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THE WTO DISPUTE
SETTLEMENT SYSTEM:
ADMINISTRATION,
COURT OR TERTIUM GENUS?



The WTO Dispute Settlement System: Administration, Court or Tertium Genus?

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1. Introduction

It is an undeniable reality that some organizations exercise their powers *beyond and over* national governments.

Most of these supranational bodies (WTO, World Bank, *Codex Alimentarius* Commission) have to comply with a universal set of public law principles¹. Their action is supposed to be consistent with the principles of natural justice; their decisions have to be reasonable and fair; and the decision-maker has a duty to give reasons, and so on. The application of these principles constitutes one of the effects of a *rule-oriented* development of these international bodies, and it can be considered the outcome of the *juridification* process of their original international paradigm.

The growing role of the *rule of law* in this context is also reflected in the creation of more and more sophisticated dispute settlement bodies, which perform their adjudication powers applying procedural and substantive rules of the *Western legal tradition*. They make their decisions using techniques that are not so different from those used by national courts and tribunals.

Looking at these features, some of these international organizations are commonly called *global or international administrations*².

¹ C. Harlow, *Global Administrative Law: The Quest for Principles and Values*, *European Journal of Internat. Law*, 2006, vol. 17, 187 e ss.: “a universal set of administrative law principles, difficult in any event to identify, is neither welcome nor particularly desirable; diversity and pluralism are greatly to be preferred”. Recently F. Spagnuolo, *Principi e regole del giusto procedimento tra ordinamenti nazionali, diritto comunitario e World Trade Organization: verso una “global procedural fairness”?*, A. Massera (ed.), *Le tutele procedimentali, Profili di diritto comparato*, Napoli, 2007, 367

² B. Kingsbury, N. Krisch, R. Stewart, *The emergence of Global Administrative Law*, in *Law and Contemporary Problems*, vol. 68, 2005, 15; S. Battini, *Amministrazioni senza Stato, Profili di diritto amministrativo internazionale*, Milano, 2003; S. Cassese, *Gamberetti, tartarughe e procedure. Standards globali per i diritti amministrativi nazionali*, *Riv. trim. dir. pubbl.*, 2004 n. 3, 657; *Il diritto amministrativo globale: una introduzione*, *Riv. trim. dir. pubbl.*, n. 2, 331; *Oltre lo Stato. Verso una costituzione globale?*, Editoriale Scientifica, 2006; G. Falcon, *Internationalisation of Administrative Law: Actors, Fields and Techniques of Internationalisation – Impact of International Law on National Administrative Law*, *Revue Européenne de droit public*, 2006, 217 e ss.; G. della Cananea, *Il diritto amministrativo globale e le sue Corti*, paper presented at the meeting on *La cittadinanza globale*, Reggio Calabria, 30 ottobre 2003.

However, there is no concordance on this definition yet. Namely, international mechanisms and relationships existing between the parties involved do not seem to be consistent with the supposed administrative nature of the organizations; furthermore, it is difficult for national governments (their sovereignty) to accept the idea of administration by an international organization.

This project aims at analyzing the *status* of the *juridification* process in the World Trade Organization, in order to verify if it is possible to find a typical *administrative law relationship* between the Member States and the international organization. Specifically, I will try to single out what kind of power is exercised, its possible classification (Adjudicatory function? Judicial power? Something else?) and the mechanisms of the implementation of the Dispute Settlement Body decisions.

As the WTO does not have proper *executive powers* and because of the persistent prominent role of its members in the law-making process, my research focuses on the adjudication proceedings of the Dispute Settlement System in order to verify if – when member states are addressed by WTO decisions – the exercise of typical *administrative powers* occurs. Moving from the fundamental features of the system, this project aims at answering the following questions: 1) Can the decisions adopted in the DSS be considered administrative decisions?; 2) Or do we have to consider them judicial decisions? 3) Do we have other choices beyond these alternatives?

To answer these questions, we have to address a preliminary methodological question, clarifying the concept of administration (and court) in order to apply it in this context.

In the global dimension, we need to consider different contents and definitions of administration, from the *civil law* concept (connected to the idea of authorities invested in the protection of public interest) to the *common law* concept (a neutral and arbitral administration that adjudicates with formalized procedures between conflicting interests), looking for a universal definition that includes both normative and adjudicatory elements³.

The same has to be done with the concept of court: domestic law and international law single out different features or patterns of the idea of court, but for our goals we conventionally consider a court an independent body

³ B. Kingsbury, N. Krisch, R. Stewart, *The emergence of Global Administrative Law*, in *Law and Contemporary Problems*, cit., 17: in the global context the institutional landscape is more variegated than in the domestic law; even so, we can adopt a conventional definition of administrative action as «*rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlement between parties*».

that applies the law on the ground of legal arguments and whose decisions produce binding effects on the disputing parties.

2. The World Trade Organization and its Dispute Settlement System: a brief history

The history of the World Trade Organization begins in 1994, but the transformation of the world trade regulation occurred over the entire forty-seven year GATT operation (from 1947 to 1994)⁴. Nevertheless, the 1994 WTO Treaty was very important because it led to the institutionalization of the GATT, and it established the foundation for a new organization with legal personality, the World Trade Organization⁵.

Before this institutionalization, no administrative machinery existed: yet in 1947, GATT articles XXII and XXIII established that if a violation of an agreement occurs, the contracting parties had to mutually settle any disputes without the possibility to apply before a court or another dispute settlement body. The *Interim Commission* of the ITO provided the administrative services, and the intergovernmental meetings between the contracting parties were responsible for direction and oversight⁶.

The GATT system was like a club, in which contracting parties mutually recognized principles and rules and settled their disputes diplomatically⁷.

In 1952, panels were introduced for the first time, and consequently, the disputes were assigned to these impartial bodies with the exclusion of the

⁴ J. Pauwelyn, *The Transformation of World Trade*, Michigan Law Review, 2005, 104, 1-66.

⁵ M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, 3rd ed., London – New York, 2005, 112. The GATT initially included 23 contracting parties and aimed to promote free trade with the elimination of nationalistic and protective measures. Starting in the 70's with the Tokyo Round, trade liberalization was also pursued by monitoring internal trade barriers, which were established to guarantee environmental and public health interests.

⁶ M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 112; R. E. Hudec, *The GATT Legal System and World Trade Diplomacy*, Salem NH, Butterworth, 1990, 68.

⁷ See J. H. H. Weiler (*The Geology of International Law – Governance, Democracy and Legitimacy*, http://www.zaoerv.de/64_2004/64_2004_3_a_547_562.pdf): looking at the development process of international law we find an «initial stratum of horizontal dyadic, self-help through mechanisms of counter-measures, reprisals and the like», and over it a «triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like». This thickening is not only due to the creation of a dispute settlement system in which neutral and third bodies decide the disputes, but also to the related juridification process, based on the compulsory nature of the system.

litigant parties. The use of panel proceedings marked an important shift in the GATT dispute settlement history, even if, for a long time period, the member states were reluctant to show a significant amount of confidence in this new legal mechanism.

The introduction of panel practice constituted an effort to give WTO members more objectivity in dispute resolution and to strengthen their legal obligations.

During the Tokyo Round, some proposals were made from the United States to improve the panel procedural rules and to increase the predictability of the dispute settlement system. However, most of the limits of the prior GATT system remained, and the *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, adopted on November 28, 1979, did not bring about a real system reform.

Nevertheless, from this moment up until the Uruguay Round, the question of the nature of the dispute settlement system became the crucial issue in the debate on the World Trade Organization. Two opposite directions were emerging: on one hand, the supporters of procedural legalism wanted to strengthen the system's juridification process, with more formalized procedural rules, the introduction of a general duty to give reasons, modified appointment mechanisms for panellists and so on; on the other hand, supporters of the diplomacy paradigm tried to obtain more procedural flexibility and proposed to facilitate political and diplomatic assessment of the disputes.

With the Uruguay Round, the procedural legalism direction prevailed, and the *Understanding on Rules and Procedures governing the Settlement of Disputes* improved the legal standards of the proceedings; the powerful expression of this trend was the creation of a permanent Appellate Body in the dispute settlement system⁸. More specifically, deficiencies and faults of the panel process were corrected; rigorous terms were established for the assessment of the panel, and the entire dispute system was streamlined. Most importantly, the right to veto the establishment of a panel or the

⁸ In 1981, a Legal Office was constituted in the Secretariat, as evidence of the increased role of the legal dimension in comparison with the diplomatic dimension. See J. Pauwelyn, *The Transformation of World Trade*, cit., 19; R. E. Hudec, *Enforcing International Trade Law. The Evolution of the Modern GATT Legal System*, 1993, 70-71; R. E. Hudec, *The Role of GATT Secretariat in the Evolution of WTO Dispute Settlement Procedure*, cit., 114.

adoption of its rulings was eliminated, and the DSU demanded a negative consensus of all members in order to block the process⁹.

