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Table Talk: Around the Table of the Appellate Body of the World Trade Organization

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ABSTRACT

In this Article, James Bacchus describes his experiences as a "faceless foreign judge" of the World Trade Organization. In this capacity, Bacchus and his six colleagues on the WTO Appellate Body hear appeals in international trade disputes among the 144 member countries and other customs territories that are Members of the WTO. Bound by the WTO Rules of Conduct, he cannot comment on cases or the specific deliberation process, but rather comments on the processes and role of the Appellate Body relative to the WTO.

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I am often asked, What is it like to be one of the "faceless foreign judges" of the World Trade Organization—the WTO—in Geneva, Switzerland?

I will try to answer that question, or at least part of it. I must begin, however, by offering an apology to those who may be hoping for exhaustive and revealing detail. I am bound by the constraints I have accepted in the WTO Rules of Conduct. I cannot elaborate on past decisions by the WTO. I cannot comment on pending cases in the WTO. I cannot offer my views on how WTO rules might be improved—if at all—by being changed. If I did, anything I said could rightly be used against me in a "court" of law—namely, the WTO dispute settlement system. So I will say less, and in less detail, than I might prefer ideally to say if I were free to do so.

All this said, what, then, is it like to be one of the "faceless foreign judges" of the WTO?

We meet at ten every morning around a round table in a corner room of a quiet wing of the Italianate Villa that serves as the global headquarters of the WTO in Geneva, Switzerland. The windows of our chambers look out on a broad green lawn that slopes down to the shore of the lake of Geneva, Lac Leman. Across the lake are the medieval heights of the old town. Beyond are the snowy peaks of the Alps. We work in a picture postcard.

We see the sun stream through the windows of our chambers in the morning. We see it make its way slowly across the southern sky throughout the day. We see it sink slowly into the darkness of the evening. Watched by the sun, we sip endless cups of a French coffee-and-milk concoction called *renversé* while we pursue the work we share.

We have met around this table, morning after morning, for nearly seven years. We began doing so in 1995 after more than one hundred countries agreed on the treaty that transformed the General Agreement on Tariffs and Trade (GATT) into the newly created WTO.[1] We were appointed then by the Members of the new WTO to a supposedly "part-time" job that most of us do, in reality, full-time.

Since then, the faces around the table have changed. The table has not. The same wooden table in Geneva, with its smoothly polished surface, and with a few scratches here and there, has seen both faces and cases come and go.

We are seven around the table. We are from seven different countries. We are from seven different regions of the world. We are from seven different legal traditions. We are, in the words of the

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 3 [hereinafter WTO Agreement].

WTO treaty, "broadly representative of membership in the WTO."[2] I am the only American, and also the only North American, among the seven. I am also the only one remaining of the original seven who were first appointed by the Members of the WTO in 1995, and who first sat together around our table in Geneva and sipped *renversé*.

Then I was the youngest, by fourteen years, of the original seven. Today, I remain the youngest of the current seven. I confess that, at 53, I find it increasingly difficult to find pursuits in which I am "the youngest." Having been asked by my six colleagues to do so, I now serve as Chairman of the Appellate Body and, thus, chair our meetings.

The seven original and founding Members of the Appellate Body who first worked together around our table were: Julio Lacarté-Muro of Uruguay, Claus-Dieter Ehlermann of Germany, Florentino Feliciano of the Philippines, Said El-Naggar of Egypt, Mitsuo Matsushita of Japan, Christopher Beeby of New Zealand, and yours truly of the United States of America. My colleagues Lacarté-Muro, Ehlermann, and Feliciano all served six years, and retired at the end of 2001. My colleagues El-Naggar and Matsushita both retired after four years, in 1999. My dear friend Chris Beeby died in Geneva in 2000 while working at the WTO.

The seven who work together around our table today are: Georges Abi-Saab of Egypt, A.V. Ganesan of India, Yasuhei Taniguchi of Japan, Luiz Olavo Baptista of Brazil, John Lockhart of Australia, Giorgio Sacerdoti of Italy, and, still, yours truly. We are aided in our work by the Appellate Body "Secretariat," which is a fancy way of describing our very fine staff. For more than five years, the director of our Secretariat was a superb international lawyer and former trade negotiator from Canada named Debra Steger. She has been succeeded by another gifted Canadian lawyer named Valerie Hughes. Through the years, numerous bright young lawyers on our Secretariat have worked with us and joined with us from time to time in the discussions around our table.

The subject of these discussions is what we call the "covered agreements." The "covered agreements" are the GATT and the numerous other international trade agreements that comprise the WTO treaty and that bind all WTO Members.[3] We seven are, according to the WTO treaty, "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."[4] As such, our job is to

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2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 17.3, 33 I.L.M. 112, 125 [hereinafter DSU].

