

# The Limits of Litigation: “Americanization” and Negotiation in the Settlement of WTO Disputes

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## I. INTRODUCTION

This Article examines the extent to which World Trade Organization (WTO) dispute settlement is “Americanized.” It scrutinizes three features of the WTO mechanism for proof of “Americanization”: the right to a panel, the legalization of the panel process, and the bilateral and adversarial nature of the WTO dispute settlement system. Recognizing the many benefits linked to these three features, the Article then identifies some of the problems that have accompanied them. Finally, the Article suggests ways to remedy those problems focusing, in particular, on how trade disputes could be settled other than through bilateral state-to-state litigation. In that sense, the Article correlates “Americanization” to an increasing focus on *litigation* and explores ways by which different forms of *negotiation* could complement, or provide alternatives to, litigation in the effective resolution of modern trade disputes.

## II. IS WTO DISPUTE SETTLEMENT “AMERICANIZED”? THREE FEATURES EXAMINED

In this section, it is argued that certain features of WTO dispute settlement are present, at least to some extent, because of U.S. influence. Although these features have traditionally been heralded as major improvements (a fact that we do not contest here), this Article questions whether practice has not pointed also at certain drawbacks. We will not elaborate on why this “Americanization” took place, although three obvious reasons come to mind: (1) the U.S. weight and influence in drafting the WTO treaty (including its dispute resolution mechanism); (2) the U.S. involvement, as a main party or a third party, in the large majority of WTO disputes, offering the United States a tremendous opportunity to “shape the system”; and (3) the U.S. legal background or education of most of the lawyers in the WTO secretariat and even many of the lawyers pleading on behalf of WTO Members other than the United States (including full-fledged U.S. private attorneys hired mainly by developing countries).

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### A. *The Right to a Panel*

The most important difference between General Agreement on Tariffs and Trade (GATT) and WTO dispute settlement is that the veto power for states to block the establishment of panels and the adoption of panel reports has been abolished. As a result, WTO Members now have “a right to a panel.”<sup>1</sup>

Can this feature be identified as “Americanization” because of it has tipped the balance in favor of a rules-based system, a trait of U.S. legal culture? I do not think so. Rather than a genuine U.S. transplant for the settlement of disputes, the right to a panel is better viewed as a political compromise between the major trading partners that was necessitated by past practice. The United States was fed up with the European Community’s (EC) exercise of its veto power in disputes such as the Hormone Beef controversy and therefore wanted to have an automatic system in place.<sup>2</sup> The EC, Japan, and most other countries, in contrast, had had enough of U.S. unilateralism *à la* Section 301 and wanted the United States to bind itself to the multilateral track of dispute resolution.<sup>3</sup> The result was an automatic dispute settlement system with a *right* to a panel, coupled with an *obligation* to bring all WTO disputes to the WTO and not to enforce them unilaterally.<sup>4</sup>

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<sup>1</sup> WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 6.1 [hereinafter *DSU*], available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm#Top](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#Top)

<sup>2</sup> For a pre-Uruguay Round discussion of the hormone beef controversy, see Adrián Rafael Halpern, *The U.S.-E.C. Hormone Beef Controversy and the Standards Code: Implications for the Application of Health Regulations to Agricultural Trade*, 14 N.C. J. INT’L L. & COMM. REG. 134 (1989). The controversy involved a 1985 EC Council Directive that banned the sale or importation of animals or meat from animals raised with growth hormones. *Id.* at 136. The United States viewed the ban as a violation of GATT’s Standards Code, and sought to establish an experts panel under the Code to resolve the dispute. The EC, however, persistently blocked those efforts. *Id.* at 142–43. The impasse was not broken until the United States took advantage of the Uruguay Round reforms to bring a complaint before the Dispute Settlement Body [hereinafter DSB], which established a Panel in 1996. Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997). The Panel, as confirmed by the Appellate Body, found that the EC’s hormones ban violated the Sanitary and Phytosanitary Agreement [hereinafter SPS Agreement]. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

<sup>3</sup> Tracey M. Abels, Comment, *The World Trade Organization’s First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467, 492 (1996) (“Section 301 was perceived as quite successful, inducing GATT members to view revitalized dispute settlement procedures in a new light—as a way to restrain U.S. unilateralism.”).

<sup>4</sup> *DSU*, art. 23.

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Moreover, it is not as if the old GATT dispute settlement system was a purely “power-based” political process. Panels *did* already exist, and GATT panels too made their decisions on the basis of GATT rules, not on the basis of discretionary power politics.<sup>5</sup> The main difference today is that these panels get established and their reports are adopted automatically. Parties no longer need to go through the process of establishment, and panels no longer must be adopted by consensus.<sup>6</sup> In other words, the *substantive examination* of trade disputes has largely remained the same (*i.e.*, based on rules); only the way this examination is *triggered* and *concluded* (*i.e.*, only panel establishment and the adoption of reports) has changed.<sup>7</sup>

Consequently, to say that the right to a panel has brought about a sea of change from a power-based to a rules-based system—somehow more in line with the “American” way of settling disputes—is not entirely correct. It remains the case, however, that the United States was one of the main proponents of this right to a panel.<sup>8</sup> But this is hardly enough to talk of “Americanization” because, after all, what *can* happen at the WTO *without* the active support of the United States?

What then is the negative side of this right to a panel? Clearly, the dwindling number of out-of-court settlements. The mandatory consultations that must be held before a panel can be established<sup>9</sup> have, indeed, led to fewer mutually agreed solutions. Out of 262 requests for consultations, 58

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<sup>5</sup> Donald E. deKieffer, *GATT Dispute Settlements: A New Beginning in International and U.S. Trade Law*, 2 NW. J. INT’L L. & BUS. 317, 325–26 (1980) (noting that the Tokyo Round reforms of the GATT dispute settlement process give Panelists the ability to consider “issues narrowly defined in terms of substantive law. . . . The sharper focus of investigation will permit and even require much more discrete analysis of the facts (and ‘law’) in individual cases.”).