The juridification process of the panel procedures and dispute settlement mechanisms has not been completed: it has to face the persisting importance of the diplomatic habits and consequent practises of the WTO players¹⁰.

Notwithstanding this diplomatic ethos, the Dispute Settlement Understanding created a dispute settlement system that is based on third and impartial bodies¹¹, which shifted the adjudicatory function partially away from and beyond the WTO members.

3. The Dispute Settlement System Structure

3.1. A two-stage process of Dispute Resolution

There are two stages in the dispute settlement system. In the first stage, the dispute is assigned to a panel; in the second stage, an appeal from the panel's decision may be made to the Appellate Body¹².

Nevertheless, the dispute may be settled before a panel is established, within a process of consultation created ad hoc in order to negotiate a mutual solution. Par. 7 of art. 3 gives the dispute settlement system a positive and consensual definition of the case, and states that «*a solution mutually acceptable to the parties (...) is clearly to be preferred*»¹³. The favour towards a negotiated solution is clearly reflected in the fact that an attempt

⁹ This means that only with the opposition of all members can the assessment of a panel or the adoption of report be avoided (automatic right to the establishment of panel and to the adoption of ruling).

¹⁰ Despite the transformed juridified WTO, «the diplomatic ethos which developed in the context of the old GATT dispute settlement tenaciously persists»: J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Harvard Jean Monnet Working Paper, 9/00.

¹¹ J. Pauwelyn, *The Transformation of World Trade*, cit., 47. See also G. Sacerdoti, *Il sistema di soluzione delle controversie dell'organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, *La Comunità internazionale*, 2005: through the USD we shifted from a multilateral not organized *power-based* system to a *rule-based* system.

¹² It must be noted that the formal notice to the DSB of the decision to appeal the panel's decision impedes the DSB from adopting the decision thus making it binding for the parties (art. 16, par. 4 DSU)

¹³ The mutual dispute solution has to be *consistent with the covered agreement*. However, it must be shown that it did not come from any WTO body or mechanism and it must be verified as compatible with the WTO rules regarding mutual solutions. A different approach can be found in the European Community system, in which a Treaties guardian role is conferred on the European Commission.

at conciliation must be made before the panel process may begin¹⁴. Yet, in order to prevent the possibility that these consultations may delay the process coming before the panel, the DSU establishes strict deadlines for the conciliation attempt (art. 4)¹⁵.

The failure of the conciliation entitles the complaining party the right to apply for the appointment of a panel¹⁶.

A crucial role regarding the panel's and Appellate Body's decisions is played by the Dispute Settlement Body. This body is nothing more than the General Council in a different guise. Beyond its panel establishing power, it has the authority to adopt the panel's decisions, to supervise the panel's decisions and recommendations, and to authorize the suspension of concessions and other obligations of the WTO (DSU art. 2)¹⁷.

In this way, the dispute resolution taken by the adjudicatory bodies, *temporary excluded from the Members negotiation circuit and given to third and neutral judicial bodies*, comes back to the decision-making power of the contracting parties (DSB).

Moreover, the subordination of the panel reports to the substantial approval of the governments was real in the widespread practice of the GATT agreements, in which the necessary conditions for the adoption of the decisions were possible only with the unanimous approval by all of the states in the Dispute Settlement Body (DSB). The actual order was, however, completely changed after the Uruguay Round negotiations, and

¹⁴ Technically the dispute could be considered *unripe* for the establishment of a panel. See *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*, Report dell'AB, WT/DS132/AB/R (21 November 2001) (01-5170), AB, 2001-5: in this case the *Appellate Body* established that the panel process was ripe and correctly constituted, despite the missed consultations, if the parties conduct was such to be over its right to consultations.

¹⁵ Article 4 par. 3 provides that the party has to reply to a consultations proposal within 10 days from its receipt and has to intervene within 30 days. If it does not take part in the consultations within a mutually fixed term, the claimant has a right to apply for the establishment of the panel process.

¹⁶ Article 6 of the Dispute Settlement Understanding.

¹⁷ Cfr. G. Sacerdoti, *Il sistema di soluzione delle controversie dell'organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, cit., 438: the strengthening of the role of the political body in the WTO constitutes not a weakness but a strength of the system, because formally the decisions declaring the violation of the agreements and impose the restoration of the violated rule are recommendations in this sense, which come from, however, a political body; consequently the judicial body is not the only subject that has to decide and to condemn, because the DSB, representing all the members, assumes the paternity and the responsibility of the decisions, becoming, in doing so, the source of compliance proceedings.

now a decision (of the panel or the Appellate Body) *is* adopted by the DSB *unless there is a unanimous vote against its adoption*¹⁸.

Reversing the consensus criteria from assent to dissent made the right of adoption of the decisions finally possible in practice.

Before the reversal, it was almost always impossible to adopt a decision due to the presence of the winning member in the needed assent unanimity. This also allowed the panel to gain independence from the judicial function that it and the Appellate Body exercise in the political-negotiatory dimension¹⁹.

3.2 Panel and Appellate Body composition and the secretariat's role

The Secretary General (art. 8 DSU) nominates panel components (members) and chooses three individual panellists from a list of experts²⁰. There is a considerable degree of discretion when choosing components that is

¹⁸ Art. 16 par. 4 of the DSU establishes, in fact, that within 60 days from the circulation date of the decision among the Member states that the decision “*shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report*”. It is interesting to point out that the modification of the consensus rule was agreed upon following a threat from the United States to make use of section 301, which provides for unilateral commercial sanctions, arranged by internal law, everytime that a state violates an agreement. The enforcement of these unilateral sanctions (laid out by the US Congress in 1988) is justified, according to the US, by the extreme weakness and sluggishness of the WTO dispute settlement mechanisms. In response to this criticism, the Member states reached an agreement in 1991 to adopt the new DSU, which designed a more rigorous and restrictive dispute resolution system, which would start on the first of January, 1991. R. E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, in Friedl, Weiss & Jochem Wiers (eds.), *Improving WTO Dispute Settlement Procedures*, Cameron May Publishers, 2000, 345 e ss.

¹⁹ G. Sacerdoti, *Il sistema di soluzione delle controversie dell'organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, cit., 439, writes that the lack of adoption by the *Dispute Settlement Body* constitutes a purely hypothetical case that has never been verified, and a security valve in the case in which the conclusions of the judicial branch would be unanimously rejected, with the accord of the winning state, or for the absurdity of a judgment or for some undetermined reason or political evolution of the general interests. Moreover, according to P. Picone – A. Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, Cedam, 2002, the inversion of the consensus rule makes the recommendations formulated by the panel and the Appellate Body mere propositions, even if formally conceived, that help the DSB in their final decision, which normally assume the final recommendations that the parties in the controversy must comply with.

²⁰ The nomination is not usually contestable by the parties unless for compelling reasons. The experts are sometimes diplomatic, former Secretariat officers or trade law experts from national administrations. They need to ensure independence from judgement – they should not represent interested parties – and to guarantee varied orientations and backgrounds (M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 124).

conditioned only by a few stipulations. One of these relates to the inclusion criteria in the panel that is deciding a dispute between two developed countries of a component coming from a developing country²¹. This political-diplomatic dimension of the nomination, together with the fact that most panel members are chosen among diplomats (with little legal background), prohibits a full correspondence between the system's juridification process and the underlying legal culture²².

The Appellate Body is a different matter. Its seven components have recognized authority, expertise in the field of international trade law, and have been nominated by the Dispute Settlement Body. Each nomination lasts for four years with the possibility of being reappointed only one time. Decisions are made by bodies composed of three components. The Appellate Body's different nomination and membership conditions ensure a greater independence from the interested disputing countries and from the political-diplomatic Secretariat representatives. Not surprisingly, there is much argument over whether the Appellate Body can be likened to a true international court²³.

3.3 Fundamental features of the panel process: standing, evidence, burden of proof

Standing is a useful reference to measure the degree of openness of a judicial system.

In the DSS field, the standing necessary to request the establishment of a panel is recognized when an interested party believes that there has been a

²¹ J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, cit., 10: altogether the Secretariat maintains a key role in the nomination of the panellists. In the author's opinion, In order to avoid too great a range of choices, some elements have to be guaranteed: a stable and limited list of nominations, the promotion of an automatic majority of the selection and the abandonment of the nationality rule that forbids that a component of a panel, which is called upon to decide particularly important questions, comes from one of the Member states in the dispute. Likewise on this point, P.M. Wald, *The Judicial Evolution of the WTO Appellate Body*, Conference on the WTO at 10: Governance, Dispute Settlement and Developing Countries, NY City, April 6, 2006, accessible at: <http://www.sipa.columbia.edu/wto/html/papers.html>.

