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THE THREAT POSED BY THE WORLD TRADE ORGANIZATION TO DEVELOPING COUNTRIES.[1]

by Durval de Noronha Goyos jr.[2]

1.- INTRODUCTION.

1.1.- Towards the end of the Uruguay Round of the General Agreement on Tariffs and Trade[3], in 1993, an ominous work[4] by the World Bank indicated that 64% of the benefits of the Round would benefit developed countries against only 36% favouring

[1] Basic text of the presentation made at the Latin American Centre of the UNISA – University of South Africa, in Pretoria, South Africa, on March 20, 2001 and for the LLM students of the University of Cape Town, in Cape Town, South Africa, on March 22, 2001.

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[3] Launched in Punta del Este, Uruguay, in September 1986, by the then 72 signatories of GATT. The WTO has today 140 members.

[4] See "Trade Liberalisation: Global Economic Implications.", by Ian Goldin et al, 1993, The World Bank and the OECD.

the developing nations. In fact, during the last two years of the negotiations, developing countries practically ceased demanding concessions on the part of their developed trade partners and proceeded with a frenzy of unilateral liberalisation before the golden idol of the ideology of globalisation. Developed countries, with justifiable glee, reaped the profits. They had secured major tariff reductions on the part of the developing countries, as well as the liberalisation of the services' sectors, which was a major strategic objective, together with the inclusion of new treaties regulating matters such as investments and intellectual property. Whilst these major concessions were obtained, developed countries had ensured to forego in practice any concessions in the most traditional areas of trade: agriculture and textiles.[5]

1.2.- The conclusion of the Round was brought about by the execution of the so-called Treaties of the Uruguay Round, which provided "inter alia" for the creation of the World Trade Organization (WTO), in 1995. The period that ensued was characterised by growing prosperity in the developed countries and by numerous crisis and a decreasing participation of developing countries in world trade. The volume of subsidies practiced by developed countries increased substantially, ensuring the dissemination of misery to many, in favour of

[5] For a history of the negotiations of the Uruguay Round and the matter of agricultural subsidies, see the bi-lingual "GATT, MERCOSUL & NAFTA", by Durval de Noronha Goyos jr., Legal Observer, Sao Paulo/Miami, 2nd edition, 1996.

prosperity to a few. The creation of the dispute resolution system of the WTO, which had been hailed as the promoter of juridicity and the rule of law in international trade relations, and accepted by developing nations as a hope in order to neutralise the unilateral measures directed against them mostly, but by no means solely, by the United States of America (USA), has proved to have become yet another instrument to enhance the hegemonic desires of developed countries.

1.3.- Today, I propose to analyse how the dispute resolution system of the WTO, in six years of operations, has become a travesty of justice and an effective means of subjugation of developing countries, against whom the system has proven to be directed. The perception of this fact by the international public opinion, has contributed enormously for the dramatic erosion of credibility of the WTO. Accordingly, I would like to review today the operational defects of the dispute resolution system of the WTO and how they were utilised for establishing the prevalence of the interests of developed countries against developing nations. After this examination, I would like to give you an overview of the system in action, demonstrating how developing nations lost approximately 90% of the cases they disputed with developed countries. Lastly, I would like to show to you how the system has been successfully utilised by developed countries in order to derogate rights deriving from other international treaties and to usurp members' rights and

create new precedents and obligations not allowed by international law.

1.4.- Thus, the presentation has been divided in the following manner:

i) This Introduction;

ii) Operational Defects of the Dispute Resolution System of the WTO;

iii) Overview of the System in Action from a Developing Country Perspective;

iv) The System as an Instrument of Usurpation of Rights of Developing Countries; and

v) Conclusions.

2.- OPERATIONAL DEFECTS OF THE DISPUTE RESOLUTION SYSTEM OF THE WTO.