<sup>6</sup> Kenneth W. Abbot, *The Uruguay Round and Dispute Resolution: Building a Private Interest System of Justice*, 1992 COLUM. BUS. L. REV. 111, 130 (noting that one of the “most significant products” of the Uruguay Round negotiations establishing the WTO was the “move toward guaranteed access to the panel process for complainant states”); *id.* at 141 (noting that the DSU provisions providing for “virtually automatic adoption of panel and appellate body decisions” were a “dramatic development[, constituting a watershed in the history of GATT dispute resolution”).

<sup>7</sup> That is not to say, though, that the two are unrelated. In the old GATT days, panels surely kept in mind the consensus rule when they drafted their decision (in an effort to secure its adoption) as much as WTO practice today shows that the now automatic process has increased the level of “legalization” of the entire system. But this brings us to the next feature we set out to examine: the “legalization” of the panel process.

<sup>8</sup> Robert E. Hudec, Discussion Following Professor Abbott’s Presentation, in 1992 COLUM. BUS. L. REV. 151, 153 (noting that the United States had been pushing for a right to a panel since 1970).

<sup>9</sup> DSU, art. 3.6.

were officially settled (only 35 of which through a formal “mutually agreed solution” notified to the WTO<sup>10</sup>), whereas 78 gave rise to a panel (the remaining 128 being “ongoing,” although quite a number of them are, in practice, inactive).<sup>11</sup> The decreasing number of settlements could be explained, *inter alia*, on the following grounds: “[I]n the shadow of the law” (as opposed to “in the shadow of the veto”), weaker states feel more confident to resist diplomatic pressure to conclude a settlement; in the same circumstances, stronger countries, in particular democracies, have found it difficult to justify to their domestic constituencies their failure to go “all the way,” including before a panel, often digging themselves in to such extent that the chances of a settlement become increasingly remote.<sup>12</sup> Marc Busch has made the additional point that democracies “may well prefer the greater formality of a panel . . . to the informality of consultations, motivating them to escalate more of their disputes.”<sup>13</sup> He attributes this largely to the mutual trust that democracies have in the rule of law.<sup>14</sup>

As explained below, however, negotiated settlements are sometimes the only way out of state-to-state disputes, even those that did go all of the way through litigation. In Part III below, we examine how such settlements can be facilitated.

### B. *The Legalization of the Panel Process*

In contrast to the first feature, the second feature we set out to examine does, in my view, bear the hallmarks of “Americanization” (*viz.*, the increased legalization of the panel and Appellate Body process). This legalization—of a largely procedural and behavioral nature (*e.g.*, the effect of “bringing in the lawyers”)—must first be distinguished from the automaticity of the process and the right to a panel discussed in the previous section (although the two are not unrelated, the right to a panel has clearly facilitated, even induced, legalization of the panel process).<sup>15</sup> The legalization at issue here is also different from the rules-based nature of WTO dispute settlement

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<sup>10</sup> *Id.*

<sup>11</sup> The statistics are taken from the WTO overview of disputes. WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/8 (July 31, 2002), at <http://www.wto.org>.

<sup>12</sup> See Marc Busch, *Democracy, Consultation, and the Paneling of Disputes Under GATT*, 44 J. CONFLICT RESOL. 425, 425–46 (2002).

<sup>13</sup> *Id.* at 426.

<sup>14</sup> *Id.* at 430.

<sup>15</sup> See *supra* notes 6–8 and accompanying text.

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decisions themselves (as pointed out, a feature that was already present in the old GATT days).

Legalization, as it is used here, was spurred, among other things, by the creation of the Appellate Body. Legalization takes the form, for example, of a dramatic increase in procedural claims and objections raised by disputing parties, as well as in the number of pages spent by panels and the Appellate Body on procedural issues (e.g., burden of proof, mandate of the panel, submission of evidence, and participation in the proceedings).<sup>16</sup> More generally, the entire discourse used in WTO dispute settlement is now almost exclusively legalese.<sup>17</sup> The discourse is set out in very long submissions and statements, and in even longer panel and Appellate Body reports, going into and explaining in detail the most intricate legal findings. This legalization resulted in—and may, in turn, have been partially caused by—the admission of private lawyers in oral hearings. It also led to a strict adherence to Vienna Convention rules on treaty interpretation, and in particular, a heavy focus on the text of the WTO treaty and its dictionary definitions, and detailed rules and rulings on business confidential information, amicus curiae briefs, burden of proof, and submission and gathering of evidence, including expert advice.<sup>18</sup> In line with this legalization, it has now become standard practice for panel and, especially, Appellate Body reports to be referred to in subsequent cases, almost taking the stature of common law precedent.<sup>19</sup> As a

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<sup>16</sup> See, e.g., Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (Aug. 23, 1999) (presenting an extensive discussion of the correct burden of proof to be applied under Article XVIII:B of the GATT 1994 (balance of payments restrictions)).

<sup>17</sup> For example, the unedited version of the combined panel reports in the recent Steel Safeguards dispute runs nearly one thousand pages, and recounts in detail parties' arguments on such issues as standards of interpretation, standards of review, burden of proof, the distinction between substantive and procedural obligations, and the definition and establishment of "causal links." Panel Reports, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (July 11, 2003) [hereinafter the Steel Safeguards case].