²² Weiler comments on *dissonance* (in *The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, cit., 9).

²³ An interesting analysis by P.M. Wald, *The Judicial Evolution of the WTO Appellate Body*, cit. and again that of J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, cit.

violation of an agreement, even between other parties, and judges that some usefulness will be derived from the panel²⁴. According to the Appellate Body's jurisprudence, a country should have considerable discretion when evaluating whether a usefulness connected to the undertaken action exists or not (self-regulation)²⁵. The Bananas case is emblematic of this approach. On this occasion, the Appellate Body came to a decision based on such criteria to admit the United States as claimant as to why they could be a "potential banana exporter," even though the European Community had brought up this lack of standing, because the United States had never exported bananas into the European Community.

Looking at this standing case law, it is not necessary to show any actual damage but only to demonstrate a strong possibility that damage may take place²⁶.

The request to the panel must be written in such a way as to identify the contested measures (in reference to the violated provisions) and to illustrate the legal arguments of the claimant. The clear and unambiguous indications of the violation (terms of reference) appear fundamental for two reasons: on one hand, it is necessary in order to allow an efficient defense for the counter-party (due process), while on the other hand, to identify panel jurisdiction. Thus, the indication cannot be unspecific, but must rather pertain to the specific violated dispositions. In fact, the panel must and should decide only on the dispositions contemplated by the party, without having to find out any other dispositions of the agreements.

In light of this request, the panel should proceed to factfinding and add their conclusions that will allow the DSB to formulate their own recommendations and decisions about the case (art. 11 DSU). Technically,

²⁴ This has to do with art. XXIII of the GATT and of art. 3 par. 7 of the DSU.

²⁵ M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 121.

²⁶ This is a very large legitimization that coincides neither with the received notion, for example, in the adversarial process of common law (see L. D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, in *American Business Law Journal*, 2003, Spring, 40, 511) nor with the generally received notion of civil law, in which an actual break in party interests is generally requested. The question of *what* is susceptible to generate a violation of the agreements and therefore is contestable in front of the panel is moreover revealed. The violation can, in fact, be a product of a national legislation if this rule obliges the administration to violate the rights protected by the WTO agreements (mandatory legislation). In this case, the act undertaken that contests the legislation will be considered ripe. On the contrary, if the legislation leaves discretionality up to the administration (discretionary legislation) and it is the concrete administrative act that affects the rights protected by the agreements, the act will be proposed only following the exercise of administrative activity.

the panel assists the DSB to fulfill their responsibilities, according to a model that brings to mind the *justice retenue* of the French conseil d'état²⁷. In fact, the panel is the body that provides the legal consultation that is necessary to resolve the cases under DSB jurisdiction.

The burden of proof is on the complaining party according to a principle, established by the Appellate Body in the *Shirts and Blouses* case²⁸, which refers back to the general principle that is applicable in the context of national and international courts. The panel has a considerable margin of discretion over the allegations of the parties. Its only limit, however, is when it makes an insufficient consideration or a misrepresentation of the facts, which is considered an egregious error that demonstrates bad faith²⁹.

On another point, even if the panel does not take into consideration certain elements of the evidence, the fact findings are not subject to *Appellate Body* review, which gives substantial deference to the factual conclusions reached by the panel.

If we use the categories that are customary in the jurisdictional field, we could say that the Appellate Body assumes the role more of a “cassation court” rather than as a court of appeal in regards to the panel’s work. Moreover, the Appellate Body only makes a substantial revision of the questions of law that were decided by the panels³⁰.

²⁷ S. Cassese, *Oltre lo Stato. Verso una costituzione globale?*, cit., 47.

²⁸ *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the AB, WT/DS33/AB/R (May 23, 1997). M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 128., discuss the case.

²⁹ In the *Thai Cigarette* case, the panel did not take a document into consideration that was presented by the World Health Organization (*GATT Thailand – Restrictions on importation of and Internal taxes on Cigarettes* (November 7, 1990) WTO Doc. BISD 37S/200 (panel Report) and therefore violated art. 11 of the DSU. In the decision *Canada – Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT DS 31/AB/R (June 30, 1997) (97-2653), AB 1997-2, pp. 22-23, the *Appellate Body* established that the conclusions on the questions of law must be founded on an adequate appreciation of the fact that comes from the preliminary instruction conducted by the panel, when faced with mixed questions of fact and law, in which the judicial question appears particularly connected to the factual context.

³⁰ M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 132, observed how this adherence of the Appellate Body to the factual conclusions reached by the panel constitutes a feature of the system that ends up favouring interests that promote market liberalization, with little consideration given to the other interests in play. P.M. Wald, *The Judicial Evolution of the WTO Appellate Body*, cit., 23-24 also shares this negative judgment and claims that this attitude on deference is unjustifiable. Making a comparison between the deference agreed upon by the court of appeal with the district court of the United States, Wald individualizes fundamental differences. While, in fact, in the district courts deference is recognized on factual questions due to its “superior ability to see and

3.4 The power of review of legal issues of the Appellate Body

If the level of *deference* of fact finding seems high, to the point that the appealing body cannot be considered a court of appeal, the review of the questions of law becomes more intrusive, even if in principle it extends only to the legal arguments that were developed by the panel and contained in the final report³¹.

This supervision over the errors of law by the panels, similar to that practiced by the court of appeals over the inferior courts of the United States' system³², evidently assigns the Appellate Body an important role in interpreting the rules of the agreements. In fact, because of its "apical" position in the dispute settlement system, the Appellate Body assures dispute resolution (and therefore a protection of the natural rights guaranteed in the agreements) but also acts as a guarantor of the certainty and predictability of the international trade rules (art. 3 par. 2 DSU).

hear witnesses first hand", the very same circumstances do not take place in the WTO system. Moreover, the panel has the responsibility to make the most agreeable solutions possible for the disputes, and its nominations guarantee less independence in comparison with those of the Appellate Body. All of these factors make, according to Wald, the Appellate Body's attitude on deference inappropriate in regards to the panel's factual conclusions. Also in this sense, J. J. Konstantin, *True appellate procedure or only a two-stage process? A comparative view of the Appellate Body under the WTO Dispute Settlement understanding*, in *Law and Policy in International Business*, winter 1999, writes "like domestic appellate courts in common law countries and higher courts in civil law countries, the Appellate Body engages only in the interpretation of law".

³¹ Art. 17 par. 6 establishes, in fact, that "an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". The appeal may regard an eventual act by the board in violation of the DSU or other rules relating to the system. The terms and the procedure for the hearing are contained in the AB's *Working Procedures or Appeal*. The *AB Working Procedures* do not explicitly contain a distinction between questions of fact and of law, but the Appellate Body has specified, in EC Hormones (*EC Measures Concerning Meat and Meat Products (Hormones)*) (16 January 1998) WTO Docs, WT/DS26/AB/R and WT/DS48/AB/R (*Appellate Body Report*) that in that case the Appellate Body reviewed question of fact and question of law. Moreover, on this point T. Voon – A. Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, in *Journal of World Trade*, 2006, 239 ss.

³² On this point cfr. G. Lawson, *Federal Administrative Law*, St. Paul, Minnesota, 2001, 499. The same thing happens in the community with the Court of Justice's review of the decisions made by the First Instance Court, which may limit review to the questions of law.

This suggests an interpretive role of the Appellate Body that is similar to the role assumed by the European Community's Court of Justice in creating the fundamental principles and features of the international trade law³³.

But such an analogy cannot be substantiated. In fact, article IX, par. 2 of the WTO agreement assigns the ministerial conference and the General Council "the exclusive authority" to interpret WTO agreements and the other multilateral commercial agreements³⁴, which, in these terms, denies the Appellate Body the role of institutional interpreter. In practical terms, however, regardless of the abstract recognition of this interpretive power of the General Council, the complexity of the political decision making process and the difficulty to reach a three quarters majority by the Member states (that is the majority necessary for these deliberations) assigns de facto the Appellate Body the power to definitively interpret the agreements dispositions³⁵.

Moreover, the Appellate Body can review the legal significance of facts taken by the panel: according to the decision taken by the Appellate Body in the Hormones case, while a substantial deference is reserved for the factual conclusions reached by the panel, the legal significance of the facts (the c.d. mixed questions of law and fact) would be subject to review³⁶.

When discussing decisional power, article. 17 par. 13 of the DSU establishes that the Appellate Body can confirm, modify or reform panel

³³ Cfr. J. J. Konstantin, *True appellate procedure or only a two-stage process? A comparative view of the Appellate Body under the WTO dispute settlement understanding*, in *Law and Policy in International Business*, winter, 1999.

³⁴ The disposition fixes the majority to _ of the members needed for the adoption of the authentic interpretation.