3. *Id.* art. 1.1.

4. *Id.* art. 17.3.

help the Members of the WTO fulfill the terms of the "covered agreements." Our job is "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law" as a final forum of appeal in WTO dispute settlement.[5]

We do not wear robes. We do not wear wigs. We do not wear the white bibs that are often worn by jurists on other international tribunals. We do not have all the institutional trappings that have accrued to other tribunals with the passage of time and the accretion of tradition. We do not even have titles. The WTO treaty speaks only of a "standing Appellate Body."[6] The treaty does not say what the seven "persons" who are members of the Appellate Body should be called. So we call ourselves simply "Members of the Appellate Body."

Others do not seem to know what to call us. Some observers of the WTO describe us as "trade experts." Some trade experts describe us as "generalists." Journalists, in reporting our rulings, often describe us generically and anonymously as simply "the WTO." And, yes, some, sometimes, call us "faceless foreign judges."

We are called "faceless" perhaps because few in the world seem to know who we are. Few in the world who write about the WTO, few who criticize the WTO, and few even who defend the WTO, know who we are. We always sign our opinions, but, for whatever reason, few ever mention our names. We may be called "faceless" as well because the WTO Members have mandated in the WTO treaty that all our proceedings must be "confidential."[7] So we meet behind closed doors. No one who has not participated in one of our appeals has ever seen us work.

We are called "foreign" perhaps because we are, by treaty, "unaffiliated with any government."[8] We do not represent our own countries in our work in Geneva. Instead, each of us and all of us have been appointed by *all* the Members of the WTO to speak for *all* the Members of the WTO by speaking *solely* for the WTO trading system *as a whole*. We are independent.

And we may be called "judges" because, whatever we may call ourselves, that word may best describe what we do. For our job is to "judge" appeals in international trade disputes affecting the lives of 5 billion people in the 95% of all world commerce conducted by the 144 countries and other customs territories that are—currently—Members of the WTO. Moreover, the scope of our jurisdiction seems to grow daily. At this point, every country in the world is either a

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5. *Id*. art. 3.2.
6. *Id*. art. 17.1.
7. *Id*. art. 17.10.
8. *Id*. art. 17.3.

Member of the WTO or seems to want to be. At last glance, more than two dozen additional countries had applied for admission in a process we call "accession." China and Taiwan are the newest Members. Russia, Saudi Arabia, Vietnam, and Ukraine are among those waiting to become Members. Among the others awaiting membership are about half the Arab states and a handful of former Soviet republics.

Technically, the Appellate Body is rightly described as "quasi-judicial."[9] To have legal effect, our rulings must be adopted by the Members of the WTO. But a ruling by the Appellate Body in an international trade dispute will *not* be adopted only if *all* the Members of the WTO decide "by consensus" that it should *not* be—including the Member or Members in whose favor we may have ruled.[10] Thus far, this has never happened.

But whether our work is described as "judicial" or "quasi-judicial," and whatever we may be called, we have much to do around our table in Geneva. We have much to do because, among all the international tribunals in the world, and, indeed, among all the international tribunals in the history of the world, the Appellate Body of the WTO is unique in two important ways.

The first way in which we are unique is that we have what we lawyers call "compulsory jurisdiction." All WTO Members have agreed in the WTO treaty to use the WTO dispute settlement system to resolve all treaty-related disputes with other WTO Members. A WTO Member that does not do so may be sued by another WTO Member for not doing so in WTO dispute settlement. Thus far, this, too, has never happened.

The second way in which the Appellate Body is unique is that we make judgments that are enforced. Our judgments are enforced, not by us, but by the Members of the WTO themselves through the power of economic suasion. Like all treaties, the WTO treaty is in the nature of a contract. Indeed, the members of the GATT, which preceded the WTO, were often called "Contracting Parties." In every contract, there are obligations and there are benefits. And, as in every other contract, in the contract called the WTO treaty, if a WTO Member fails to fulfill all of its obligations, it risks losing some of the benefits of the contract.

The Members of the WTO are sovereign countries and customs territories. No Member of the WTO can ever be required to comply with any judgment in WTO dispute settlement. Yet, under the WTO

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9. *Quasi-judicial* is defined as, "of, relating to, or involving an executive or administrative official's adjudicative act." BLACK'S LAW DICTIONARY 1258 (7th ed. 1999).

10. DSU, *supra* note 2, art. 17.14.

treaty, if a Member chooses not to comply, it risks paying an economic price. That price is what the treaty describes as "compensation and the suspension of concessions."[11] This is a form of "damages" to the other Member injured in that trade dispute. These "damages" consist of either additional access for the injured Member to the market of the "non-complying" Member in other sectors of trade, or reduced access for the "non-complying" Member to the market of the injured Member in other sectors of trade. As this can sometimes be a very high price to pay, WTO Members have considerable economic incentive to choose to comply with WTO judgments. And they almost always do.

