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Inside the World Trade Organization

James Bacchus is one of seven members world wide, and the only North American member (since 1995) of the Appellate Body of the World Trade Organization (WTO). He was voted Chairman of the Appellate Body in December 2001. The Appellate Body is the newly-created “Supreme Court” of world trade that judges final appeals on trade disputes among the more than 140 member nations of the WTO. The WTO has jurisdiction over more than 90% of world commerce. Mr. Bacchus has been a panelist in a number of key WTO Appellate Body decisions, including EC-Bananas, US-FSC, EC-Asbestos, US-Shrimp, US-Havana Club, and India Patents, among others. Before joining the WTO, he was in private practice in Florida. From 1979-1981, he served as Special Assistant to United States Trade Representative Reubin Askew and had broad trade policy exposure. He is also a former member of the U.S. Congress. A Democrat, he represented Florida.

On 17 April 2002, the APEC Study Center and the Program in International Economic Policy, School of International and Public Affairs, sponsored a Special Keynote Address by James Bacchus. Mr. Bacchus gave his audience an inside look at the workings of the Appellate Body. An excerpt of his address is presented below, accompanied by highlights of his exchanges with the audience that afternoon.

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School for International and Public Affairs, Columbia University**

MERIT E. JANOW

Director,
Program in International Economic Policy, School of International and Public Affairs;
Co-Director, APEC Study Center, Columbia University

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

—James Bacchus

The General Agreement on Tariffs and Trade (GATT) was once characterized perhaps only half jokingly as a series of exceptions held together by waivers. When the Uruguay Round was concluded, the scope of matters that were covered by international rules broadened to cover new areas, and existing rules and commitments were deepened. The GATT became the World Trade Organization (WTO) and many steps were taken to harden the agreement, particularly the dispute settlement process. Some have described this evolution of the WTO as the triumph of lawyers over diplomats, as the procedural deficiencies of the GATT, particularly with respect to dispute settlement, resulted in a binding two-stage process on WTO covered matters. The drafters of the revised dispute settlement understanding may not have fully anticipated that parties would invoke the second stage or review the Appellate Body stage, as routinely as it has come to be used. The judicialization of WTO dispute settlement process has been strengthened, but it also retains some of the ad hoc features of the earlier GATT process. Many WTO members treasured the more informal and diplomatic features of the GATT process. As a result, the first stage of panel review remains somewhat ad hoc with few established procedures, a changing pool of panelists drawn from the diplomatic community, academia and elsewhere, coupled with a full-time, standing Appellate Body. I was at USTR when the UR was under negotiation, and I recall some thought that the job of serving on the Appellate Body was something that distinguished experts could undertake part time, in conjunction with a full time job elsewhere. Nearly seven years and 50 Appellate Body cases later, we have the

very special opportunity today to hear from James Bacchus, the senior member of the Appellate Body and now its Chair. We are delighted to welcome you to Columbia.



James Bacchus

Chairman,
World Trade Organization Appellate Body

JAMES BACCHUS

Chairman of the World Trade Organization Appellate Body

I would like to take you into the WTO and into our chambers to try to tell you what it is that we are asked to do and how we go about doing it. I am one of those “faceless, foreign judges” that Ralph Nader and Pat Buchanan keep warning you about. I want, to the extent that I can, consistent with the WTO rules of conduct, to tell you a bit about what it’s like to be a “faceless, foreign judge” for the WTO.

We generally meet at ten o’clock 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. The windows of our chambers look out onto a broad, green lawn that slopes down to the shore of Lake Geneva. Across the lake are the medieval heights of the old town; beyond are the snowy peaks of the Alps. We work in a picture post card. We see the sun stream through the windows of our chambers in the morning and make its way slowly across the southern sky throughout the day. We see it sink into the darkness of the evening. Watched by the sun, we sip endless cups of a French coffee and milk concoction 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 late 1995, after more than one hundred countries agreed on the WTO treaty that transformed the General Agreements on Tariffs and Trade into the newly-created WTO. We were appointed 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 has seen both faces and cases come and go. We are seven around the table. We are from seven different countries, seven different regions around the world, seven different legal traditions. We are, in the words of the WTO Treaty, “broadly representative of membership in the WTO.” 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. Having been asked by my colleagues, I now chair our meetings.

