

**“Woulda, Coulda, Shoulda”:  
The Consolations of WTO Dispute Settlement**

**Address**

**by**

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**to the**

**International Bar Association**

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Many talented lawyers have appeared before me during my time on the Appellate Body. One of the most talented is Scott Andersen.

Mr. Andersen was formerly an advocate for one of the Members of the WTO, the United States of America. Today, he employs his considerable legal talents in private practice with a large law firm in Geneva.

Yet, as talented as he is as a lawyer, Mr. Andersen is perhaps even more talented as a musician. Indeed, he is perhaps best known in and around Geneva as a member of a popular band of musicians called “The Swing Solicitors.”

“The Swing Solicitors” is an international band of mainly international trade lawyers who devote their days to the considerable depths of the WTO “covered agreements” and their nights to the consoling rhythms of swing music.

From time to time, I have been known to emerge from the depths of my own explorations of the “covered agreements” to go and hear them swing.

As one of “The Swing Solicitors,” Mr. Andersen plays what *he* calls an “acoustic bass,” and what those of us who happen to have been born in Nashville, Tennessee, call a “bass fiddle.”

Sometimes Mr. Andersen sings while he strums his bass fiddle. My favorite among the songs he sings is his unique rendition of the old swing tune, “Do I love you? ’Deed I do.”<sup>1</sup>

No doubt the lyrics of this old tune appear somewhere in the thousands of pages of the “covered agreements.” Everything else does. You will all, of course, recall the words.

“Do I love you? Oh my. Do I. Honey, ’deed I do.”

Surely these words are worthy of inclusion in the musical pages of the GATT.

In his own riff to these words from this old swing standard, the bass fiddle player of “The Swing Solicitors” sings a recurring refrain of regret about all that “*woulda*,” “*coulda*,” and “*shoulda*” happened if only he had been able to show his true feelings to the true love of his song.

This refrain made such an impression on me when I first heard it that, some time later, when Mr. Andersen, shorn of his bass fiddle, was so bold as to advance, on behalf of his country, an equally lyrical, but somewhat less impressive, riff to an argument in an oral hearing before the Appellate Body, I could not resist saying to him in reply, “Woulda, coulda, shoulda, Mr. Andersen. Woulda, coulda, shoulda.”

In recounting this exchange, I trust that I neither embarrass Mr. Andersen nor betray the sanctity of the “confidentiality” of dispute settlement proceedings in the World Trade Organization. The particular argument he made and the particular appeal in which he made it, will forever remain safely “confidential” — if for no other reason than that I have forgotten what they were.

But I have not forgotten the riff. I still remember the recurring refrain of “woulda, coulda, shoulda,” and I am reminded of that refrain again today as I reflect on the future of WTO dispute settlement. For, it seems to me that “woulda, coulda, shoulda” may well be an appropriate refrain for all those who strum the chords today for the future of WTO dispute settlement.

I play “bass fiddle” in another swing band in Geneva. Our band is called “The Appellate Body.” Our band is not nearly as popular as “The Swing Solicitors.” For some reason, everyone always seems to want to re-write our lyrics.

The members of our band are not allowed to say a lot about our lyrics or about our performances. We do not sing solos on the Appellate Body. Moreover, there is nothing in our repertoire under the WTO Dispute Settlement Understanding to suggest that Members of the Appellate Body should be singing at all about what “woulda,” “coulda,” or “shoulda” be done to improve WTO dispute settlement.

The Members of the WTO have their own band that sings those songs. They call their band “The Dispute Settlement Body.” Their band is busy now, rehearsing. The Dispute Settlement Body is in the midst of a jam session in which the Members of the WTO are trying their best to sing in harmony on a discordant song called “DSU Review.”

Clearly, all of us who support the WTO and the WTO trading system need to sing in harmony on WTO dispute settlement, and, clearly, there is much that “woulda, coulda, shoulda” be done in DSU review to improve the WTO dispute settlement system.

There is much we *would* do if we had the will to do it. There is much we *could* do if we had the will — and the resources — to do it. There is much we *should* do to strengthen and sustain the dispute settlement system so that the multilateral trading system will be able to meet all the many challenges the Members of the WTO will face going forward.

Clearly, too, after eight years of strumming my bass fiddle on the Appellate Body, I have my own views about what “woulda, coulda, shoulda” be done to improve WTO dispute settlement.

