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The Dispute Settlement System of the W.T.O.: Structure and Function in the Perspective of the First 10 Years

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"The Dispute Settlement System of the W.T.O.: Structure and Function in the Perspective of the First 10 Years "

Giorgio Sacerdoti*

From the GATT to the WTO. – 2. Basic features of the system. – 3. The role of the system within the WTO. – 4. The Appellate Body as a judicial body. – 5. Relations between judicial and political bodies. – 6. The first ten years of activity. – 7. The reform of the DSU. – 8. The position of private parties.

1. The dispute settlement system of the World Trade Organization (the "WTO") presents a number of innovative features within the various models of international justice existing at the turn of the millennium. Ten years after its establishment, it is worthwhile examining its key features in the light of a comparative analysis, exploring its strength and weaknesses, and highlighting aspects of general interest and possible developments.

We recall that no compulsory dispute settlement mechanism had been envisaged during the Uruguay Round, nor had been provided, after five years of negotiations, in the "Dunkel text", which was almost adopted in Brussels in 1991. It was the far reaching and interrelated commitments deriving from the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement") of 1994 and its principle of a "single undertaking" that prompted the parties to draft and adopt a system of dispute settlement, intended to be significantly more reliable than the panel mechanism provided in Article XXIII of the *General Agreement on Tariffs and Trade* (the "GATT") of 1947. The aim sought was, first of all, of an economic nature: to ensure that the market access commitments and the other undertakings mutually agreed, notably in new areas such as the *General Agreement on Trade in Services* (the "GATS") and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "TRIPS Agreement") and TRIPS, be protected and not eluded or circumvented without the possibility of sanctioning breaches effectively. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") was meant to provide this discipline by substantially reforming the GATT panel system, while retaining some of its traditional features.

The DSU is one of the agreements annexed to the Agreement establishing the WTO. It is often qualified as "horizontal" since it is applicable, in case of dispute, to all the sectoral ("vertical") agreements concluded in Marrakech as well as to the basic treaty establishing the WTO. As frequently happens in diplomatic negotiations, the new features were introduced by elaborating on the existing GATT panels procedure rather than by creating a wholly new system. This explains why in order to set up a compulsory and binding system the negotiators did not adopt the approach that would have been natural for an academic, namely that of replacing the existent mechanism with a new international court to be added to the many such bodies established in recent years within the international community. The parties to the

* Of the Board of Editors.

negotiations decided instead to retain the current system as the basis, though adding to it so many new features as to alter it so substantially that it was radically transformed. Indeed, such a way of proceeding, though not as radically, had been common during GATT's forty year life span: suffice to say that the General Agreement did not even mention the panels.

The panel system as it was operating at the end of the Uruguay Round in 1994 was the result of a practice, reflected in several decisions of GATT's Contracting Parties. The Contracting Parties which were competent to recommend a "satisfactory adjustment" of any dispute under Art. XXIII would entrust to committees of experts the assessment of the facts and their evaluation. We recall that the controversy did not necessarily involve the breach of an obligation. It could arise from an unforeseen prejudice due to a formally lawful action taken by another party, impairing a benefit expected from the operation of the agreement (*no violation complaint*), thus evidencing the prevailing underlying trade and economic concerns. In practice panels took from the outset upon themselves to assess any measure challenged from a legal point of view, although their conciliatory competence was never formally eliminated. In parallel, procedural guarantees of due process and fairness in the process were strengthened through the years.

There were several weaknesses in such a mechanism. First of all a defendant could obstruct the establishment of a panel; second panellists were not skilled as lawyers, indeed the composition of panel by diplomats and trade experts was prevailing. But the most stumbling requirement, impairing the effectiveness of the whole mechanism in bringing about the settlement of trade disputes, was the requirement, in line with GATT's general practice, that the report of a panel be adopted by consensus by all GATT's Contracting Parties in order to become binding.

Thus, the opposition of a losing party could prevent the adoption of a panel report, as it often occurred. Similarly, there was no guarantee of implementation except through recourse to trade retaliation which were difficult to apply. Distrust in the actual effectiveness of any agreed undertaking made States reluctant to agree on far reaching obligations in negotiations. Likewise, major players (notably the USA) were prompted to introduce resort to unilateral countermeasures in their trade legislation as a tool of dissuasion, pressure and sanctioning.

2. The first new feature of the dispute settlement system of the WTO concerns the very function of the mechanism, which was previously not even spelled out.¹ The aim went beyond that of ensuring the resolution of a few occasional disputes; it became the goal of safeguarding "a central element in providing security and predictability to the multilateral trading system" (Article 3.2 of the DSU). This function explains the evolution towards the legalization or "jurisdictionalisation" of the dispute settlement system that, in turn, is the mirror of the qualitative leap taken between GATT and WTO: away from a partial, incomplete framework, multilateral yet not organized, essentially "power based", relying only on negotiations, towards a "rules-based" organization. In the new system, procedural guarantees and an implementation mechanism in order to ensure compliance with the rules represent a necessary complement to the agreed substantive provisions.

¹For an overview, see The World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, (Cambridge 2004), .

Such an approach is twofold. First, it is now clear that expert dispute settlement bodies (panels, the newly established Appellate Body, as well as arbitrators) must take their decisions based on legal grounds. The body of law to be applied is to be interpreted by means of the "customary rules of interpretation of international law" (Article 3.2 of the DSU). In their practice, the dispute settlement organs have applied the principles of interpretation, provided for in the *Vienna Convention on the Law of Treaties* of 1969. It is thus made clear that the WTO is not a "soft law system" subject to unilateral discretion and negotiated adjustments in case of non-compliance by Members. General international law, not economic or political expediency, drives the resolution of disputes within which the new organization and its rules operate. The WTO can thus be considered a specialized "sub-system" or "regime" within the international community, though characterized by certain particular features (such as in respect of the consequences of unlawful acts). This does not mean that it functions outside of the international legal order; specifically, it does not operate "*in clinical isolation from international law*".²

The new approach is reflected at all stages of the current setting. On the one hand, *ad hoc* panels (having jurisdiction both as to facts and law and usually not composed by lawyers) have been retained, so that the risk of inconsistent decisions not necessarily based on accurate legal reasoning remains. On the other hand, appellate review has been introduced, conducted by a permanent body endowed with most of the features typical of an international tribunal. This is a remarkable development, since an appeal instance is still exceptional in interstate disputes. Appellate review, in fact, hardly fits the arbitral nature (*ad hoc* justice relying on an arbitral agreement between the parties to a dispute) characterising most of interstate litigation submitted to dispute resolution bodies. The limited jurisdiction of permanent tribunals explains the absence of a second instance also in respect of these tribunals.³ Appeal at the European Court of Justice and before international criminal courts are not relevant as precedents, since they pursue a different objective, that of guaranteeing individual rights.

The strengthening of the jurisdictional arm has been accompanied (or balanced) by a stronger role in respect of dispute settlement for the organization's political bodies which represent the direct expression of the members States' collective will in a "Member-driven organisation", as the WTO is often described. This explains, in part, the decision that the action taken by the dispute settlement bodies should not result in *per se* binding judgements. They are instead recommendations, at least formally, addressed to the parties in dispute through the Dispute Settlement Body, that is the plenary council in which Members exercise their collective functions of initiative, decision making, as well as monitoring and surveillance of implementation of the reports of the adjudicative organs. In this way, Members have retained those functions previously entrusted to the CONTRACTING PARTIES of the GATT collectively, in view of the absence of any organisational framework in that institution.

