

Open Doors for Open Trade:
Shining Light on WTO Dispute Settlement

Remarks
of
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to the
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For the past eight years, I have spent much of my time in Geneva, Switzerland. I have served there as one of the seven members worldwide of the Appellate Body of the World Trade Organization. I have assisted the Members of the WTO in their efforts to uphold the rules of world trade by upholding the rule of law in world trade. I have been one of the “faceless foreign judges” of the WTO.

During those eight years, I have usually tried to be “faceless.” I have tried to be “faceless” because, despite what Ralph Nader and Pat Buchanan may wish you to believe, there *are* WTO rules of conduct. I have been bound by those rules for the past eight years, and I remain bound by them now. The rules require those who judge international trade disputes in Geneva to be “faceless” because they require them to be “voiceless” individually and publicly on the trade issues they may be asked to address for the Members of the WTO. A view voiced individually and publicly on a pending trade issue is a potential conflict for a Member of the Appellate Body.

Those who know me — and especially those who knew me during my days in Washington as a Member of the Congress — know that it is definitely *not* in my nature to be “voiceless.” And it is certainly *not* in my nature *not* to wish to add my voice to all the other voices that are heard nowadays in the ongoing debate about trade.

Because of the WTO rules of conduct, for the past eight years, I have had to be content with confining my voice largely to the words I have written together with my six colleagues in the shared voice of our reports to WTO Members in appeals in WTO dispute settlement. But now I am a *former* Member of the Appellate Body. And now I am eager to reclaim my singular voice as a private citizen, and to rejoin the debate as an advocate for trade. My voice will be a voice especially for securing the mutual benefits of trade by sustaining and strengthening the world trading system that has been established by the Members of the WTO.

Under the WTO rules of conduct, I will never be able to speak about the specifics of our deliberations or our decisionmaking during my years on the Appellate Body. Nor can I comment on any of the handful of remaining disputes that I helped judge and that have not yet been resolved. So I will not do so today.

Even so, there is much else that I am free to say now that I could not say before, and, starting today, I intend to say it.

Over time, I hope to say much that will help increase public support for the WTO. There is much public discussion of the WTO, but there is little public understanding of the WTO, and this makes it difficult to increase public support. The true character of the WTO — and of those who serve the Members of the WTO — bears no resemblance to the false caricature. Now that I am no longer part of the WTO, I hope to help shine more light on the true reality of the WTO, on the true benefits of the WTO, and also on the true need for reform of the WTO.

In particular, I hope to help shine more light on WTO dispute settlement. For I believe in the centrality of dispute settlement in the WTO. I believe in the indispensability of effective dispute settlement to the WTO. And I believe we must improve dispute settlement by shining more light on dispute settlement if we hope to ensure the continued success of the WTO.

So I will begin today where I believe the Members of the WTO must begin in shining that light. For the past eight years, I have helped keep the doors to the oral hearings of the Appellate Body closed. I was bound to uphold the rules established by the Members of the WTO, and those rules say that the doors be must be kept closed. Now I am free for the first time to say what I have always thought.

We must open the doors.

We must open the doors of the WTO, and let in the light of public scrutiny. We must let the five billion people in the world who are served by the WTO *see* the WTO. For, if we do not, the Members of the WTO will never secure the increased public support that will be needed worldwide to continue to maximize all the mutual gains that can be made from trade through a rule-based world trading system.

Only with more open doors will we be able to achieve all our goals for more open trade.

Let me be precise about what I am proposing. We must open the proceedings of the panels and the oral hearings of the Appellate Body to press coverage and to overall public observance. Further, we must do the same for the meetings of the General Council, the Dispute Settlement Body, and all of the other major councils of the WTO. Those doors of the WTO must be opened.

Let me also be precise about what I am *not* proposing. I am not proposing that the *deliberations* of either panels or the Appellate Body should be open. No judicial system in the world does that. I am not proposing that the *trade negotiations* that are conducted separate and apart from the general meetings of the various WTO councils should be open. No one who has ever negotiated trade agreements would favor that.

Moreover, I am certainly not proposing that NGO's and other private interests of any kind should be parties to either dispute settlement proceedings or to trade negotiations, or should have any form of official "standing" in the WTO. The WTO must remain an intergovernmental organization consisting exclusively of countries and other custom territories.