But that is *not* the song I will sing today.

I will be leaving our band for a new “gig” at the end of this year. Next year, as a *former* Member of the Appellate Body, I will be free to play my own improvisations and sing my own tunes about how we might find the harmony we seek in dispute settlement.

Today, I will sing a different tune.

My tune today is not a foot-tapping tune that is intended to drum a downbeat for the current review of the WTO dispute settlement system. Rather, my tune today is a consoling tune that is meant to mark a back beat of reassurance about the many successes, thus far, of the WTO dispute settlement system. My tune today is meant to offer some much-needed perspective in the hope that it will inspire some much-needed confidence in the midst of DSU review.

It goes like this.

Nearly a decade after the creation of the WTO dispute settlement system, there is a growing chorus of criticism of the system. Lawyers, scholars, journalists, politicians, and trade diplomats — not to mention a global choir of activists of all kinds and all persuasions — have all joined in a rising crescendo of competing and cacophonous voices and views about what *would* and *could* and *should* be done to improve WTO dispute settlement. This crescendo has risen to still higher octaves in recent months as the members of that other Geneva band — the Dispute Settlement Body — have “tabled” literally dozens of proposals for changing the arrangements of the dispute settlement system as part of their DSU review.

But, for all the talk all over the world about all that “woulda, coulda, shoulda” be done to improve WTO dispute settlement, there is considerably less talk about all that the Members of the WTO have already done for the world in the first decade of WTO dispute settlement. There is considerably less talk about all the many successes that are our *consolations* for all our many efforts in WTO dispute settlement.

The riff in my tune today — the refrain that I hope will be remembered — is this. The steady back beat of reassurance that reminds us of all our recent successes in WTO dispute settlement is needed to set the tempo for more successes in the future. But the back beat is hard to hear in the current debate about DSU review. And, my worry is that, without the back beat, the WTO will play out of tune.

As Mr. Andersen surely knows, every time he hums when he strums his bass fiddle, he is harmonizing with an ancient Roman philosopher named Boethius.

In the sixth century of our era, Boethius wrote a treatise on musical theory that became a basic textbook for musicians for a thousand years. His account of sound, pitch, scale, and syncopation informs the strumming of every bass fiddle player, even today.<sup>2</sup>

More famously, Boethius was also a politician who was wrongly imprisoned and brutally executed after a fatal fallout with his Gothic king. While in prison, bravely awaiting his fate, he wrote another influential book that is still widely read today, The Consolation of Philosophy.<sup>3</sup>

As we strum away today on the subject of WTO dispute settlement, we, too, should be mindful of our *consolations*. We should remember the example of that ancient musician, Boethius, and we should pause to ask ourselves: In addition to those that may be offered by philosophy, what *other consolations* do we have as we await the fate of DSU review?

Our greatest consolation is one that is very much on my mind because of world events on this very day. In my view, as someone who has spent nearly eight years strumming the bass fiddle for the Appellate Body of the WTO, the most consoling of all the many consolations of WTO dispute settlement is the success of the dispute settlement system in serving its original and most fundamental purpose. That purpose is to resolve international trade disputes *peacefully*.

More than half a century on, we tend to forget sometimes why we created our rule-based multilateral trading system, and why we invented a mechanism for dispute settlement within that trading system. We did so to keep “trade wars” from becoming real wars.

The aim of the WTO is not to *eliminate* trade disputes. In an international economy, international disputes about trade are inevitable. The aim of the WTO is to *resolve* the inevitable disputes about trade through the hums and strums of WTO dispute settlement so that we will be less likely to hear the drums of war.

It may be too much to say that trade ensures peace. It may be too little to say that it does not. Trade cannot end war, because trade cannot change our unchanging human nature. But trade can help silence the drums of war. Trade can help chain the dogs of war.<sup>4</sup>

Even as we meet today, the dogs of war strain at their chains. For all our hopes for harmony in the world, the cry of havoc is still heard in the world. But where are these cries heard? The world is threatened by war, but the world is *not* threatened by war *between Members of the WTO*.

Despite all that is happening to the world as we meet today, we can be consoled by this particular refrain of reassurance. We must be ever aware that, in settling trade disputes, we are serving the cause of peace.