²This expression, which has since become famous, was used in the first Report of the Appellate Body, in the dispute *US – Gasoline*, p. 17, DSR 1996:1, p.3 at 16.

³I have developed some general considerations on this subject in my article 'Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review', in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (Kluwer, The Hague, 1997, pp. 245-280 at p. 245 ff.

In my view, what is generally deemed by legal observers to be a weakness, namely the lack of formally binding effects of the findings the panels and of the Appellate Body establishing whether there has been a breach of a WTO obligation, should be viewed rather as an advantage of the new system. Formally, decisions establishing that a breach has been committed and requiring redress and compliance with an obligation that has been disregarded are mere recommendations, yet they derive ultimately from the political body, namely the Dispute Settlement Body (DSB). The judicial arm is therefore not left alone with the task of adjudicating. The risk of facing non-compliance with the findings does not fall on this arm alone. It is rather the WTO political body, and hence the whole membership, that becomes the source of the decision and takes that decision by adopting a panel or Appellate Body report. It is thus the political body that requires implementation from the Member concerned and ultimately authorizes retaliation as a sanction, if the dispute has not been resolved in accordance with the rules, basically by prompt compliance (Article 21.1 of the DSU).

This is how the matter is generally perceived by the public at large as it is evident when one reads the press coverage of WTO-related issues. While referring to the International Court of Justice or to European Court of Justice, the press indicates that either court has "established", "decided" or "ordered" this or that, as the case may be. Things are presented differently in respect of the WTO, whose dispute settlement decisions make the front lines rather more often. The press attributes any ruling or decision directly to the organisation: it is the WTO that has "decided", "summoned" or "ordered" this or that, as the case may be. Only if one reads the "fine print" will one learn that it was in effect a "panel" or an "appellate panel" (*sic*), occasionally "the WTO top court", that has decided one way or in another, and this even before adoption of the report by the DSB (which is taken for granted, and *de facto* rightly so).

Putting the weight of the entire membership behind any decision resolving a dispute induces implementation by making the political consequences of non implementation harder to bear for any party that has to face the whole constituency, and not just its opponent in the dispute. Viewed differently, all Members are politically engaged so as to avoid non-implementation of any decision according to which a breach by any of them has been duly ascertained, that is, independently, impartially, objectively, and based on law. More generally, the system aims at preventing the loss of confidence in the organizations' reputation that would otherwise ensue, to the prejudice of the whole membership.

In substance, however, the role of the political body amounts to a kind of notarial acknowledgement (by "automatic adoption") of a decision actually delegated to, and taken by, the judicial arm. Negotiators provided for such an arrangement in order to ensure that political opportunism and concerns about the balance of power would not, as was the case in the GATT, prejudice impartial adjudication and the obligation to comply. The latter ultimately rests on the duty to respect the treaty obligations undertaken by becoming a member of the WTO. To this end, negotiators opted for the "negative consensus" rule in the main decisions of DSB: reports and findings are automatically adopted and confirmed by the DSB, unless the DSB decides, by consensus, not to adopt a panel or an Appellate Body report" (Articles 16.4 and 17.14 of the DSU).

The political dimension is not thereby ignored, rather on the contrary. Its significance becomes manifest when the DSB monitors implementation. It is up to this body to authorize countermeasures, normally defined as (trade) sanctions or retaliations, consisting in the suspension or withdrawal of tariff and other concessions. These are neither definitive nor an

objective in themselves, but rather a means to an end: that of ensuring compliance (Articles 21.1 and 22.8 of the DSU) by resorting to multilateral pressure, thus avoiding recourse to unilateral retaliation by individual States, which are explicitly prohibited.

Political considerations affect the system in the contrary direction as well. In fact, at the implementation stage, the DSU takes into account the economic, political and bureaucratic burden faced by States when they must undertake legislative or administrative changes in order to comply. Various features of the implementation process tend to assist States in this task. First of all, in lieu of implementation, "voluntary compensation" is admitted, pursuant to Article 22.1 of the DSU), albeit as a "temporary measure"; such compensation could be bilaterally agreed upon so as to satisfy the complainant.⁴ Above all, a "reasonable period of time" is provided in order to comply, a period which may last up to 15 months, and even beyond, from the date of adoption of a report (Article 21.3 of the DSU). This is a notable derogation from the general principle of international law according to which a State must remedy a breach of a legal duty *ex tunc* and not only *ex nunc* (i.e. not just for the future). Moreover, the length of the implementation phase as opposed to the unusually speedy procedure for an international litigation (about two years and a half from the establishment of a panel to the adoption of the Appellate Body report is not rare) tends to reward resistance by the defendant State. This limits the effectiveness of the mechanism, especially when temporary protective measures, such as anti-dumping measures and safeguards, are being challenged.

Notwithstanding those shortcomings, this compromise solution is preferable to, and represents a significant advance in respect of, the previous GATT arrangements. It represents also a more efficient attempt to ensure respect for accepted obligations than in other international contexts, where disregarding an unfavourable judicial or other binding ruling by the losing party is not sanctioned at all.

3. On balance, it appears that this flexibility in the implementation phase represents somehow the *pendant* to the strict obligations accepted by WTO Members in order to ensure effective compliance with the multilateral trade agreements. These obligations entail submitting to compulsory proceedings resulting in a binding decision, without any exception whatsoever, at the unilateral initiative of any other Member that claims that its treaty rights have been infringed or that it has suffered "nullification and impairment" of its benefits. This is a weighty development in international regimes: a *de facto* compulsory jurisdictional system, applicable, moreover, to a wide set of agreements and a broad array of relations covering the whole of the multilateral trading system, goods, services and trade-related intellectual property rights.

⁴As to the systemic importance of such fundamental duty to comply with a recommendation or ruling of the Dispute Settlement Body, even if a formal obligation to this effect is not spelled out in the DSU, see the two editorial comments by John H. Jackson, 'The WTO Dispute Settlement Understanding – A Misunderstanding on the Nature of Legal Obligation?' (1997) *American Journal of International Law* 91, 60–64, p. 60; John H. Jackson, 'International Law Status of WTO Settlement Reports: Obligation to Comply or Option to "Buy Out"?' 2004 *American Journal of International Law* 98, 109–123, p. 109. For an economic perspective see Bernard Hoekman & Michel Kostecki, *The Political Economy of the World Trading System* (2nd edn. Oxford, 2001).

