

WTO at 10



Governance, Dispute Settlement and Developing Countries

World Trade Organization

Tenth Anniversary Conference

at Columbia University

New York City



Members of the Appellate Body, front row from left to right:
A.V. Ganesan, Luiz O. Baptista, Merit E. Janow, Georges Abi-Saab.
Second row from left to right: *Yasuhei Taniguchi, Giorgio Sacerdoti, David Unterhalter.*



Columbia University
President
Lee C. Bollinger

WTO at 10 Conference at Columbia University, Casa Italiana



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WORLD TRADE ORGANIZATION
TENTH ANNIVERSARY CONFERENCE
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5 - 7 APRIL, 2006

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As a member of the Columbia faculty and also the Member of the WTO Appellate Body from North America, I am honored that Columbia University hosted a major conference commemorating the tenth anniversary of the establishment of the World Trade Organization (WTO) and its dispute settlement system.

The WTO was established ten years ago following the Uruguay Round of Multilateral Trade Negotiations. The areas of economic activity now covered by international trade rules are much broader than those covered by the rules of the General Agreement on Tariffs and Trade (GATT). The WTO's dispute settlement mechanism is also greatly altered from that of the pre-Uruguay Round period. The Uruguay Round introduced a binding dispute settlement system and the establishment of an Appellate Body comprised of seven members from around the world.

The current Members of the WTO Appellate Body thought that this was an appropriate moment to reflect on what has been accomplished and to discuss some of the important issues facing the dispute settlement system. As a result, some Members of the Appellate Body and the academic institutions with which they are affiliated have organized conferences in their home country or region. All of the regional conferences have been centrally focused on the dispute settlement system, yet each has selected other themes as well.

On 5–7 April 2006, Columbia University hosted the North American conference to commemorate the Tenth Anniversary of the WTO. The Columbia University conference was the last of five regional conferences held over the past year by WTO Appellate Body members. The previous four conferences were held in Italy, Brazil, Japan, and Egypt.

The Columbia Conference brought together a diverse group of leaders from around the world. The Conference examined the dispute settlement mechanism from many different perspectives. It also considered the governance and operation of the WTO and some of the challenges faced by developing countries. The goal of the Columbia Conference was ambitious: to serve as a forum for serious discussion and to contribute to scholarship.

The Columbia Conference opened with a dinner hosted by Columbia University President Lee C. Bollinger at Low Library's grand rotunda. The dinner, which was also a *World Leader's Forum* event, was followed by two full days of discussion on the operation of the WTO and its dispute settlement system. More than 65 speakers from 26 countries made presentations to over 300 attendees from around the world, including senior policymakers, scholars, business leaders, private sector lawyers, students, diplomats and leaders of non-governmental organizations (NGOs). We hope that this conference summary, as well as the forthcoming book that is an outgrowth of the papers presented at the Columbia Conference, will enhance our collective knowledge of the WTO.*

Sincerely,



Merit E. Janow

*Professor in the Practice of International Economic Law & International Affairs
Member, WTO Appellate Body*

*The draft papers and other conference materials can be found at: <http://www.sipa.columbia.edu/wto>. See also, Merit E. Janow, V. Donaldson & A. Yanovich (eds), *WTO: Governance, Dispute Settlement and Developing Countries*, Juris Publishing, forthcoming 2007.



Merit E. Janow

WTO AT TEN: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES¹

5–7 April 2006

OPENING DINNER AND DISCUSSION THE URUGUAY ROUND AND THE WTO: WHAT HAVE WE ACHIEVED?

In his welcoming remarks, Columbia University President Lee C. Bollinger observed that, while international trade is extremely important for global prosperity it also plays a crucial role in shaping fundamental values such as equality and freedom of speech. The study of international trade law and policy is thus an important part of the intellectual life of a great university, such as Columbia University, especially since there remains so much ignorance concerning trade issues. He affirmed the importance of conferences such as this one in encouraging serious exchange and promoting a better understanding of international trade issues.

The moderator for the evening was Merit E. Janow, Professor in the Practice of International Economic Law and International Affairs, School of International and Public Affairs, Columbia University; Co-Director of Columbia's APEC Study Center; and Member of the Appellate Body of the WTO. The panelists were: Jagdish Bhagwati, University Professor, Columbia University; Carla A. Hills, Chairman and CEO, Hills & Company International Consultants, and former US Trade Representative; Peter Sutherland, Chairman, Goldman Sachs International, Chairman, BP plc, and former Director-General of the General Agreement on Tariffs and Trade (GATT) and the WTO; and Clayton Yeutter, Of Counsel, Hogan & Hartson LLP, former US Secretary of Agriculture, and former US Trade Representative. Professor Janow invited each panelist to assess the contributions and limitations of the Uruguay Round.

