw WTO inconsistent measures in the financing of external sales. Because the amount was much superior than the bilateral current of trade could absorb without a major distortion, Canada chose not to implement the retaliation. Canada opted instead for direct illegal subsidies of its own to its aeronautical industry when facing the competition of its Brazilian competitor, i.e., its own idiosyncratic retaliation. That prompted another panel established by Brazil against Canada, Canada – Aircraft[243], in which Brazil prevailed. There again, the bilateral current of trade could not absorb the amount of the retaliation and Brazil too has failed to implement it. This serious sequence of unimplemented awards exposed the failures of the relief structure of the WTO, particularly if one considers that the matters at stake had at the time the highest value of any brought before the DSB.

Those, however, were not isolated instances. There were very serious issues of implementation in *United States - Anti-dumping Act of 1916, complaint by the EC*[244] *and Japan*[245]; in *Canada - Measures Affecting the Importation of Milk and the Exportation of*

[240] *Testimony of Ambassador Charlene Barshefsky*, 'U.S. Interests and Experience in the WTO Dispute Settlement System', *opere citato*, p. 8.
[241] WT/DS33.
[242] WT/DS46/ARB.
[243] WT/DS/70.
[244] WT/DS/136/15.
[245] WT/DS162/1

Diary Products, complaint by New Zealand[246]; in *United States – Tax Treatment for 'Foreign Sales Corporations' (FSC), complaint by the EC*[247]; in *Australia – Measures Affecting the Importation of Salmon, complaint by Canada*[248]; in *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, complaint by the US* [249]; in *United States – Section 110(5) of the US Copyright Act, complaint by the EC*[250], among others. In most of them of the cases before the DSB at present, there are issues of implementation. In the recent AB decision in the matter *United States – Continued Dumping and Subsidies Offset Act of 2000, complaint by Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea and Thailand*, when the AB found against the Byrd amendment[251], for instance, the US advised that it will seek to comply with the ruling without repealing the illegal act[252]. Accordingly, there is a growing risk of the multilateral trade system deteriorating into unilateral sanctions unwarranted by international law.

A particularly extraordinary aberration, in a system fecund of them, occurred in the case *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, brought by the USA, in which a panel found that certain subsidies granted by Australia to its automotive leather industry were prohibited by the relevant WTO treaties and ordered the Australian government to require the recipients of the subsidies to repay all the funds illegally received[253]. As we saw earlier, private parties neither have rights of action nor are subjects of the dispute settlement system of the WTO and thus the Australian company in question was not a party to this particular panel.

In addition, as we saw above, the system is not self-executing. Execution of a direct order would be against the compliance rules of the WTO and execution against a company who was not and could not be a party is sheer lunacy. Speaking at the Feb. 11, 2002 meeting of the DSB, representatives from Australia, Brazil, Canada, Japan and Malaysia all said the decision went beyond WTO and international law. In typical diplomatic

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[246] WT/DS113.
[247] WT/DS108/AB.
[248] WT/DS18.
[249] WT/DS126.
[250] WT/DS160.
[251] WT/DS217.
[252] 'Appellate Panel Upholds WTO Decision against Byrd Amendment; EU Seeks Repeal' (volume 20) *International Trade Reporter*, number 4, p. 188.
[253] D. Moulis; B. O'Donnel, 'Does "Withdraw the Subsidy" Mean "Repay the Subsidy"? The Implications of the Howe Leather Case for Firms in Receipt of Government Subsidies' (2000) *International Trade Law and Regulation*, issue 5, p. 168.

understatement, the Japanese representative declared '[w]e seriously doubt if the panel's interpretation is the best solution for this case[254]'.

In the matter *United States – Sections 301 – 310 of the Trade Act of 1974*[255], a case brought by the EU, the most devastating unilateral arsenal was put before the dispute settlement system of the WTO. A great international controversy ensued when a momentous decision was proffered by a panel to the effect that, whilst the US law may be in violation of the WTO treaties, the system should be amply satisfied by the 'assurances' given by the administration of that country consisting of promises of not applying the respective measures[256].