<sup>18</sup> For example, an electronic search of Appellate Body and WTO Panel reports at [www.worldtradelaw.net](http://www.worldtradelaw.net) shows that the term "Vienna Convention" has been cited in 127 separate reports. In thirty-eight of those cases, the Vienna Convention is cited forty or more times in the individual report. See, e.g., Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/R (Feb. 28, 2001) (citing the Vienna Convention 122 times). In contrast, only fifteen GATT panel reports discuss the Vienna Convention at all, and only two of those GATT reports mention the Vienna Convention forty or more times.

<sup>19</sup> The Appellate Body found, for example, that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, *should* be

logical consequence of this legalization wave, one could also mention the mainly U.S. driven call for more openness and transparency in the system, akin to domestic legal procedures, in contrast to the traditionally more secretive state-to-state process of negotiations and arbitration.<sup>20</sup>

Although all domestic legal systems have traits of this legalization—so that the tendency could just be described as the WTO process becoming of judicial age—it seems fair to say that the U.S. legal system has weighed heavily on this legalization, not only in its coming about, but also in the specific content and substance that it has taken. In particular, the rules on burden of proof, business confidential information, and amicus curiae briefs will look very familiar to U.S. common law lawyers, and less so, for example, to European civil lawyers. The same can be said about the almost precedential value that is now attributed to adopted Appellate Body reports. More generally, U.S. trial lawyers would feel far more comfortable in the increasingly contentious and litigious WTO system than, for example, Japanese lawyers, who come from a more consensual and non-litigious national legal culture.<sup>21</sup>

What then are the dark sides of this legalization? First, the legalization has focused almost exclusively on the panel and Appellate Body process (*i.e.*, the litigation stage leading up to a “judgment”). With the risk of “too much law” in that process, the fact remains that *before* and *after* it (*i.e.*, in pre-panel consultations and when it comes to inducing compliance with reports), there is “not enough law.” This is felt particularly in the ineffective system of WTO remedies, which do not offer enough of a deterrent either to

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taken into account where they are relevant to any dispute.” Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, at 14 (Oct. 4, 1996) (emphasis added).

Later, the Appellate Body added that the same applies to adopted Appellate Body reports. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, para. 109, at 30 (Oct. 22, 2001). It seemingly highlighted the additional importance of Appellate Body reports in the following statement: “The Panel had, necessarily, to consider our views on this subject, as we had overruled certain aspects of the findings of the original panel on this issue and, more important, had provided *interpretative guidance for future panels*, such as the Panel in this case.” *Id.* para. 107, at 30 (emphasis added).

<sup>20</sup> For more information on the U.S. push for greater transparency in GATT/WTO dispute settlement, see Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT'L L.J.* 173, 178 (2000).

<sup>21</sup> For a discussion of the reduced role that litigation plays in Japanese society compared to the United States, see J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 *YALE L.J.* 604 (1985).

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induce compliance with adopted reports or to prevent further breaches of WTO law (to the contrary, in many cases there is ample room for efficient breach).<sup>22</sup> As I have pointed out elsewhere, the legalization of disputes under the WTO stops, in effect, roughly where noncompliance starts.<sup>23</sup> As a result, as Eric Reinhardt explains, by the time a ruling is issued, the system has lost its best chance to influence the defendant's policy, for in the WTO "the anticipation of a ruling, and not its actualization, induces concessions from a defendant."<sup>24</sup>

The second drawback of the legalization of the panel process is that it sometimes risks going too far, especially when it is viewed in the context of state-to-state litigation. In some cases it may actually hamper the achievement of a resolution to the dispute in that countries lock themselves in a legal battle in which any form of compromise or willingness to negotiate may be seen as an admission. Moreover, strong democracies have the tendency to dig themselves in, making it increasingly difficult to reach a settlement because of high audience costs at home. As an empirical study by Marc Busch shows, "pairs of democracies realize greater concessions in the consultation stage where there is less of a paper trail, facilitating deals that might otherwise be politically costly with respect to domestic and foreign audiences."<sup>25</sup> However, once the dispute has escalated to the panel stage, settlements are less likely because of the "lock in" just mentioned.<sup>26</sup>

The combined result of these two flaws—the limited scope of the legalization and its dampening effect on negotiations—is that the WTO has been faced with a number of disputes that have remained unresolved even after they went through the entire WTO litigation process: the *Bananas* saga,<sup>27</sup> the *Hormone Beef Case*,<sup>28</sup> the *Canada-Brazil Aircraft* disputes,<sup>29</sup> and

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<sup>22</sup> Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 5179 (2002) (arguing that the WTO dispute settlement provisions were designed to encourage efficient breach).

<sup>23</sup> See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules Are Rules—Towards a More Collective Approach*, 94 AM. J. INT'L L. 335, 335–47 (2000).

<sup>24</sup> Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 J. CONFLICT RESOL. 174, 192 (2001).

<sup>25</sup> Busch, *supra* note 12, at 442.

<sup>26</sup> *Id.* at 426.

<sup>27</sup> Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997). The Bananas dispute concerned a preferential trade regime under which certain African, Caribbean, and Pacific (ACP) countries were allowed to import a set amount of bananas into the EC either duty-free or at lower duties. Bananas of non-ACP origin were subject to higher tariffs and received lower quota amounts. The United States and several Latin American

the *U.S. Foreign Sales Corporations Case*.<sup>30</sup> As the resolution in the Bananas saga has shown, in those “hard cases,” endless litigation does not offer a way out; negotiation does.<sup>31</sup>

In that sense, too much legalization, especially if it remains focused on only one stage in the entire process, can have negative side effects. It may reduce the chances of reaching a resolution to the dispute and neglect the importance of consultations and negotiations. In Part III below we examine how settlements through negotiation can be facilitated.