These two ways in which we are unique help keep us busy around our round table in Geneva as we try to help provide what the WTO treaty calls "security and predictability to the multilateral trading system."[12] Our jurisprudential uniqueness is, of course, the culmination of more than half a century of building the multilateral trading system, first under the GATT, and now under the Dispute Settlement Understanding that is the legal linchpin of the WTO treaty.

We are also kept busy because WTO Members know that when they bring a case in WTO dispute settlement that eventually reaches the Appellate Body, they will receive a *legal* judgment, not a *political* judgment. They know they will receive a judgment that will, in the words of the treaty, "address" the "issues of law" that are "raised . . . during the appellate proceeding." Nothing more. Nothing less. For, in addressing issues of law in WTO appeals, we seven have always been, and we will always be, as one observer for the *New York Times* has put it, "impartial and unflinching."[13]

For these reasons, in the seven years since we began working together around our table, the WTO has become by far the busiest international dispute settlement system in history. As the treaty says, "The aim of the dispute settlement system is to secure a positive solution to a dispute" involving WTO Members.[14] And, as the system has grown, ever-increasing numbers of trade disputes have been brought to the WTO by WTO Members in search of a "positive solution." Thus far, approximately 240 formal complaints have been brought to the WTO, and more than 11,000 pages of jurisprudence

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11. *Id.* art. 22.1.
12. *Id.* art. 3.2.
13. Michael M. Weinstein, *Economic Scene: Should Clinton Embrace the China Trade Deal? Some Say Yes*, N. Y. TIMES, Sept. 9, 1999, at C2.
14. DSU, *supra* note 2, art. 3.7.

have resulted from WTO dispute settlement.[15] These numbers are increasing almost every day.

The parties to the proceedings in WTO dispute settlement that arise from these trade disputes are exclusively the countries and other customs territories that are Members of the WTO. No one else is entitled under the WTO treaty to participate in WTO dispute settlement. Private interests do not have "standing" to bring suits in the WTO. But, of course, the WTO Members that are parties to WTO proceedings are always of the view that they are asserting and defending important domestic interests. Thus, for example, it is not surprising that the journalists who reported on the dispute a few years ago between Japan and the United States involving the Japanese market for photographic film routinely described that dispute as the "Kodak-Fuji" case.[16]

In these first few years of the WTO, numerous trade disputes among the Members of the WTO have been settled "out of court," so to speak, by virtue of the very existence of a compulsory dispute settlement system that can make enforceable judgments. Many of the other disputes that have been brought to the WTO in its brief history have resulted in rulings by the *ad hoc* three-member panels that are the WTO equivalent of trial courts. And about fifty of these disputes have resulted in rulings by the Appellate Body that have been adopted by the Members of the WTO. Almost all these disputes have been resolved with what the parties to the disputes have viewed as a "positive solution."

Not without reason has Director General Mike Moore of the WTO frequently described the dispute settlement system as the "crown jewel" of the multilateral trading system.[17] Peter Sutherland, former Director General of the WTO's predecessor, the GATT, has gone so far as to say that the WTO dispute settlement system "is the greatest advance in multilateral governance since Bretton Woods," the conference at the conclusion of World War II where the victorious allies agreed on much of the architecture of the post-war global economic system.[18]

Given the broad scope and sway of the WTO treaty, the disputes that are resolved in WTO dispute settlement can involve

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15. John H. Jackson, *Perceptions About the WTO Trade Institutions*, 1 WORLD TRADE REV. 101, 109 (2002).

16. *See e.g.,* Nancy Dunne et al., *WTO's Film Ruling Angers Washington*, FIN. TIMES, Dec. 8, 1997, at 3.

17. The Director-General used this phrase, for example, during the "swearing-in" ceremony for the newest Members of the Appellate Body before the WTO Dispute Settlement Body, in Geneva, on December 19, 2001.

18. Guy de Jonquieres, *Rule to Fight By: The US and Europe Are Looking to the World Trade Organization to Resolve Their Dispute Over Steel*, FIN. TIMES, Mar. 25, 2002, at 22 (quoting former Director-General Sutherland).

manufacturing, agriculture, services, intellectual property, investment, taxation, and virtually every other area of world commerce. The appeals we have judged thus far have involved everything from apples to computers, automobiles to semiconductors, shrimp to satellites, bananas to chemicals, and oil to aerospace. Ever more varied kinds of disputes are resulting in WTO dispute settlement as more agreements enter into force, more agreements are concluded, and more concessions are made. Increasingly, the "boundaries" of WTO jurisdiction are the subject of both political and academic debate.[19] But, clearly, the "boundaries" of the WTO are both extensive and expansive.