2.1.- The initial step in the dispute resolution system (DRS) of the WTO is given by the formal request of consultations from one member to another[6]. This request is advised to the Dispute Resolution Body (DRB) of the WTO. If the consultations fail to settle a dispute within 60 days, the complaining party may request the establishment of a panel. The right of action is reserved for the sovereign state member of the WTO.

[6] See Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Accordingly, physical or juridical persons of private law are not subject to the jurisdiction of the DRB. Once requested, the DRS will automatically establish an arbitration panel[7], unless there is a consensus against it, which reversed the rule applicable to the GATT.

2.2.- Any member state which is a third interested party may be heard by the panel, without however being a party to the dispute[8], as disgracefully, active joinder of plaintiffs is only allowed when the complaint is jointly filed. The joinder of defendants is totally disallowed. This is a major shortcoming of the system, because it allows for different panels to analyse related matters and possibly enact different awards. This imperfection can be further aggravated by the fact that, in the DRS, the terms of reference[9] of a dispute are not given by plaintiff, but the secretariat of the WTO through its legal division. Therefore, it could happen that identical cases brought by different member states against one single country be transformed into different matters, brought to different panels and even draw different decisions.[10]

2.3.- Similarly, the system does not permit counterclaims or cross-complaints, which may result in two different panels, with

[7] See Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[8] Accordingly, third parties may not appeal, as per Article 17 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[9] See Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[10] For a complete analysis of the procedural aspects of the DRS, see the bi-lingual “Essays on International Law”, by Durval de Noronha Goyos jr, Legal Observer, Sao Paulo/Miami, 2000.

the same parties and different terms of reference for the same basic issue at stake with disparate decisions. The possibilities of an occurrence of such a situation are not remote, as the dispute involving Brazil and Canada over subsidies given to the respective aeronautical industries has proven with eminently disastrous results for Brazil and for the credibility of the system. To complicate matters further, semantics present an enormous problem in the system, as it eschewed established legal terminology in favour of very imprecise argot. For instance, "practice" means jurisprudence; "submission" means petition; complaint; response and rebutter; "recommendation" means decision; "report" means award; "substantive meeting" means both hearing and session; and, among several aberrations too numerous to itemise here, there is even room for "oral hearings".

2.4.- Because all panel deliberations are confidential[11], as well as petitions and briefings filed by the parties, the system fails dramatically in terms of governance and presents formidable obstacles to democratic controls, within the member states, of the actions taken by their representatives before the WTO. Therefore, errors and omissions by such representatives are not easily identifiable, which precludes democratic control and denies assessment of legal responsibility under municipal law. In order to further complicate matters, the WTO proceedings do not have

[11] See item 3 of Annex 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

a physical file of the case, as in any reliable judiciary or arbitration case anywhere in the world.

2.5.- Panels will establish time periods for filing of petitions and briefs on a case by case basis[12]. This will often allow for different treatments to parties in a dispute, face each other, as well as before similar situations applicable to other parties. The awards are drafted without the presence of the parties[13]. Individual opinions of arbitrators are anonymous and, whenever dissenting, are excluded from the award[14]. This situation serves to mask the true and correct deliberations of the panel and present an unfair disadvantage for the defeated party, with respect to the merits and changes of an eventual appeal.

2.6.- A grave shortcoming of the system keenly and very ably explored by developed countries, in detriment of and with disastrous consequences for developing nations, is the failure to accept deliberation on preliminary issues. The most common preliminary issue denied jurisdiction by the DRS has to do with conflict of treaties, as developed countries have attempted, successfully I may add, to derogate rights of developing nations deriving from other bodies of international law, such as the Chart of the United Nations; the International Monetary Fund (IMF) Agreement; and several human rights and

[12] See Article 12 (6) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[13] See Article 14 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[14] See Article 14 (3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

health treaties. The first case before the WTO to renege rights deriving from other treaty was the won brought by the USA against India on the matter of quantitative import restrictions. With the precedent established, Brazil was also denied IMF rights in the panel brought by Canada in connection with interest rates equalisation for the aeronautical industry. The next case to address conflict of treaties, if Brazil presents the argument, will be the one brought by the USA on patent protection, with a view of demolishing Brazil's successful aids programme.