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countries challenged these and other aspects of the regime. The Panel found the regime to violate various GATT provisions, and the Appellate Body upheld the Panel’s finding of a violation. The EC revised its bananas regime, but the United States argued that the new regime was still a violation of the EC’s GATT obligations. A subsequent WTO panel agreed, and authorized the United States to implement countermeasures. Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB (April 9, 1999).

<sup>28</sup> See generally SPS Agreement, *supra* note 2.

<sup>29</sup> Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999); Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW (July 21, 2000). These cases concerned alleged Brazilian and Canadian government subsidies of their respective domestic aircraft industries. The Panels found that certain aspects of each government’s aircraft-support programs violated the Agreement on Subsidies and Countervailing Measures [hereinafter SCM Agreement], and these findings of a violation were upheld by the Appellate Body. Canada revised its aircraft measures in response to the Appellate Body ruling, and Brazil challenged the revised measures in a third case. Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R (Jan. 28, 2002) (holding that certain aspects of Canada’s revised aircraft measures were subsidies in violation of the SCM Agreement).

<sup>30</sup> Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/AB/R (Feb. 24, 2000) (upholding the Panel’s finding that a U.S. tax exemption constituted an export subsidy prohibited under the SCM Agreement). The United States revised the Foreign Sales Corporation (FSC) program in response to the Appellate Body’s ruling, but the revised program was also successfully challenged as an illegal export subsidy. Appellate Body Report on *United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (Jan. 14, 2002). A WTO arbitral panel subsequently authorized the EC to impose countermeasures for the continuing breach. Decision of the Arbitrator, *United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB (Aug. 30, 2002).

<sup>31</sup> At the Doha Ministerial Meeting of the WTO in November 2001, WTO Members granted a waiver to the revised EC import regime for bananas. *European Communities—The ACP-EC Partnership Agreement*, WT/MIN(01)/15 (Nov. 14, 2001).

### C. *The Bilateral and Adversarial Nature of the System*

The WTO dispute settlement system is largely what one could call a state-to-state, bilateral enforcement mechanism focused on third-party adjudication. This stands in contrast, for example, to the so-called collective monitoring or compliance mechanisms that ensure compliance with multilateral environmental agreements (MEAs).<sup>32</sup> This bilateral nature of the WTO system is largely warranted by the bilateral (*i.e.*, reciprocal or synallagmatic) nature of most WTO obligations themselves. As I have argued elsewhere,<sup>33</sup> most WTO obligations, though set out in a multilateral treaty, are, indeed, bilateral in nature in the sense that they can be reduced to a compilation of bilateral treaty relations, each of them detachable from the other, where one WTO Member makes a promise towards each and every other WTO Member *individually*. This stands in contrast to obligations of the multilateral (*i.e.*, *erga omnes partes* or integral) type, such as many human rights or environmental obligations, where the binding effect of these obligations is collective, the different relationships between state parties cannot be separated into bilateral components, and a promise is made, not so much towards individual states, but towards the *collectivity* of all state parties *taken together*, in their common interest, common interest being defined as an interest “over and above any individual interest that may exist in a given case.”<sup>34</sup> Consequently, the bilateral nature of WTO dispute settlement is the result largely of the nature of WTO obligations themselves, not of some form of “Americanization.”

In addition to being bilateral, however, the WTO system is also largely adversarial in that the parties in dispute (not the “judge” or some higher form

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<sup>32</sup> For a comparison of compliance procedures in the WTO and MEAs, see WTO & UNEP Secretariats, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, WT/CTE/W/191 (June 6, 2001). For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora

includes a number of multilateral processes to review and monitor compliance with the agreement. In practice, monitoring is carried out by the Animals and Plant Committee and by the CITES Secretariat. Some NGOs have elaborated a trade monitoring programme such as TRAFFIC (the Trade Records Analysis of Flora and Fauna In Commerce), which provides technical and scientific support to the Secretariat, the Parties and the various CITES Committees to ensure that the Convention is implemented successfully.

*Id.* at para. 30.

<sup>33</sup> See Joost Pauwelyn, *The Nature of WTO Obligations*, THE JEAN MONNET WORKING PAPERS, No. 1/02 (2002), at <http://www.jeanmonnetprogram.org/papers/02/020101.html>.

<sup>34</sup> James Crawford, *Third Report on State Responsibility*, para. 92, at 41, U.N. Doc. A/CN.4/507 (2000).

of public interest or rule of law) control the process. The disputing parties can settle at any stage during panel or Appellate Body proceedings, they can withdraw complaints, and they can modify most of the procedures by mutual agreement.<sup>35</sup> Crucially, the DSU makes it explicit also that “mutually acceptable” solution to a dispute is “clearly preferred” over a settlement imposed by litigation.<sup>36</sup> In other words, “the aim of the dispute settlement mechanism is to secure a positive resolution to a dispute,”<sup>37</sup> not, for example, to develop a body of international trade law in the interest of the public good. In the same vein, Article 3.2 of the DSU states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements” so that it is generally accepted that panel and Appellate Body reports are only legally binding on the disputing parties, not on other WTO Members (although this has, of course, been tempered by the almost precedential value attributed to adopted Appellate Body reports).<sup>38</sup>

This adversarial nature of the WTO system clearly borrows from the common law tradition and could, therefore, be qualified as a form of “Americanization.” It stands in contrast to the more inquisitorial nature of civil law in which the judge or some form of public interest or rule of law has a more active role to play, even in matters that were, for example, not raised by the parties themselves. Although most international adjudicatory processes have a strong adversarial component (expressed, for example, in the general principle of *non ultra petita*), this feature has been particularly predominant in the WTO system so that it may, indeed, be fair to speak of an “Americanization.”