The seven original and founding members of the Appellate Body who first worked together around our table were: Julio Lacarte Muro, of Uruguay; Claus-Dieter Ehlermann, of Germany; Florentino Feliciano of the Philippines; Said El-Naggar of Egypt; Mitsuo

Each 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.

Matsushita of Japan; Christopher Beeby of New Zealand and yours truly, of the United States of America. My colleagues Lacarte Muro, Ehlermann and Feliciano all served six years and retired at the end of last year, 2001. My colleagues El-Naggar and Matsushita both retired after four years in 1999, and my dear friend Chris Beeby died in Geneva in 2000 while working on an appeal at the WTO. The seven who work around our table today are: G M Abi-Saab of Egypt; A V Ganesan of India; Yasuhei Taniguchi of Japan; Luiz Olavo Baptista of Brazil; John S. Lockhart of Australia; Giorgio Sacerdoti of Italy; and still yours truly, from the United States of America.

The subject of the discussions around our table is the Covered Agreements, the more than 27,000 pages of concessions and obligations that comprise the WTO treaty. 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.” As such, our job is to help the members of the WTO interpret, implement and enforce the terms of the Covered Agreements. We don’t wear robes or wigs. We do not yet 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 Agreements speak only of a “standing Appellate Body.” It 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 know what to call us. Some observers 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, sometimes call us faceless, foreign judges. We are called faceless, perhaps, because few in the world seem to know who we are. The few in the world who write about the

WTO, a few who criticize the WTO and a 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 agreement mandates that all our proceedings must be confidential. We meet behind closed doors.

We are called “foreign,” perhaps, because we are unaffiliated with any government. I am not the Representative of the United States of America to the WTO. There is a very fine and bright woman from New York who holds that job. None of us represent our own countries in our work in Geneva. Each 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 may be called judges, perhaps because, whatever we call ourselves, that word may best describe what it is we do. Our job is to judge appeals and international trade disputes affecting the lives of 5 billion people in 95% of all world commerce conducted by the 145 countries and other customs territories that are currently members of the WTO.

Technically, the Appellate Body is properly described as quasi-judicial. This is the halfway house, rhetorically, between the ways of diplomacy and the ways of the juridical world. To have legal effect, our rulings must be adopted by the members of the WTO. However, 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. Thus far this has never happened.

Whatever we may be called, we have much to do around our table in Geneva, 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 “compulsory jurisdiction”. All WTO members have agreed in the Treaty to resolve all their disputes with other members involving matters that are covered by the Treaty in the WTO Dispute Settlement System. The second way in which the Appellate Body is unique is that we make judgements that are enforced. Our judgements are enforced not by us, but by the members of the WTO themselves through the power of economic suasion. The members of the WTO are sovereign countries and customs territories. No member of the WTO can ever be required to comply with any judgement in WTO dispute settlement.

Yet, under the WTO Agreements, if a member chooses not to comply, it pays an economic price. That price is what the rules describes as “compensation and the suspension of concessions,” a form of damages to the other member injured in that trade dispute. These damages consist of either additional access to the market of the non-complying member in other sectors of trade or reduced access for that 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 judgements and they almost always do. The concept is akin to that of a contract. As in any contract, there are benefits and there are burdens. If one wishes to have the benefit of the contract, then one must bear the burdens of fulfilling the obligations of the contract and if one does not do so, then one stands the risk of losing some of the benefits.

These two ways in which we are unique, compulsory jurisdiction and the ability to see that our judgements are enforced, keep us busy around our round table in an effort to help provide what the WTO treaty calls “security and predictability” to the multilateral trading system. Our juris-prudential uniqueness

is 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 (DSU) that is the legal lynchpin of the WTO Treaty. We are also kept busy because the WTO Members know that when they bring a case in WTO dispute settlement that eventually reaches the Appellate Body, the end of the DSU’s procedural pipeline, they will receive from us a legal judgement and not a political judgement. They know they will receive a judgement 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 been and we will ever be, as one observer for the New York Times has put it, “impartial and unflinching.”