Yet another consolation of WTO dispute settlement is how *relatively little* there really is in the world trading system that is in dispute. If we only read the headlines, we might conclude that there is no harmony at all in the trading system. And yet the humming, strumming, day-to-day reality of the trading system reveals the reassuring back beat.

Almost all of the trillions of dollars of international trade that is conducted annually in the 95 percent of the world economy that is generated by the 145 countries and other customs territories that are Members of the WTO is conducted *without dispute*.

The Members of the WTO have agreed — at last count — on *thirty thousand* pages of rules and concessions that comprise the “covered agreements” of the WTO. The Members of the WTO have adopted — at last count — about *thirteen thousand* pages of rulings in reports that have resulted from WTO dispute settlement.

Often overlooked in all the discord about the WTO — and especially in all the debate about WTO dispute settlement — is the fact that, on a daily basis, as a matter of mundane commercial routine, every single Member of the WTO tries to abide by *virtually every single one*

of the rules *and* the rulings that have been agreed and adopted by the Members of the WTO. Furthermore, every other Member acknowledges that this is so — *without dispute*.

Our consolation from this refrain of my tune today is the knowledge that the growing global volume of all of this *undisputed* trade creates a growing volume of unprecedented overall wealth for the five billion people who are served every day by the WTO trading system.

There is consolation, too, in the knowledge that the *very existence* of the WTO dispute settlement system helps *prevent* trade disputes. The *very existence* of the dispute settlement system encourages WTO Members to sing from the same page, and sing in the same key.

WTO Members generally trade in unison in accordance with WTO rules and rulings, because they know there will be consequences from dispute settlement if they sing off key. In this way, WTO dispute settlement helps provide the “security and predictability to the multilateral trading system” that WTO Members sought in writing the arrangements of the Dispute Settlement Understanding.<sup>5</sup>

Still another consolation of WTO dispute settlement is the *consistency* with which WTO Members take their disputes with other WTO Members to the WTO dispute settlement system in an effort to resolve them. Where there *are* trade disputes, those disputes are largely resolved through WTO dispute settlement.

To be sure, all of the Members of the WTO are supposed to play in the band. They have all *agreed* in the WTO treaty to use the WTO dispute settlement system to resolve all their treaty-related disputes with other WTO Members. But all of us who sing so ardently for international law know only too well that it is one thing to *agree* to a treaty, and quite another to *abide* by it.

Our consolation from WTO dispute settlement is that, for the most part, after only a few years on stage with the new WTO system, everyone *is* playing in the band. For the most part, it is now *simply assumed* that trade disputes between and among the Members of the WTO will be resolved through the arrangements of WTO dispute settlement.

Further, an additional grace note of consolation is afforded by the fact that this is especially so for the developing countries that comprise the majority of the membership of the WTO. Developing countries are increasingly featured in the performances of the Dispute Settlement Body.

We can be consoled as well by the *frequency* with which WTO Members have used the WTO dispute settlement system. Professor Andreas Lowenfeld has said that the WTO dispute settlement system is “the most complete system of international dispute settlement in history.”<sup>6</sup> It can also safely be said that the WTO dispute settlement system is by far the *busiest* system of international dispute settlement in history.

Here, too, though, it is important to listen for the back beat. Here, too, if we only read the headlines, we might conclude from the *sheer busyness* of the system that WTO dispute

settlement reverberates with an unrelenting drumbeat of unresolved and unresolvable disputes. And, yet, here, too, the reality of what happens daily in dispute settlement reveals the consoling and reassuring rhythm of the back beat.

According to the DSU, “The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”<sup>7</sup> The WTO dispute settlement system achieves this aim *in almost every dispute*.

Many — perhaps even most — of the international trade disputes that are brought to the attention of the WTO are resolved in a “positive solution” *without* formal consultations. Most of the disputes that result in formal consultations are resolved *without* the formal establishment of a panel. (To be more precise, the Legal Affairs Division of the WTO Secretariat reports that, thus far, a panel has been established in only about *40 percent* of the disputes in which there has been a request for consultations.<sup>8</sup>)

Furthermore, *almost all* of the trade disputes that are addressed by a panel and, if appealed, by the Appellate Body, result in what all the WTO Members that are parties to those disputes agree is a “positive solution” within a reasonable period of time after the adoption of the dispute settlement reports by the Dispute Settlement Body.