2.7.- Panels are formed by three or five members[15]. Arbitrators shall be well-qualified governmental or non-governmental individuals[16], who shall be selected with a view to ensuring independence of the members[17]. Citizens of members involved in a dispute will not be able to serve as arbitrators[18]. The secretariat of the WTO maintains a roster of arbitrators[19]. When a dispute is between a developing country member and a developed country, the panel shall, if the developing country member so requests, include at least one panelist from a developing country[20]. In practice, however, the arbitrators are chosen by the legal division of the secretariat of the WTO according to criteria not subject to transparence,

[15] See Article 9 (5) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[16] See Article 8 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[17] See Article 8 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[18] See Article 8 (3) of the Understanding on Rules and Procedures Governing the Settement of Disputes.
[19] See Article 8 (4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[20] See Article 8 (11) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

governance and often in contradiction with the diversity requirement of the treaty.

2.8- There is a requirement of automaticity for the adoption of the awards[21], unless one or both of the parties appeal the decision. The DRS has a standing appellate body (AB), with 7 arbitrators and each appellate panel will have 3 panelists, which is denominated a division. There are no provisions for session "en banc" of the AB. The maximum period for a decision is 60 days, which in practice has put enormous constrains on the system. In accordance with the treaty[22], the AB should address each of the legal issues raised in the appeal. Appellate awards are also subject to automatic adoption[23].

2.9.- WTO arbitrators of both first instance and of appellate level function on a "ad-hoc" basis, therefore on a non permanent situation. Frequently, they do not reside in Geneva, Switzerland, where the headquarters of the WTO are situated, and they do not have any independent or own infra-structure of support for their activities. Therefore, they have to rely on the technical support and assistance on the "legal, historical and procedural aspects of the matters dealt with"[24] by the secretariat of the WTO. This situation has caused serious distortions in the DRS and grave

[21] See Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[22] Se Article 17 (6 and 12) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[23] See Article 17 (14) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
[24] See Article 27 (1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

accusations over the actual role played by the secretariat, which we will see later on in the course of this presentation.

3.- OVERVIEW OF THE SYSTEM IN ACTION FROM A DEVELOPING COUNTRY PERSPECTIVE.

3.1.- In the six years since the creation of the WTO on January 1, 1995, 220 complaints[25] were notified by the member states to the secretariat, the majority of which, 116, were resolved one way or another during the phase of consultations; 51 have been object of definitive decisions by the DRS; 39 have been settled by the parties or are inactive; and 14 cases are presently under way on first instance or appellate level. In accordance with the WTO's annual report for the year 2000, "Developed countries filed about three quarters of the complaints under the Dispute Settlement Understanding (DSU), and were respondent in the same share of complaints. Developing countries filed the remaining one quarter of complaints, against developed countries in over 50% of the complaints and the rest against other developing countries. The USA and the European Union (EU) are the most frequent complainants to the WTO..."[26]

3.2.- What the WTO's annual report miserably and unjustifiably fails to do is an analysis of the results of the cases subjected to awards of the DRS and of the situation of

[25] Figures updated as of January 15, 2001.
[26] Seer WTO FOCUS, December 2000, No. 50, page 6.

developing countries in the system. Of the 51 panel reports either issued or adopted by the DRS, only 3 involved developing countries against other developing countries; 17 had developed countries as plaintiffs against developing nations; 8 had developing countries as plaintiffs against developed countries as defendants; and 23 involved developed countries against developed countries. Therefore, the majority of the conflicts were set between developed and developing countries.