³⁵ "The current WTO Agreement (...) does not provide for a speedy decision-making process, due to the need to obtain the support of such a large number of members countries to either overrule the report (in response to a "wrong" ruling) or approve of the report (in response to a "right" ruling)". In fact, this circumstance assigns the Appellate Body a unique position that differentiates it from the Court of Justice and the Superior Courts, which work in an international context, because its role as interpreter of law is not efficiently balanced, as it happens in the community and national contexts by executive and legislative power. J. J. Konstantin, *True appellate procedure or only a two-stage process? A comparative view of the Appellate Body under the WTO dispute settlement understanding*, cit. On this point is also T. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding*, accessible at: http://www.zimmermann-thomas.de/publikationen/zimmermann_2006_book_dsu.pdf, 221.

³⁶ *EC- Hormone*, cit.: "The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization. It is a legal question". On this point, T. Voon – A. Yanovich, *The Facts Aside: The Limitation of WTO Appeals to Issues of Law*, in *Journal of World Trade*, 2006, 246.

decisions; remand to the panel, however, does not seem possible, so that the Appellate Body has definitive dispute resolution power³⁷. The fact that the Appellate Body does not have the power to remand may cause inadequate outcomes if a procedural error occurred before the panel (for example, if a fact, which was relevant to the decision, was missing). At this point, it would be difficult for the Appellate Body to reach the fact findings of the dispute because of its role as a “cassation court”³⁸.

3.5 Open questions: *amicus curiae* briefs and the confidentiality problem

The panel and the Appellate Body proceedings present several analogies to court proceedings. All the same, some features of the procedural discipline prove problematic and are not subject to legal logic. One element of differentiation, which is actually quite frequently debated, is constituted by the functional limitations in order of the admissibility of *amicus curiae* briefs³⁹. A second element is the fact that the proceedings have a tendency to be confidential, rather than open to the public.

Regarding the first question, the position taken by the Appellate Body in the Shrimp/Turtle case was fundamental⁴⁰. In fact, the conclusions reached by the panel were subject to review by the Appellate Body because they had

³⁷ The Appellate Body in the Shrimp-Turtle case (*WTO United States – Import Prohibition of Certain Shrimp and Shrimp Products* (October 12, 1998) WTO Doc. WT/DS58/AB/R (Appellate Body Report): “Reversal of a panel’s finding on a legal issue may require us to make a finding on a legal issue which was not adduced by the panel”. In this case, the Appellate Body proceeded to define the dispute (completing the analysis) applying their own legal arguments to the fact findings. An analogous operation took place in the Periodicals case, cit. On this point, E. U. Petersmann, *How to Promote the International Rule of Law?, Contributions by the World Trade Organization Appellate Review System*, (1998), 1, *Journal of International Economic Law*, 25.

³⁸ J. J. Konstantin, *True appellate procedure or only a two-stage process? A comparative view of the Appellate Body under the WTO dispute settlement understanding*, cit.

³⁹ As it is well-known, *amicus curiae* is a figure, in the legal proceedings in the United States, that can bring interests, other than those that are represented by the parties, to the proceedings when the decision may produce effects that go beyond those of the parties: the presentation of *amicus curiae* briefs must be authorized by a judge. Among others, P. C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, Jean Monnet Paper 2/01, in A. Von Bogdandi - P. C. Mavroidis - Y. Meny (eds), *Festschrift für Claus-Dieter Ehlermann*, Kluwer, 2002; M. M. Slotboom, *Participation of NGOs before the WTO and EC tribunals: which court is the better friend?*, in *World Trade Review*, 2006, 69 e ss.

⁴⁰ *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998.

not taken into consideration, at the end of their decisions, some elements that emerged from the *amicus curiae* briefs, which were presented by a non-governmental organization. In particular, according to the Appellate Body, having not considered these elements relevant, the panel had failed to fulfil its obligation to accomplish an objective verification of the facts necessary to make a decision⁴¹.

The impact of the Dispute Settlement system's decisions and its importance in terms of representation of the interests of the dispute resolution process is significant; considering that prior to the system, it was not possible for non-WTO member subjects to participate in a dispute or even to influence a possible decision⁴².

Nevertheless, looking at the case law, the *amicus curiae* brief was admitted with caution into the dispute resolution system, most likely due to a WTO General Council recommendation. If, in fact, the admissibility of *amicus curiae* briefs was not excluded from the panel proceedings, their relevance is above all guaranteed, letting the panel have discretion on whether to accept them or not and on how to take them into consideration in the final report. Therefore, whoever (an individual or non-governmental organization) wants to submit a brief as *amicus curiae* to the panel has

⁴¹ The panel had excluded the right to consider *amicus curiae* briefs by referring to art. 13 DSU, which states that it is the panel that should research the necessary information to resolve a dispute and that any unrequested information would be inadmissible. The Appellate body reached a different conclusion on the same point considering that the panel can discretionally authorize the presentation of *amicus curiae* if it did not cause a considerable delay and, if possible, after it had consulted with both parties of the dispute. In this case, “for all practical and pertinent purposes, the distinction between ‘requested’ and ‘non-requested’ information vanishes” (par. 107 Report). In particular, according to the Appellate Body, once the panel had accepted the brief, from that moment on, it could no longer refuse to consider it, although it had the discretion to refuse to accept the brief when it was initially presented. P. C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, cit., critically comments on this point.

⁴² M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 126, according to this source, the presentation of *amicus curiae* briefs seems desirable in a system that aims to represent the point of view of subjects, other than the Member states, that have interests that are affected by the rulings of the disputes without having to go through the national administration filters. P. C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, observes that all the WTO members (excluding the US) disagree about the decision to admit third party (non-governmental organizations) briefs into the decision making process that may influence the ruling of the dispute. That would grant, in fact, these subjects greater rights and potentialities in comparison with those of the Member states. The risk would be, moreover, to weigh down the panel with work and to increase the political character of the decisions.

neither a legal right for it to be accepted into the process nor, once accepted, a guarantee that it will bear on the fate of the dispute⁴³.

Furthermore, according to the Appellate Body's clarification of the Asbestos case⁴⁴, the party who wants to present an *amicus curiae*, needs to request for leave, through a process that seems significantly burdensome for the interested party⁴⁵. In fact, the requesting party must specify its interests in the dispute, the nature of its activity, its financial sources, the specific legal question that it wishes to address, a declaration that explains how any possible conclusions could contribute to the dispute and why it would not be repeating the parties' conclusions and, finally, a declaration concerning a possible conflict of interest⁴⁶.

Moreover, the other parties of the dispute have a full right to reply to the *amicus curiae* arguments and conclusions.

The cautious conditions for *amicus curiae* to be admitted in the Dispute Settlement System most likely expresses the pursuit of a balance between the opposing interests existing inside the system⁴⁷. On one hand, in fact, the Member states want to deny the entry of interested third parties into the disputes in order to avoid a potential politicalization of the decision arena, or moreover, an overload of the dispute settlement system. On the other hand, the more that the DSS decisions affect not only trade interests and prove to have a global impact, the more it becomes difficult to justify that these decisions are formed without the intervention of new players with special interests (environmental, health, etc.)⁴⁸.

⁴³ It is interesting to point out that following the Asbestos case, the Appellate Body has never granted leave, rejecting requests to present *amicus curiae* briefs due to their irrelevance to the question.

⁴⁴ *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001) (01-1157), AB 2000-11. Additional procedure adopted Under Rule 16(1) of the Working Procedures for Appellate Review, WT/DS135/9 (November 8, 2000).

⁴⁵ See A. L. Stoler, *Suggestions on Enhancing the Operation of the WTO Panel Process and Appellate Review*, Conference on the WTO at 10: Governance, Dispute Settlement and Developing Countries, NY City, April 6, 2006, accessible at: <http://www.sipa.columbia.edu/wto/html/papers.html>.

⁴⁶ The conditions to present *amicus curiae* briefs are substantially the same established by art. 29 of the Federal Rules of Appellate Procedure of the United States.

⁴⁷ According to Weiler (*The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, cit., 12) “the *modus operandi* established by the Appellate Body seems a perfect example of the interplay between external and internal legitimacy”.

⁴⁸ P.M. Wald, *The Judicial Evolution of the WTO Appellate Body* , cit., according to which “the age of sovereign nations as the exclusive players may be passing in trade as well as in

In regards to the second question, concerning the public or private nature of the proceedings, the dispute resolution system follows different rules than the jurisdictional bodies. National and international courts generally form their decisions after public hearings with witnesses and evidence, and at the end of the process, they adopt their decisions in documents subject to publicity⁴⁹. The panel and Appellate Body, on the other hand, do not abide by these rules.

The deliberations of the panel are confidential and the final report is written without the presence of the litigant parties (art. 14 of the DSU). Article 17 par. 10 does not provide for public hearings, establishing that the proceedings before the Appellate Body remain confidential and that the report be made without any assistance from the parties. Furthermore, the opinions of the panel and Appellate Body components must remain anonymous⁵⁰.