Not surprisingly, many of those throughout the world who follow the performances of the WTO from afar tend to focus on the *mere handful* of disputes in which it has been most difficult to achieve a “positive solution.” Those of us who play in the band have a better perspective, because we can hear the reassuring back beat of the dispute settlement system. So we know that the difficulties, thus far, have been, in fact, in only a mere handful of disputes. We could count them on the fingers of the hand we might use to strum a bass fiddle.

The *efficiency* and the *sufficiency* of WTO dispute settlement as sources of consolation can be seen in how *very few* disputes there have been, thus far, that have truly tested the limits of the dispute settlement system in achieving the aim of a “positive solution.” No doubt there will be more in the future. Even so, there is reassurance for the future in the steady back beat of all that occurs in the daily rhythm of dispute settlement.

I would hope, too, that the Members of the WTO would find some consolation as well in the services that those of us who have been privileged to serve them as Members of the Appellate Body have rendered through the years as performers in the WTO dispute settlement system.

Like any band, from time to time, we may have missed a beat or two. But we have always heard the back beat on the Appellate Body. We have been consistent in our interpretations of the complicated arrangements of the “covered agreements” of the WTO, and we have been consistent, too, in our common commitment to serving all the Members of the WTO.

Our band sings on cue. We meet the deadlines the Members of the WTO have given us for addressing the legal issues that are raised on appeal.

Our band sings in harmony. In nearly sixty appeals, there has *never once* been a dissent by any Member of the Appellate Body to the conclusions and recommendations in any Appellate Body report.

And our band sings our own songs. In nearly eight years, there has *never once* been a suggestion by any Member of the WTO that the Appellate Body is anything but independent and impartial in reaching and rendering our judgments in dispute settlement.

The WTO rules of conduct require the Members of the Appellate Body to be both “independent” and “impartial.” The Members of the WTO have put this important requirement in the rules of conduct in two separate places — perhaps as an accent for emphasis.<sup>9</sup>

True to their trust in us, and true to our obligations to them, we have stressed what they have stressed in the rules of conduct. We perform for *all* the Members of the WTO. We play for *all* the trading system. We are always independent. We are always impartial. We will always be. We will always sing our own songs.

There is consolation also in knowing that our efforts to assist the Members of the WTO in clarifying the obligations of WTO Members under the “covered agreements” have helped clarify also the commitment of the Members of the WTO to *the international rule of law*.

To my musical ear, this soothing note of consolation sounds sure and true in the tones of every performance in WTO dispute settlement. Admittedly, some shrill solos are sometimes heard in the performances of the Dispute Settlement Body. But, despite the occasional solos, the reports from dispute settlement have always been adopted, and the Members of the WTO have shown an admirable and remarkable consistency in following the score of the DSU by complying with the rulings and recommendations of the Dispute Settlement Body. In upholding the rule of law in international trade, the Members of the WTO have, consistently, played the right notes in the right pitch to the right beat.

This is an historic achievement. This is an unprecedented achievement. Moreover, this is an achievement that must become a cadence for all the world. The “automatic” beat of the “automatic” adoption of WTO dispute settlement reports is a beat that must be heard and heeded throughout the world.

We are proving that the rule of law can prevail in international trade. We must prove also that the rule of law can prevail as well in many other arenas of compelling international concern.

In their clear regard and in their consistent respect for the international rule of law, the Members of the WTO have set an example for all time and for all the world. All of us who continue to have high hopes for the WTO must hope that this example will endure, and that WTO dispute settlement will, like the musical treatise of Boethius, become a textbook that will be read for a thousand years.

Even Boethius might be consoled by the extent of all of these many consolations of WTO dispute settlement. These many successes so far in WTO dispute settlement give the Members of the WTO every reason for confidence that there can be many more. These refrains of my tune today offer ample reassurance to the Members of the WTO that, if they keep rehearsing, if they keep trying to play together, and if they play in tune, they will find the harmony they seek.

For all their difficulties thus far in harmonizing on the melody of DSU review, the Members of the WTO seem to me to know this. They seem to me to be aware of the rhythm of the back beat. They may not be singing about it. But they do seem to hear it.

Dozens of changes to the DSU have been proposed as part of DSU review. Changes have been suggested in almost every single article of the DSU. Changes are being debated in almost every single provision of the DSU.

But listen closely to the subtle back beat of DSU review. Listen to the revealing and reassuring back beat.