3.3.- Of the 8 cases developing nations had against developed countries, developing nations won 3 and lost 5. When, however, developing nations acted as defendants against developed countries as plaintiffs, developing nations lost 16 and won only one. Therefore, developing nations lost 21 out of 25 cases against developed countries, a failure rate of approximately 90 per cent! Both USA and EU, but occasionally also Japan and Canada, the so-called QUAD countries, were the greatest beneficiaries of the system. But the greatest of them all was the USA. According to the testimony of Amb. Charlene Barshefsky, former head of the United States Trade Representative (USTR) to the US Congress, the USA prevailed in virtually all of the disputes in which the country was involved. In addition, it prevailed almost always in the consultation phase of the dispute, particularly against developing countries. Ms. Barshefsky went on to compliment Congress for having made “a more effective

GATT dispute settlement system a principal US negotiating objective."[27]

3.4.- The developing countries most involved in the disputes with developed countries were Brazil, India and Korea. India always and Brazil occasionally were leaders of the developing world in multilateral trade negotiations and suffered the largest number and greatest strategic defeats of the DRS. India lost its 5 panels against developed countries, prevailing once against another developing country, Turkey, in the matter related to textiles. Its defeats included the strategic case of quantitative restrictions against the USA; shrimps against the USA; patents against the EU; pharmaceuticals against the USA; and textiles against the USA.

3.5.- On the other hand, Brazil was discomfited in two panels against Canada on incentives for the aeronautical industry, a matter of great strategic relevance, once as plaintiff and once as defendant. Brazil also lost two cases against the EU on matters involving poultry and dairy products and prevailed on one, together with Venezuela, against the USA on a matter pertaining to environmental standards for gasoline. Brazil also succumbed often in the consultations, namely on the matter of automotive policy to the USA, EU and Japan; and on import licences with the EU and import restrictions with the USA.

[27] Testimony of the USTR before the Trade Subcommission of the Senate, "US INTERESTS AND EXPERIENCES IN THE WTO DISPUTE SETTLEMENT SYSTEM", testimony of Ambassador Charlene Barshefsky, June 20, 2000.

3.6.- Korea was involved in seven panels. It settled one with the USA on the matter of semi-conductors, in which the Americans hailed victory. In the other six, Korea lost the matter of alcoholic beverages against the US and against the EU. Korea also lost a matter pertaining to dairy products against the EU and panels pertaining to beef against the US and Australia. Korea won a panel against the USA on government procurement, but the USA did not implement the award. Indonesia was involved in three panels on the strategic issue of its automotive policy and lost all of them to the USA; EU and Japan. Argentina lost the two panels it was involved, both dealing with footwear, against the EU and the USA.

3.7.- With respective to active panels yet without a final award, the confrontational nature of the struggle between developed countries against developing nations is still more pronounced. Out of 14 cases, 10 involve conflicts between developed and developing countries, of which 7 have developed countries as plaintiffs. Of the remaining, 3 pertain to conflicts between developed countries and one between developing countries. The developing countries most involved in the active panels are Argentina, Brazil and India with two panels each. Both panels involving Brazil and Argentina had very relevant strategic implications. The Philippines is a defendant on a strategic complaint by the USA on motor vehicles.

3.8.- If data of both decided and undecided panels is compounded, we will have a total of 65 cases, of which 51 were decided and 14 undecided. Of those, 35 cases (25 decided and 10 undecided), or the vast majority, pertain to conflicts between developed countries against developing nations. On the other hand, 26 cases (23 decided and 3 undecided) evolved between developed countries. Lastly, there were 4 cases (3 decided and 1 undecided) between developing countries. Thus, with less than 25% of the world trade, developing countries are involved in approximately 54% of the trade litigation, normally as defendants! If consultations are added to the tally, the percentage would be even higher! Brazil, a developing country with less than 5% of the international trade volume of the EU and of the USA is involved at present in as many consultations as those trade partners! Thus, the DRS of the WTO, after 6 years is markedly directed at the developing countries.

4.- THE SYSTEM AS AN INSTRUMENT OF USURPATION OF RIGHTS OF DEVELOPING COUNTRIES.