The reasons for this opacity most likely come from the negotiatory and diplomatic features of the dispute resolution system. The level of secrecy of the proceedings could be justified with the preference for a conciliatory decision of the dispute⁵¹.

individual human rights". This reflects a tendency that is found in many cases of international public law, which contribute to a transition "*from a jurisprudence based on relations between states to one dealing with the rights of individuals within those states*". In general, on the presence of *amicus curiae* in the International courts. L. Bartholomeusz, *The Amicus Curiae before the International Courts and Tribunals*, in *Non-State Actors and International Law*, 2005, 3, 209 *ess.*

⁴⁹ P.M. Wald, *The Judicial Evolution of the WTO Appellate Body*, cit., according to whom publicity constitutes one of the principal guarantees needed for impartial justice. The secrecy of proceedings can only be justified if witnesses need protection or for matters of national security.

⁵⁰ The parties' conclusions, again, are reserved, unless otherwise indicated by the parties themselves. Moreover, par. VII of the rules of conduct attached to the DSU establishes that "*each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential*".

⁵¹ J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, cit., 11, states that "*the secrecy of the procedures is a throwback to the diplomatic phase of GATT development*". According to the author, however, even though before a panel is fixed a considerable level of secrecy is justifiable, once the panel has been established that justification becomes invalid. "*It is only the fact that WTO discourse has been dominated for its entire life by civil servants to whom confidentiality and secrecy is both second nature and a source of empowerment and self-importance that this practise has continued to date*". On the same point is G. Sacerdoti, *Il sistema di soluzione delle controversie dell'organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, cit., 444-445, who believes that

It seems questionable, however, that this feature is compatible with the dimension and scope assumed by the dispute settlement system or with the ultra-commercial importance and changed context of the disputes. As previously mentioned, in a rising number of cases the decisions adopted by the DSS, when applying the rules of the agreements, are not limited to individualize finding of whether a particular piece of behaviour conformed to international trade law, but end up evaluating national and international policies in various fields, facilitating or penalizing the specific values that these fields incorporate⁵². In this case, market regulation should not be the only objective kept in mind. Instead, it should intertwine with the need for solutions that are just for other interests and people that are affected by the decisions. The fact that the reports are circulated among all WTO members in order to solicit any eventual comments does not seem to sufficiently guarantee system transparency or an understanding of the WTO circuit from abroad.

3.6 The crucial issue of the enforcement proceedings and the re-emergence of the diplomatic ethos

The dispute resolution system has an exclusive and obligatory nature⁵³, which is typical of its jurisdictional function. The governments have, in fact, an obligation to address the dispute settlement system when declaring a violation of a WTO agreement disposition and cannot resort to other national or international courts⁵⁴. When a panel or Appellate Body reach a decision, the shortcomings of the jurisdictional features of the system surface, because until a decision is adopted by the Dispute Settlement Body (the political body that represents the governments), it is not binding. In other words, the panel and Appellate Body recommendations become, in

making the proceedings public does not constitute a necessary prerequisite of international jurisdiction, while its absence seems, however, to characterize an arbitary procedure.

⁵² M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 115-116. In analogous terms, P.M. Wald, *The Judicial Evolution of the WTO Appellate Body*, cit., according to whom “an organization which has exclusive dispute jurisdiction in so vital an area as international trade has to enlist the trust of third parties and the public, and secrecy would seem to operate in the opposite direction”.

⁵³ On this point, T. Treves, *Le controversie internazionali. Nuove tendenze, nuovi tribunali*, Milano, Giuffrè, 1999, 53.

⁵⁴ Article 23 D.S.U.: « When Members seek the redress of a violation or other nullification or impairment of benefits under the covered agreement or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this understanding ».

fact, obligatory only when the dispute settlement body adopts them. The DSB must first adopt a decision and then address their recommendations to the losing party in order to enforce State compliance with the ruling made by the DSS⁵⁵. In that sense, even if the DSB does not have the direct power to revise or modify panel and Appellate Body decisions, it is only after its formal deliberation to adopt a decision that the dispute resolution procedure comes to a close producing a binding outcome. The definition of the controversy, accordingly, is assigned to third party arbitrators (who, other than establishing the obligations of the parties, can suggest to the losing party, even in a nonbinding manner, the concrete way by which to comply), but formally refers to a political body, the DSB, which makes the rulings obligatory and surveys their implementation⁵⁶.

From a jurisdictional point of view, this feature of the dispute resolution system is obviously not easily reconcilable. Although the international courts, in general, do not have the power to enforce their decisions, the binding nature of their decisions is beyond doubt.

The executive phase is regulated by article 21 and 22 of the DSU, which provide two distinct cases: the voluntary implementation of the recommendations and the procedure for coercive implementation. A prompt compliance with the recommendations is considered a fundamental condition for the proper functioning of the system⁵⁷: the losing party has to communicate to the DSB, within 30 days of the report's adoption, its intention regarding the recommendations. If a state is unable to immediately comply with the recommendations, it may be granted a "reasonable period of time" in order to carry them out⁵⁸.

⁵⁵ On this point, V. Di Comite, *L'esecuzione delle decisioni del Dispute Settlement Body dell'OMC*, in *La Comunità internaz.*, 2007, 3, 531. It should be pointed out that the term "recommendation", in the GATT/WTO context, means "*legally binding order*" once it has been adopted by the *dispute settlement body* (R. E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, accessible at: <http://www.worldtradelaw.net/articles/hudecremedies.pdf>).

⁵⁶ G. Sacerdoti, *Il sistema di soluzione delle controversie dell'organizzazione mondiale del commercio a dieci anni dalla sua istituzione*, cit., 449; M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 146.

⁵⁷ Article 21 par. 1 literally establishes that « *prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members* ».

⁵⁸ This period of time can be fixed, according to art. 21 par. 3 of the DSU or by a suggestion made by the state itself, if approved by the DSB with a positive consensus (lett. A); or following an agreement between the parties, reached within 45 days of the adoption date of the report (lett. B); or, in the case that no agreement is reached, with a binding arbitration within 90 days of the adoption of the decision (lett. C). In the lett. C hypotheses,

The adequacy and compatibility of the losing state's implementation may be contested in the same dispute resolution system with an appeal to the compliance panel (which may possibly coincide with the original panel that decided the disagreement⁵⁹). After the losing party receives the ruling, it has 90 days, unless a different period is set by the DSB, to express its reasons for any further delays⁶⁰.

Furthermore, each WTO member has the right to go before the DSB, which acts as a special watchman over the execution of the decisions, and to question the adequacy of the implementation by the losing state. What's more, the DSB continuously monitors the losing party and performs an initial check on the state of compliance six months following the fulfilment date⁶¹.

If a state voluntarily disregards a DSB ruling, article 22 provides provisional measures (compensation, concession suspension and other obligations deriving from the agreements) in order to remediate a situation of unfulfilment⁶².

In particular, if a losing member does not comply with the requested implementation measures (by the deadline), the state must negotiate, on

the period of time indicated by the arbitrator cannot exceed 15 months, even if, specified by the disposition, that period of time may be longer or shorter depending on the circumstances of the case.

⁵⁹ This responds to a «principle of opportunity of general validity in international law, according to which a controversy related to a secondary obligation of compensation must be judged on the base of the questions of facts and law connected with the primary rule, and therefore are preferably assigned to the competent body from the original controversy»: from A. Ligustro, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, cit., 544.

⁶⁰ V. Di Comite, *L'esecuzione delle decisioni del Dispute Settlement Body dell'OMC*, cit., 536-537, comments abundantly on the compliance panel legislation and notes how an appeal to the panel is, nevertheless, unanimously considered admissible, according to article 21 par. V of the DSU.

⁶¹ Moreover, article 21 specifies that the implementation question remains on the dispute settlement body's agenda «until the issue is resolved». In addition, the same political body has the discretionary power to promote specific interventions if the question of the adequacy and compatibility of the implementation measures are raised for a developing country. In this case, the DSB will take into account the impact that the implementation measures will have on the economy of the interested country.

⁶² The provisionary and instrumental nature of the countermeasures established in article 22 of the DSU and explicated in par. 8 of the same article establishes that «the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement the recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached».

request by the interested party, a compensation with the winning party within 20 days of the expiration date. Furthermore, if this agreement is not respected, the interested party can ask the authorities to impose countermeasures, such as concession suspensions or other obligations provided by the WTO agreements⁶³.