The panel was united in its praise of the Uruguay Round, which was seen as fortunate in its timing, coming in the wake of the collapse of the Iron Curtain, as import substitution fell out of favor and the world was in greater agreement than at any recent time on theories of growth and development. One speaker compared the rather fitful process of starts and stops in the negotiations of the Uruguay Round to those of the current Doha Round, noting, however, that when the *WTO Agreement* was signed in 1995, the end result was a solid 400 pages of agreements, with 22,000 pages of commitments by 120 members. The panel agreed the Uruguay Round agreements opened markets, creating billions of dollars worth of new opportunity and growth and reducing poverty worldwide. Tariffs were reduced by roughly 40 percent, representing a greater reduction than was achieved in either the Tokyo or Kennedy Rounds, and a ceiling



Lee C. Bollinger



Merit E. Janow



Carla A. Hills



Peter Sutherland

¹ This document is an overview summary of the Columbia Conference. The views summarized herein should not be attributed to any specific conference participant.



Clayton Yeutter



Jagdish Bhagwati

on tariffs was established for nearly all imports of industrialized countries and 60 percent of imports of developing countries. Voluntary export restraint arrangements were also eliminated.

Agriculture, for the first time, was brought under international rules; until then the overwhelming focus of the GATT had been manufactured goods. The limits on export subsidies achieved in the Uruguay Round have provided the basis for the discussions on eliminating agricultural export subsidies in the current Doha Round of multilateral trade negotiations. The panel also praised the Uruguay Round for adding services, investment, and trade-related intellectual property rights to the agenda of the multilateral trading system, among other “firsts.” Other important achievements included the plurilateral *Agreement on Government Procurement*, which opens up government contracts to international competition and makes the government procurement process more transparent, and the *Agreement on Sanitary and Phytosanitary Measures*, which requires members to have a scientific basis for making food safety decisions.

In essence, the Uruguay Round transformed the GATT into the remarkable institution that is the WTO. The panel also emphasized the importance of shifting to a binding agreement, often called “the single undertaking,” which requires each member to sign on to all commitments, rather than leaving some codes open for voluntary membership, which had been the earlier approach taken during the Tokyo Round.

The formalization of the dispute settlement system and the creation of the Appellate Body were also viewed as notable and important achievements. All panelists agreed that the dispute settlement system has worked far more effectively and efficiently than anticipated.

Although some critics have decried the Uruguay Round as a failure in terms of promoting development, one panelist noted that several developing countries, in particular Brazil and India, were actively engaged in the Uruguay Round negotiations. The panelist asserted that the Uruguay Round was, in fact, an even greater success for the developing world than it was for the developed world, citing the steadily rising share in world trade gained by the developing countries since the agreements were signed. The greater problem of the Uruguay Round lay in the failure to recognize the difficulties developing countries would face in implementing the multitude of detailed and varied obligations they had undertaken, despite the long transition periods. The WTO’s annual budget for technical assistance following the Uruguay Round amounted to less than \$1 million a year.² Even so, it was argued, developing countries are not worse off today for having had to implement the obligations of the Uruguay Round.

Panelists agreed that greater progress should have been made in agriculture, as well as in textiles and apparel. The *Multifibre Arrangement* was phased-out, but as one panelist noted, the rules on trade in textiles that replaced it were heavily back-loaded and gave little immediate benefit to developing countries. Some panelists would have liked greater coverage in the rules governing investment and antidumping. Another wished that more attention had been paid to the role and powers of the WTO’s Director-General.

A key failure of the Uruguay Round, one panelist argued, was incorporating intellectual property protection into the WTO. He regretted that there was not a self-standing agreement on intellectual property, similar to the Kyoto Treaty. He described the inclusion of intellectual property protection (IPP) as a triumph for IPP interest groups in the advanced economies, at the expense of the trade principles underlying the WTO. The end result, he said, was that a growing array of rich country interests, such as labor unions, environmentalists, and financial firms are also trying to bring other areas under the auspices of the WTO. These demands are all

² All values are in US dollars unless otherwise indicated.

the more insidious, this panelist said, because they appear virtuous, but often act as a mask for protectionism; they are yet another way to raise the costs to one's rivals abroad.

Professor Janow asked the panelists to turn their attention to the Doha Round: what is the significance of the Doha Development Agenda? If this Round fails, what would be the likely impact? How might Doha be brought to a successful conclusion?

The panelists were united in their belief that a failure of the Doha Round would have negative effects on the international trading system. Unfortunately, they generally assessed the odds of a successful conclusion at 50-50, or less. One panelist suggested that the European Union had proposed the Doha Round to obscure some of its prior commitments, particularly in agriculture. Now that the Round is underway, however, its failure would affect the credibility of the WTO and lead to a further proliferation of bilateral and regional arrangements, a scenario Jagdish Bhagwati has likened to a "spaghetti bowl effect." The impact of such failure would be especially serious for developing countries. Panelists were apprehensive about the current rise in protectionist sentiment in developed countries; one panelist argued that the European Constitution was voted down not because of real problems in its content, but because of trepidation regarding migration, EU expansion, and the rapid growth of China, as well as the events of September 11, 2001, and their aftermath. Others suggested that the failure to conclude a successful round could threaten poverty alleviation efforts in the developing world and even lead to political instability. Citizens of developed economies would also forfeit a potential rise in their living standards.