The advantages are obvious for WTO Members in general, and specifically for all those countries that lack economic bargaining chips in order to protect their interest in trade disputes. The obligations ensuing from the system, on the other hand, have fuelled criticism from time to time towards those so-called "faceless foreign judges" who decide trade issues in Geneva. It should be emphasized, however, that the bodies effectively entrusted with deciding cases, that is, panels and the Appellate Body, are subject to clearly-defined boundaries as to subject matters, type of rulings they may issue, as well as the standards of review to be applied to domestic actions.⁵

Concerns about accountability, legitimacy and democracy in WTO are also expressed from quite different quarters, namely anti-globalization and environmentalist movements. Critics of the pervasiveness of international trade regulation complain that such regulation is excessively liberistic and does not take into due consideration the protection of non-trade interests, which are often characterized by a national dimension. Criticisms to the WTO as an organization that appears to impose bureaucratic and non transparent decisions to national parliaments, thereby allegedly "deprived of their sovereignty", are common. These criticisms tend to overlook the fact that it is not the WTO as such that legislates, but that any regulation is the result of intergovernmental agreements duly accepted by national parliaments. The benefits of liberalization, non discrimination between domestic products or services and foreign ones, and between the latter irrespective of national origin, as well as the benefits that balanced market opening that take into account special and differential treatment requests from least developed countries may bring in the fight to poverty tend also to be played down.⁶

The incommunicability and frustration that characterises at times what should be an open dialogue in good faith between different points of views reflect the inherent problems of managing complex systems in the current global environment. This requires decision-making at multilateral or regional level; this process makes it difficult to involve effectively public opinion and representatives of citizens of all nations, though they will ultimately enjoy the advantages and suffer the burden of those decisions. To grant an adequate role for politics and democratic participation and accountability (which involves an essentially national dimension), both for small and major players, is a challenging question⁷. Not even the European Union has been able to reconcile the two horns of this dilemma after 50 years, notwithstanding the role of an elected European Parliament, as signalled by the recent negative referendums against the Constitutional Treaty in France and the Netherlands in 2005.

At the WTO, an innovative choice has been made in order to legitimize the application of a given obligation and to overcome resistance against compliance on the part of any individual Member: that of entrusting the determination of the obligation to an optional, but binding impartial dispute settlement proceedings. The result of the proceedings is, in substance, a declaratory judgement, which is not automatically enforceable, but is implemented through a flexible multilateral process of monitoring compliance. Some flexibility as to compliance is allowed, as highlighted above, but with the aim to ensure compliance in a reasonable time,

⁵As to the latter issue that attracts much attention but that we are not covering here, see Matthias Oesch, *Standards of Review in WTO Dispute Settlement* (Oxford, 2003)

⁶ Jadish BAGWATI, *In Defence of Globalisation*, (Oxford 2003); Joseph STIEGLITZ, *Globalisation and Its Discontents* (Penguin, New York 2004).

⁷ In this respect see Robert HOWSE, *The Legitimacy of the WTO*, in Jean-Marc COICAUD & Veijo HEISKANEN (Eds.), *The Legitimacy of International Organizations*, UN University, Tokyo 2001

thus preserving the rights and interest of all members. The automatic adoption of reports by negative consensus of the entire membership avoids political interferences with the outcome, as would be the case if a majority vote of approval was admitted, implying variable alliances and political compromise.⁸ In such a context, reports would be little more than advisory opinions, to be adopted only if supported by general consensus, as was the case in GATT.

It is important to stress that it is for the Member governments to make political choices in negotiations, subject to democratic debate and parliamentary control in their respective countries.⁹ International judicial and other similar bodies are in charge of interpreting existing rules, not of laying down new ones. The DSU clearly reflects the intent to limit and define the proper role of the dispute settlement system. First, although disputes are decided by independent and impartial bodies through application of the WTO rules, these bodies have not been defined as judicial organs, although this is, in reality their, function. Secondly, the DSU spells out that "recommendations, rulings, findings" by either the DSB, panels or the Appellate Body "cannot add or diminish the rights and obligations provided in the covered agreements" (Article 3.2 and 19.2 of the DSU).

Politics also preserved for itself the competence of influencing the interpretation of the agreements, possibly diverging from that provided in a particular dispute, which is binding only for the case at issue. Article IX:2 of the *WTO Agreement* provides that the General Council can adopt "authoritative interpretations" of any WTO agreement and not necessarily by consensus, since a three quarter majority would suffice. Such an interpretation, never resorted to up to now, is an authentic interpretation that might even entail a modification to any existing provision. As such, it would have to be followed in the resolution of any future dispute (Article 3.9 of the DSU).

4. A relevant issue in order to assess the system, also as a possible model for improving the functioning of other international organizations, is whether the Appellate Body can be properly characterized as an international tribunal, notwithstanding the above-mentioned peculiarities, most importantly the lack of binding force of its findings.

It is worth highlighting, first, the basic provisions governing the proceedings leading to the issuance by the Appellate Body, as is the case for panels, of "reports" (and not judgments) containing *legal findings* and *conclusions*. According to Article 19 of the DSU ("*Panel and Appellate Body Recommendations*"), when a panel or the Appellate Body "*concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement*". Broadly speaking, the function of panels, according to the generic expression of Article 11 of the DSU (reflecting the function of panels under the GATT), is "*to assist the DSB in discharging its responsibilities*" under the DSU; this is done by providing an "*assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*" and by making "*such other findings as will assist the DSB in making the recommendations or in*

⁸As advocated by Claude Barfield, *Free Trade, Sovereignty, Democracy. The Future of the WTO* (AEI Press, Washington, 2001) at 125.

⁹For divergent views among political scientists as to the respective roles of States and civil society in respect of peoples empowerment, fighting poverty and trade negotiations and regulation, see Fareed Zacharia, *The Future of Freedom* (Norton, New York, 2003), at 245 -246, and Michael Walzer, *Politics and Passion* (Yale, 2004), at 131 ff.

giving the rulings provided for in the covered agreements". These recommendations and rulings are, in turn, aimed "*at achieving a satisfactory settlement of the matter in accordance with the rights and obligations*" under the DSU and the covered agreements (Article 3.4 of the DSU). The DSB adopts reports by panels and the Appellate Body within the short time limit of 60 or 30 days after their release, except if "*the DSB decides by consensus not to adopt the report*" (Articles 16.4 and 17.4 of the DSU).

As to Reports of the Appellate Body, Article 17.4 contains an interesting additional provision: a report shall be "*accepted unconditionally by the parties to the dispute*". By adopting the report, the DSB does not decide *motu proprio*, but just endorses the recommendation contained in the report. The content of the DSB recommendation addressed to the parties to the dispute, with which, according to Article 21, they must promptly comply, is to comply with the recommendation of the report.¹⁰

Let us now examine the Appellate Body's (a) essential features, (b) procedural rules and (c) functions, according to Article 17 of the DSU.

(a) With regard to its *features*, such as composition, appointment, and tenure of its members, the Appellate Body follows the pattern of other international tribunals. It is composed of individuals with "demonstrated experience in law, international trade and the subject matter of the covered agreements generally", appointed on a personal basis and unaffiliated with any government. The DSB appoints them by consensus for a 4-year term, renewable once, taking into account a broad representation of the membership, as is usual for such international bodies.

Independence, impartiality and competence are thereby ensured; abstention in case of conflict of interest is required. These are typical and essential prerequisites for members of a judicial body. Furthermore, the body is permanent, although the appointment is part-time, (a feature not uncommon in international tribunals), based on an initial assumption of a limited workload.