It is not clear if the request for the authorization of the countermeasures presupposes or not a decision from the compliance panel, which assesses the inadequacy of the losing state's compliance⁶⁴. While waiting for an amendment that will clarify art. 21 par. 5 (compliance panel's mandate) and art. 22 par. 6 (the dispute settlement body's authorization of countermeasures) it has been suggested to distinguish between the case in which the losing state does comply with the implementation measures and the hypothesis in which the state did, indeed, at least make an attempt to follow the decision⁶⁵. In the first case, of total inertia of the state, it is possible to address the dispute settlement body to request countermeasure authorization, while in the second case, it is first necessary to go to the compliance panel in order to determine if the party's compliance was or was not adequate in respect to the obligations provided in the recommendations. In either case, the countermeasure authorization will be approved, unless the dispute settlement body unanimously opposes it. Nevertheless, if the interested state contests the level of the suspensions or a lack of respect for the procedure and principles found in article 22 par. 3⁶⁶ (principle of

⁶³ On this point is M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 140. The countermeasures can be contested in front of an arbitration panel, which will evaluate the adequacy and proportionality regarding the amount of damage caused due to the lack of an implementation of the decision.

⁶⁴ V. Di Comite, *L'esecuzione delle decisioni del Dispute Settlement Body dell'OMC*, cit., 550, reveals how the problem of «the sequential relationship appears, at least temporarily, resolved, thanks to the solutions that are made between the parties themselves» even if the question of the relationships between the two rules/laws remain problematic and risks to undermine the certainty and predictability of WTO rules during the implementation phase of the dispute settlement system's decisions.

⁶⁵ P. R. Mavroidis, *Remedies in WTO System – Between a Rock and a Hard Place*, in *European Journal of International Law*, 2000, 11, 763. M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 141, also agree with the solution. On the surveillance of the panel's countermeasures and their adequacy and compatibility, V. Di Comite, *L'esecuzione delle decisioni del Dispute Settlement Body dell'OMC*, cit., 545.

⁶⁶ The proposed countermeasures by the winning state must respect some fixed principles in par. 3 of art. 22: the countermeasures must tendentially pertain to the same trade sector as the principal violation; if that is not practicable or efficient, the countermeasures may pertain to a different trade sector found in the same agreement; finally, if even this change is not efficient or practicable and sufficiently serious circumstances exist, the

gradualness), the question will be assigned to an arbitrator (the original panel, if possible, or an arbitrator that has been nominated by the Secretary general), who will decide within 60 days of the compliance deadline⁶⁷.

This implicates that the panel, which originally decided the dispute, can find itself, subsequently, with the responsibility to act as the compliance panel, which decides on the adequacy of the losing state's implementation. Moreover, the panel may also end up as the arbitrator (article 22 par. 6) that decides the proportionality, gradualness and compatibility of the countermeasures put into effect by the winning state due to the disregard for the implementations of the initial recommendations by the losing state.

The object of the panel's decision, in this case, is to balance the positions of the disputing parties.

After the arbitrator's decision, the dispute settlement body must be quickly informed and, if requested by the interested party, can authorize, unless there is unanimous dissent, the suspension of the concessions or of the obligations contemplated in the agreement.

3.7 Modification propositions and possible DSS developments

The analysis of the dispute resolution system and its mechanisms of action confirm that it has reached an elevated degree of "juridification." The creation of a two layers system of judicial review, on the degree of jurisdiction of the arguments developed by the judging bodies, and on the substantial necessity and binding character of the decisions (made thanks to

countermeasures may pertain to an even different sector than the ones contained in the WTO agreement. In response to this, M.J. Trebilcock – R. Howse, *The Regulation of International Trade*, cit., 141, mentions how this third hypothesis was verified in the Bananas case, in which Ecuador consented to withdraw its concessions not only relating to the GATT agreements, but also to TRIPS, because a reprisal in the trade sector would not have been efficient due to the fact that it would have suspended half of the European export, much of which consisted of essential goods for Ecuador's economy (*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the EC under Article 22.6 of the DSU*, WT/DS/27/ARB/ECU (March 24, 2000) (00-1207).

⁶⁷ Paragraph 7 of article 22 specifies that an arbitrator does not examine the nature of the countermeasures, but only if «*the level of such suspension is equivalent to the level of nullification or impairment*» as well as in the light of WTO agreements. The arbitrator's decision regarding the adequacy and compatibility of the countermeasures cannot be appealed to the appellate body and the question cannot even be presented for a second arbitration, insomuch as it is tendentially defined (art. 22 par. 7: «*the parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration*»).

the consensus rule) all bring to mind a system that protects jurisdictional features⁶⁸.

However, the passage towards a global trade court has not been reached, and it is not certain that it will ever be accomplished: several elements of the system remain that provide evidence of the original negotiatory and diplomatic features, and the reform propositions in discussion today reveal uncertain future developments.

After the 1997-98 negotiations, following the 2003 Doha Round, a revision of the Dispute Settlement Understanding⁶⁹ was put on the agenda, but so far it has proven quite troublesome to complete. The difficulty of agreeing on the system's modifications reflects the diverse, fundamental philosophies of the negotiators, which reside in a balance between an ulterior strengthening of the jurisdictional nature (rule-oriented) and a substantial reinvigoration of the negotiational and diplomatic model (power-oriented)⁷⁰.

In order to strengthen the juridification process of the system, several propositions have been made: substantial juridification of the conciliations, which would make them more transparent through a prevision of a duty of notice; furthermore, the provision of remedies in case of violation; creation of a permanent panel (permanent panel body) – like a first instance court – that would make the first level of judgement independent, exempting them from member interference (through the Secretariat) and with the objective of achieving a greater juridification of its action; resolution of the problems of art. 21.6 and art. 22 of the DSU in regards to the implementation of the recommendations (sequencing issue); strengthening of the executive phase, with importance placed on balancing rights and party obligations; greater interior and exterior transparency (also achieved through the strengthening

⁶⁸ These elements confirm that the general observation, in the international scene, that «the traditional distrust of the states to accept that its controversies can be submitted with unilateral appeal to a court or tribunal that makes binding decisions» is valid even for the World Trade Organization. T. Treves, *Le controversie internazionali. Nuove tendenze, nuovi tribunali*, cit., 6-7, writes on this point that «in other words, the obligatory solution of the controversies is now accepted more diffusely among the states, which are therefore more inclined to recognize both the right of the other party in the controversy to unilaterally submit to a jurisdictional or arbitral body and the binding nature of the decisions made by that body».

⁶⁹ T. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding*, cit., writes extensively on the revision process in existence.

⁷⁰ T. A. Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding*, cit., 204.

of third party rights); assignation of the power of remand to the Appellate Body panel⁷¹.

Moving towards an expansion of the negotiatory and diplomatic roles of the dispute system, other measures, moving in the opposite direction, have been proposed: an automatic time limit for making the request (or more manageable conditions for its withdrawal), turning the complaint into an important tool on the negotiations table; a proposal to introduce separate panellist opinions with consequences relevant to their independence from the national governments; the United States and Chile, moreover, have asked to give the parties the right to consensually eliminate the panel and AB conclusions (thus returning the dispute to the parties' will), to diminish the importance of the judging bodies and to further reduce the transparency of the procedures. It is also proposed that the parties have the possibility to suspend an appeal, to arrange for procedural terms and to intervene in the procedures, according to the mutual agreement rule, making it more flexible in respect to the political-diplomatic power of the negotiations.

If these last modifications were realized, a better balance between the rule-oriented and power-oriented components would be reconstructed. According to Zimmermann's observations, in fact, «the relative success and well-functioning of the dispute settlement system with its adjudicate bodies on the one hand, and the weakness of the consensus-based political decision-making in the WTO on the other, is leading to a serious imbalance»⁷².

⁷¹ There is no room for discussing other reforms raised by some states, among which the question of compensation for damages caused by the illegal conduct and that of *amicus curiae* briefs. On this point. R. E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, cit., 15. In the same sense, J. Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, in *The American Journal of Internat. Law.*, 2000, vol. 94, issue 2, 335.

⁷² *Op. ult. cit.*, 221. The imbalance created from the juridification process of the dispute settlement system could be, according to the author's report, redeveloped in two ways, both outlined within the system: weaken the third and legal component of the mechanisms of the dispute resolution system, or significantly improving the decisional, political processes with the purpose of the exercise of the power of amendment of texts and the power to interpret the agreements, assigned, as stated, exclusively at the Ministerial Conference and General Council of the WTO (art IX.2 WTO). According to Zimmermann, the weakening of the dispute resolution system – with the purpose to recognize a greater relevance of the political-negotiatory power – would be an inadequate solution, because it would reduce the predictability of the entire WTO system (234). Apropos of the machinery of the WTO decisional processes, considered a serious institutional problem, J. H. Jackson, *The Changing Fundamentals of International Law and Ten Years of the WTO*, in *Journal of International Economic Law*, 2005, 8, 3.

4. Court, arbitrator or tertium genus?

The analyzed difficulties of the DSU reform process express, on one hand, the uncertainty on the right direction to follow, and on the other, a clear level of satisfaction from the obtained results, which allows for procrastination, making the modifications and adjustments less urgent.