I fully understand the reservations about "transparency" of those developing countries that are concerned that, if the doors are opened, they will be elbowed aside by an army of well-funded private interests from the developed world in of what is currently — and must always remain — a "Member-driven" organization.

However, I believe these concerns can be addressed if we open the right doors in the right way. More, I believe these concerns are significantly outweighed by the overriding need to

reassure the world that the WTO is “Member-driven,” and that it is working in ways that fulfill the objects and purposes of the WTO treaty.

The WTO calls its proceedings “confidential.” The rest of the world calls them “secret.” There is no reason for WTO proceedings to remain secret, and there is every reason for them to be open to the light of public scrutiny. It is only because the doors are closed that the critics of the WTO can claim any credibility at all in referring to the WTO as a “star chamber” or as a “kangaroo court.” It is only because the doors are closed that there are suspicions that the process of decisionmaking in the WTO may not be consistent with the WTO treaty.

Opening the doors would be more redeeming than revealing. If the doors were opened to dispute settlement proceedings in the WTO, then the world would see that those who have been entrusted by the Members of the WTO with the responsibility of helping resolve trade disputes are fulfilling that responsibility correctly and conscientiously. WTO jurists are independent, impartial, fair, objective, and utterly exhaustive in examining virtually every nuance of every issue that is raised in every dispute. It is only because the doors are closed that anyone is able to suggest otherwise.

Perhaps the biggest beneficiaries of opening the doors of the WTO would be the Members of the WTO. As it is, the last time I looked, *a majority of the Members of the WTO* had never even seen a hearing of the Appellate Body. This is because only parties and third parties to a dispute are allowed to attend and participate in an oral hearing in a WTO appeal. Opening the doors would allow many of the Members of the WTO to see what happens in WTO dispute settlement firsthand for the first time.

Keeping the doors closed is self-defeating for the WTO. It feeds the unfounded paranoia about the WTO that prevails among the anti-globalists, the hard-core protectionists, and all the others in the world who oppose all that the Members of the WTO are trying to accomplish as the WTO. Those who oppose the WTO can portray it in the distorted way they do only because, by keeping the doors closed, the Members of the WTO make it possible, and seemingly credible, for them to do so.

Yes, to be sure, on the first day the doors were opened, the panels and the Appellate Body would undoubtedly be greeted by one or two well-wishers wearing turtle costumes. But the novelty of that first day would soon pass. As someone who has sat through endless hours of endless discussions about the meaning of a single footnote among the more than thirty thousand pages of the WTO “covered agreements,” I am confident that, a few days later, only those turtles with the hardest shells would remain.

We must also open the windows.

NGO’s and other private interests should *not* have “standing” in the WTO. They are not governments. They should not have the rights of governments. And yet ways must be found to open the windows of the WTO to the wider world. Others outside the WTO have useful views. Others outside the WTO with a demonstrated interest in the outcome of WTO proceedings should have a way to have their say. If we want those outside the confines of the trade

committees, the trade agencies, and the trade ministries of the Members of the WTO to see that the WTO cares about the wider world beyond the “widgets” of trade, then the windows of the WTO must be open to the wider world.

Such openness can be achieved nationally — as it is done routinely in the United States under to American law. Under U.S. law, many varying views must be heard in the making of U.S. trade policy. It can also be achieved internationally. At the WTO, there have been increasing — and increasingly successful — efforts to involve NGO’s and other private interests much more in the ongoing process of global trade decisionmaking. These efforts by the WTO to *involve* the wider world, and to *listen* to the wider world, must continue, and must increase.

In particular, in dispute settlement, panels and the Appellate Body must continue to accept “*amicus curiae*” briefs in panel and appellate proceedings, and they must, in my view, make greater use of such briefs in dispute settlement. The opportunity to submit *amicus* briefs can give those from the wider world the chance to have their say — without in any way undermining the essential intergovernmental nature of such proceedings. *Amicus* briefs can provide an additional and valuable point of view — as they do for judiciaries throughout the world.