Commenting on this ill fated decision, Bhagirath Lal Das, former head of the India mission to the GATT well observed that '[T]he panel found that this provision of the US trade law was not in accordance with the WTO agreements. Yet, it did not suggest corrective action because it took note of the fact that the US administration had given an undertaking that it would not use this provision of the law in contravention of the obligations under the WTO. The Marrakesh Agreement Establishing the WTO clearly lays down in Article XVI.4 that 'each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'. Accordingly, the countries were required to amend their laws, regulations and administrative procedures before 1 January 1995, when they became Members of the WTO. As such, even if the administration gives an undertaking to use a law in a particular manner, there is no diminution in the obligations as the very existence of such a law is in violation of this obligation[257].'

It is hardly surprising, however, that many of the proposals for the reform of the dispute resolution mechanism of the WTO address the issue of relief, compliance, enforcement and retaliation[258]. In its proposal for the reform of the DSU, Mexico claimed that it could take up to three years before a complainant could obtain compensation or

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[254] 'Countries Blast Panel Ruling on Australian Leather Subsidies' (volume 17) *International Trade Reporter*, number 7, p. 259.

[255] WT/DS152/1.

[256] B.Lal Das, 'WTO's Defective Dispute Settlement Process' (July 6, 2000) *The Hindu*, New Delhi.

[257] B. Lal Das, 'Preface' in C. Raghavan, *The World Trade Organization and its …*, *opere citato*.

[258] See, for instance, 'Flurry of Negotiating Proposals Signal Push on WTO Trade Dispute Reform Talks' (volume 20, January 3, 2003) *International Trade Reporter*, number 5, p. 208.

apply retaliation in connection with a DSB finding. '[I]t estimates the average value of trade lost while a case winds its way through the dispute settlement process close to US$ 370 million per case[259].' Accordingly, Mexico has proposed that WTO panels should have the authority to establish, via an interim ruling, a level of retaliation to be applied against the offending or discomfited party. The systemic problem with implementation and relief within the DSU is such that the Mexican proposed cure would be markedly insufficient.

Section 5
THE REFORM OF THE DISPUTE SETTLEMENT SYSTEM OF THE WTO

Scope

Most of the structural failures and operational vices of the dispute settlement system of the WTO, as discussed above, were already apparent to most observers by the date of the mandatory review of the system, to have taken place by the end of 1998. However, some of the main trade partners were not yet fully convinced of what particularly had to change. Thus, by the end of 1998, Japan was, not surprisingly, the only QUAD (USA, EU, Japan and Canada) country to have submitted a proposal for the reform of the DSU. On the other hand, a few diplomats have, to the stupefaction of most observers, extolled the attributes of the workings of the dispute settlement system of the WTO by calling it not only a 'success story' '(*sic*)', but also a great example of contribution to international public law[260].

Even if some developing countries submitted their proposals for review, the prevalent attitude was for a postponement of the whole process until the end of 1999. When that failed, a statement for the reform consisting of improvements and clarifications of the DSU was included in the Doha Ministerial Declaration[261] establishing a deadline of May 31, 2003[262], which was not met. This time, many countries, both developed and developing submitted their proposals, including the USA, EU, Japan, Canada, Mexico, Chile, China, Australia, Ecuador, South Korea, Taiwan and Thailand. Some other parties

[259] 'Mexico Seeks to Force "Prompt Compliance" with Dispute Settlement Rulings' (November/December 2002) *Bridges*, year 6, number 8, p. 15.
[260] Celso Lafer, for instance. See C. Lafer, *A OMC e a Regulamentação do Comércio Internacional: Uma Visão Brasileira* (Livraria do Advogado Editora, Porto Alegre, 1998), p. 151.
[261] Adopted on November 14, 2001.
[262] Art. 30 of the Doha Ministerial Declaration (November 14, 2001).

submitting suggestions were the Africa Group of Countries and the Group of Least Developed Countries (LDCs). These negotiations on the reform of the DSU are exempt from the single undertaking pact covering the other areas[263]. This means that an agreement on the reform of the DSU may be obtained independently of and before the other sundry matters under discussion within the ambit of the Doha Round.

The suggestions for the reform of the DSU presented by the Member-States were so voluminous that only a compilation prepared by the ubiquitous Secretariat resulted in a short version with 77 pages calling for changes in all of the 24 articles and 4 appendixes of the DSU! The proposals also addressed many of the omissions of the dispute settlement mechanism of the WTO. The reform became the reconstruction of a system most thoroughly compromised by its many vices and defects that caused its ultimate disrepute. Unfortunately, the operational disaster of the dispute settlement system of the WTO led many developing countries to despondency with respect to the merits of a proper judicial structure for the resolution of disputes, in accordance with international law.