Failure of the Doha Round would also mean the loss of a valuable opportunity to address inequities in the trading system. Two disparities were listed as examples: Mongolia, with less than \$300 million in trade with the United States, pays more in tariffs to the United States than Norway, with \$6.5 billion in trade; Bangladesh, with only \$2 billion in exports to the United States, is subject to the same in tariffs as France is on \$30 billion in exports to the United States. One speaker further ventured that the special and differential treatment sought by the developing world is not in their best interest because more than half of the developing world's trade is conducted with other developing countries. "If they do not open their markets to one another, they will not benefit as they might under Doha," this panelist said.

Another panelist proposed that negotiators have been overly concerned with formulas to achieve reductions in trade barriers. For three years, he asserted, there has been an ongoing argument about the appropriate formulas for agricultural market access, domestic support, and industrial market access, the key elements to boosting world trade and development. The problem, he said, is that "the generally applicable rules always leave out of account particular interests and particular concerns that have to be accommodated. It may seem to be a simple way to proceed, but sometimes it doesn't work and that's why negotiators are in their present mess." It was suggested the negotiations be ended quickly, that negotiators settle for what is currently on the table, a scenario many have termed "Doha Light." WTO members could return to the negotiating table later to gain the exceptions and small advantages that would make the agreement more palatable to their constituents back home. This approach to negotiation was typical early in the GATT.

There was doubt that "Doha Light" would gain the full support of the US agricultural community, which would be necessary for Congress to ratify any agreement. A panelist argued there was simply not enough support in services or industry for Doha to succeed without the support of the agricultural community. Access to the European agricultural market itself is not that critical, but the lack of ambition on the part of the European Union undermines the ambition of the rest of the world with regard to agriculture, as well. The speaker lamented the many loopholes in market access in agriculture being discussed in the Doha Round, particularly with

regard to the potential exceptions for special products and sensitive products, and special and differential treatment. Developing countries are also asking for a special safeguards provision in agriculture.

The panel reiterated the need for American and European leadership in agriculture, as well as in textiles and apparel, the areas most crucial to the developing world. A panelist contended that market access, not domestic subsidies, was the crux of the Doha Round. US agricultural tariffs are five times higher than tariffs on manufactured goods. Other countries have tariffs that are as high as 1,000 percent in agriculture. Unfortunately, for the poorer developing countries, an average of 50 percent of their economies is in agriculture. Europe has offered a 75 percent cut in its highest tariffs, but this cut would be from bound rates and thus give no additional market access. The United States' offer of a 90 percent cut would improve access.

One panelist speculated that the negotiations might achieve something in their final stages, as "much of the steam has gone out of the antiglobalization NGOs." With respect to agriculture, a panelist agreed that real movement on the part of European negotiators was unlikely as Doha would be the third agricultural reform to occur in Europe in a relatively brief period of time. Further liberalization is politically difficult in Europe, where there are perhaps ten times more farmers than in the United States, although the aggregate amounts of agricultural aid are comparable. Moreover, many European farmers are small, subsistence farmers, and therefore agricultural liberalization is a "deadly issue" for them. The panelist praised President George W. Bush's commitment to trade, but stressed the importance of setting priorities; this panelist suggested that the United States needed to set aside, for now, other trade negotiation efforts in favor of concentrating its efforts on the Doha Round.

Another panelist noted a tendency to downplay the changes in agricultural policy in Europe even though they have, in fact, been quite significant, particularly in the last decade. For example, the problem of agricultural surpluses has been tackled by substantially decoupling assistance from the requirement to produce. Europe has seriously reduced its export subsidies as well. Also stressed were the changes to the European Union's sugar regime. The panelist repeated his assertion that the European Union's resistance to further agricultural liberalization discourages developing countries from opening their own markets. This is particularly damaging so far as liberalization of Asian agricultural markets is concerned. Asia has the necessary combination of population growth and rising purchasing power to make it the natural source of future expansion in agriculture. For the Doha Round to succeed, the panelist argued, Asia must acknowledge its self-interest and liberalize.

Professor Janow noted that each member of the panel had referred to the erosion of support within the United States and abroad for open markets and for international trade agreements. She asked the panel how this problem should be addressed. One panelist suggested the issue could be targeted through education: "What a difference it would make if businesses, whether they had 5 employees or 50,000, would take the responsibility to educate their workforce and tell them why trade matters to the company, what percentage of that employee's paycheck comes from international activity." Most Americans, the panelist said, simply don't know about the inequities of the US trade regime. No one tells them that most US households would be better off by opening markets rather than by protecting them, nor do they understand the potential impact of open trade on the developing world. Ultimately, the panel agreed, it is the responsibility of academia and the business community to support the efforts of the WTO and to communicate with the public about trade and development issues.

DECISION MAKING AT THE WTO: AN ANALYSIS OF A MEMBER-DRIVEN ORGANIZATION

Opening the first session of the day on April 6, Lisa Anderson, Dean of Columbia University's School of International and Public Affairs, said that the conference showcased a history of commitment by Columbia University to international organizations, peaceful conflict resolution, and economic development. Dozens of Columbia faculty were at Dumbarton Oaks and San Francisco at the founding of the United Nations in 1945. Many of these same faculty members also were instrumental in establishing the School of International and Public Affairs in 1946. She noted that several current members of the faculty, including Jagdish Bhagwati, Jeffrey Sachs, Joseph Stiglitz, Albert Fishlow, and Arvind Panagariya have served not only as scholars, but also as practitioners furthering the prospects of development. Numerous Columbia faculty have served in the Secretary-General's office at the United Nations, on the International Court of Justice, at the World Bank, in regional development banks, and now, in the person of Merit E. Janow, on the Appellate Body of the WTO.