Some features are specific to the Appellate Body and are not shared by other international tribunals. Apart from the unusually short term of its members, it is striking to find such a small number of members (seven) compared to a certain abundance of judges that compose most international tribunals, notwithstanding these other tribunals' restricted jurisdiction and smaller workload. This set-up increases the role of individual members in sharing the responsibility for every decision, although, at the same time, collegiality is ensured: three members, drawn randomly and by rotation, compose the division deciding a specific case, but an exchange of views among all members takes place before the decision in any appeal. Another important feature is that nationality of individual members is irrelevant with respect to the composition of each division, irrespective of which Member is party to the dispute.

Unlike some other tribunals operating within international organizations, there is no logistical separation between the WTO and the adjudicatory organs: panels and the Appellate Body are located in the WTO building. While panels rely on the Legal Affairs Division of the WTO secretariat for legal and administrative support, the Appellate Body relies on its own staff,

¹⁰See Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 334; upon adoption the recommendation of a panel "will become a recommendation or ruling of the DSB". See also Mitsuo Matsushita, Thomas. J. Schoenbaum, Petros Mavroidis, *The WTO, Law, Practice and Policy* (Oxford 2003), at p. 25.

distinct from rest of the WTO secretariat. Functional independence from the organization is thus ensured at the appellate level.¹¹

(b) As to *procedure*, adversary proceedings and due process, typical of international jurisdiction, is a key feature of the proceedings both before panels and the Appellate Body.

It is worth recalling some specific features of these proceedings. The extreme rapidity of the procedure before the Appellate Body (60 days, a period which can be, and in fact always is, extended to 90) imposes various constraints, such as: short standard deadlines for the filing of the parties' submissions; not more than one hearing; and little space for procedural exceptions. Unlike the prevailing practice before international tribunals, both the panel proceedings (essentially arbitral) and those before the Appellate Body are confidential: briefs, documents and hearings are not public, although some States are promoting more transparency. Publicity does not seem to be, in any case, an essential requirement of international jurisdiction; confidentiality is in fact typical of arbitration.¹² This feature points to the arbitral-diplomatic origin of the dispute settlements system of the GATT; it leads to a certain informality of the hearings, while fully respecting due process.

The history of the case, the subject matter of the dispute and the arguments of the parties are recorded in the decisions, which contain extensive *reasoning* (indication of the grounds). In one of its first cases, the Appellate Body settled a disputed issue by admitting private lawyers to represent governments and plead on behalf of any party.¹³ This has become common practice since. Hence, "equality of arms" in the right of defence is made possible, especially for those States less endowed with internal legal resources. Furthermore, developing countries can avail themselves in WTO litigation of the services of the Advisory Centre, established in 1999 as a separate organization funded by voluntary contributions.

Proceedings are characterized by an original combination of bilateralism and multilateralism. Strictly speaking, the parties to the dispute are the relevant WTO Members. That is, on the one side, the State or States that allege, as claimants, of infringement of an obligation or a breach of a rule having an adverse impact on their interest under one of the covered agreements (those attached to the *WTO Agreement*). On the other side, the defendant State whose conduct or, more specifically, measures are challenged as being in breach of those rules and obligations. Any other WTO Member claiming to have an interest in the outcome of the dispute can take part in the procedure, as long as this Member enters the proceeding at the initial panel stage. Rights of third parties are limited, but third parties can nevertheless fully develop their legal arguments. The justification is that any decision can affect the interpretation and the application of those agreements in respect of all Members. The role of the intervention of third parties can be compared to the one that European Communities' Member States that are not parties to a dispute play by intervening before the Court of Justice

¹¹See generally Steve Charnovitz, 'Judicial independence in the WTO', in Laurence Boisson, Cesare Romano, Ruth Mackenzie (eds.) *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, New York 2002), 219-240 at p. 219.

¹²In September 2005, for the first time a panel decided, following a request of the parties (Canada, the European Communities, and the United States), to open its hearings to the public through closed circuit TV in the Article 21.5 proceedings of the *EC – Hormones* dispute.

¹³Appellate Body Report, *EC-Bananas III*, paras. 5-10.

in Luxembourg, rather than to third parties' interventions before the international Court of Justice (the "ICJ") (where a direct interest in the outcome is a prerequisite).

(c) The *function* entrusted to panels and the Appellate Body is, without any doubt, that of judging. The task of these bodies is to settle a dispute between WTO Members by evaluating the conformity of the measures or, more generally, the conduct of the defendant alleged by the claimant to be in breach of a legal obligation owed to it under a treaty. Fulfilling this task requires an objective assessment of the facts (reserved to the panels) and must be based on international law.

In other words, the subject matter of a dispute is the claim by a Member that another Member is not complying with a WTO obligation, that is, that a breach of a rule of international law has or has not occurred. Such a dispute is being resolved according to international law. The litigation deals therefore with issues of international legality (*contentieux de légalité*) and does not aim at assessing and awarding damages (such as in the context of investment arbitration at ICSID). It is resolved through the issuance of what is in substance a declarative judgement, typical of international courts, which determines which party is right and which one is wrong. The explicit reference to customary international law rules of interpretations in Article 3.2 of the DSU is essential in this respect: thanks to this reference, panels and the Appellate Body may be properly defined as arbitral tribunals, and as a court that "creates jurisprudence" within the international system, respectively. Indeed, the legal literature, as well as international tribunals and other authorities¹⁴, consider them as such, that is, as one of the subsidiary sources of international law according to Art. 38.1(d) of the Statute of the ICJ.

Panels and, above all, the Appellate Body have made interesting contributions to the principles of interpretation of treaties, particularly in articulating systematically the difference between context, subsequent practice, preparatory work of a treaty and the circumstances of its conclusion, according to Articles 31 and 32 of the *Vienna Convention*. The Appellate Body's approach to interpretation differs from that followed by many other international courts for its painstaking attention to the terms of the treaty provisions and for the methodical and explicit recourse to the interpretative criteria laid down in Articles 31 and 32 of the *Vienna Convention*, such as the insistence on textual and contextual interpretation.¹⁵ This methodological approach has been criticized as being excessively narrow. The cautious approach of the Appellate Body, as well as its reluctance to engage in innovative or

¹⁴International Law Commission's Commentary on the Draft Articles on State Responsibility, *Comment to Article 2*, footnote 76; *Comment to Article 13*, footnote 233; *Comment to Article 30*, footnote 459; *Comment to Article 50*, footnote 814; *Comment to Article 55*, footnote 863.

¹⁵This approach has been stressed and justified by former chairmen of the Appellate Body, see Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO', *Journal of International Economic Law*, 6 (2003), 695 – 708, at p. 699: "a method of interpretation that puts the emphasis on the ordinary meaning of the terms of the treaty is more faithful to the intention of the parties of the treaty"); James Bacchus, *Appellators: the Quest for the Meaning of And/Or* (mimeo 2005), who describes the approach as "literalist", or in US parlance, as "strict constructionism". The jurisprudence of the Appellate Body is systematically collected in WTO Appellate Body Repertory of Reports and Awards 1995-2004, Compiled by the Appellate Body Secretariat, (Cambridge University Press, Cambridge, 2005), available also online at www.wto.org.

teleological interpretations¹⁶, may be partly explained by the compulsory character of its jurisdiction and its exclusivity.