Such developing countries had believed the propaganda to the effect that WTO's mechanism was 'rules' oriented' and confounded the specious idiosyncratic legal structure of the DSU with a proper judicial one. Thus, many are now favouring a return to a more strict diplomatic process in the vain hope that this route will accord a better treatment. For instance, LDCs criticised AB decisions for having displayed '[e]xcessively sanitised concern with legalisms, often to the detriment of the evolution of development-friendly jurisprudence[264]'.

The broad spectrum of the proposals made covering the entirety of the current regulation of the dispute resolution system of the WTO should not belie the fact that they are desultory, disconnected and often contradictory, because they are presented by a number of different countries with diverse expectations. The areas covered by the proposals of the Member-States for the reform of the DSU are basically 7:

(a) Consultations;

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[263] Art. 47 of the Doha Ministerial Declaration.

[264] 'Developing Countries Propose Many Changes to the WTO's Dispute Settlement Rules' (October 2002) *Bridges*, year 6, number 7, p. 17.

(b) Panel formation and procedures;

(c) AB procedures;

(d) Implementation and relief;

(e) ‘Case law’;

(f) Developing countries; and

(g) New Treatment for Third Parties and *Amicus Curiae*.

Reform on Consultations

With respect to consultations, proposals have been made with a view to broadening the scope of the institute *ratione personae*, by means of allowing a wider range of interested parties in the mechanism. In addition, the suggestions have been made as to the deportment and discipline of the parties during the respective procedures. A modest attempt at greater transparency has been proposed with respect to the timely communication of a settlement at consultations to the DSB.

India proposed a very interesting suggestion to the effect that, when a developed country consults with a developing country on a given matter, it should indicate to the latter how it took into account the particular problems and interests of the developing Member-State concerned. If the matter goes to arbitration, this topic should become a matter of record and the respective panel should make a ruling on the issue[265].

Reform on Panel Formation and Procedures

In connection with panel formation and proceedings, many proposals have been made, starting with the transformation of the first instance arbitration body into a

[265] World Trade Organization. India’s Proposal (TN/DS/W/47).

permanent one, rather than an *ad hoc* panel, as it is currently structured. This change has been endorsed by, among others, Canada and the EU, and is quite important in the elimination of many of the current operational vices of the system, as seen above. Chile and the USA tried in their joint proposal to achieve this same objective by inserting a mechanism to ensure that members of panels have appropriate expertise to appreciate the issues presented in a dispute. The EU also proposed a set of rules on conflict of interests within the DSB, which is another initiative to be highly commended[266].

Norms have been proposed in order to allow and regulate the participation of independent lawyers in the dispute settlement system, which are much needed. Some rules as to evidence have also been suggested, including a chronology for the presentation and filing of documents and apposite material. In the joint contribution made by Chile and the USA[267], proposals were put forward for the recognition of the wayward institute of 'judicial economy'. Chile and the US also proposed that a set of rules of interpretation of WTO agreements be created, acknowledging the inconsistency of the decisions proffered by the system since its inception.

Furthermore, still with respect to panel formation and proceedings, proposals to permit counterclaims and to clarify the issues of multiple parties and notices of appeal have been made. Very importantly, the USA has advocated greater publicity in the acts and workings of the dispute settlement system of the WTO, including the permission for public observers to participate in all meetings, although those portions dealing with confidential information should be excluded from this rule. In addition, the USA proposed that all parties' submissions and statements not containing confidential information, as well as final panel awards should be made immediately available to the public. Canada endorsed this suggestion and added that parties providing confidential information would be required to provide edited versions of their filings that could be made available to the public.

Reform of AB Procedures

[266] World Trade Organization. European Communities' Proposal (TN/DS/W/38).
[267] World Trade Organization. Chile and United States' Proposal (TN/DS/W/52).

India proposed to limit the term of AB members to a non-renewable six-year term, to which the EU has recently concurred. The EU and others also proposed a much necessary remand authority and adequate procedures thereof, with a view to ensuring that proceedings did not drag on indefinitely. The remand authority is to be used when the AB finds that the first instance panel failed to make adequate findings on facts. Of course, as we saw above, this modification by itself would be of difficult implementation if the structure of panels of first instance is not transformed from and *ad hoc* to a permanent basis.