As Chair for the session, Professor Janow then introduced the panel's distinguished participants: Stuart Harbinson, Special Adviser, Office of the Director-General, WTO; Hyun-Chong Kim, Minister for Trade, Republic of Korea; Amina Mohamed, former Chair, WTO General Council, and Ambassador and Permanent Representative of the Republic of Kenya to the WTO; Mary Robinson, Professor in the Practice of Public Affairs at Columbia University, Executive Director of Realizing Rights: The Ethical Globalization Initiative, and former President of Ireland; and Zhenyu Sun, Ambassador and Permanent Representative of the People's Republic of China to the WTO.

The panel echoed the sentiments of the opening dinner discussion, agreeing that, although not as broad an undertaking as the Uruguay Round, the depth of negotiation currently under way in the Doha Round was substantial. It was noted that Doha's formula for cutting industrial tariffs is even more ambitious than that of the Uruguay Round. If the negotiations prove successful, it will be a boon for the multilateral trading system. Failure, however, would allow WTO members to "drift away into bilateral and regional deals." Ironically, a vicious circle may be in operation here. One panelist criticized the proliferation of regional trade agreements noting that they draw resources and energy away from the multilateral negotiating process: "A lot of attention is paid to regional and bilateral trade agreements and one just needs to open any of the major newspapers when negotiations are ongoing to see that." The panelist suggested that a perception of the WTO process as slow and ineffective might be helping stimulate interest in bilateral and regional agreements.

A discussion of the value of consensus decision-making ensued. Consensus was a slow process, one panelist asserted, but that is to be expected in a body of almost 150 diverse, sovereign governments. "We can't, after all, ride roughshod over the sovereign rights of individual members," the panelist reminded the audience. The advantage of a decision-making process based on consensus is that it provides a greater sense of legitimacy for the decision once it has been made. Consensus also gives greater protection to the poor and the weak. Another panelist noted that, although the WTO has elaborate rules on voting, the fact that its members have never used them demonstrates that they are acutely aware of the problems associated with voting and of the advantages of consensus. There were serious discussions in 2002 about voting, but negotiators failed to reach a consensus on whether voting should be by a simple majority, a trade-weighted majority, or a population-weighted majority. Still, the dilemma remains; a determined member can, for tactical or other reasons, stall an agreement, even when it may have no vital national interest at stake. One panelist suggested voting might be an option in making less important decisions, particularly those of a procedural or administrative nature. This panelist lauded the



Lisa Anderson



Merit E. Janow



Stuart Harbinson



Hyun-Chong Kim

report by the Consultative Board to the Director-General of the WTO, which was published to coincide with the tenth anniversary of the WTO. The report recommended that when a member chose to block consensus, it should be required to state clearly what vital national interest was at stake. Nearly all of the panelists endorsed this proposal.

The panelists also agreed that great strides had been taken in improving the WTO's decision-making process, particularly since the failed Cancun talks in 2003. The panel acknowledged that, in practical terms, negotiations and decisions simply cannot take place with all 149 members in the room all the time; therefore, small-scale consultations are necessary. One panelist defended this practice, saying these smaller consultations are carefully designed to be representative and that it is important to recognize that these groups are not decision-making bodies and that their deliberations are reported back to the membership. Others expressed concern about these meetings, which consist of twenty or thirty ministers and where attendance is by invitation only. Developing countries worry they will be unable to challenge any consensus that emerges from these meetings. "If a quickly convened general meeting is called to endorse a smaller group agreement," a panelist asked "how many developing countries will be there to discuss it on an equal footing or will have had an opportunity to be properly briefed?"

The panel discussed the external transparency of the WTO and its relationship with civil society. The WTO, one panelist said, was commonly misperceived as a "shadowy group of unaccountable people in Geneva who are doing the bidding of big business and undermining the will of people everywhere." While resources may be in short supply, it is important that the WTO explain its internal processes and its decisions in greater detail. A panelist praised the current Director-General for being particularly sensitive to the positions of civil society and NGOs. One panelist stressed the importance of allowing developing countries, with their inadequate resources, sufficient time to examine the results of meetings. Furthermore, the WTO needs to be proactive in promoting participation by developing countries.

Another panelist extolled the contribution of NGOs, such as Oxfam, to the Hong Kong ministerial meeting, saying these NGOs had worked hard to help small delegations from developing countries who were finding it difficult to keep up with the complex and often behind-the-scenes negotiating process. "It may be a members' club," the panelist emphasized, "but all members are not equal in that club." When one panelist suggested expanding developing countries' participation in the Hong Kong ministerial "Aid for Trade" initiative, another noted there was a great deal of confusion on the part of business people and officials in some developing countries, such as Ghana, about precisely what this task force would do. The panelist stressed that developing countries have a lot of work ahead of them to align their interests more closely in order to play a greater role in shaping consensus within the WTO.