We do not render advisory opinions on the Appellate Body. We render opinions only when there are specific trade disputes. By treaty, all WTO Members that are parties to a dispute have the automatic right to appeal "issues of law covered in the panel report and legal interpretations developed by the panel" to the Appellate Body.[20] On appeal, we seven "shall address each of the issues raised . . . during the appellate proceeding."[21] We "may uphold, modify or reverse the legal findings and conclusions of the panel."[22]

Thus, we cannot choose either the disputes that are appealed to us or the issues of law that are appealed to us in disputes. Unlike the United States Supreme Court, for example, we have no discretionary jurisdiction. Further, we have no power to remand a dispute to a panel for further consideration. We have no authority whatsoever to decline to hear an appeal. Moreover, we have no authority whatsoever to refrain from "addressing" a legal issue that has been properly raised in an appeal. The WTO treaty says that we "shall address" every legal issue raised in an appeal. So we do.

And we do so within strict deadlines established by the treaty. Most other international tribunals have no deadlines. But no matter how complicated the issues may be that are raised on appeal, generally we have no more than ninety days in which to hear and decide an appeal.[23] As our record reflects, we take seriously the need to "address" the legal issues raised in each appeal both thoroughly and appropriately within the treaty deadlines. We have met our treaty deadlines consistently, and I am persuaded that this, too, has contributed to the success thus far of the WTO dispute settlement system.

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19. *See, e.g., Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002).
20. DSU, *supra* note 2, art. 17.6.
21. *Id*. art. 17.12.
22. *Id*. art. 17.13.
23. *Id*. art. 17.5.

By treaty, we have been granted the authority to establish our own "working procedures" within our deadlines.[24] Seven years ago, we sat down together at our table with a blank legal pad and began writing our procedures. It took us three weeks. Since then, we have made only minor changes. Using these working procedures, in each appeal, we review the panel record and the panel report, we review submissions by the WTO Members that are interested parties and third parties, we conduct an oral hearing on the legal issues that have been raised, and we deliberate and write a final report containing our judgment. And generally we do all this within no more than ninety days.[25]

For translation and other purposes, there are three official languages of the WTO—English, Spanish, and French.[26] As a matter of practice, the seven of us generally work in our common language—English. We conduct our oral hearings in English—unless asked by the WTO Members participating in the hearing to do otherwise. We deliberate in English—embellished by the occasional Latin legal phrase heard around the table. We write our reports in English. Our reports are translated into Spanish and French before release to the parties to the appeal and to the world.

We have been able to meet our deadlines in part because we have shared our growing workload among the seven. By treaty, three of us sit as a "division" to hear and decide each appeal.[27] Those three sign the report of the Appellate Body in that appeal. Before a decision is reached, the three on the "division" in the appeal engage in an "exchange of views" with the four others who are not on the "division." One of the three serves as "Presiding Member" of the "division." By treaty, all seven of us "serve in rotation" in all these roles, and, by rule, we do so on an anonymous and random basis that tends to equalize our individual workloads.[28]

Whatever our individual role may be in any particular appeal, each of us strives always to reach a "consensus" in every appeal. We are not required to do so. The treaty does not prohibit dissents. The treaty provides only that "opinions expressed" by individuals serving on the Appellate Body must be "anonymous."[29] But, thus far, in all our years of working together, and in about fifty appeals, there has

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24. *Id*. art. 17.9.

25. My colleagues would no doubt urge me to add that this is, actually, no more than seventy-five days, as we must allow two weeks for mandatory translation.

26. WTO Agreement, *supra* note 1, art. 16.

27. DSU, *supra* note 2, art. 17.1; WTO Appellate Body, Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/3, Rule 6(1) (Feb. 28, 1997) [hereinafter Working Procedures].

28. DSU, *supra* note 2, art 17.1; Working Procedures, *supra* note 27, Rule 6(2).

29. DSU, *supra* note 2, art. 17.11.

not been even one dissent to the conclusions in any report of the Appellate Body. Thus far, all our decisions have been by "consensus."

I do not believe that I betray the "confidentiality" of our table talk in any way by saying that the "consensus" we have achieved in the many appeals that have been made, thus far, to the Appellate Body has not always been achieved easily. Nor do I think that I betray any of our "confidentiality" by saying that our ability to achieve consensus around our table in our first seven years is testimony to the considerable care taken by the Members of the WTO in the elaborate and global selection process they have employed in appointing all the Members of the Appellate Body.