In one case, the Appellate Body bashed the panel, for example, because it had drawn up its own alternative to a contested phytosanitary regime even though it did so on the basis of evidence submitted by panel-appointed experts.<sup>39</sup> The Appellate Body thus limited the role of a panel in bringing the

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<sup>35</sup> See, e.g., DSU, art. 7.1 (allowing the parties to agree to an alternative term of reference for the panel); DSU, art. 12.1 (allowing the panel to depart from the standard working procedures at the request of the parties); DSU, art. 12.8 (establishing procedures for party settlements reached after a panel has been established); DSU, art. 12.12 (allowing the panel to suspend its work at any time at the request of the complaining party); DSU, art. 20 (allowing the parties to agree to an alternative timeframe for DSB adoption of a panel or Appellate Body report).

<sup>36</sup> DSU, art. 3.7 (“A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 3.2; see also *supra* note 19 and accompanying text.

<sup>39</sup> Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129, at 35–36 (Feb. 22, 1999).

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parties together towards a solution on the following ground: “A panel is entitled to seek information and advice from experts and from any other relevant source it chooses . . . to help it to understand and evaluate *the evidence submitted and the arguments made by the parties*, but not to make the case for a complaining party.”<sup>40</sup> In another dispute, the Appellate Body found that the right to consultations under the DSU could be tacitly waived by the parties so that the absence of a prior request for consultations does not necessarily invalidate the subsequent establishment of a panel:

[W]here the responding party does not object, explicitly and in a timely manner, to the failure of the complaining party to request or engage in consultations, the responding party may be deemed to have consented to the lack of consultations and, thereby, to have relinquished whatever right to consult it may have had.<sup>41</sup>

Let us turn now to the drawbacks of the bilateral and adversarial nature of the WTO system. First, the multilateral nature of most modern trade disputes does not fit well in the above-described bilateral and adversarial enforcement of WTO rules. Modern trade disputes are, indeed, often multilateral in the sense, first, that one and the same measure may affect a large number of other WTO Members and, second, that more than one Member may have the same allegedly illegal trade restriction in place. The former has led to the problem of multiple injured states or complainants, who would each have to file a complaint to obtain redress.<sup>42</sup> The latter has led to the problem of multiple wrongdoers and persistent wrongdoers (*i.e.*, other, or even the same, WTO Members continuing a practice that was earlier condemned as WTO-inconsistent).<sup>43</sup>

This flaw—the tension between the bilateral enforcement of WTO rules and the multilateral nature of many WTO disputes—could be addressed first by injecting more law into the adjudication stage, for example, by making the

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<sup>40</sup> *Id.* (emphasis added).

<sup>41</sup> Appellate Body Report, *Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, para. 63, at 21 (Oct. 22, 2001).

<sup>42</sup> *E.g.*, the Bananas controversy, *supra* note 27; the Steel Safeguards case, *supra* note 17; *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (2003).

<sup>43</sup> *E.g.*, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141 (2002-03), where a certain anti-dumping practice by the EC was condemned and *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294 (2003), where the EC, in turn, challenged the same anti-dumping practice which the United States continued to engage in, notwithstanding the earlier WTO ruling in the other dispute.

process more collective or multilateral, both in scope and in terms of available remedies. Secondly, this flaw could be addressed outside the process of litigation, for example, by borrowing elements from the collective compliance or monitoring systems in place under other international treaties, which are despised by many trade lawyers. This would shift the attention away from bilateral litigation to multilateral negotiation (although, obviously, the latter need not replace but should rather complement the former).

A second drawback related to the bilateral and adversarial nature of the WTO system is that this feature stands in increasing contrast to the fact that WTO rules no longer just affect governments, but also private economic operators, including consumers. The bilateral and adversarial idea that states (*i.e.*, government officials) can simply “resolve,” for example, a major health or environment-related trade dispute as between themselves and behind closed doors—without other WTO Members, non-governmental actors, or any form of public interest voice having an equal say in it—is increasingly difficult to sell to domestic constituencies. In other words, even though the WTO dispute settlement system is now automatic (with a right to a panel), increasingly legalized, and based on legal norms in terms of its outcome, the fact remains that its bilateral and adversarial nature has largely precluded the emergence of a rule of law in the broader sense of a collective legal regime based on public goods and developed in the interest of all participants and stakeholders.

### III. GIVING NEGOTIATIONS A CHANCE: ALTERNATIVES AND COMPLEMENTS TO LITIGATION

Many of the drawbacks pointed out in the previous section—the right to a panel decreasing the number of negotiated settlements, the legalization of the panel process causing parties to lock in their respective positions, and the bilateral and adversarial nature of the system being unable to grapple with the multilateral, public interest nature of modern trade disputes—point at the importance of negotiations (be they bilateral or multilateral) as a means, in some cases the only means, to resolve trade disputes.

How, then, can we give negotiations a better chance? It may be useful to distinguish the role that negotiations can play *before*, *during*, and *after* the litigation stage, as well as to deal separately with certain forms of negotiation that can be resorted to as full-fledged alternatives to litigation, including negotiations *outside* the process of dispute settlement. By litigation stage, I mean the panel and Appellate Body process up to the adoption of Dispute Settlement Body (DSB) recommendations.

### A. *Negotiations Before the Litigation Stage*

Consultations *must* be requested *before* a panel can be established.<sup>44</sup> In most cases, such formal DSU consultations will be preceded by informal discussions or consultations that failed to settle the dispute. As a result, formal DSU consultations are as much a final attempt to settle a dispute as a prelude to the litigation stage during which the parties can clarify their positions and fact-finding or discovery can take place.<sup>45</sup> Another reason why the consultation phase remains important is that it may serve as a safety valve to let off domestic pressure to take a dispute seriously. Requesting formal WTO consultations demonstrates the resolve of the complaining WTO Member, both towards its own domestic constituency and the defendant. Even if the complainant does not genuinely want to pursue a dispute all of the way up to litigation, requesting formal consultations may, therefore, serve useful purposes and even settle the dispute.