Reform of Implementation and Relief

This is one area of the DSU that received justifiably most proposals for reform. The frustration many countries experience with the appalling shortcomings of the compliance system of the DSU led Mexico to propose granting WTO panels authority to determine the level of retaliation that may be imposed on a Member-State for non-compliance, once that panel had issued an interim ruling on the merits of the case[268]. The improvement of the mechanisms for the surveillance of the implementation of recommendations and rulings has also been suggested. The EU has made an effort to clarify when a Member-State may initiate proceedings to secure retaliation. A proposal has also been made to the effect that cross-retaliation should be reconsidered as this provision is more likely to work against developing countries. Cross-retaliation occurs when a retaliation is authorised in one sector (goods) for compensation for a defeat in another area (services, for instance).

The Africa Group of countries, supported by China, called for financial compensation to be provided to members affected by trade measures later found to be in violation of WTO norms, and the application of 'collective sanctions' by all developing countries against a developed country member applying illegal measures against developing countries. The system was devised because often developing countries, individually, do not have a sufficient current of trade to impose DSU retaliations or are intimidated to do so. Professor Hu Wei observed that the suggestion, if implemented, 'could resolve the problem of availability in the WTO retaliation system because the economic strength of individual States is not important any more under this "collective

[268] 'Mexico Seeks to Force "Prompt Compliance" with Dispute Settlement Rulings', *opere citato*, p. 15.

retaliation system"[269]'. On the other hand, it has been noted that this initiative is unlikely to be accepted and would simply spread the economic damage to other poor nations[270]. If it is indeed refused, it would be so for other much more practical grounds than causing damages to poor countries.

On the other hand, the EU reiterated its demand for a specific prohibition against the so-called 'carousel' retaliation, which is the listing by the USA of potential goods and countries for removal of concessions, as this brings uncertainty to the business climate and thus becomes a sanction in itself.

Elimination of the 'Case Law' Approach

A number of developing countries, led by India, have proposed measures to ensure that the WTO panels and AB do not encroach into rights reserved to them under the WTO Agreements. Late into the revision process, the USA indicated that it would also support the initiative in order to prevent panels and the AB from imposing on national authorities obligations that are not contained in the agreements. In support of this line, the Africa Group proposed that parties to a dispute should have the right to refer questions on interpretation of WTO provisions to the General Council, before the DSB authorises retaliation in a given case[271]. This is a proposal trying to limit the effects of the quasi-judicial system with a recourse to a diplomatic last instance to be.

Brazil, on the other hand, took the opposite approach in a confused proposal in which that country suggests the application of the *stare decisis* approach to DSU disputes, via a 'fast track or an expedited procedure[272]'. This should be implemented with a view to eliminate what its mission calls a *de novo* review of a matter that is not *res judicata*. This proposition, clearly without a professional legal review, is even more puzzling if one considers the fact that the doctrine '*stare decisis'* is neither accepted nor employed in the orbit of domestic law in Brazil.

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[269] H. Wei, 'The Reconstruction of a Retaliation System under WTO', (volume 9, March 2003) *International Trade Law and Regulation*, issue 2, p. 33.
[270] 'WTO Minnows Cry Foul on Mediation', *opere citato*.
[271] 'Developing Countries Outline Priorities for Reform of WTO Dispute Procedure' (volume 19, September 19, 2002) *International Trade Reporter*, number 37, p. 1583.
[272] World Trade Organization. Brazil' s Proposal (TN/DS/W/45).

Measures Concerning Developing Countries

The clear perception by most developing countries that the dispute settlement system of the WTO is biased against them evoked a number of different proposals in this area. One of such sundry suggestions pertains to the recovery of costs, a subject of great relevance particularly to LDCs. Others relate to the matters of more time for submissions, permission of cross-retaliation against developed countries, and the creation mechanisms for legal assistance and for the monitoring of the application of the special and differential treatment provisions in the DSU. In this latter area, China commented that: '[I]n particular, the current DSU lacks general and horizontal provisions applicable to all developing-country Members, which is different from other WTO agreements[273]'.