Some may say that there is no accounting for my own selection. As one astute observer remarked in a letter to the editor of my hometown newspaper in Florida shortly after I was first appointed to the Appellate Body seven years ago, which I paraphrase here from memory, "I don't understand all this fuss about Jim Bacchus. He is just another lawyer from Orlando."[30] And so I am. However, my colleagues on the Appellate Body have all long been much more than "just lawyers." From the beginning, I have been joined around our table in Geneva by distinguished international jurists of the very highest order. They have, each and all, been legal thinkers and legal craftsmen of the very highest quality. They have been students of history and philosophy as well as students of economics and jurisprudence. They have been seekers of the better world that yet can be—if we succeed in our shared efforts to secure the international rule of law. Today, I am still just a lawyer from Orlando. Yet because of my colleagues, and because of all I have learned from them while working with them around our table in Geneva, I am, perhaps, more than I was seven years ago.

In our time together around our table, we have learned that the issues that are raised on appeal are rarely clear-cut. Even seven years on, there are many important provisions of the "covered agreements" and, in fact, some entire agreements that are part of the overall WTO treaty, that have yet to be construed even once by the Appellate Body. Moreover, issues are raised in almost every appeal that are, in legal parlance, issues of "first impression." In truth, it might be said of the entirety of the ruled-based WTO multilateral trading system that, in many ways, it poses a *world* of "first impression." Given this, we seven are very much of the view that we owe it to the Members of the WTO, and to all the people of the world that we seven serve through the Members of the WTO, to examine

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30. Wayne Lindsey, *Just Another Lawyer*, ORLANDO SENTINEL, Dec. 8, 1995, at A22.

every last shade of nuance of every single legal issue that is raised in every single appeal. And we always do.

That is why our hearings sometimes last for days, our deliberations sometimes last for weeks, and our drafting sometimes lasts for draft after draft after draft. That is why we meet, day after day, around our round table. That is why we sit, hour after hour, day after day, plumbing the depths of meaning of the words of the WTO treaty, slicing the layers of logic in the interpretation of those words, and turning over and over, up and down, and inside and out, every last argument that may have been advanced about those words in an effort to reach a "consensus" on the right reasoning and the right result on every legal issue raised in every appeal. That is why we work together to forge a "consensus" up until the very limits of our ever-present and ever-pressing deadlines.

As our current chairman, I preside over our general discussions. Our practice also is for the "Presiding Member" of a particular division to preside in the deliberations of that division and also in the "exchange of views" with that division. As a practical matter, this usually consists mostly of keeping a list on a legal pad of the order in which we have each asked to speak about the many subtleties of the WTO treaty.

The WTO treaty is *not* a free trade agreement. It does not *mandate* free trade. The WTO treaty is an international agreement for freeing trade and for preventing trade discrimination. It establishes rules that enable WTO Members to free trade by making voluntary trade concessions on a multilateral basis. And it discourages WTO Members from engaging in certain kinds of trade discrimination against trading partners that are also Members of the WTO-based multilateral trading system. Among all the more than—at last count—twenty-seven thousand pages of WTO rules and concessions, three basic rules are perhaps the most significant and the most central to this WTO system of concessions and non-discrimination.

The first is the basic rule on binding concessions. This first rule has been the key to the historic success of the WTO-based system in stimulating growth in both the volume and the variety of world trade. This rule establishes an agreed framework for voluntary trade concessions that increase market access by lowering tariff barriers to trade worldwide. WTO Members are not required to make tariff concessions. But, under this vital and fundamental WTO rule, once

WTO Members do make tariff concessions, and once they agree to "bind" those concessions, they are bound by them.[31]

The second is the basic rule requiring "most-favoured-nation," or "MFN," treatment. Contrary to what many in the media—and, alas, some in politics—seem to think, this is *not* a rule that requires that *more favorable* treatment be given to one trading partner than to others, but, instead, a rule that requires that the *same* treatment be given to *all* foreign producers of like products that is given to producers from the "most-favoured-nation."[32]

The rule requiring "most-favoured-nation" treatment, when applied in concert with the rule on binding concessions, *multiplies* the potential of trade concessions for lowering barriers to trade worldwide by requiring that any concession that is made to *one* WTO Member must be made also to *all other* WTO Members on a multilateral "most-favoured-nation" basis. This is an important example of what advocates of the WTO usually mean when we speak, as we often do, of the virtues of what is called, in WTO jargon, "multilateralism."

The third basic rule is the rule requiring "national treatment." The "national treatment" rule prevents the favoring of domestic over foreign producers. Under this rule, WTO Members must not discriminate in favor of domestic producers but, rather, must, with respect to domestic taxes and other regulatory treatment, give "no less favourable treatment" to foreign producers than is given to domestic producers of like products.[33] The "national treatment" rule is a good example of how WTO rules relating to international trade can also have considerable domestic implications for WTO Members in areas that do not primarily involve trade.