For these reasons, pre-panel consultations remain an important step in the WTO system. The argument sometimes raised that one should get rid of them altogether (making the process instead purely judicial), or at least attempt to reduce the window of opportunity offered by these consultations,<sup>46</sup> should be countered. Instead, consultations should be strengthened so as to enhance the chances of a settlement. Several elements may contribute to achieve this end.

First, it is important that consultations remain “confidential, and without prejudice to the rights of any Member in any further proceedings.”<sup>47</sup> In addition, if either of the parties so wishes, the consultations should be held exclusively as between the two WTO Members involved, without the involvement of third parties (which is currently the practical effect of Article 3.11 of the DSU). All three of these features—confidentiality, “no prejudice,”

<sup>44</sup> DSU, arts. 4.7, 6.2.

<sup>45</sup> See, e.g., Appellate Body Report, *supra* note 41, para. 54, at 18:

We agree with Mexico on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.

<sup>46</sup> The United States, for example, has proposed to shorten the already short minimum timeframe for consultations.

<sup>47</sup> DSU, art. 4.6.

and the option to consult on a purely bilateral basis—can contribute to a settlement in that parties can be completely open, explain their bottom lines, and put their ultimate proposals on the table without the risk of burning their fingers.

Second, a delicate balance must be found as between (1) the above-mentioned advantages of keeping consultations confidential and purely bilateral and (2) the need to ensure that consultations and ultimate settlements are set in the broader multilateral context of the WTO. The latter objective is currently aimed at the following: all settlements must be notified to the WTO and must be consistent with WTO rules, in particular the rights of third parties. In addition, Article 3.11 of the DSU provides for third parties to participate in certain consultations under certain conditions (in essence, the agreement of the defendant).<sup>48</sup>

Third, to facilitate settlements it may be useful to make them subject to the WTO dispute settlement mechanism. Currently, in the event a Member does not respect a settlement, the other Member can only pursue the original case that it intended to bring in the first place (*i.e.*, a complaint of a violation of WTO rules).<sup>49</sup> The settlement itself is not a part of those WTO rules or “WTO covered agreements.”<sup>50</sup> In order to make settlements more attractive, one could, therefore, allow WTO Members to bring claims under those settlements before a WTO panel. However, a major caveat should then apply: only settlements that do *not* infringe upon the rights of other WTO Members, not a party to the settlement, can be judicially enforced.

Fourth, in order to facilitate both the settlement and the discovery function of consultations, Members could be advised to appoint a mediator or independent third party to assist them in coming to a settlement or in getting out the facts and arguments in the dispute. This may not be very useful in disputes between major trading partners who are “big enough” to try to settle a case, although even in those circumstances an independent fact-finder may help to bring the case forward (this could be the case especially in highly technical or scientific disputes). In asymmetric disputes, however, involving a big player and a developing country, for example, it may be more fruitful to appoint a mediator or independent fact-finder. Article 5 of the DSU provides for “good offices, conciliation and mediation,”<sup>51</sup> which may be requested “at any time by any party to a dispute.”<sup>52</sup> However, these alternative modes can

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<sup>48</sup> DSU, art. 3.11.

<sup>49</sup> See DSU, art. 1.1 (outlining the coverage of the DSU), 3.6 (providing for notification of mutually agreed solutions).

<sup>50</sup> See *id.*

<sup>51</sup> DSU, art. 5.1.

<sup>52</sup> DSU, art. 5.3.

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only be triggered once *both* parties agree to have them. The only exception is provided for “cases involving a least-developed country Member,” in which the least-developed country (LDC) can unilaterally request that the Director-General of the WTO or the Chairperson of the DSB offer their good offices, conciliation, or mediation.<sup>53</sup> This *right* to have good offices, conciliation, or mediation could be extended to *all* developing countries.

Fifth, another problem that often arises for developing countries (in particular those that do not have a permanent representation at the WTO) is a lack of resources to conduct consultations, an exercise that mostly takes place in Geneva. Article 4.10 of the DSU directs that during consultations Members “should give special attention to the particular problems and interests of developing country Members.”<sup>54</sup> This provision could be strengthened and complemented by technical assistance permitting developing countries to consult on par with other WTO Members.

### B. *Negotiations During the Litigation Stage*

Even during the panel or Appellate Body stage, a convergence of positions may emerge under which a settlement becomes once again more likely. In many cases, however, the dispute will then have become so litigious and polarized that, although a serious window of opportunity seems to open up, no actual consultations take place. In those cases, the panel or Appellate Body could play a role as a facilitator. First, they could decide to suspend the proceedings on their own initiative and call upon the parties to try to work out a settlement.<sup>55</sup> Second, panels could get more actively involved in facilitating a settlement by changing hats and becoming more of a mediator for a predetermined period of time.<sup>56</sup> Alternatively—and perhaps better so as to avoid later claims of partiality of panel members in case the mediation fails—panels could decide to appoint a third party as mediator. One could think, for example, of panel-appointed experts who could, in addition to explaining the evidence to the panel, also play an important role as facilitators in resolving a highly technical or scientific dispute.

Finally, it should be recalled that the so-called interim review stage—in which the panel sends out its interim findings for comments by the parties

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<sup>53</sup> DSU, art. 24.2.

<sup>54</sup> DSU, art. 4.10.

<sup>55</sup> Under current rules, litigants are not explicitly authorized to do this; Article 12.12 of the DSU, for example, allows for the suspension of panel proceedings, but only at the request of the complaining party.