The apprehensions about *amicus* briefs that are often heard from many Members of the WTO are misplaced. *Amicus* briefs will not overwhelm or dominate the dispute settlement system. The participation of *amicus curiae* in dispute settlement proceedings can — and should — be limited to the submission of their briefs, and the acceptance of such briefs can — and should — be governed and controlled in a reasonable way by reasonable rule — as it is in judiciaries throughout the world.

The rule used by the Appellate Body several years ago in the appeal in the “asbestos” case is a good place for the Members of the WTO to start in addressing this issue. The pending proposal of the European Communities in the current “DSU review” of WTO dispute settlement echoes this rule, and, in my view, is deserving of very serious consideration.

The Members of the WTO should be mindful of this: In the absence of any rulemaking by the Members of the WTO, *amicus* briefs will continue to be accepted in dispute settlement under the existing rules and rulings. And there may soon come a case in which more explicit use will be made of such briefs.

I am from Florida. In Florida we have long believed in “Government in the Sunshine.” The arguments for keeping the doors and the windows closed at the WTO are much the same as those we have heard for decades for keeping the doors and the windows of government closed in Florida. My answer for Geneva is the same as my answer for Tallahassee.

Let the sunshine in.

The whole world is watching the WTO. The whole world must be able to see the WTO. And the WTO must be able to see the whole world.

On these and many other issues relating to the WTO and to WTO dispute settlement, we *must also open minds*.

The WTO dispute settlement system is the most successful system for international dispute settlement in the history of the world. Even so, it is still new. It is still very much in the making. Although it builds on nearly half a century of the GATT *acquis*, WTO dispute settlement is less than a decade old. At most, some of the provisions of the WTO have been construed a few times. Most of the provisions of the WTO treaty have been not been construed at all. There are entire agreements in the WTO treaty that still have never been construed even once by the Appellate Body. Thus, in some respects, virtually every new case that comes before the WTO is still very much, as we lawyers say, a case of first impression.

For this reason, we should be careful about making sweeping generalizations about the future implications of the outcomes of the relative handful of disputes that have been resolved, thus far, in WTO dispute settlement. The more than twenty thousand pages of rulings, thus far, in WTO dispute settlement are a mere beginning, and they should be seen as such. WTO dispute settlement is a work *in progress* of the work *of progress*, and our continued progress in improving WTO dispute settlement will be, like all progress, incremental. It will be rule by rule. It will be case by case.

In the first decade of the WTO, I had the privilege of participating in more divisions and in more appeals than any other Member of the Appellate Body. I am the only person who served on the Appellate Body during all of its first sixty appeals. I was one of the founding seven. I was the last remaining of the founding seven. Based on this singular experience, I have, in addition to the views I have already voiced today, strong views as well on many other changes that I think are worthy of consideration by those whose open minds are desirous of improving WTO dispute settlement.

I will not delve into all the details of those other needed changes today. Instead, today, I will simply mention a few of them. Some I will mention are on the current agenda of DSU review. Others are not.

We need rules of evidence and rules of discovery in WTO dispute settlement. There are many reasons why. One reason, for example, is the urgency of finding an effective way to balance the need for panels to find facts with the necessity for governments to protect business confidential information. Indeed, in my view, we need comprehensive standard working procedures that would apply to all of the procedural aspects of WTO panel proceedings — akin to the standard “Working Procedures for Appellate Review” we have had from the outset in WTO appeals.

We need a better understanding — and a stronger consensus — among *all* of the Members of the WTO on the appropriate standard of review in dispute settlement. In particular, this is so for trade remedies. What the WTO treaty says about the standard of review for trade remedies — and what a few people in Washington seem to think it says — are two different things.

We also need a better understanding — and a stronger consensus — among *all* of the Members of the WTO on the balance they are seeking in the WTO treaty between their right to apply trade remedies and their right to benefit from trade concessions through market access.

We need more and better rules as part of the WTO treaty on the appropriate interrelationship between trade and the environment, trade and labor, trade and health, trade and human rights, trade and intellectual property, trade and bribery, and trade law and other international law.

Ideally, *none* of these issues should be resolved in WTO dispute settlement. Ideally, *none* of them should be resolved by panels or by the Appellate Body. As I see it, *all* of these procedural and substantive issues — and many more of similar significance and sensitivity — should, ideally, be resolved by negotiations that result in a consensus and an agreement by the Members of the WTO on rules that take the form of WTO treaty obligations.