The panel discussed alternatives to the current negotiating strategies, including the concept of "variable geometry," in which WTO members assume different levels of obligations, with those willing to go further and faster able to move forward on their own. While this option would reduce the frustration of many members regarding the slow pace of negotiations, it would constitute a return to the old GATT system with several tiers of membership, depending upon whether a given member participates in a particular agreement or not. One panelist maintained that special and differential treatment in itself provides sufficient scope for varying the geometry of the obligations of WTO members.

Critics have questioned the value of large rounds of negotiations, asking whether it makes sense to expect 149 members with a diversity of backgrounds to adopt, in a single undertaking, a very large package of deals. One panelist responded that earlier deals in financial services and telecommunications did not take place under the umbrella of a larger package of agreements. The panelist noted, however, that negotiations in agriculture and



Amina Mohamed



Mary Robinson



Zhenyu Sun



services were stalled for several years before the launch of the Doha Round and suggested that these issues may require the lure of the additional *quid pro quo*, which is possible in a larger negotiation. Returning to a series of smaller packages might be advisable following the end of the current round, however.

Another panelist advocated that national parliaments improve their scrutiny of WTO policy making, arguing that there should be more discussion with stakeholders. The WTO guidelines on relations with NGOs, the panelist contended, are unnecessarily defensive; the 1996 guidelines adopted by the General Council recall the special character of the WTO as both “a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations and this precludes direct involvement of NGOs.” The WTO, the panelist said, is the only intergovernmental organization in the world today that has made no formal arrangements with NGOs. Input from NGOs could enhance the trade policy review mechanism of the WTO, whose mandate specifies that it should permit an “evaluation of the full range of the individual Member’s trade policies and practices” and should take place “against the background of the wider economic and development needs, policies and objectives of the Member concerned, as well as of its external environment.” The current trade policy review mechanism, the panelist said, focuses rather narrowly on a member’s trade liberalization policies and their impact on other members, rather than on the broader welfare effects on citizens. Another panelist argued that WTO members have neglected the task of persuading their parliaments and their societies to support Doha.

Asked by Professor Janow whether they could imagine a negotiating process that was “open to the world,” one panelist responded that the WTO process was certainly open to the special needs of the diversity of its membership. In Hong Kong there was broad representation by both interest and region. In services, for example, bilateral meetings occurred with all the interested parties, followed by a small group meeting in which thoughts and views were exchanged.

There was skepticism about outside participation. One panelist noted that in the process of bargaining, there is give and take; certain sectors will have to make more sacrifices than others. If that process were subject to complete openness, it would likely come to a halt. Another panelist clarified that groupings such as the G-4, G-6, G-10, and G-20 are not official WTO groupings. When they meet, they are not having an official meeting of the WTO; they are a group of ministers who have decided to meet at their own initiative. “It’s entirely up to individual members if they want to get together and discuss certain issues amongst themselves.” However, it is important to remember that the results worked out in these meetings are not decisions; they must be presented to the open meetings for all members to consider and discuss, and a consensus must be reached.

Overall, the panel expressed appreciation for openness and transparency. They recounted that much of their own time had been spent meeting with actors external to the WTO, such as farmers’ groups, NGOs, and delegations from the business community. They valued the interaction and felt it was an important opportunity to tell people about WTO processes, but also to listen to some concerns and, hopefully, address them.

One member of the audience questioned the transparency of certain NGOs. A panelist replied that Oxfam, Amnesty International, and other major NGOs have good systems of accountability and are, in fact, developing a “new set of ground rules” they will attempt to promote for all NGOs.



Yasuhei Taniguchi

EXAMINING THE DISPUTE SETTLEMENT SYSTEM: HOW HAS IT PERFORMED?

Professor Yasuhei Taniguchi, Member of the WTO Appellate Body, served as Chair for this session. The panelists were: John H. Jackson, Professor of Law, Georgetown University Law Center; Julio A. Lacarte-Muró, former Member and Chairman of the WTO Appellate Body; George A. Bermann, Jean Monnet Professor of EU Law and Walter Gellhorn Professor of Law, Columbia Law School (presenting a paper on behalf of Petros C. Mavroidis, Edwin B. Parker Professor of Foreign and Comparative Law, Columbia Law School); Frieder Roessler, Executive Director of the Advisory Centre on WTO Law; and Werner Zdouc, Director of the Appellate Body Secretariat.



John H. Jackson

The discussion began with high praise for the WTO dispute settlement system. The dispute settlement system was lauded as the best system of its kind at the international level. The panel noted that the impact of the dispute settlement system has spread not only to other trade agreements, but even to international organizations operating in different contexts, such as the World Health Organization, which has begun to experiment with dispute settlement as a result of the success of the WTO in this area. The Uruguay Round eliminated the blocking possibilities of the GATT dispute settlement system, “vastly improving an already powerful institution,” in the words of one panelist. The Dispute Settlement Body (DSB) was given mandatory jurisdiction under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). Every member of the WTO is obliged to take disputes arising under the Uruguay Round agreements to the dispute settlement system. The addition of the Appellate Body, the panel agreed, has improved the credibility of the system.