For all 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.” As the system has grown, ever increasing numbers of trade disputes have been brought to the WTO by members in search of a positive solution. Far more disputes are resolved short of dispute settlement than ever reach dispute settlement. I’m told by some observers that my signal accomplishment in serving on the Appellate Body has been the mere fact that I’ve been there along with my colleagues. The mere existence of a dispute settlement system in which there is compulsory jurisdiction and there can be enforceable judgements has been sufficient in many, many instances for the countries that are members of the WTO to resolve international trade disputes. These are the disputes that never make it into the pages of the New York Times.

The parties to the proceedings in WTO dispute settlement that arise from trade disputes are exclusively the

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countries and other customs territories that are members of the WTO. There is no “standing,” as we lawyers say, for private parties to bring an action in the WTO. No one, other than the members of the WTO, is entitled under the WTO Treaty to participate in WTO dispute settlement. The implication in the Treaty is that the members of the WTO themselves are perfectly capable of discerning what their interests are and of asserting those interests in dispute settlement. Of course, the parties to our proceedings are always of the view that they are asserting and defending important domestic interests, so there are many important, private constituencies that are directly and indirectly affected by WTO dispute settlement. It is not by accident that what we call under the WTO, the Japan Photographic Film case was called by the media the Kodak-Fuji case. They were one and the same, but the parties to the proceedings were Japan and the United States.

Although numerous trade disputes have been settled, so to speak, “out of court” by virtue of the very existence of the Dispute Settlement System, many others that have been brought to the WTO in its brief history have resulted in rulings by the ad hoc, three-judge panels that are the WTO equivalent of trial courts. About 50 of these disputes have resulted in rulings by the Appellate Body that have been adopted by members of the WTO. Almost all of these disputes have been resolved with what the parties to the disputes have viewed as a “positive solution” (again, in the words of the treaty). Not without reason has Director General Mike Moore of the WTO frequently described the Dispute Settlements System as the crown jewel of the multilateral trading system. Peter Sutherland, the 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 achievement of the international community since Bretton Woods.

Given the broad scope and sway of the WTO Treaty, the disputes that are resolved in WTO dispute settlement can involve 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, from automobiles to semiconductors, from shrimp to satellites and from bananas to chemicals, to oil, to aerospace and much more. More and 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. The boundaries of WTO jurisdiction are the subject of both political and academic debate, but, clearly, the boundaries of the WTO are both extensive and expansive.

By WTO 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. On appeal, we seven shall address each of the issues raised during the Appellate Proceeding. “We may uphold, modify or reverse the legal findings and conclusions of the Panel”—those are all the words of the Dispute Settlement Understanding. Thus, we cannot choose the appeals that are brought to us. We cannot choose the disputes in which we rule. Unlike the Supreme Court of the United States, we have no discretionary writ of any kind.

Further, we have no power to remand a dispute to a Panel for further consideration, even if we might, hypothetically, think that further consideration might be needed. 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. If a country raises the issue, we



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must address it. So, we do, within strict deadlines established by the Treaty.

Most other international tribunals have no deadlines and they sometimes take decades in which to decide. No matter how complicated the issues may be that are raised on appeal, generally we have no more than 90 days in which to hear and decide an appeal. 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. I am persuaded that this, too, has contributed to the success thus far of the WTO Dispute Settlement System.

By treaty, we have been granted the authority to establish our own Working Procedures within the deadlines. Seven years ago, literally, we sat down at our table in Geneva with only a legal pad and began writing our Working Procedures. It took three weeks. Since then, we have made only two minor changes in our 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 con-

taining our judgement. Generally we do so within than no more than 90 days. My colleagues would, no doubt, urge me to add that this is actually no more than 75 days, as we must allow two weeks for mandatory translation.

There are three official languages of the WTO, English, Spanish and French. 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 then 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 the terms of the WTO Agreements, three of us sit as what we call a Division to hear and decide each appeal. 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 what we call 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

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treaty, all seven of us serve in rotation in all of these roles and by rule, we do so on an anonymous and random basis that tends to equalize our individual workloads. When we're working on several appeals at a time, I might, for example, be presiding in a Division in one appeal, be a member, but not presiding in another and be one of the four who is not on the Division in a couple of others. My colleagues have a similar workload. This provides for "intellectual checks and balances" in reaching a consensus.