<sup>56</sup> Under current rules—in particular Articles 5 and 11 of the DSU—which, again, would require the agreement of both parties.

before it sends out its final report to all WTO Members—could constitute an important gateway to a last minute settlement. Sometimes the Member that is found to have lost the dispute in the interim report may, indeed, prefer to settle the case, and also the winning party may see benefits in settling, thereby avoiding the report becoming public. Consequently, proposals to abolish the interim review stage—to gain time or based on the fact that panels rarely change their legal conclusions based on interim review comments—should not be adopted lightly.

### C. Negotiations After the Litigation Stage

As explained in Part II.B, above, many WTO disputes do not end with a panel or Appellate Body ruling. In most disputes compliance is achieved more or less within the set timetable. In an increasing number, though, the dispute lingers on, with the defendant not changing anything (*e.g.*, the *Hormone Beef Case*)<sup>57</sup> or enacting a new regime, which is then, once again, challenged (*e.g.*, the *Bananas* saga,<sup>58</sup> the *Aircraft* conflict,<sup>59</sup> and the FSC dispute).<sup>60</sup> The limited nature of WTO remedies contributes largely to these instances of non-compliance. In addition, the sensitive nature of many of these disputes can make a judicial solution increasingly unlikely so that negotiations are often the only way out. However, no formal structure is provided for post-litigation negotiations. The following elements may facilitate such negotiations, be they bilateral or multilateral.

First, it should be made explicit that consultations *must* be requested before bringing a so-called implementation case in which the WTO consistency of an implementing measure is examined.<sup>61</sup> New implementing measures are often completely new regimes so that consultations on them are as crucial as consultations preceding standard panels.

Second, the role of the DSB as a multilateral compliance body should be enhanced. The DSB should, indeed, more actively monitor compliance and

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<sup>57</sup> *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26 (Jan. 16, 1998).

<sup>58</sup> *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS16 (Sept. 28, 1995), WT/DS27 (Sept. 9, 1997), WT/DS105 (Oct. 25, 1997), WT/DS158 (Jan. 25, 1999).

<sup>59</sup> *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222 (Feb. 17, 2003); *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70 (Aug. 2, 1999); *Brazil—Export Financing Programme for Aircraft*, WT/DS46 (July 21, 2000).

<sup>60</sup> *United States—Tax Treatment for “Foreign Sales Corporations,”* WT/DS108 (Apr. 25, 2003).

<sup>61</sup> Article 21.5 of the DSU is silent on this matter.

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provide for both more effective sanctions and positive incentives to achieve implementation. Lessons could be learned here from multilateral environmental or human rights monitoring systems. Obtaining compliance with WTO rules should not be a burden borne only by the complainant. It should be seen as something that is in the interest of all WTO Members so that all WTO Members must be expected to actively participate in the process. In order to get a more active DSB, its decisionmaking rule of positive consensus ought then be changed to, for example, three-fourths majority. In some cases (*e.g.*, the Bananas saga), in order to end a dispute, a waiver may be needed. In other words, full compliance should not always be an absolute must (as it is, for example, in human rights cases); if trade concessions can be realigned in such a way that all interested parties can agree to them, the WTO system should be flexible enough to accept such realignment as a settlement to the dispute. This is explicitly set out, for example, in the tariff renegotiations clause of the GATT.

Third, in cases in which litigation has not worked and negotiations have failed, thought may be given to bring in a neutral mediator pursuant to Article 5 of the DSU.

### D. *Negotiation or Arbitration as an Alternative to Litigation*

Article 5 of the DSU provides for “[g]ood offices, conciliation and mediation,”<sup>62</sup> both as an alternative and as a prelude or complement to litigation. So far, this provision has only been invoked once.<sup>63</sup> This is explained largely because good offices, conciliation, and mediation require the agreement of *both* disputing parties.<sup>64</sup> In addition, Article 3.12 of the DSU gives the right to complaining parties that are developing countries to invoke the procedure set out in a 1966 Decision, rather than the usual panel process set out in the DSU.<sup>65</sup> This alternative procedure gives a right to the complainant to request the good offices of the Director-General. It further provides for an expedited panel procedure of sixty days.<sup>66</sup> The latter feature does not really work to the advantage of developing countries, which may

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<sup>62</sup> DSU, art. 5.1.

<sup>63</sup> Appellate Body Report, *United States—Import Measures on Certain Products from the European Communities*, para. 54, at 14, WT/DS165/AB/R (Dec. 11, 2000).

<sup>64</sup> DSU, art. 5.1. An exception to this general rule is provided in Article 24.2 of the DSU, pursuant to which least-developed countries have a *right* to those alternative dispute resolution (ADR) models.

<sup>65</sup> DSU, art. 3.12.

<sup>66</sup> *Id.*

need more time to prepare their case. As a result, the 1966 Decision has not been relied on in any WTO dispute so far.

Article 25 of the DSU also provides for “[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement.”<sup>67</sup> It does so, once again, only upon the agreement of *both* parties. So far, Article 25 has only been used once, and only to settle a disagreement about the amount of nullification caused by a WTO regime that was previously found to be inconsistent, hence not as a genuine alternative to normal DSU procedures.<sup>68</sup> Whereas arbitration under Article 25 of the DSU may offer an attractive alternative to the panel process in special types of cases—such as detailed scientific disputes in which the parties may want to have the case decided by scientific experts or scientific considerations or extremely urgent cases or disagreements for which no specific DSU procedures are provided, such as in the *U.S. Copyright Case*—generally speaking, it does not seem that special arbitration has a bright future in the WTO. The private nature of arbitration<sup>69</sup> does not fit well in the increasingly multilateral character of the WTO. In addition, no appeal is possible in an Article 25 arbitration, and the system has become so legalized that waiving one’s right to appeal is something that WTO Members are unlikely to do.