George A. Bermann

As of January 2006, the dispute settlement system had received 335 complaints and adopted approximately 105 panel reports and 73 Appellate Body reports. As one panelist remarked, that amounted to 30,000 pages of jurisprudence. Most cases have involved the United States and the European Communities, but, as the panelist observed, that is hardly surprising: the larger economies logically will have more disputes. Notably, at least half the complaints do not go on to formal proceedings. A great number of settlements are reached, reflecting, the panelist speculated, an appropriate degree of predictability offered by the system. Developing countries use the dispute settlement system far more frequently than they used the GATT dispute settlement procedure. The use of the system by a broad array of countries, the entire panel agreed, signifies its acceptance and utility. The panel agreed that compliance has been very high, although there have been some problematic cases, most notably those involving EU and US losses. In the case of the United States, compliance has been quick when it involved administrative action, but has lagged when congressional action was required.

Frieder Roessler
& Werner Zdouc

The panel admired the “deep, penetrating jurisprudential analysis” that takes place in the WTO. One panelist suggested that the issues addressed have been handled with greater depth than anywhere else in the international law literature. The panelists agreed that, while there was certainly room for improvement, the dispute settlement system performed quite well and stood in good stead in comparison with other institutions, such as national court systems or the European Court of Justice. One panelist offered three benchmarks for measuring the success of the dispute settlement system, particularly of the Appellate Body. The first is to focus on the implementation rates of the reports. The second is to examine the quality of the reports. The third is to scrutinize the merits of every dispute.

On the whole, the panel agreed the Appellate Body had avoided “excessive” judicial activism. The panel stressed the integrity of the Appellate Body. One panelist described the rules of conduct that apply to its members and the Appellate Body Secretariat as even more stringent than those of the International Court of Justice. The “collegiality” of the Appellate Body



was also highlighted. Every member of the Appellate Body, one panelist insisted, must be fully conversant with every aspect of every appeal that comes before it: "If he is not able to discuss that matter at great length, in great detail with the other members of the division, he looks very bad indeed, because the depth of the analysis that is carried out in the heart of the Appellate Body is so extreme that you cannot participate in an exchange of views in the application of the concept of collegiality unless you know exactly what you are talking about. The Appellate Body has set a very high hurdle for itself and for each individual member . . ." Another panelist added that dissenting opinions are, in point of fact, allowed under the treaty, but noted that the first generation of Appellate Body members deliberately chose to "swallow their ego and work on institution building." He suggested that they were mindful of the dispute settlement system as a "nascent institution." Appellate Body members were also praised for their impartiality, essentially leaving nationality at the doorstep of the WTO building.

The principal task of the dispute settlement system, and particularly of the Appellate Body, one panelist contended, is quite difficult since it must clarify what he called "an incomplete and ambiguous contract." The challenge is to do so without measurably expanding or reducing the policy sphere that the WTO occupies, or the way in which it occupies that sphere. The Appellate Body must also avoid leaving the impression that its role is to mediate disputes, rather than adjudicate them. He explained further that the WTO, unlike many other international organizations, is not transaction- or sector-specific; this is evidenced by a higher degree of reliance on general concepts than would occur if this were a transaction-specific or sector-specific international agreement. Moreover, corrective political devices are absent; Appellate Body judges are not subject to anything remotely resembling a referendum on their performance. And because of the difficulty of achieving consensus in an international organization of this magnitude and diverse membership, there are no opportunities for political correction.

The panel wrestled with the question of the relationship between WTO law and general international law. If WTO law is, in fact, a part of general international law, one panelist suggested, the *Vienna Convention on the Law of Treaties* could rightfully be used to address some of the issues facing the dispute settlement system. Another panelist countered, however, that this approach would result in the unfortunate situation of completing one incomplete contract by resorting to another incomplete contract. The panel disagreed in its assessment of the interpretation methods of the Appellate Body. Some argued that its approach was "insufficiently contextual," while others contended that the Appellate Body has never favored an approach that relies on only one interpretation method, or what has been mocked as "dictionary jurisprudence." One panelist argued it was an expression of judicial restraint to rely on text and context in a system where the object and purpose of certain agreements is obscure and possibly in conflict. While the critique of textualism was probably apt some years ago, he said, today the Appellate Body is much more contextualist.

One panelist called for interpretation methods beyond the *Vienna Convention on the Law of Treaties*. Another claimed the Appellate Body has often relied on the principle of effectiveness, which, he explained, includes the presumption against conflicts and an emphasis upon harmonious interpretation, among other features. In one sense, he argued, the Appellate Body has also been balancing free trade concerns with fair trade concerns and other legitimate, "non-trade" objectives. Members of the Appellate Body have also tried to respect the determinations of domestic authorities, rather than substitute the judgment of the Appellate Body for that of the national authority. The entire panel agreed that, while the Appellate Body may be able to identify a goal that ought to be achieved, it does not have the right to impose the means to achieve this goal where the *WTO Agreement* has not provided one.