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. It provides only that "opinions expressed" by individuals serving on the Appellate Body must be anonymous in any such additional opinion. Thus far, in all our years of working together and in more than fifty appeals, there has not been even one dissent to the conclusions in any report of the Appellate Body. I do not believe that I betray the confidentiality of our table talk in Geneva in any way by saying that the consensus we have achieved has not always been achieved easily. Nor do I think that I betray any confidentiality by saying that our ability to achieve consensus around our table in our first seven years is a validation of the elaborate global selection process that has been employed by the members of the WTO in selecting the members of the Appellate Body through the years.

One astute observer once remarked in a letter to the editor of my hometown newspaper in Florida after I was first appointed to the Appellate Body, "I don't know why there is all the fuss about Jim Bacchus. He is just another lawyer from Orlando." And so I am. Yet, my colleagues on the Appellate Body have been more than just lawyers. From the beginning, I have been joined around our table in Geneva by 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 students of the world who have shared a view of the better world that can be, if we succeed in our shared efforts to secure the international rule of law. All these years later, I am still a lawyer from Orlando, yet because of my colleagues and because of all that I have learned while working with them in Geneva, I am perhaps, much more than I was seven years ago.

I have heard some of the many detractors of the WTO denounce the decision makers in WTO dispute settlement as trade bureaucrats who have no appreciation for anything other than trade and worse, have no commitment to democracy. I think of my colleagues, who are not lapsed politicians like myself and wish those who say such things knew them, as I have known them. In particular, I wish this were so of a lot of my fellow countrymen in the United States. If they did, they would surely be reassured about the virtues and the vision involved in WTO dispute settlement.

The issues raised on appeal are rarely clear cut. Even seven years on, there are many important revisions 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 rule-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 to examine 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, sitting hour after hour, plumbing the depths and meaning of the words of the WTO Treaty, slicing the layers of logic and the interpretation of those words and turning over and over, up and down, 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 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. The disputes that are appealed to us and discussed around the table are about the meaning of the obligations that are contained in the Covered Agreements. These obligations are found in the words of the Treaty. The meaning of the words of the Treaty is, thus, our constant focus in rendering our judgements. As we noted in our very first appeal, this approach is in keeping with the rules of treaty interpretation found in the Vienna Convention on the Law of Treaties. 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 raised in that appeal and, thus, assist the WTO members in resolving that dispute in a positive solution. Our aim in every appeal is to do only that and no more.

Our focus on the words of the WTO Treaty is as it should be. The Appellate Body exists to construe WTO rules and 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. 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. In reply, I would reiterate that under the WTO Treaty, we must rule on every issue that is raised on appeal. We have no choice. The Treaty mandates that we shall address every such issue, we have no discretion not to do so. Inevitably, 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, including some members of the WTO, 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 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 cases have been brought into WTO Dispute Settlement that should never have been brought before the WTO. In some instances, I might personally agree, but it is not up to me to decide which cases should be brought before the WTO. That is a decision that by right and by treaty is made only by members of the WTO. The members of the WTO 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.”

Finally, some may say 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 rulemaking. Here, too, in some instances I might agree. Yet, it is neither my role, nor my place to make suggestions to the members of the WTO about their rulemaking, not while I serve on the

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Appellate Body. The members of the WTO have established an effective system for settling disputes about existing rules. It is for them to decide how best to establish an effective system for making new rules.

In fulfilling our responsibilities, no effort is spared by the members of the Appellate Body in reaching the decisions that are reflected in our rulings. In particular, this is true of our deliberations, which are the closest I am ever likely to come to the conversations that enlightened the taverns of Samuel Johnson's London and the salons of Voltaire's Paris.

In our deliberations, we take turns speaking. There are no time limits other than those of mutual tolerance. There are no occasions when we do not endeavor to take into consideration every conceivable point of view relating to a 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 every one from Aristotle to General Ulysses S. Grant cited as authority around our table.

I am, I confess, a reformed politician. In my time in the Congress I was rarely asked a question that I had not already

been asked at least 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, "Jim, your time for reading and reflection is over." Yet my years on the Appellate Body have been years of much reading and much reflection. This has been true, I imagine, for all who have served on the Appellate Body.

The panel record in each appeal consists of thousands of pages. The parties and the third parties' submissions in each appeal are lengthy. At present, our working procedures do not impose page limits on such submissions. Each appeal increasingly involves issues that require an abundance of reading and reflection on other issues, and other appeals and other rulings in other relevant considerations. Each of us brings with us to our table and to our deliberations in every appeal, long hours of reading and reflection. 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 criticism and

through considerable mutual thought, we try to find the answers. 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. Those who have argued before us might be pleased to know that the mutual interrogation in which we engage in our deliberations is no less intensive.