4.1.- We have seen how many grave imperfections there are in the legal framework of the DRS and how the system is utilised by developed countries against developing nations with

devastating effects, allowing for a winning record of approximately 90%. If the structure is faulty, it is also heavily weighed in favour of developed countries in the composition of the legal division of the secretariat, the location of the headquarters of the WTO and even in the language of the DRS, English, native of the great majority of the developed trading partners.

4.2.- The lack of transparency of the composition of the legal division of the secretariat, compounded to the enormous powers granted this bureaucracy, make the DRS a travesty of juridicity. Accordingly, the secretariat has usurped the rights of member states to choose the terms of reference of the disputes; in practice, the secretariat has been selecting the arbitrators for all disputes; the secretariat supports the works of the panels in a way that no administrative structure has ever supported the administration of justice, often drafting awards and in practice conducting “de facto” the dispute process.

4.3.- With all such systemic and idiosyncratic advantages, developed countries wasted no time in utilising the DRS of the WTO in a way to impair and, in practice, derogate rights granted developing nations by virtue of certain long standing international agreements, which had fallen out of favour with them with the end of the cold war and with the prevalence of the ideologies of liberalism and globalisation. Such “disgraced”

treaties comprise the Agreement of the IMF; agreements within the ambit of the World Intellectual Property Organisation; World Health Organisation (WHO); International Labour Organisation (ILO); United States Conference on Trade and Development (UNCTAD); amongst others.

4.4.- The DRB of the WTO complied readily and efficiently with the desires of its masters, the developed countries, on numerous occasions in the past 6 years. On at least two separate instances, the AB of the DRS decided "ultra vires", creating new obligations for the member states, which had not been contemplated in the treaties of the Uruguay Round. The first of those instances occurred in the case of Canada versus the EU on the matter of asbestos, where the AB allowed "amicus curiae" briefings, setting up apposite procedures therefor[28]. In the case pertaining to textiles brought by the USA against India, the AB decided that, contrarily to a specific disposition of the relevant agreement[29], "a panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".

4.5.- Similar aberrations occurred in the case brought by the USA against Australia on the matter of leather seats, when the DRS decided that the company recipient of the declared illegal

[28] See "Amicus Brief Storm Highlights WTO Unease with External Transparency", in BRIDGES, November-December 2000, Geneva, Switzerland.
[29] See item 2.8 and footnote 20 hereinabove.

subsidies should return the same to its national government[30]. If private companies and/or individuals are not admitted as parties to the DRS of the WTO, how can they be subject to its jurisdiction? How could the Australian government be expected to enforce this decision against the domestic company in a municipal court? In another scandalous decision favouring the USA, in a case brought by the EU, the AB decided in favour of the USA based on its promise of not applying the unilateral measures allowed by the notoriously illegal section 301 of the Trade and Commerce Act.[31]

On the matter brought by Korea against the USA on the question of government purchases, won by the USA, the AB decided that it had competence to decide on the matter of error in the negotiation of international treaties[32]. Furthermore, in the bananas case against the EU, the USA, a country that neither produces nor exports bananas, had its right of action recognised[33] and proceeded to win the dispute. In the case brought by the USA against the UE on the matter of hormones, the AB decided that the USA "had in fact a valid 'prima facie' case on the central risk issue"[34] (sic)!

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[30] For an interesting review of the case, see "Does withdraw the subsidy mean repay the subsidy? The implications of the Howe leather case for firms in receipt of government subsidies", Daniel Moulis and Benjamin O'Donnell, in International Trade Law Review issue 5, 2000.
[31] See "WTO's Defective Dispute Settlement Process", by B.L. Das, in The Hindu, New Dehli, July 6, 2000.
[32] As a result, the US hailed this victory as the recognition by the WTO of the legality of the respective domestic legislation. See " US Trade interests and..." op. cit.
[33] See " The Developing Countries and the Dispute Settlement Mechanism under the WTO" in www.southcentre.org.
[34] See "The Reconciliation of interests and the revision of the dispute resolution procedures in the framework of the WTO", by Pierre Pescatore, in Free World Trade and the European Union, edited by AP van Kappel and Wolfgang Heusel, Academy of European Law Trier, 2000.