China also expressed a position in favour of allowing developing countries the right to seek cash compensation from developed countries, in support of the stance by the Africa Group of countries. This should be permitted in the cases where developed countries fail to comply with an award given by the dispute settlement system of the WTO, since the imposition of sanctions is an ineffectual option for many developing countries. Others have proposed norms in line with abuse of process and vexatious litigation rules of municipal law, with a view to limiting the use of the system for the harassment of developing countries.

New Treatment for Third Parties and *Amicus Curiae*

As we saw above, the matter of third parties in the DSU needs major improvements in the treatment of the question of joinders. Thus, it is not surprising that there have been proposals for the institution of a proper system with a view to allow a *tertius* a legal standing equal to the litigating parties, under certain conditions. A proposal has also been made to allow all parties to a customs union to participate fully, should they so wish, in the dispute settlement mechanism of the WTO, in matters having to do with a common trade policy of that customs union.

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[273] 'Flurry of Negotiating Proposals Signals Push on WTO Trade Dispute Reform Talks', *opere citato*, p. 209.

Many proposals have been made by developing countries to disallow the AB rule to permit unsolicited submissions, the so-called *amicus curiae* briefs, to the dispute settlement system of the WTO. In accordance with such suggestions, only the parties to a dispute would have the right to file briefings in the proceedings of a given case. The Africa Group proposed sensibly that any co-operation to be offered by NGOs, or other non-parties to a panel, should be forwarded to the parties in a dispute, who can then decide whether to incorporate it in their submissions. Accordingly, the Like-minded Group, formed by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, indicated that whilst 'there is no need for making any provision for accepting *amicus curiae* briefs, it would be necessary and useful to address this issue during the review[274]'. This could be done through a clarification to the effect that any information to be filed should be what is specifically sought by the panels and that unsolicited information should not be taken into consideration.

The US, in its first and individual communication[275], unsurprisingly, not only differed but also took the opposing view, in a trenchant support of the *amicus curiae* mechanism developed by the AB, and proposed that it should be incorporated into the body of the DSU. This position enjoys ample support amongst legal scholars, trade commentators and observers at large in the USA and had already been publicly defended both by the USTR and by the then President of that country, Mr. Bill Clinton.

Some Concluding Remarks on the Reform of the DSU

As already observed at the beginning of this Section, the utter discredit of the dispute settlement system of the WTO prompted proposals for reform of a very broad nature, involving all of the articles of the DSU and its Annexes. However, as we have already commented, the proposals for reform made by the Member-States are desultory, disconnected and often contradictory, as it becomes eminently clear in the case of *amicus curiae* discussed above. In addition, there are conflicts in many other areas, both in terms of concepts, as well as in implementation detail or even drafting. On the other hand many important omissions were not addressed in the suggestions made by the Member-States.

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[274] 'Developing Countries Propose Many Changes …', *opere citato*, p. 17.
[275] World Trade Organization. United States' Proposal (TN/DS/W/13).

Thus, the proposals presented by the Member-States address many important points, but by no means all of them and very often in a inept legal approach. The suggestions presented lacked the appropriate legal methodology and were drafted by diplomats using terms such as ‘front loading’, ‘mandatory law’, ‘discretionary law’, ‘hit and run’, ‘fast track’, ‘playing with the time periods’, ‘stress of the system’, etc. Most of the suggestions presented had very serious legal drafting problems that will undoubtedly result in more critical results, if adopted in those terms. None of the Member-States, not even developed countries with ample resources, forwarded a substantial legal study for a complete review. Extensive published contributions made by academics, of much better quality even if also understandably inconsistent, were largely ignored.

Furthermore, the system chosen for the reform of the dispute settlement system of the WTO allows for the preparation of a draft under the responsibility of the chairman of the DSB, based on the suggestions presented. However, how will be conflicting interests be conciliated? In addition, the ubiquitous Legal Affairs Division of the Secretariat, source of so many of the problems of the system, will be in charge of the drafting of a proposal. What credibility does the institution have for this task? What legal expertise does it have? What are the conflict of interests of their members? These are queries that entail difficult answers and permit us to prognosticate an inadequate draft and a difficult review of the DSU. The end results are certainly going to fall very short of expectations but, if the dispute settlement system of the WTO fails to move towards a judicial structure, its days are counted for no arbitration mechanism can possibly survive in disrepute.