These innovative and dominant features of the multilateral trading system of the WTO are unknown to most, if any, other international regimes and organizations. The more binding the *ex ante* jurisdiction, the more justified appears the caution and the self-restraint of the judicial body in the use of the different criteria of interpretation of the obligations undertaken by Members. The wide coverage of the multilateral trade agreements, the importance and variable nature of the obligations contained therein, as well as the different interests that lead States to become Members of the WTO underscore these concerns for the viability of the system, that is "to the benefit of all Members" (Article 21.1 of the DSU). Ambiguity resulting from negotiating compromises relating to several provisions—and not only concerning details—and the conflicting interpretations submitted by parties in dispute before the Appellate Body show that actual consensus may be narrower concerning key provisions than it might appear at first glance. Furthermore, the DSU does not allow panels and the Appellate Body to abstain from judging in those cases, by resorting to a *non liquet* finding or referring the issue to intergovernmental political bodies (see Article 17.12 of the DSU). This context increases the risk that the outcome of a case will be met with opposition, where the interpretative methodology underpinning the decision is not generally considered, by Members and the commercial interests involved, but also by the legal community, to be correct. The perception of procedural and methodological legitimacy of the decisions provides important support for the acceptance of their substance by the membership, including the losing party.¹⁷

How to determine the legal obligations stemming from the WTO agreements is also a sensitive issue from a more general point of view. Since the WTO dispute settlement system has no equivalent in other sectors of international law and relations, sectors in which reciprocal interaction is possible and contentious (specifically as to environmental protection and labour standards), the judicial branch of the WTO may *de facto* be called to determine the limits of the WTO's jurisdiction. Another sensitive demarcation line, which again the WTO may be called to determine through dispute settlement, is that dividing trade-related multilateral obligations from the competence of member States to freely regulate the needs and interests in their domestic sphere (domestic regulatory competence).

¹⁶This trend has not prevented some criticism in the opposite direction, namely that the Appellate Body has engaged in judicial activism or judicial law making (the latter being an obscure concept for a continental lawyer), as well as in "gap filling" (i.e. filling gaps left by drafters of the relevant agreements). For a rejection of this criticism see, from a political perspective, Robert Howse & Susan Esserman, 'The WTO on Trial', 2003 *Foreign Affairs*, 130-140 at 130 ff, and, from a legal perspective, Richard Steinberg, 'Judicial Lawmaking at the WTO: Discourse, Constitutional and Political Constraints' 2004 *American Journal of International Law* 98, 247-275, at p. 247 ff.

¹⁷The discussions that take place in the Dispute Settlement Body (the "DSB") when reports are being adopted represent an important opportunity for Members to express their views, both about the specific outcome of the dispute and about the general systemic questions of interpretation and implementation. Articles 16.4 and 17.4 of the DSU expressly recognize this right. Thanks to this immediate "feed-back", a kind of "dialogue over distance" is established between the judicial organs and Members, although criticism expressed does not affect the "automatic adoption" of the reports. Thus, at a DSB meeting in 2005, a Member party to a dispute whose report was being adopted, pointed out that "the Appellate Body's hard-won reputation depends on Members' confidence that it will apply detailed legal reasoning equally to all Members on a consistent basis".

5. In summary, the following general features of WTO dispute settlement stand out. In the complex path consisting of (i) *bilateral consultations*, followed, if unsuccessful, by (ii) *third party adjudication of the dispute*, and finally by (iii) *multilateral surveillance of implementation*, the decision-making stage entrusted to arbitrators and judges is fundamental. It is, first of all, a kind of *compulsory jurisdiction*: all WTO Members, in respect of all the WTO agreements, are bound by the DSU and subject to those proceedings. These proceedings can be initiated and pursued unilaterally by any one of them.

Secondly, *jurisdiction is exclusive*. Members cannot resort to other *fora* nor can they assess unilaterally infringements by others members (Articles 23 of the DSU). It is, moreover, a *specialized multilateral framework*. Dispute settlement bodies interpret systematically a comprehensive and important array of agreements, a unique case, apart from regional agreements such as the European Union and the European Convention on Human Rights. The DSU does not attribute the effect of binding precedents to previous appellate decisions in the same matter¹⁸; such an effect would be contrary to the natural scope of judicial decisions, namely, that of deciding the specific case brought before the jurisdiction, and contrary to the practice of international tribunals.¹⁹ However, *de facto*, by establishing a permanent Appellate Body in charge of reviewing the conclusions in law of the first instance panels, the findings of this body are meant to serve as guidance in future cases. Article 3.2 of the DSU describes the general role and function of the dispute settlement system as "*providing security and predictability to the multilateral trading system*" as well as "*to preserve the rights and obligations of Members under the covered agreements*" and, hence, to assist WTO Members in the implementation of their WTO obligations, as well as in their dealings within the WTO more generally.

The subsequent sentence in Article 3.2 of the DSU, according to which recourse to international law principles of interpretation should serve "*to clarify the existing provisions of those agreements*", widens, through the use of a modest and legally undefined term such as "clarify", the general role of panels and Appellate Body. That is why during DSB discussions on the occasion of adoption of Appellate Body Reports, Members' representatives often point out to the "guidance" provided by these Reports to the Members' future conduct under the various agreements. Furthermore, panels rely on, and tend to conform to, the jurisprudence of the Appellate Body. Probably, this is one of the reasons for which, during the last few years, about one third of panel reports have not been appealed, whereas initially appeals were almost systematic.

Nevertheless, there is one standard feature missing from the above discussion, a feature which prevents that panels and the Appellate Body be formally defined as "tribunals". This feature is the lack of authority to resolve disputes with binding effect on the parties on the basis of adjudication alone, that is, the lack of *res iudicata* effect of panel or Appellate Body reports. These reports are not defined as judgments containing decisions, but as reports containing recommendations. However, in reality, the *vis rei iudicatae* actually accrues to it through the adoption of the reports by the DSB, since adoption occurs automatically on the basis of the "negative consensus" rule (Article 16.4 and 17.14 of the DSU). Only by unanimous consent of all parties, including the parties to the dispute, can a report could be set

¹⁸As considered already existing *de facto* and advocated in law by Raj Bhala, *Modern GATT Law*, (Sweet & Maxwell, London 2005), at xvii.

¹⁹Moreover, panels and the Appellate Body cannot directly affect the legal position of third parties to the dispute, pursuant to Article 19.2 of the DSU.

aside.²⁰ The recommendations of a panel or the Appellate Body to comply with the infringed obligation, embodied in the conclusions of the report, thus become an obligation for the parties to the dispute, particularly for the losing party, in accordance with Article 21 of the DSU. This holds true even if, literally speaking, the DSB in turn issues a recommendation, namely that to comply with the final recommendations of the panel or the Appellate Body. Moreover, we recall again that, according to Article 17.14 of the DSU, an Appellate Body report shall be "*unconditionally accepted by the parties ...*".

Also the requirement of *finality*, typical of international judgments, applies to non-appealed panel reports and to appellate review: the DSB has no competence to modify reports, although it is entitled to not adopt them, nor can the same dispute be lawfully resubmitted.