When one observes today's dispute resolution system, however, the image does not allow for an accurate individualization of the nature or an outline of a framed subject, even if a few details and features seem adequately in focus and recognizable.

One thing that is plainly understood is the existence of a process in action, of a subject in motion that has an uncertain shape.

Several of the Dispute Settlement Understanding rules give the impression, due to the formerly examined reasons, that we are in the presence of an international jurisdiction, centered on the appellate body, the permanent judging body of appeal regarding the panel's decisions and its privileged role as interpreter of the WTO agreements⁷³.

Many other features, however, exclude that the system has a jurisdictional connotation. There is, in fact, a lack of essential elements.

Above all, the independence of the judging bodies is not assured. The panel's nomination mechanisms do not guarantee it, and even if the Ab nominations follow rules that appear more capable of assuring impartiality and independence of its components, the panel has the last word on the decision, in comparison with the appellate body that grants a substantial deference⁷⁴.

The entire structure of the system then seems formally contrived, when recognizing the panel and appellate body as special dispute consultants, rather than judges: they formally assist the body that represents the member states (the dispute settlement body) when exercising its function to resolve

⁷³ In the same sense, article 3 par. 2 of the DSU provides that it is up to the Dispute Settlement System to clarify the provisions of the agreements, looking to the customary rules of international public law, to ensure the certainty and predictability of the multilateral system of agreements and to protect the rights and obligations of the parties of the agreements. In favor of the jurisdictional nature of the DSS, for example, Van de Bossche, in R. Yerza – B. Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years*, Cambridge University Press, 2005.

⁷⁴ For example, J. Kingery, *Part I, Review of Dispute Settlement Understanding (DSU): Panel I B: Stage II – Operation of Panels: Commentary*, in *31 L. & Pol'y Int'l Bus*, 2000, Spring, 665-666, states how the litigating parties have increased the recusing of panellists with the same nationality as the counter party or with previous participation of a panel.

the conflicts. And if the rule of “negative consensus” has made the adoption of the recommendations coming from the judging bodies of the DSB automatic, the overall establishment is not easily reconcilable with the idea of an international court.

In this sense, the adjudicatory function is substantially allocated outside of the negotiatory-diplomatic circuit of the litigating parties, even if the member states, acting as DSB, continue apparently to be the *formal dominus* of the function of the definition of the controversies⁷⁵.

Particularly strong is the adversarial character of the disputes: it is the parties, not the judge, who lead the process, and no superior public interests seem capable of influencing the progress of the proceedings. The complaining parties can, at anytime during the process, come to an agreement, decide to give up for any reason and often can consensually modify the procedural rules. These accusatory features, which have consequences beyond the bilateral nature of the dispute, seem inadequate in regards to the multilateral and complex nature (in terms of involved interests) of the system (multilateral public interest nature)⁷⁶.

It draws attention to the closure and opacity of panel and appellate body procedures; if, in fact, it is true that a certain level of confidentiality characterizes the action of other international courts⁷⁷, the secretive nature of the proceedings appears, however, anachronistic, even under the light of the actual ultra-commercial dimension of the disputes. It is, moreover, evident that an adequate level of openness of the dispute settlement system to the outside could, on one hand, improve the quality of the decisions (with the admittance of *amicus curiae* briefs relevant in the disputes and capable to influence them) and, on the other, increase the external legitimization and accessibility of the system in the global context.

A look at the enforcement system of the dispute resolution decisions reveals inefficient and ineffective features. Several parties have denounced the

⁷⁵ P.C. Mavroidis, *Legal Eagles?*, Conference on the WTO at 10: Governance, Dispute Settlement and Developing Countries, NY City, April 6, 2006. In the same sense, article 3.7 of the DSU specifies that, as previously seen, a negotiated conclusion of the dispute is clearly the preferred and desired solution to the dispute.

⁷⁶ J. Pauwelyn, *The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes*, in *Ohio State Journal on Dispute Resolution*, 2003, vol. 19, 121. The author sees in the adversarial nature of the WTO’s dispute resolution system the result of the influence of the United States. This is due to three factors: the significant influence of the United States during the formation phase of the agreements and the DSU; the strong presence in the disputes as a litigating party; the legal background of the United States of several lawyers who work in the Secretariat and the WTO system.

⁷⁷ T. Treves, *Le controversie internazionali. Nuove tendenze, nuovi tribunali*, cit.

limited prospective of forward looking remedies⁷⁸. The violation of the obligations provided in the agreements does not produce any consequences for the violating state, forcing them, for example, to pay for damages, but instead translates exclusively into an obligation to eliminate the illegal conduct in the future.

The system of countermeasures, then, shows its limits when a dispute is between states with different economic and commercial strength and appears incapable of guaranteeing effective protection of developing countries with weak economies⁷⁹. Despite the constant preoccupation to ensure, during the implementation phase, the proportionality between countermeasures and losses, which were endured due to the violation, the system does not take adequately into account the strong discrepancies that are present at the starting point. This may be the reason that, in the face of an increase in the comprehensive number of complaints presented to the dispute settlement system, there is a decrease of complaints submitted by developing countries⁸⁰.

⁷⁸ R. E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, cit., 15, on this point, comments that in front of the request by developing countries to introduce among the suggestions on how to modify the DSU, the compensation for damages to the winning party of the dispute, the strong states have countered that the question of monetary compensation is «*simply outside the realm of the possible*». On the theme of remediation see T. Gazzini, *The Legal Nature of WTO Obligations and the Consequences of their violation*, in *Eur. Journal of International Law*, 2006, vol. 17, 723.

⁷⁹ R. E. Hudec, *Broadening the Scope of Remedies in WTO Dispute Settlement*, cit., 15 e ss.: according to the author, regarding countries with weak economies, the effectiveness of the WTO system is guaranteed more from the pressure generated politically by the community of the states than by the solution of the disputes.

⁸⁰ J. Kingery, *Part I, Review of Dispute Settlement Understanding (DSU): Panel 1 B: Stage II – Operation of Panels: Commentary*, cit., 666. After the adoption of the DSU, not a single sub-Saharan state has brought a dispute to the DSS. On this point, also H. Horn – P. C. Mavroidis, *The WTO Dispute Settlement System 1995-2004: Some Descriptive Statistics*, accessible at: <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/HornMavroidisWTODSUDatabaseOverview.pdf>, who, at the end of an attentive analysis of the WTO Dispute Settlement System Data Set statistics, formulate three general observations. The first one involves the evident absence in the DSS of developing countries (in the two Least developed countries (LDC) categories and of several countries included in the Developing countries other than LDC category); the second one concerns the particularly active role of a few industrialized countries (China, Korea, Mexico and Turkey, in particular); the third observation extracted from the accumulated data regards how the United States and the European Community are not dominating in the DSS, how they frequently participate in the system as agreeing parties (rather than as playing parties) and how they do not seem to influence the nomination of panellists. This is not meant, however, to discuss «*the “weight” of these countries in the organization, but just to point out how our members come out*».

5. *The WTO system and its DSS: some summary reflections*

In the WTO environment, it is the community of states that has the function of rule-making: it imposes international trade rules, by negotiating agreements, and modifies them according to procedures and processes that are typical of a power-oriented decisional system. The fixation of these standards constitutes a limit of the states action, not only in trade, but also for national politics in areas such as health, the environment, national security, etc.⁸¹.

In respect of the agreement rules, the member states are asked to adopt compatible and conforming national behaviours⁸².

In this limited sense, it is the national governments' duty to implement the rules of the WTO system⁸³.

Until now, the World Trade Organization does not differ from several other international organizations, originated from international agreements between national states.

Particular features of the WTO come to light when a violation of an agreement has occurred, because in this case the dispute is assigned to an organization, specifically the dispute settlement system, which is responsible for the adjudicatory function. In pursuit of this specific

⁸¹ P. Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, in C. Joerges – E.-U. Petersmann (editors), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford and Portland, Oregon, 2006, 67.

⁸² G. Falcon, *Ordine giuridico e ordine politico nel diritto amministrativo globale*, in P. Carta – F. Cortese, *Ordine giuridico e ordine politico*, Padova, 2008, currently in print. «Through their decisions, the national authorities undoubtedly act according to their national law, but that law, in turn, is bound to comply with internationally established requirements, both in rule-making/normative activity and, more properly, administrative activity». In this sense, eventual restrictive trade measures must be adequately justified and their adoption must follow the procedural rules established in the agreements. In the Safeguards agreement, for example, substantial and procedural rules and principles were fixed that impose both substantial criteria of proportionality, adequacy and motivation for restrictive action and procedural rules to guarantee publicity and procedural participation, of which it is not difficult to retrace a nucleus of universally recognized administrative law principles.