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

In conclusion, let me apologize that I am not free to say anything specific about the substance of what we say around our table. I am not free to elaborate on what we may have said in the past, or to speculate on what we might say in the future about specific legal issues in Dispute Settlement. The Rules of Conduct do not permit me to do so. Nor am I free to say all that I might wish in reply to the many critics of the WTO and the WTO Dispute Settlement—not while I remain on the Appellate Body. For now, I must remain content to speak mainly in the shared voice of all who serve on the Appellate Body through the words of our Appellate Body Reports. I feel I can say this, in conclusion: I do passionately believe our work around our table in Geneva is making an historic contribution 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.

DISCUSSION

JANOW: There are many proposals on the table that are considering how to improve the dispute settlement process. Is there anything that would help make your job easier, more effective, more efficient?

BACCHUS: In terms of funding and of staff, we have no concerns at this time on the Appellate Body. We're caught up to where we need to be thanks to the generosity of the Members. The Appellate Body is at the end of the procedural pipeline. It's only a part of dispute settlement. There is a vast array of procedures that precede an appeal and sometimes precede the exclusion of an appeal. Not all Panel Reports are appealed to the Appellate Body. The members of the WTO currently are taking a look at the DSU to determine whether they want to make any changes in it as part of the new Doha Round. They have given themselves an early deadline of May of next year for doing so. They have asked me the same question and I have pointed to a couple of times in our opinions in which we have suggested it would be appropriate for the members to look at the possibility of providing standard working procedures for the panels.

As it is, panels are entirely ad hoc. These are the WTO equivalent of trial courts. The procedures are established on an ad hoc basis, with the establishment of each panel. There are some very bare bones procedures that can be used unless the parties to the proceeding decide otherwise, but there is no consistency in the way that these procedures are followed at the panel level. We have pointed out that this is a due process consideration and we believe that due process must be a part of the system. I would not suggest that due process has not been provided at the panel level. Increasingly, the panels have been creative in making certain that it is provided. However, I think the members might want to take a look at providing for standard procedures for

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We are seeing more disputes involving issues in which trade considerations compete with other considerations in economy and in society.

working at the panel level in the same way that they have allowed the Appellate Body to establish Working Procedures on appeal.

Q: Could you give us a typology of the three or four main types of appeals, from an economic or jurisprudential point of view, that keep coming up? Also, of those types that keep coming up, which suggest to you that they should be looked at by the signatories of the Treaty in terms of re-writing rules so that this kind of issue can be resolved without having to come to you?

BACCHUS: First, in terms of economics, the WTO covers pretty much every kind of thing in the world economy. Goods, services, intellectual property—these are all under the jurisdiction and the coverage of the Covered Agreements that comprise the WTO Treaty. In terms of what we've seen in our cases economically, I gave you a sampling of the kinds of cases we've had. Usually the cases are described by the name of the particular product or services that's involved, say, the Bananas case. In the past half dozen years, we've had several dozen cases. Many of them have been agricultural cases, in large part because agriculture was, de facto, left out of the ambit of the GATT for so long. One of the great accomplishments of the Uruguay Round was the conclusion of the Agreement on Agriculture that is beginning to bring agriculture fully under the trading system. Agriculture is very sensitive politically, everywhere in the world. Agricultural products are highly protected. Agricultural tariffs are much higher than manufacturing tariffs, which have been diminished considerably through the years under the trade rounds of the GATT. Many of our cases have involved disputes over agricultural products. A number have involved disputes over manufacturing products. We have had several, but only a few thus far, on services; and we have had several, but only a few thus far, on various aspects of intellectual property.

What have we seen jurisprudentially, in terms of the kinds of legal issues coming forward? An array of initial cases were re-runs of GATT cases that had not been resolved. The Bananas case, the Beef Hormones case, the Japan Alcohol case, had all been GATT cases that had not led to a positive solution so they were brought again to the WTO under the new Dispute Settlement System. There have been a goodly number of the cases involved claims under the GATT, which is now just one of two dozen agreements, but it is frequently employed as a cause of action in dispute settlement. There are many important agreements which we have not yet construed even once on appeal—the Agreement on Technical Barriers to Trade, for example. We have had only a few cases construing the Agreement on Sanitary and Phytosanitary Measures, a very important agreement dealing with issues relating to human, plant and animal health issues.