The requirement that the membership adopt the judgement between the parties for it to become effective for them and all the other Members of the WTO is not incompatible with the general theory on international binding adjudication by means of third parties awards and judicial decisions. On the contrary, the traditional, still valid, theoretical view is that the binding *res judicata* authority of these adjudicatory bodies derives from the agreement of the parties to entrust the binding resolution of their dispute to a particular dispute settlement mechanism (be it an *ad hoc* or permanent tribunal).²¹ Adjudication creates new obligations for the parties, namely those contained in the decision, and, therefore, creates new legal norms between them. These norms, however, cannot create new nor prejudice existing rights and obligations of third parties. Since WTO adjudication affects all the members through their involvement in the monitoring of implementation (including notably the authorisation of sanctions having a multilateral effect), it is more than natural that bilateral adjudication should be subject to multilateral screening or acceptance before being enforceable *erga omnes*. The decision rendered, however, rests on a presumption of conformity with the multilateral agreements and of respecting the rights and duties of third parties. Hence, given the automatic adoption of any report, the unanimous will of all members would be necessary in order to set such report aside; for the reasons just stated, this possibility does not detract from the legal nature of the adjudication as a binding decision. One may add that the parties to an international litigation are always free to agree not to comply with the judgement that has been rendered, settling their dispute otherwise. In the WTO, setting aside a report once issued would require not only the consent of the parties to the litigation, but, in addition, the consensus of the entire membership.²²

²⁰This might conceivably happen either because of a radical disagreement with the legal reasoning and the basis of a decision, or because of systemic reasons, such as the introduction, through subsequent negotiations, of different rules than those applied in the report.

²¹See especially the contributions of the late Judge Morelli of the ICJ: Gaetano Morelli, *La sentenza internazionale* (Cedam, Padova 1931) Gaetano. Morelli, 'La théorie générale du procès international', *Recueil des Cours* 1937-III, p. 257 ff. See also Louis Delbez, *Les principes généraux du contentieux international*, Paris 1962.

²²The parties to a dispute may "informally" agree on a bilateral basis (the "winner" may even do so unilaterally) not to have a report adopted, just by not asking that its adoption be put on the agenda of a DSB meeting to be held within 30 or 60 days following its issuance.

The parties may moreover agree bilaterally that, notwithstanding the failure of the losing party to fully implement an adopted report within the reasonable period of time (although it is still engaged to do so), the other party will refrain from seeking sanctions for the time being. See for instance the Understandings (in substance identical) made to this effect by the parties (the United States and Japan, as well as the United States and the European Communities, respectively) in the disputes in *US – Hot Rolled Steel from Japan* and in the

One can conclude, also in the light of ten years of practice, that the DSB is not an adjudicatory, or even less a judicial body, in respect of which panels and the Appellate Body would exercise only an advisory or merely preparatory role. Rather, the DSB is a political body, essentially the WTO General Council that "simply changes name when it considers disputes", vested with specific competences that become manifest when the DSB authorizes (also automatically) the initiation of panel proceedings, as well as in the subsequent phase of multilateral surveillance of implementation. As to adoption, the role of the DSB is just that of conferring, without any discretion concerning the merits of the case, formal binding force on the decisions of the respective disputes, issued by panels and the Appellate Body, which act in reality therefore as the judicial bodies of the WTO.²³ This "effectiveness in action" is an integral part of legal discourse when evaluating the features of an international institution, such as here the WTO and its dispute settlement system.

In the WTO framework, the likelihood of implementation—a measure of the effectiveness of the mechanism in attaining the aims attributed to it—is enhanced by the detailed regulation of multilateral monitoring of implementation by the DSB. It is important to stress here the extensive reliance, envisaged by the DSU, on decision-making by impartial bodies entrusted with an arbitral or adjudicatory function (arbitrators, panels, and the Appellate Body), also at different stages of implementation; by this, we are referring to procedural steps concerning compliance, that is, avoiding elusion in implementation or excessive retaliation. Resort to these mechanism has been increasing in recent years.

Three instances are envisaged by the DSU, at the discretion of the parties to the dispute in case of their disagreement on key implementation issues: in order to fix the reasonable period of time for implementation (Article 21.3(c) of the DSU); for ascertaining whether the measures adopted by the losing party in order to comply have effectively eliminated the breach of its obligations (Article 21.5 of the DSU), and in order to determine the level of trade sanctions that would match the prejudice caused by the lack of compliance (Article 22.6 of the DSU). Those features, too, are innovative. In fact, they combine the overarching role of the political body, the DSB—as specifically regulated by the relevant provisions of the DSU—with the impartial settlement of further disagreements between the parties to the dispute that may arise as to implementation. Recourse to those additional proceedings helps to achieve the objective of effectively settling of the dispute ("*prompt compliance ... in order to ensure effective resolution of disputes to the benefit of all Members*", stipulated by Article

US – Section 211 disputes in 2005 (see respectively WT/DS184/19 of 8 July 2005 and WT/DS176/16 Of 1° July 2005)

²³Scholars in the field share generally this view as to the "jurisdictionalisation" of the system, see Wolfgang Benedek, *Die Welthandels-Organisation* (Beck, Munich, 1998), at p. 34 ; Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (2nd edn, Routledge London, 1999), at p. 54; John H. Jackson et al., *Legal Problems of International Legal Relations* (West Gr., St. Paul, MN, 2002), at p. 247 (chapter by William J. Davey); Patrick Daillier & Alain Pellet, *Droit international public* (7th edn., Paris 2002) at p. 918, para. 552bis ("*arbitrage qui ne veut pas dire son nom*"); Paolo Picone & Aldo Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio* (Padova, Cedam, 2002) at p. 596 ; Eric Canal-Forgues, *Le règlement des différends à l'OMC* (2nd edn., Bruxelles 2004), at p. 27.

We do not consider therefore that contrary views depict accurately the actual functioning of the system, such as Carlo Santulli, *Qu'es-ce qu'est une jurisdiction internationale? Des organes répressifs internationaux à l'ORD* (AFDI 2000), at p. 58; Friedl Weiss, 'Inherent Powers of National and International Courts', in Federico Ortino & Ernst-Ulrich Petersmann (eds.), *The WTO Dispute Settlement System 1995-2003* (Kluwer 2004), at p. 190 ("they do not issue judgements or awards, but only make advisory reports containing recommendations to the Members, albeit highly influential ones"); Dominique Carreau & Patrick Juillard, *Droit international économique*, (2nd edn., Dalloz, Paris, 2005), paras. 206 and 211 at pp. 76 and 79.

21.1 of the DSU; "full implementation of a recommendation to bring a measure into conformity with the covered agreements", as stated by Article 22.1 of the DSU).