⁸³ J. H. Jackson, *The WTO Dispute Settlement Understanding - Misunderstanding on the Nature of Legal Obligation*, in *American Journal of International Law*, 1997, vol. 91, 208. Recently, on this point, S. Battini, *Amministrazioni nazionali e controversie globali*, Giuffrè, Milan, 2007, 127-128.

adjudicatory function, the organization is arranged on a remedial structure, which is based on two levels of judgement that are confided to neutral bodies, which are, *in fact*, assigned the power to resolve the disputes. As previously mentioned, this system is obligatory and exclusive, and although it is also characterized by logic and negotiatory-diplomatic features, it appears, however, strongly juridified, to the point that it has “emerged” from the political-negotiatory circuit dominated by the national governments.

The member states have, in this sense, delegated the dispute settlement system a central role in dispute resolution, so that it acts as a kind of “adjudicatory administrative agency” that, thanks to the particular expertise of its bodies and to the formalization of its procedures, is the best equipped to decide the disputes⁸⁴.

The rigorous respect of the rules and principles in terms of due process, burden of proof, duty to give reason, evidence, the right to a defense, guarantees a procedure that is very similar to national and international jurisdictions⁸⁵. Nevertheless, for the reasons mentioned before, the rulings that define the disputes cannot be considered a judicial decision, but rather binding rulings in the form of DSB deliberations.

⁸⁴ Some elements are analogous between the adjudication function exercised by the DSS of the WTO and that exercised by some administration agencies in the United States. In the US, the independent agencies serve as implementation tools for the rules established by Congress and their adjudicatory function is justified by the expertise of the decisor/desicion makers. The final decisions, adopted by an Administrative Law Judge is consequently made by agency superiors, who formally adopt the final order. The lack of democratic legitimation of the independent agencies, derived from their partial independence regarding the executive power, made the adoption of the Administrative Procedure Act in 1946 possible, which established a notable formalization of the adjudication procedures, the applicability of due process and the scope of judicial review. In the WTO framework, the adjudication function (or dispute settlement), first in the hands of the states, and now exercised by third and neutral bodies that apply the rules of the agreements to controversies: the report that decides the disputes is made by the Dispute Settlement Body, a body of the organization representing all the states. In this sense B. Kingsbury, N. Krisch, R. B. Stewart, *The emergence of Global Administrative Law*, cit., 44, writes that the Dispute Settlement Body would work like a mechanism that ensures the effective implementation of the WTO agreements against the administration of the member states. More in general, R. B. Stewart, *U.S. Administrative Law: A Model or Global Administrative Law?*, NYU School of Law, Working Paper n. 13, 2006, discusses the exportability of the United States’ model of administrative law in the global context.

⁸⁵ In this sense, once this function is given to the organization, a strong processualization of the procedures is made, aimed to legitimize decisions made by bodies that, even if third and neutral compared with the litigating parties, seem without democratic legitimacy.

The dispute settlement system bodies must apply the rules of the agreements when resolving disputes, interpreting and clarifying their range and significance; and in this way, they are acting like judges. In front of the ambiguity of the rule, they refer to its literal interpretation, to the theological criteria and they often apply the principles established in the Vienna Convention⁸⁶.

Frequently, then, beyond the role as interpreter, the structure of the dispositions contained in the agreements prelude real and true operations of balancing between opposing interests and values, which are sent to the judging bodies.

According to article XX of the GATT agreements, for example, the states can assume restrictive measures if it is necessary to protect: (a) “public morals”, (b) human, animal or plant life and Health, to secure compliance, the protection of patents, trademarks and copyrights and the prevention of deceptive practices. Other paragraphs pursue market limiting measures in relation to the conservation of exhaustible natural resources and products of prison labour. Analogous possibilities of market restriction are provided in other WTO agreements.

When deciding a dispute in which the interests of free trade are facing the interests connected to the protection of the environment and health, the panel and AB employ balancing techniques and proportionality test that end up shaping the development of the WTO rules⁸⁷.

It is evident that through the adoption of the decisions of the DSS, the comparison and prioritization of the interests in play are realized, and consequently, the dispute settlement system becomes a decisional forum that is crucial in deciding the fate of the system, its openness towards extra-commercial interests and its more or less representative structure in regards to the values present in the global context⁸⁸.

⁸⁶ B.Gerstetter, *The Appellate Body's Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, in C. Joerges – E.-U. Petersmann (editors), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford and Portland, Oregon, 2006, 111 e ss.

⁸⁷ A. Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, accessible at: http://www.law.columbia.edu/null/Stone-Sweet+-+Proportionality+Balancing?exclusive=filemgr.download&file_id=101159&showthumb=0, 46. The same AB, after all, explicitly recognized the abstract equivalence of values contemplated from such provisions (societal values) compared to those with a trade nature incorporated in the agreements.

⁸⁸ B.Gerstetter, *The Appellate Body's Response to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, cit.120 e ss. that in

The technique of proportionality control causes the panel and AB to consider market limitations and to disapprove as unreasonable (and thus inadmissible) those market restriction that taken in the name of the national interests, nevertheless seem disproportional⁸⁹, because the protected value can be safeguarded with a different measure that is less restrictive (e.g. the Thai Cigarettes 1990 case⁹⁰). In these terms, the affirmation according to which «*proportionality review (...) is inescapably an exercise in applied policymaking*»⁹¹ seems sharable.

When the rules of the agreements disclose this type of proportionality test, the dispute resolution suggests a conspicuous degree of discretion that brings to mind that of the constitutional courts and, for other aspects, the public administrations' power of balancing interests.

And if the AB ends up to be, in substance, the last maker of policy choices due to the inefficiencies in the rulemaking processes of states that rend them unable to correct the decision adopted by the dispute settlement system then we must address the problem of legitimization and accountability of the system, not only regarding member states, the direct recipients of the rulings, but also regarding other subjects (consumers, businesses, the nations' citizens) whose interests are variously touched by the adopted decisions⁹².

particular examines the balancing techniques used by the Appellate Body in the Shrimp-Turtles case.

⁸⁹ Al Stone Sweet, *op. ult. cit.*, 1: the criteria of proportionality would be after all extensively used in three Treaty-based regimes that can be considered constitutional: the European Union, the European Convention of Human Rights and the World Trade Organization: «*proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all*».

⁹⁰ GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, 1990. In critical terms on the decision, S. Cho, *Toward an Identity Theory of International Organizations*, 15-16 accessible at: [www.http://ssrn.com/abstract=968433](http://ssrn.com/abstract=968433).

⁹¹ A. Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, cit., 46., according to which, however, «*it also fits the mission of modern trustee courts, who govern political rulers by regulating the exercise of lawmaking authority in light of higher law norms, that are assumed to be both constitutive and permanent*».

In an analogous sense, S. Battini, *Amministrazioni nazionali e controversie globali*, cit., 134: «*the international body of review can, therefore, like domestic administrative judges, develop a sort of judicial legislation, capable to compress even further the liberty of the actions of the states in the administrative sphere, furthermore, by means of rules produced without their consensus*».

⁹² On the deficit of legitimization fo the international organizations, among several, A. Aman Jr., *The Democracy Deficit: Taming Globalization Through Law Reform*, New York University Press, 2004; J.A. Rabkin, *Law Without Nations? Why Constitutional*

Consequently, it will be necessary to see if the juridification process, which has already produced significant results on the legitimacy front (with the creation of the appellate body, the provision of impartial and expert decision makers, the respect for the fundamental principles of due process, participation, duty to give reasons and reasonableness), will continue to strengthen or if diverse development logics, characterized by the reinforcement of the negotiatory-diplomatic mechanisms, will prevail⁹³.

In conclusion, the management of the disputes within the World Trade Organization has amply surpassed the first dyadic and horizontal level of dispute settlement, founded on the states' management of the disputes, achieving a *triadic stratum*⁹⁴, in which the disputes are obligatorily distributed to neutral bodies, chosen by the administration, that decide according to extremely formalized procedures, which are also inspired by due process.

A superior level of constitutional dispute settlement, which is characterized by an emancipation of the system towards a jurisdictional structure that is called upon to decide the rights and obligations of the parties deriving from a higher international law however, cannot be located. And it is not even clear if that last level will ever be formed.

Government Requires Sovereign States, Princeton University Press, 2005; recently on this topic, S. Battini, *Amministrazioni nazionali e controversie globali*, Milan, Giuffrè, 2007, 177.

⁹³ In this sense, P. Nanz, *Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory*, cit., 68, agrees with the observation, writing that « *the democratic legitimacy of international governance depends on the openness of its (political) deliberations to public scrutiny* ».

⁹⁴ J. H. H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, cit., 6. The individualization of the different geological layers of the *dispute settlement* is also recalled by S. Cassese, *Oltre lo Stato*, cit., 37-38.