The availability and the advantages of these basic WTO rules help explain why so many countries and other customs territories have become Members of the WTO, and also why so many more are waiting in line to become Members of the WTO. The enforceability of these and many other beneficial WTO rules in WTO dispute settlement adds all the more to the attractiveness of WTO membership. Benefits that can be assured through effective enforcement are benefits that are well worth having.

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31. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. II, LEGAL INSTRUMENTS–RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1995) [hereinafter Final Act].

32. *See* Final Act, *supra* note 31, art. I; General Agreement on Trade in Services, Dec. 15, 1993, art. IV, 33 I.L.M. 44 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1197 [hereinafter TRIPS Agreement].

33. *See* Final Act, *supra* note 31, art. III; GATS, *supra* note 32; TRIPS Agreement, *supra* note 32, art. III.

The disputes that are appealed to us and that are discussed around our table are about the meaning of these three basic rules, and are also about the meaning of all the many, many other obligations that are contained in the "covered agreements." These obligations are expressed in the words of the treaty. The meaning of the words of the treaty is thus our constant focus in reaching and rendering our judgments. As we noted in our very first appeal, this focus is in keeping with the international rules of treaty interpretation that have been codified in the Vienna Convention on the Law of Treaties.[34]

Our focus on the words of the WTO treaty is as it should be. The WTO treaty contains WTO rules. The Appellate Body exists to clarify WTO rules in WTO dispute settlement. Yet, as we also noted in our very first appeal, WTO rules cannot, in WTO dispute settlement, be viewed in "clinical isolation" from other international law.[35]

Our responsibility in every appeal is to say everything about the meaning of the words of the treaty that must be said in order to "address" the legal issues that are "raised" in that appeal, and thus assist the WTO Members in resolving that dispute with a "positive solution." Our aim in every appeal is to do that—only that—and no more.

Some may say that, from time to time, we may have gone too far by ruling on some of the legal issues that have been raised on appeal. I would disagree. And, in reply, I would reiterate that, under the WTO treaty, we *must* rule on every issue that is raised on appeal. The treaty mandates that we "shall address" every such issue. We have no discretion not to do so.

Unavoidably, this means that we are often compelled by the fulfillment of our responsibilities under the WTO treaty to rule on important legal issues when some who have not raised those issues on appeal might prefer that we would refrain from ruling. Even so, I would maintain that a careful reading of our rulings would lead most fair-minded observers to conclude that, while fulfilling our responsibilities under the WTO treaty, we have consistently shown a great measure of restraint. Our approach always has been one, if you will, of "quasi-judicial" restraint.

Some may say also that some of our rulings may have added to the obligations of Members of the WTO under the WTO treaty. I would disagree. Article 3, paragraph 2 of the Dispute Settlement Understanding that is part of the WTO treaty says clearly, with

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34. United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R, at 17 (May 20, 1996), 35 I.L.M. 603, 620 [hereinafter U.S.—Gasoline]; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, 691 (1969).

35. U.S.—Gasoline, *supra* note 34, at 16.

respect to the Dispute Settlement Body, the DSB, that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[36] Article 19, paragraph 2 of the Dispute Settlement Understanding says clearly that this prohibition applies both to the panels and to the Appellate Body.[37] In all our recommendations and rulings, we have been true to these responsibilities.

The WTO treaty is like any other international treaty. It is the product of international compromise. In the past seven years, we have learned that the meaning of some of the words of the WTO treaty is sometimes seen *clearly* by different WTO Members in *clearly different ways*. What one Member may see as only an argument may be seen by another Member as an obligation, and vice versa. The difference must sometimes be discerned in the process of dispute settlement because this is what dispute settlement is all about. And the fact that the meaning that one Member may happen to see—however clearly—for a particular word or provision or obligation does not happen to prevail in a considered and reasoned judgment, after a full and fair hearing, and after many months of dispute settlement, does *not* mean that the DSB has either added to or diminished the rights and obligations of that Member that are provided in the "covered agreements."[38]

Some may say also that we may not have been true in some of our rulings to the "standard of review" that is established in the WTO treaty for the review of national decision-making in WTO dispute settlement. Here, again, I would disagree. And I would invite them to read carefully both the WTO treaty and our interpretations of the WTO treaty relating to the issue of the appropriate "standard of review." They will find that we have been true, consistently, to all that the WTO treaty says about the "standard of review." What they seem to be seeking is a "standard of review" *different* from the one on which *all* WTO Members have agreed and which *all* WTO Members have included in the WTO treaty. But it is not our place on the Appellate Body to provide for a "standard of review" different from the one that has been included in the WTO treaty. For, again, as the treaty says, it is not our place, in dispute settlement, either to "add to or diminish the rights and obligations provided in the covered agreements."