The panelists put forth a number of recommendations. One panelist advocated the writing of minimalist judgments. It would also be desirable to see a methodology emerge from

the case-law, another panelist noted. Other recommendations encouraged adjudicators to take more time (even if it should lead to delay) to achieve a careful, convincing reconciliation of precedents. It was agreed that justice delayed can amount to no justice, but at the same time, panelists suggested that a reflection period allows drafts to mature, improving both reasoning and outcome. Panelists also urged that reports be shorter and more readable. Given the weight of these demands, a panelist made two institutional recommendations: first, that more economists be brought into the dispute resolution process, either as members of the Appellate Body itself or as members of the staff; and second, that Appellate Body members become full-time adjudicators, not because they suffer from any conflicts of interest, but simply to help them meet the extraordinary burdens placed upon them. With regard to panel composition, a panelist commented that the DSB had been wise in selecting non-trade diplomats or “outsiders” to the system as Appellate Body members. He suggested that “this set the stage for a new approach for perceiving trade law, and a more comprehensive approach to seeing WTO law in context with international law.”

The panel considered some of the criticism of the dispute settlement system, beginning with the charge that the system is too powerful. One panelist remarked that even if this were the case, which it is not, one could argue it was so because the decision-making arm of the WTO may be “inappropriately stymied.” The panelist contended that some “pushing of the envelope” is necessary if the dispute settlement system is to accomplish its mission. Another panelist rejected the notion that the dispute settlement system was too powerful by reasoning that the WTO is “all about hard law.” “What a country subscribes to, it must abide by; there are no General Assembly resolutions taken and then not applied,” he said. The text commits governments legally. If anything, the prudence of panels and the Appellate Body has led some to accuse them of exercising too much judicial economy. If that accusation can be made, one can hardly accuse the dispute settlement system of overreaching its authority. Nor does the dispute settlement system intrude upon national sovereignty. As one panelist put it, “when governments agree in an international agreement to accept commitments, they are thereby ceding that part of their sovereignty on their own volition and agreeing through their congresses and their own democratic processes. Therefore there is no intrusion on sovereignty.”

The panel agreed that great care should be taken in reforming the dispute settlement system. One panelist found particularly hazardous those proposals that introduced political veto power or political modification of Appellate Body findings; such proposals threaten the credibility and impartiality of the system, the panelist said. The dispute settlement system is not only for the government disputants, the panelists pointedly observed. The system also serves to maintain stability and predictability for millions of entrepreneurs worldwide, reducing the “risk premium of their activities.”

A speaker theorized that when members of the WTO are considering whether to bring their case to the WTO, they take into account both the potential and the limitations of the system. Naturally, the WTO’s dispute mechanism tends to attract only those cases that it has the potential to resolve. Therefore, to shed light on the limitations of the DSU, he argued, a full assessment should examine not only the cases that have reached panels and the Appellate Body, but also those that did not.

The same provisions of the WTO agreements tend to be invoked more frequently, this speaker said, namely, the provisions dealing with taxes or regulations on imports and exports, and the various provisions regulating exceptions to the general prohibition of such measures. Typically, members resort to the dispute settlement on behalf of producers seeking to remove a measure maintained by another member to protect its own producers from foreign competition. However, he asserted, WTO law is intended not only to prevent trade-restrictive measures, but also to ensure their nondiscriminatory and transparent application when such measures are

permitted. These principles can be applied to specific government purchases or to the denial of an import license for a particular product, for example. Also, WTO law regulates not only the trade policy conduct of its members but also their conduct within the institutional and procedural framework of the WTO and its organs. These issues have remained largely outside dispute settlement.

Three hypotheses were offered to explain how specific features of the system reduce the range of WTO law enforced through the DSU. First, in many situations the dispute mechanism does not offer an effective remedy. The only liability that a member found to have violated WTO law incurs under the DSU is to bring the measure found to be inconsistent into conformity. In instances such as the temporary denial of an import license or the discriminatory allocation of a government procurement contract, there is no redress available, as the situation does not continue to exist over time.

Second, there are provisions of WTO law that are of great systemic importance, but which individual members generally have no interest in enforcing. For example, Article 11 of the *Agreement on Safeguards* prohibits voluntary export restraint agreements. Once two members have agreed on a voluntary export restraint agreement, however, neither one of the parties to the agreement is likely to file a complaint. Third parties are generally happy the agreement exists, because it prevents further competition and they benefit indirectly from this violation of WTO law. In these instances, one cannot expect enforcement in a system that relies only on members' initiative.

Third, the jurisdiction of panels and the Appellate Body is confined to disputes between members. The WTO, or an organ of the WTO, cannot be a party to a DSU proceeding. Disputes related to the provisions governing the competence and procedures of the organs of the WTO, and to the relationship between the WTO and its members, cannot be settled through the DSU procedures. Of course, as another panelist noted, it is possible that some areas of WTO law are better left to negotiation than adjudication.