But, again, the Members of the WTO should be mindful that the world will not wait. The world will keep turning. If these issues are not resolved, clearly, through negotiations, then many of them will be resolved, necessarily, through dispute settlement.

We must also open minds to the need for structural changes in WTO dispute settlement. Two deserve mention today. First, we have reached the point where we need a standing Panel Body as recommended by the European Communities in DSU review. And, second, we will soon reach the point as well when the standing Appellate Body should be transformed from a part-time into a full-time global tribunal for trade.

For several years now, service on the Appellate Body has been, *de facto*, full time. It certainly was for me. As the workload of the Appellate Body continues to increase, and as the dispute settlement system continues to evolve, the Members of the WTO will need to face the fact that, if they want to be certain of the full-time attention to WTO dispute settlement that the DSU rightly requires of Members of the Appellate Body, then they will need to have full-time jurists.

There are many other issues I might discuss. The need for remand powers for the Appellate Body. The anachronism of “interim reviews.” The need to provide more assistance to developing countries in asserting their rights in dispute settlement. The need for more resources to support the work of dispute settlement. The many issues that have emerged from our experience with compliance in the “back end” of the dispute settlement treaty — “sequencing,” “damages,” and more.

But if I can take just one more moment today to shine just one more ray of light on WTO dispute settlement, it must be this:

What we need most in dispute settlement is not a change in dispute settlement at all. What we need most in dispute settlement is for effective changes to be made in all of the *other* endeavors of the WTO that are *not* a part of dispute settlement. Whatever doors and windows and minds we may need to open in dispute settlement, the greatest difficulties of the WTO are

nevertheless *not* in dispute settlement. We have an effective system for clarifying and upholding rules in the WTO. What we need most of all in the WTO is an equally effective system for making and revising rules through successful multilateral negotiations.

When we established the WTO, we hoped it would become an ongoing forum for ongoing negotiations on a myriad of emerging and ever-evolving trade issues. We hoped then for a WTO that would be a permanent place for a “permanent round” of global trade rulemaking by the Members of the WTO. Instead, we are engaged now in a new — and ninth — round of multilateral trade negotiations. This ninth round is, in structure, much like the previous eight.

I certainly believe that the overriding priority for the world today in trade must be the successful conclusion of the Doha Development Round. I applaud USTR Robert Zoellick for his recent initiative in trying to advance the global negotiations. He has my full support in his efforts to do so. Trade is too important to be a partisan issue, and trade is too important to be postponed until after the next presidential election.

As we work toward a successful conclusion of this round, we must, as I see it, remember our original vision for the WTO, and we must continue to work also for better ways in which all of the Members of the WTO will be able to work together to make and agree on the right rules for trade on a continuing and ongoing basis. We must work, too, for ways in which the WTO can become an ever-better example of democratic and cooperative self-governance among the nations of the world. If we succeed in this, then I am confident that the WTO dispute settlement system will also continue to succeed as an appropriate and effective part of the overall world trading system.

If we open the doors, if we open the windows, and if we open our minds, then I believe we can open the way to building and sustaining a worldwide consensus for more open trade. If we have more open trade, then we can have more open societies, and we can have more of the freedom that open societies make possible. By shining more light *on* the WTO, we can make it possible for more light to shine *from* the WTO — light from the growth, the prosperity, and the freedom that can flow to all the world from the illumination of trade.

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- * In December, 2003, James Bacchus completed eight years and two terms as one of the seven Members of the Appellate Body of the World Trade Organization in Geneva, Switzerland. He was a founding Member, and remains the longest-serving Member, of the highest global trade tribunal. He was twice appointed to the Appellate Body by consensus of the Members of the WTO, and was twice elected chairman of the Appellate Body by his six colleagues. Previously, he served as a Member of the Congress of the United States, from Florida, and served also as special assistant to the United States Trade Representative in the Executive Office of the President of the United States. Currently, he is the chairman of the global trade practice group of the international law firm Greenberg Traurig, P. A., and also a professor of law at Vanderbilt University Law School. He lives with his family in Winter Park, Florida, and has offices with his law firm in Orlando, Florida, and in Washington, D. C.