Some may say also that some cases have been brought in WTO dispute settlement that should never have been brought before the WTO. In some instances, I might agree. But it is not up to me to

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36. DSU, *supra* note 2, art. 3.2.
37. *Id.* art. 19.2.
38. *Id.*

decide which cases should be brought before the WTO. That is a decision that, by right, is made only by the Members of the WTO. The Members alone bring the cases. And, to quote the WTO treaty, "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful."[39]

And, lastly, some may say as well that some decisions have been made in appeals in WTO dispute settlement that should, ideally, have been made instead by the Members of the WTO through multilateral negotiations leading to WTO rule-making. Here, too, in some instances, I might agree. But it is neither my role nor my place to make suggestions to the Members of the WTO about their rule-making. The Members of the WTO have established an effective system for settling disputes about existing rules. It is for the Members of the WTO to decide how best to establish an effective system for making new rules.

You tell me. Which makes better sense? Should the Members of the WTO unravel an effective system for settling disputes about *existing* rules because they have not yet established an effective system for making *new* rules? Or, should the Members of the WTO try instead to establish a system for making new rules that will be as effective as the system they already have for settling disputes about existing rules? To intone one of the many truisms of which we sometimes seem so enamored in international law, but without the usual, obligatory Latin phrasing: "don't fix what ain't broke"; fix only what needs fixing.

In sum, I will say this to the critics of the various outcomes of various cases thus far in WTO dispute settlement. I will leave it to others to tote up the tally of supposed "wins" and "losses" for individual Members of the WTO in individual cases in dispute settlement. And I will trust *every* Member of the WTO to remember that the entire national interest of *no* Member is to be found in the outcome of any one, single case. Rather, the overriding and abiding national interest of *every* Member of the WTO is to be found instead in the shared international interest of *all* Members in the continued success and strengthening of the WTO dispute settlement system. And, because I am an American, I will be so bold as to add: this is especially true of the largest economy in the world and the largest trading nation in the world—the United States of America. And we must never forget it.

From the conclusion of the Jay Treaty, to the settlement of the Alabama Claims, to the establishment of the Hague Court, to the conference at Bretton Woods, to the establishment of the United Nations, to the agreement on the GATT, to the creation at long last of

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39. *Id.* art. 3.7.

the WTO, the United States has always been in the forefront of international efforts to achieve peace and prosperity in a better world through the international rule of law. Together with others of like mind around the world, we must always be in the forefront of those seeking and serving the rule of law—whatever the political pressures or the passing sentiments of any one case or any one day. We must continue to summon the will and the wisdom to see that our true national interest is the international rule of what the Constitution of the United States calls "the law of nations."[40]

This will not always be easy. A few weeks before I was first elected to the Congress in 1990, while riding from campaign event to campaign event amid the lush palmetto brush of Central Florida, I happened to read a column by the journalist Michael Kinsley in *The New Republic*. I agreed then with what he wrote about the true test of international law, long before there was a WTO or an Appellate Body. I certainly agree now. What Kinsley wrote then is good advice for all Members of the WTO, and for all of us who support the work of the WTO, as, together, we seek and serve the international rule of law:

> Usefulness of international law depends on others believing that this time we really mean it. Really meaning it means giving up our own freedom of action on occasion, and allowing our own case-by-case moral assessments to be constrained by rules that will sometimes strike us as wrong. . . . Law that need not be obeyed if you disagree with it is not law. If we want meaningful international law to be available when we find it useful, we must respect it even when we don't.[41]

No effort is spared by the Members of the Appellate Body in the energies we devote to reaching the decisions that are reflected in our rulings. In particular, this is true of our deliberations. The deliberations around our table are the closest I am ever likely to come to the conversations that enlivened the taverns of Samuel Johnson's London and the salons of Voltaire's Paris. Intellectual sallies sail back and forth. Verbal parries go to and fro. The rhetoric around the table ascends gradually from engaging repartee up to rarefied considerations worthy of the best of medieval Thomistic angel-counting on the head of a pin.[42]

Professor John H. Jackson of Georgetown University, who has done so much through the decades to further the development of the

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40. U.S. CONST. art. I, § 8.