We are seeing more disputes involving issues in which trade considerations compete with other considerations in economy and in society. As agreements enter into force, because transitional periods have ended, we are seeing greater involvement of developing countries in the DSU. A very encouraging part of the success of this dispute settlement system is the fact that developing countries have increasingly brought their disputes with one another to the WTO. Recently, an institution has been created by a number of countries to help provide them with the financial resources to do so.

Regarding your second question, I don't think it would be appropriate for me to answer. It is not my place to suggest to the members of the WTO where they might want to revisit through rulemaking anything that has been done in dispute settlement. It would be perilous for me to do so. Over the next couple of years, both dispute settlement and negotiations will be proceeding simultaneously.

Q: Because the WTO dispute settlement has been so effective, there are lots of people who want in on it. They want to bring in issues of trade and labor, trade and environment. Do you think that the Appellate Body is the appropriate place for these discussions, procedurally and substantively?

BACCHUS: People will have a cause of action in WTO Dispute Settlement, if they have a claim under the WTO Treaty. It is not for me to say whether certain matters should be covered by the Treaty. My job is to help decide, when a claim is made, whether that claim does in fact exist under the Treaty. It is not my place at this time to engage in the linkage issue. I have a voting record in the Congress that is a matter of public record and you can find out that I have done a few things in my life besides trade. I was amazed during the entire several years of the Shrimp-Turtle case in which I was a presiding member on appeal, that no one ever noticed or recalled that when I was in the Congress, I was the principal sponsor of the newest natural wildlife refuge for endangered sea turtles in the world in my former congressional district in Florida.

Q: What do you think is the rationale in having a different approach to the Appellate Body as opposed to the Panel process?

BACCHUS: Let me make sure everyone understands your question. There is a two tiered system of dispute settlement in Geneva. The first is what we have described as the Panel System. These are the ad hoc, three-judge panels that are appointed and convened when a Panel is established to hear that case. They are not a standing group. They are ad hoc, and traditionally in the GATT and still under the Dispute Settlement Understanding, there is a nationality bar for Panelists. If your country is one of the parties or a third parties to that particular dispute, then you are ineligible to participate as a Panelist. This is not true of the

Appellate Body. Why is it one way at the Panel level and another way at the Appellate level? I think it remains that way at the Panel level, primarily because it has always been that way at the Panel level. This is a continuation of the GATT practice and approach, an adherence to GATT tradition. It's not my place to say whether that should change or not. The members may or may not address this in this Round of reconsideration of the DSU.

At the Appellate Body, the Treaty does not say what it says about Panelists. The Treaty specifically says that nationality is a bar for Panelists, but does not say that it is a bar for Members of the Appellate Body; and if you think about it, that makes sense. There are only seven members of the Appellate Body. I'm from the U.S., and first Judge Ehlermann, and now Judge Sacerdoti, are from the EU. The U.S. and the EU are either parties or third parties to half of the disputes that come to the WTO. Routinely, they are third parties in disputes in which they are interested but not even involved. If we had a nationality bar, then my European colleague and I wouldn't have anything to do and the others would have to do all the work. That's a practical consideration, and early on, it was important to reinforce that we seven do not work for any one country. We work for the system as a whole, are answerable to the system as a whole and speak for the system as a whole.

In cases involving my country, I have ruled both for and against my country. I have done the job that my country nominated me to do. I think it is overwhelmingly in the interest of the United States of America that I render the right legal judgement, even in a particular dispute. I think the U.S. has, by far, the greatest interest of any country in the world in establishing the international rule of law for the world economy. The U.S. is the biggest economy on the planet, the biggest trader in the world and the U.S. needs the rule of law. So, too, does the rest of the world.

I think it is overwhelmingly in the interest of the United States of America that I render the right legal judgement, even when it might not work out for the U.S. in a particular dispute.

*Dispute settlement
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whole enterprise
of the WTO.*

Q: What role does the Appellate Body play in relation to the IMF and the World Bank?