No one has proposed dismantling the Dispute Settlement Understanding. No one has proposed reversing the “reverse consensus” rule that has been the source of so much of the success of the Understanding. No one has proposed abolishing the Appellate Body. No one has proposed a single change with the professed intent of altering the *basic architecture* of WTO dispute settlement.

Because no one wants to break up the band.

An accomplished amateur musician — and philosophical successor to Boethius — named Johann Wolfgang von Goethe once described architecture as “frozen music.”<sup>10</sup> I do not know if Goethe ever played the bass fiddle. I do know that his well-known description of architecture does *not* apply to the architecture of WTO dispute settlement.

The music of WTO dispute settlement is not frozen. It is alive. It is alive with the life that flows from trade. It is alive with the life of the world. It swings.

“Woulda, coulda, shoulda, Mr. Bacchus?” Of course. But the din of the downbeat of all that “woulda,” “coulda,” and “shoulda” be done to improve WTO dispute settlement must not keep us from hearing the reassuring rhythm of the back beat of all we have already done for the world through WTO dispute settlement. If we hear the back beat, if we seek consolation in all we have already done, we will, indeed, find the harmony we need to do much more.

What consolation do I have as I prepare to set my bass fiddle aside, and as I turn to leave the bandstand after eight years on the Appellate Body? As I prepare to leave, do I believe the WTO dispute settlement system has been a success, and do I believe that it can be an even greater success in the years to come?

“Oh my. Do I. Honey, ’deed I do.”

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James Bacchus is the Chairman of the Appellate Body of the World Trade Organization in Geneva, Switzerland. He is the youngest Member, the longest serving Member, the only North American Member, and the only remaining original Member of the global tribunal, which hears final appeals in international trade disputes involving the 95 percent of world commerce conducted by the 145 countries and other customs territories that are Members of the WTO. Bacchus is a former Special Assistant to the United States Trade Representative in the Executive Office of the President. He is also a former member of the Congress of the United States, from Florida. He served two terms in the U.S. House of Representatives before choosing not to seek re-election in 1994. In 1995, he was appointed by the Members of the WTO to the Appellate Body. Bacchus received a Bachelor of Arts degree from Vanderbilt University, Magna Cum Laude and Phi Beta Kappa, with High Honors in History. He received a Master of Arts degree from Yale University, where he was a Woodrow Wilson Fellow in History. He was graduated with High Honors from the Florida State University College of Law, where he was Editor-in-Chief of the FSU Law Review. These are his personal views, and are not the views of his colleagues on the Appellate Body or the official views of the WTO.

## Notes

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- <sup>1</sup> “ ‘Deed I Do,’” words and music by Fred Rose and Walter Hirsch (1926).
- <sup>2</sup> “Boethius,” online at [www.stfrancis.edu/ph/hauser/boethius/boeinfo2.htm](http://www.stfrancis.edu/ph/hauser/boethius/boeinfo2.htm); *see generally* Averil Cameron, The Mediterranean World in Late Antiquity, 395-600 (London and New York: Routledge, 1993), 42; and Bertrand Russell, A History of Western Philosophy (New York: Touchstone, 1972), 370 [1945].
- <sup>3</sup> Boethius, The Consolation of Philosophy, Loeb Classical Library (Cambridge, Mass: Harvard University Press, 1973).
- <sup>4</sup> “Cry ‘Havoc,’ and let slip the dogs of war.” William Shakespeare, Julius Caesar (Act III, Scene 1).
- <sup>5</sup> Article 3.2, Understanding on Rules and Procedures Governing the Settlement of Disputes (the “Dispute Settlement Understanding”).
- <sup>6</sup> Andreas F. Lowenfeld, International Economic Law (Oxford: Oxford University Press, 2002), 150.
- <sup>7</sup> Article 3.7, Dispute Settlement Understanding.
- <sup>8</sup> According to the records of the Legal Affairs Division of the WTO Secretariat, as of February 10, 2003, there had been 281 requests for consultations in WTO dispute settlement, and there had been 105 panels established in WTO dispute settlement covering 129 disputes.
- <sup>9</sup> WTO Rules of Conduct, Articles II and III (2).
- <sup>10</sup> Johann Wolfgang von Goethe, Letter to J. P. Eckermann (March 23, 1829).