As a result, the system goes even beyond the judicial determination of the rights and obligations of the parties to the dispute through declaratory judgements, as is the case for the adjudicatory phase. The system makes active use of third party decision-making not just with respect to legal aspects (whether a previous decision has been complied with), but also by the use of some equitable discretion (as to the reasonable period of time for compliance), or by entrusting to these organs the determination of factual economic data (level of prejudice and sanctions). In this respect, too, the DSB is entrusted with endorsing the decisions of the adjudicatory bodies, rather than with powers of autonomous decision.²⁴

6. The past ten years show the vitality of the dispute settlement system, as it had been envisaged, as well as its central position within the WTO as an element capable of ensuring respect of agreed rules.²⁵ These developments highlight the different roles and functioning of the "legal-judicial pillar" (the "judiciary") and the diplomatic-negotiating pillar ("the legislator").²⁶ In particular, the latter has been affected by recurrent political-economical confrontations, highlighted by the Seattle and Cancún failures and by the difficulties faced in the ongoing negotiations of the Doha Development Round. In addition, the WTO decision-making process suffers as to its efficiency (capacity to deliver balanced and shared results) from being based on consensus and from the lack of executive bodies.²⁷ On the other hand, the consensual basis of all decisions in this "member-driven organization" should reinforce the feeling of participation and the sharing of any decision reached by the membership at large.

The effectiveness of the dispute settlement procedures cannot compensate for the shortcomings of the consensus-reaching mechanisms between member States. However, authoritative binding clarifications concerning the scope of agreements in force, stemming from the decisions of judicial bodies—such as the Appellate Body Reports issued in 2004-2005 with regard to the conflict between *Agreement on Agriculture* and the United States agricultural subsidies to cotton and EC subsidies to sugar, respectively—may indirectly assist negotiators by clarifying the scope of current obligations deriving from existing agreements.²⁸

Still, the two must be distinguished. Negotiation is about regulating the respective economic and trade interest for the future. Dispute settlement is about defining the reciprocal rights and

²⁴This model has been followed in the Doha decision granting a conditional waiver to the European Communities for its banana regime. Non-ACP countries could resort to binding arbitration if they intended to challenge the level of market access granted to them by the European Communities under its new banana market access regulation. The first such arbitration has taken place in summer 2005 (for the award of the three *ad hoc* arbitrators, see *EC – ACP / EC Partnership Agreement, Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator*, 1 August 2005 (WT/L/616). Although the arbitration is within WTO law, it is not governed by the DSU, nor subject to adoption by the DSB.

²⁵See Ernst-Ulrich Petersmann (ed.), *The WTO Dispute Settlement System* (The Hague, 2004).

²⁶In this line of thinking, the third pillar, branch or arm of the WTO would be, of course, the administrative secretariat.

²⁷At Cancún, the then European Communities' Trade Commissioner Pascal Lamy, later appointed as WTO Director General from 1 September 2005, described such decision-making as "medieval".

²⁸See Ernst-Ulrich Petersmann, *Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiation on Agriculture*, Ernst-Ulrich Petersmann (Ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (Oxford University Press 2005), p. 127 ff.

obligations under existing agreements. The first resolves conflicts of interests by laying down new rules; the latter resolves conflicts between rights based on existing rules.

In the last ten years, up to the beginning of 2005, more than 300 disputes resulting in formal consultation were filed. Panels reports, appealed or not, accounted for more than 90 while appeal decisions for more than 60.²⁹ The system has worked well. Proceedings have been concluded according to deadlines. Administrative structure withstood the workload. Major trading economies are not the only initiators of the cases—as foreseeable—but small developing countries, too, often recur to the system. Disputes concern specific, mostly bilateral issues—such as antidumping, safeguards, and countervailing duties (trade remedies)—but involve also issues of interpretation and implementation with a wider impact and involving several States—ranging from the scope of the General System of Preference (GSP) to agricultural subsidies. Notwithstanding a certain prevalence of GATT-related issues, several disputes related to new Agreements concluded during the Uruguay Round, such as the *SPS Agreement*, the *TBT Agreement*, the *Agreement on Rules of Origins* and, recently, the GATS have been considered by the WTO adjudicatory bodies.

In contrast, implementation has often been complex and has extended over time. Governments' commitment in good faith to implement decisions within the agreed reasonable period of time have been carried out rather swiftly when the domestic action required to this effect implied only administrative measures in nature, within the competence of the executive branch. Not always so when the legislative branch had to be involved. Implementation of several long standing decisions is still pending. Resorting to countermeasures has certainly not been frequent, but neither has it been rare. However, only one case has been mentioned as an example of a Member opting for a long time to facing countermeasures, rather than complying with a ruling, *in casu* due to hostility in its domestic public opinion.³⁰

Definitively, notwithstanding its shortcomings, the WTO system is the best example of working multilateralism in the present global scenario, in great part thanks to the efficient functioning of the dispute settlement system, "*the jewel in the crown*" according to former Director General Mike Moore.

From a more general political and legal perspective, the functioning of the mechanism prompts another observation. In international relations, States often resort to arbitration or to the judiciary only as an extreme choice when negotiations are unsuccessful to resolve a dispute. Moreover, it is not the most important controversies that are brought to third parties adjudication based on law. A certain dislike for judicial proceedings is evidenced by the fact that frequently, in *ex parte* judicial actions, the defendant State attempts to avoid subjecting itself to the authority of the future decision, by objecting to the tribunal's jurisdiction, or refuses to take part to the proceedings from the outset. On the contrary, recourse to settlement procedures is and has become standard within the WTO. What is more, national industries accept it and even often press for it as an immediate solution, rather than awaiting the outcome of often inconclusive diplomatic negotiations. Confidence in the speed and correctness of the proceedings and of the decisions is now widespread.

²⁹For statistical data about disputes, see DSB, *Annual Report (2004)*, *Addendum*, WT/DSB/W/269/add.1 as well as Appellate Body, *Annual Report* (since 2003).

³⁰See the dispute *EC – Beef Hormones*, brought by Canada and the United States against the European Communities.

On the other hand, the alternative procedures mentioned in Art. 5 DSU (good offices, conciliation and mediation) have rarely been resorted to, possibly due to lack of an established organizational framework or the inherent lack of transparency of these methods.

The general acceptance of the legitimacy and binding effects of the WTO dispute settlement proceedings is an important achievement and precedent, a new experience especially for those States not hitherto or otherwise used to be subject of external review as to their domestic regulation of trade or other matters. Indeed, this is not a novelty for European countries; they are used to face international proceedings before the Court of Justice of the European Communities or the European Courts of Human Rights, proceedings often initiated by private parties. They are also accustomed, as a consequence, to having to comply with unfavourable judgements issued by those courts. Here, too, compliance is often a cumbersome process. By contrast, this is a novelty for major non-European trading countries which are frequent defenders, besides acting as claimants in WTO disputes, such as the United States, Canada, and Japan.

Dispute resolution at the WTO stands out as a new chapter in the evolution of international justice.

7. The balance between the politico-diplomatic dynamics and third party adjudication at the WTO, as envisaged in 1994 and currently operating, is a pivotal structural element behind the functioning of the multilateral trading system.³¹

A further extension of the jurisdiction of the dispute settlement system of the WTO does not appear to be a realistic objective at this stage, notwithstanding some shortcomings that ten years in operation have highlighted. A reform might include, for instance, admitting claims by private parties and granting to the judicial organs the power to award damages.³² While this would make compliance to legal obligations and sanctions in case of non compliance more stringent, it would upset considerably the current equilibrium. A parallel revision of the other pillar, that is, a reinforcement of the political and administrative machinery of the WTO which might match those innovations does not appear likely either.³³

We recall that the DSU was supposed to undergo a review after 4 years from the entry into force of WTO agreements. Negotiations have gone on beyond the deadline, but significant changes by the end of the Doha Round do not appear to be likely, at least as things stand currently.³⁴ The conclusion that many observers draw is that the WTO membership is generally satisfied with the functioning of the system and is not keen to introduce substantial modifications.