BACCHUS: We haven't come up against the IMF and the World Bank in our appellate jurisprudence thus far. There are working arrangements, legal working relations between the WTO and the IMF and also between the WTO and the World Bank. There is the potential for issues to rise on appeal in which countries could conceivably offer, as a defense, compliance with IMF obligation or compliance with some lending agreement with the World Bank. That has not yet happened, and I wouldn't want to pre-judge the issue.

Q: With the accession of Taiwan and Mainland China under the WTO, do you think that the two sides of the Taiwan Strait will be treated equally?

BACCHUS: All members of the WTO are treated equally under Dispute Settlement and consistently, with respect to new members, with their Accession Agreements to the WTO, period.

Q: What is the penalty for violation of the Treaty? Do new members have some time to learn the process? Is there a formal training program for new members to learn procedures?

BACCHUS: Dispute settlement is only part of the whole enterprise of the WTO. Most of the WTO enterprise involves negotiations, monitoring the implementation of agreements and also such things as promoting and facilitating technical assistance to developing countries. The WTO has just established a new fund of \$30 million, solely for technical assistance. Even some of our attorneys, when they are not scurrying about the Appellate Body, are off giving technical assistance to developing countries. I think it's very important that all members of the WTO have the technical expertise to comply with their obligations. They want very much to do so.

In terms of dispute settlement, the members are all bound by the terms of their Accession Agreement to the WTO. Unless they have secured some special concession that gives them a transitional period, for example, they are subject to Dispute Settlement if they do not comply with the rules of the WTO.

Q: How have you dealt with different perceptions of evidentiary procedures, both at the Panel level and at the Appellate level?

BACCHUS: It is very interesting to be involved in a system that is midway between what began as diplomacy and what is becoming something very closely resembling the federal judicial system of the U.S., or any number of other countries in the world that have Rules of Evidence and other panoplies of due process. We don't have Rules of Evidence. We don't have Rules of Discovery. We haven't yet gotten to the point at the Panel level of having standard rules of Working Procedure. The WTO is a work in progress, in the work of progress. It is an imperfect institution at this point, like all human institutions. It is getting better, and the members are always working to make it better. Through the accretion of our case law, we hope that we're helping make it better, but one thing that we do not yet have is Rules of Evidence.

Q: How do you go about verifying enforcement of the rulings?

BACCHUS: In the tried and true jargon of the WTO, the WTO is a "member-driven institution." The members themselves adopt our rulings, and the members themselves monitor the matter of enforcement. From time to time, we're brought back in.

Assuming a Panel Report is modified by the Appellate Body Report and is adopted by the Dispute Settlement Body, there is then a reasonable period of time in which the member that has been adjudged not to be in compliance has to comply. From time to time, the complaining party in the case and the



responding party do not agree on what that reasonable period of time should be. They then have the ability to ask what we call an “Article 21.3 Arbitrator” to decide on a reasonable period of time. Oftentimes, that is a member of the Appellate Body. I’ve done it myself. That reasonable period of time from the date of the adoption of the ruling is then decided by final binding arbitration.

What if the complaining party decides that the member has not complied? There is then what is called an “Article 21.5 Proceeding,” which, for better or worse, has to go back, not all the way to square one, but far back in the procedural pipeline; strictly speaking it is a separate case, because usually the member has complied by changing its measure that was found to be not in compliance. “Measure” is more legal jargon; a “measure” is usually a law or a regulation or an administrative practice of some kind that is thought not to be kosher under the Covered Agreements. Where a member has sought to comply with a ruling by changing a measure, the result is a new measure that has to be examined, so this measure is then examined under that Article 21.5 Proceeding.

It can go on and on. One of the things that academics and Members are debating is whether there needs to

be an effort addressing what is called the “back end” of the Treaty (in diplomatic speak) to figure out ways to tie up the loose ends, without endangering the sovereignty of the WTO members. The attitudes of the Members on these issues vary with whether they happen to be the complaining or the responding member in a particular proceeding. Then when they get into negotiations they’re conflicted. Of course, there must be a consensus to which all agree, before there can be a change under the current rules, so currently the rules stay as they are. In reality, almost all the cases that have been adopted have resulted in a positive solution, meaning one in which the complaining party is satisfied and the responding party is satisfied it has complied and the situation is resolved. That is what is meant generally by a “positive solution.”

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