4.6.- Two cases, in particular, marked not only a defeat of dramatic strategic proportions for developing countries, as well as an illegal derogation of rights deriving from the IMF agreement, with potential devastating economic and social consequences. The IMF agreement allows for trade and financial restrictions resulting from crisis of balance of payments. Such restrictions were expressly recognised by the Understanding on Balance of Payments Provisions of the GATT 1994. In both cases the DRS derogated those rights; the first of these matters involved the case brought by the USA against India on the question of quantitative restrictions; the second was the aeronautical dispute brought by Canada against Brazil. It is not clear why Brazil and India accepted the jurisdiction of the WTO for these matters, which involved a blatant conflict of treaties.

4.7.- The case brought by the USA against India refers to quantitative restrictions put in place by the defendant for the importation of approximately 2,700 agricultural, industrial and textiles products, which according to plaintiff were illegal in face of the relevant provisions of the Agreements on Agriculture and Import Licensing. India's defence was based on the fact that it was administering exchange controls in view of a critical situation of the balance of payments, the corollary of which in trade terms was the imposition quantitative import restrictions. The panel, which was presided by the Brazilian ambassador to

the WTO, Celso Lafer, in a scandalous decision, found "contra-legem" in favour of the USA. The decision was confirmed by the AB.

4.8.- The second case refers to alleged illegal subsidies to the Brazilian aeronautical industry built into the programme of export finance (PROEX) maintained by Brazil. According to the plaintiff, Canada, the equalisation of interest rates of PROEX, according to which the Brazilian government paid the difference between the borrowing costs of Brazil companies and those of developed country companies. This situation is also recognised by the IMF agreement, as Brazil was then a signatory of the transitory clause and administered exchange controls. The panel found in favour of Canada, with the benefit of the precedent of the case against India, and Brazil was ordered to pay concessions to Canada in the order of US$ 1,7 billion. More devastating was the fact that Brazil was left without a legal export financing programme before the multilateral regime, the only among the 8 top industrialised countries to be in this hapless situation.

4.9.- The newest attempt at the derogation of other international treaties, in addition to the relevant WTO agreement, is the recently formed panel in the case brought by the USA against Brazil on the matter of patent protection for the pharmaceutical industry. Brazil has a highly efficient programme of production of aids' antiretroviral drugs, which it manufactures

in state laboratories for distribution at no cost to the affected population. This programme reduced by 50% deaths related to AIDS and saved the country approximately US$ 500 million in hospitalisation and other medical care costs. The programme has been widely praised internationally and is based on the 1996 Brazilian law on intellectual property rights that incorporated the terms of the Agreement on Trade Related Aspects of Intellectual Property Rights, including article 31 thereof, which deals with use without authorisation of the right holder. The USA wants to prevent this programme to become a model for other developing countries in order to ensure continued high revenue for its laboratories. If the USA prevails, the secretariat will ensure that the "practice"[35] is extended to other WTO members.

5.- CONCLUSIONS

5.1.- We have seen how the operation of the WTO is effected with a view to ensure the prevalence of the hegemonic interests of developed countries over developing nations. We have covered how, under the specious mantle of rhetoric juridicity, the autos-de-fé of the DRB of the WTO lead developing nations inexorably to defeat, derogation of rights, trade exclusion, disaster and misery. We have seen how the stolid Annual Report of the WTO closes its eyes to this sad reality. However, the Director-General of the WTO has not forgotten the despondent

[35] jurisprudence

plight of the rich and powerful nations: " We must not forget that if the big guys are not doing well, neither will the small guys. We need the US, Japan and Europe going strongly...the big guys also need new markets to ward off protectionist pressures at home."[36]

5.2.- If developing countries are to stall these neo-colonialist pressures, they must work together with determination and efficiency.

[36] "The WTO: Challenges ahead", speech by Mike Moore at the National Press Club, Camberra, Australia, February 5, 2001.