41. Michael Kinsley, *TRB From Washington*, NEW REPUBLIC, Oct.1, 1990, at 4.

42. According to my esteemed former colleague Judge Florentino "Toy" Feliciano, the answer to the time-honored question, "How many angels can dance on the head of a pin?," is "None." For angels have no corporeal existence. On this, I defer to my friend Toy, who was well schooled, not only by Yale University, but also by the Jesuits in the Philippines.

world trading system, and who has followed the development of the WTO dispute settlement system as closely as anyone, has speculated on what transpires around our table: "[O]ne can almost visualize the furrowed brows of the Appellate Body Members as they struggle with difficult concepts, balancing important social policies that often pose dilemmas or trade-offs, and arriving sometimes at language that is extraordinarily nuanced and delicate, sometimes discussed into late hours of the evening."[43] As my late friend and colleague Chris Beeby would undoubtedly say if he were still with us, "Indeed."

Brows furrowed, we take turns speaking. There are no time limits, other than those of mutual tolerance. There are no holds barred in our spirited Socratic fray. There are no occasions when we do not endeavor to take into consideration every conceivable point of view relating to every legal issue raised on appeal. There are no resources from which any one of us might not draw in our efforts to reach a "consensus" on the appropriate interpretation of the words of the "covered agreements." Through the years, I have heard everyone from Aristotle to General Ulysses S. Grant cited as authority around our table.

I am a reformed politician. In my time in Congress, I was rarely asked a question that I had not already been asked a hundred times before. And I always had, if not an answer, then at least a response. In my time on the Appellate Body, I have learned that, when I come to our table, I had better have answers.

When I first became a candidate for the Congress, my longtime friend and mentor, former Florida Governor and former U.S. Trade Representative Reubin Askew, told me, "Your time for reading and reflection is over." To a certain extent, he was right about the Congress. In contrast, my experience has been entirely different on the Appellate Body. My years on the Appellate Body have been years of much reading and much reflection in search of the right answers.

The panel record in every appeal consists of thousands of pages. The submissions in every appeal are lengthy. And every appeal increasingly involves issues that require much reading and reflection on other appeals, other rulings, and other relevant considerations. So, in every appeal, each of us brings with us to our table and to our deliberations long hours of both reading and reflection. In every appeal, each of us brings with us preparation for provisional positions in which we try to take into account all the necessary questions about all the pending issues. Then, together, through mutual thought, and through considerable mutual criticism, we try, in every appeal, to find the right answers.

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43. Jackson, *supra* note 15, at 110.

The free mutual criticism that is the key to the success of a free society has also been the key to the success of our deliberations. Those who have endured our interrogations in our oral hearings know the extent of our devotion on the Appellate Body to the strictures of the Socratic method. They might be pleased to know that the mutual interrogation in which we engage among ourselves in our deliberations is no less intensive. Intellectually, there are "no holds barred" in our search for the right answers to the questions raised on appeal.

As we deliberate, the empty coffee cups accumulate. The water pitcher is filled, emptied, and filled again. The table piles high with legal briefs. The nearby blackboard fills with numbers and charts. The bright young lawyers scurry in and out of the room as we tie up loose language and loose ends. The pages of the parties' submissions on appeal are scrutinized and analyzed. The arguments made by the parties at the oral hearing in the appeal are recalled and recited. The nuances of past appeals are revisited. The implications for future appeals are considered. The debate back and forth across the table ranges from the meaning of a comma to the meaning of life. And, slowly, a "consensus" emerges.

By far the most rewarding experience for me as a Member of the Appellate Body has been the intellectual communion in which I have shared around our table. For, time after time, around our table, we have, after exhaustive mutual effort, made seven minds into one. In between sips of *renversé*, we have shaped a "consensus" that has helped the Members of the WTO shape a better world.

The Appellate Body is still new. WTO dispute settlement is still new. The WTO itself is still new. All these are institutions still in their infancy internationally, and still very much in the making as ways of serving a global economy and an increasingly "globalized" world.

Shortly after my appointment to the Appellate Body, and shortly before my first official trip to Geneva and to the new WTO seven years ago, my friend Mickey Kantor, who was then the U.S. Trade Representative, told me, "I envy you your task. You will be present at the creation."

He was right. I have been "present at the creation" of the WTO. And much has been created by the WTO for the world, and for the future of the world, in the past seven years. Yet we must all be mindful that, where the historic task of the WTO is concerned, we are all, still, very much "present at the creation." There is much more that must be done. There is much more that must be created.

Ours is very much a work *in* progress in the work *of* progress that is the WTO. Even now, the Members of the WTO are looking for ways to improve the WTO dispute settlement system. I would be the first to say that the system can be improved.

Yet, whatever additional improvements may be needed, whatever our inevitable human failings and frailties may be, I do, passionately, believe this: Our work around our table in Geneva is making a historic contribution to international trade, to international law, and to the establishment of the international rule of law. And, for this reason, our work at the WTO is an important part of the work for human freedom. As we slice logic and sip *renversé* around our table in Geneva, we are working, above all, for freedom. For, without the rule of law, there is no freedom.