Finally, outside the strict bounds of dispute settlement, it should be recalled that the WTO has at least two other negotiation tracks that can be used to diffuse potential disputes: (1) the WTO’s trade policy review mechanism, pursuant to which the WTO Secretariat conducts a general overview of the trade policies in place in a particular WTO Member.<sup>70</sup> This is done every few years for the big players and less frequently for smaller players.<sup>71</sup> It gives all WTO Members the opportunity to question particular policies enacted by other WTO Members. Although no legal value is attributed to these reports, they may lead to the straightening out of disagreements. (2) The WTO has a multitude of notification requirements in

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<sup>67</sup> DSU, art. 25.1.

<sup>68</sup> U.S. copyright legislation inconsistent with the TRIPS agreement was found to have nullified EC benefits (*i.e.*, royalties) worth €1,219,900 per year. *United States—Section 110(5) of the U.S. Copyright Act, Recourse to Arbitration Under Article 25 of the DSU, Award of the Arbitrators*, WT/DS160/ARB25/1, para. 5.1, at 34 (Nov. 9, 2001) [hereinafter *U.S. Copyright Case*].

<sup>69</sup> Other WTO Members are only allowed as third parties in an Article 25 arbitration in case both parties agree to it.

<sup>70</sup> Trade Policy Review Mechanism, Marrakesh Agreement Establishing the World Trade Organization, Annex 3 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf).

<sup>71</sup> *Id.* at C(ii).

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place.<sup>72</sup> Upon notification of a new measure, other WTO Members can then start discussions on it.<sup>73</sup> Especially in those cases in which proposed legislation must be notified for comments by other WTO Members before it is actually enacted—such as under the Agreement on Technical Barriers to Trade<sup>74</sup>— a good opportunity is offered to work out differences even before a concrete trade dispute arises. Moreover, any WTO Member may raise an issue of concern to any of the specialized WTO committees, composed of all WTO Members (be it the Council for Trade in Services, the Committee on Sanitary and Phytosanitary Measures, or the Committee on Technical Barriers to Trade).<sup>75</sup> Consequently, the role of WTO political bodies and committees in the diffusion, and even settlement, of disputes cannot be overestimated.

## IV. CONCLUSION

This Article examines a predetermined set of features of the WTO dispute settlement system. It identifies some of these features as “Americanization,” in particular, the legalization of the panel process and the adversarial nature of the WTO dispute settlement mechanism, while portraying others as mainly the result of other forces, in particular, the right to a panel and the bilateral nature of the WTO system. Though cognizant of the many advantages linked to these forms of “Americanization,” the Article then points at some of its drawbacks, in particular, the dwindling number of settlements as a result of the legalization of the panel process and the fact that the adversarial nature of the WTO system is often unable to grapple with

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<sup>72</sup> *E.g.*, SCM Agreement, arts. 8.3, 25; Agreement on Technical Barriers to Trade, arts. 2, 3, 5, 7 [hereinafter TBT Agreement]; Agreement on Sanitary and Phytosanitary Measures, arts. 7, 12.4 [hereinafter SPS Agreement]; Agreement on Trade-Related Investment Measures, art. 5.1, 6 [hereinafter TRIMS Agreement]; Agreement on Trade-Related Intellectual Property Rights, arts. 1.3, 3.1, 63.2 [hereinafter TRIPS Agreement]; Agreement on Safeguards, art. 12; GATT, arts. X, XVI:1, XVII:4, XVIII:7, XVIII:14, XXIV:7, XXVII, XXVIII:5; General Agreement on Trade in Services, arts. III:3, V:7, VIII:4, XII:4, XXI:1 [hereinafter GATS]; Anti-Dumping Agreement, arts. 5.5, 12.1. WTO documents can best be accessed on the WTO website at [http://docsonline.wto.org/gen\\_search.asp?searchmode=simple](http://docsonline.wto.org/gen_search.asp?searchmode=simple) using either the title or the document number.

<sup>73</sup> *E.g.*, SCM Agreement, art. 9; TBT Agreement, art. 14; SPS Agreement, art. 11; TRIMS Agreement, art. 8; TRIPS Agreement, art. 64; Agreement on Safeguards, art. 12; GATT, art. XXIII; GATS, arts. XXII, XXIII; Anti-Dumping Agreement, art. 17.

<sup>74</sup> TBT Agreement, art. 2.9.

<sup>75</sup> Each of these committees comprises the entire WTO membership and is competent to carry out discussions specific to the agreement for which it is named. This affords Members a specialized forum to raise particular concerns regarding other Members' conduct.

the multilateral, public interest nature of modern trade disputes. Although the solution to these problems may lie, to some extent, in more law, particularly in the remedies phase, the Article then focuses on possible complements or alternatives to *litigating* trade disputes. It highlights the importance of giving *negotiations* a chance before, during, and after the litigation phase. When it comes to arbitration as a self-standing *alternative* to litigation, the Article is less enthusiastic given the public and multilateral nature of many modern trade disputes.

In sum, to remedy some of the drawbacks linked to “Americanization,” the Article suggests keeping the avenue of negotiation open. This focus on ADR modes could, in itself, be seen as a call for “Americanization,” U.S. legal culture being famous for plea-bargaining and mandatory arbitration in areas ranging from criminal law to commercial disputes. Nonetheless, the one important caveat to which this Article draws attention is the multilateral, public interest nature of many WTO disputes. As a result, any resolution of a trade dispute ought to be carried out in the multilateral context of the WTO; that is, in a way that takes into account the rights of other WTO Members and the public interest at large, rather than just the interests of the two teams of disputing government officials pleading the case.