³¹See generally José Alvarez, *International Organisations as Law-Makers* (Oxford 2005).

³²See generally Gregory Shaffer, *Defending Interests. Public-Private Partnership in WTO Litigation*, (Washington, D.C., Brookings Institution Press, 2003).

³³See Robert Howse & Kalipso Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far?', in Roger Blaine Porter et al (eds.) *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millenium*, pp. 227-252 (Washington, D. C., Brookings Institution Press, 2001). See also for a broader academic discussion Deborah Cass, *The Constitutionalization of the WTO: Legitimacy, Democracy, and Community in the International Trading System* (Oxford 2005).

³⁴For an overview, see Ernst-Ulrich Petersmann, 'The Doha Development Round Negotiations on Improvements and Clarifications of the DSU 2001-2003: An Overview', in Federico Ortino & Ernst-Ulrich Petersmann (eds.) *The WTO Dispute Settlement System 1995-2003* (Kluwer, The Hague 2004), pp. 3-17 at p.16.

From a systemic point of view, two set of proposals, tabled, respectively, by the European Communities and the United States in those negotiations, would imply significant changes with a systemic impact. The European Communities proposes that panel members be chosen from a semi-permanent roster of professional experts in law and international trade. The judicial features of the panels would be thereby strengthened, distancing the system from its dominant arbitral characteristics originating from the GATT 1947. Somehow in the opposite direction, the United States proposes to enhance the "control of the parties" in the appellate review stage, by increasing flexibility and introducing some panels procedure features (suspension of the proceedings at the request of the parties, interim review, as well as partial adoption of reports). This would enhance the arbitral features of the appellate stage: the specific interest of the parties to the dispute in pursuing a settlement would be given a clear precedence over the systemic interest of third parties and of the membership at large.

Neither proposal (which are not mutually incompatible) would represent an overhaul of the current system, but neither seems to enjoy widespread support for the time being. In conclusion, the present system appears to be acceptable for the membership. The focus is still more on consolidating the WTO *acquis* through further practice, than on introducing substantial innovation to its architecture.

8. Before concluding, a striking feature of the system must be highlighted, in marked opposition to a widespread trend in international economic dispute settlement involving States. We refer to the strictly intergovernmental nature of the WTO settlement proceedings, notwithstanding that disputes often concern specific industries or even single firms and that they are brought by States in their interest, if not formally on their behalf.³⁵ This follows the tradition of interstate dispute adjudication but is in marked contrast with other innovations in the system which we have highlighted.

International justice is inspired nowadays by an opposite trend, under which the direct settlement of international economic disputes arising between States and foreign private parties by resorting to international arbitrations or tribunals is favoured.³⁶ Not only are private parties admitted before the E.C.J. or the European Court of Human Rights, but this is the case also for investment arbitration before the ICSID or under Chapter 11 of NAFTA. As to investment disputes the purpose is not to privilege foreign investors by relieving them from the obligation to resort to domestic courts, but that of "depoliticizing" these disputes, by offering law-based adjudication as an alternative to interstate conflicts. The right of action granted thereby to private parties accords with the privatization of States' economic relations with foreigners in today's global economy.

The WTO system is unaffected by this approach. The purely intergovernmental nature of the disputes reflect the intergovernmental character of the WTO itself. Only members are admitted to take part in dispute settlement because litigation concerns alleged breaches by one member State of some international obligation owed to another member State. Members are free to decide how to protect their national interest and that of their enterprises, by bringing or not a challenge to another member conduct that causes them prejudice in breach of a WTO obligation. It is within the domestic decision-making that relevant private interest

³⁵ See Alberto Alemanno, Private Parties and the WTO Dispute Settlement System, Cornell Law School LLM Paper Series, 2004, 1

³⁶ Hélène Ruiz Fabri, La juridictionnalisation du règlement des litiges économiques entre Etats, in *Revue de l'Arbitrage* 2003, n°3, juillet-septembre 2003, p. 881-947.

can play a role, and do play it through lobbying and/or through the lodging of formal complaints

Most WTO agreements aim at facilitating trade between private parties by reducing government's interference and hurdles and by enhancing transparency and stability while fully recognizing the State's ultimate role in the pursue of national interests. Several provisions bind member States to grant specific rights to foreign private parties and to accord them effective recourse to domestic remedies in order to protect the rights they indirectly derive from the relevant agreements. However, the breach of any such obligation can be challenged internationally only by the national State of the private party thereby affected. When the breach complained of consists f.i. in the undue imposition of an antidumping duty against a specific enterprise, the complaining State is essentially exercising traditional diplomatic protection. WTO law, however, does not require the previous exhaustion of local remedies. In fact, it is possible -and it actually happened- that while a State complains for the infringement of the AD Agreement or for the unlawful imposition of countervailing duties or safeguard measures, the firm affected challenges in parallel the same imposition in the domestic courts of the foreign country. In such an instance WTO dispute settlement proceedings are effectively a further stage of recourse against the measure challenged, as an alternative or in addition to local remedies, which are often in turn required by WTO Agreements.

This is a curious discrepancy between reality and legal schemes: private parties lack *locus standi* at the WTO, but its dispute settlement proceedings are meant to serve their interest, besides that of national economies and of the general public included consumers, at large.

Finally, another contrast between aims and means related to the position of private parties and the safeguard of their interests concerns the almost general impossibility for private parties to rely on WTO legislation before national courts. It is common knowledge that this lack of direct effects in domestic law does not derive from specific provisions laid down in the multilateral agreements, which are basically silent in this respect. As to the European Community this depends from a restrictive interpretation of certain basic features WTO law by the European Court of Justice, in connection with its views on the position of international treaties in the Ec legal order.³⁷

Viewed from the perspective of the multilateral trading system, the strictly interstate character of the dispute settlement system, which governments can use at their discretion, is closely linked (or vice versa) to the non-entitlement of private parties to challenge in domestic *fora* violations of WTO Agreements. According to the Court of Justice, private parties also prevented from challenging the validity and applicability of EC legal acts that are in breach of WTO obligations (and therefore to claim damages from the Community's institutions), even when the incompatibility has been ascertained by WTO dispute settlement bodies.³⁸

The contrast is striking. On one side at the WTO the current rule-oriented approach allows interstate challenges for any non compliance, with the ensuing obligation for the State found in breach to remedy or face sanctions. On the other hand private traders that have been

³⁷ See the recent decisions by the European Court of Justice *Biret* C-93/02 of 30 September 2003 and *Van Parys* C-377/02 of 1 March 2005, notwithstanding the contrary conclusions by the Advocates General.

³⁸ See Antonio Tancredi, EC Practice in the WTO: How Wide is the "scope of Manoeuvre"? in *European J. of International Law*, 15 (2004), p. 933 – 961, at p. 934.

directly affected by those breach have no *locus standi* to challenge them or to claim damages within the domestic legal system. It is an unusual revival -or maintenance- of a rigorous dualism between international and national law, an approach that been abandoned in most areas of international law, where private rights can be affected, under most national constitutions.