One panelist acknowledged that the dispute settlement mechanism has worked well in resolving the disputes that members have chosen to submit to it, but repeated the assertion that the part of WTO law that members can and do enforce through the DSU is quite limited, perhaps because of limitations inherited from the original GATT. Inherently, the DSU "cannot address all of the legal issues that arise in the much more complex legal system of the WTO." The panel drew attention to the fact that the rules of the WTO were intended for bilateral dispute resolution, and the system has changed radically over time. One panelist commented that it has taken national systems thousands of years to develop a greater variety of remedies and law. He speculated that ten years is perhaps a bit soon to demand a similar accomplishment in WTO dispute settlement.

THE WTO AND DEVELOPING COUNTRIES

Jeffrey D. Sachs, Director, Earth Institute at Columbia University and special Advisor to UN Secretary-General Kofi Annan, introduced the luncheon speakers, Ngozi Okonjo-Iweala, then-Minister of Finance for the Federal Republic of Nigeria, and Mari Elka Pangestu, Minister of Trade for Indonesia.

Professor Sachs remarked that the Doha Round was called a development round, in part to show that the world was going to hold together despite the risks and divisions that September 11 represented. The Doha Round was presented as proof of globalization and to show that the WTO was able to work for everybody; as a result, development was put in the



Jeffrey D. Sachs



Ngozi Okonjo-Iweala



Mari Elka Pangestu



center of the agenda. He asked the ministers to discuss the importance of the Doha Round for Nigeria, Indonesia, and other developing countries and invited them to raise any other issue about the role of developing countries in the international trading system.

The discussion began with a description of how marginalized Africa has become in world trade. In 2004, total exports from Sub-Saharan Africa amounted to \$142 billion, or about 1.6 percent of global merchandise exports, and most of Africa's exports were in primary commodities. A United Nations Development Programme report noted that the share of world exports of Sub-Saharan Africa, with its 689 million people, is less than one half that of Belgium, which has a population of ten million. Africa's share in world trade has declined markedly since 1989. Had Africa maintained the share of global exports it had in 1980, the same report estimates it would earn about \$119 billion more in world trade than it does today.

Four areas are crucial for improving the ability of developing economies to benefit not only from the Doha Round but from trade in general: ensuring that the rules are observed by all the players; improving market access for low-income countries; encouraging trade in services; and addressing constraints in institutional and infrastructural capacity. Even among developing countries, however, interests diverge. Emerging market countries are at different stages of development, and their interests are not always identical to those of the least developed countries. These different interests become an important factor shaping the course of the negotiations. It is also important for the emerging market countries to examine the impact of their own trade regulations on least developed countries. An increase in "South-South trade" would be beneficial.

WTO members need to play by the rules. In agriculture, the United States, Europe, and Japan are in violation of the rules governing domestic support and export subsidies. These subsidies mean lost income for developing countries hoping to export their way out of poverty. Moreover, the existence of these subsidies makes it difficult for policymakers to sell further reforms at home.

The problem of tariff escalation was illustrated: cocoa is an important product for Africa. The average tariff on unprocessed cocoa is 0 percent and 0.5 percent in the European Union and the United States, respectively. However, the tariffs on processed cocoa products can go as high as 186 percent in the United States and 63 percent in the European Union. Many Africans see this discrepancy as a double standard, which has the effect of denying them the opportunity to move up the value chain, to generate jobs, and to manufacture their way out of poverty in the same manner as the developed countries did.

Nigeria's progress in liberalizing the insurance, banking, and telecommunications industries was contrasted with the failure of developing countries to push forward discussion of temporary workers in Doha (also referred to as "mode 4 discussions"), something that would benefit the developing world enormously.

A critical obstacle in the Doha Round is the very limited capacity of developing countries to engage in trade negotiations. Even the simple matter of trademark registration is crucial. The Nigerian marketplace is being flooded by copies of traditional Nigerian garments, which are made in China but use the trademarks of Nigerian companies and undercut the price of the domestic product by approximately two dollars. A similar situation exists for thread: Nigerian textile factories have lost an estimated 100,000 jobs.

Infrastructure is another weakness. Without working ports, goods cannot move and trade liberalization becomes moot.

The strides that have been made in fighting corruption and bringing transparency to government in much of Africa were emphasized. Nigeria has moved from a fiscal deficit of 3.5 percent of GDP in 2003 to a surplus of 10 percent of GDP in 2004 and 11 percent in 2005. In previous years, when oil prices were high, nothing was saved and corruption was rife. In

contrast, \$63.4 billion has been saved over the past three years. Inflation is down from 23 percent to 11.6 percent. Nigeria has also brought its average tariffs down from 25 percent to 17 percent and plans to bring them down even further. Many non-tariff barriers are being removed and further reforms are being made to the tax regime and the public sector. The result is a GDP growth of 6.3 percent in 2005 – double that of the previous decade – an increase derived from the non-oil sector of the economy. Nigeria is waiting for the rest of the world to do its part, to play by the rules of the game.

It was noted that openness is not sufficient unto itself, and that much depends on the way a country opens up, the sequence that is followed, the speed, and the internal capacity to manage the process. These factors also determine whether the benefits of opening up are broadly shared within the country or not. Improvements in productivity and competitiveness through trade liberalization require a comprehensive policy for human resource and infrastructure development, education, technology, a policy that includes small and medium-size enterprises, a strategy to raise the productivity of subsistence farmers, and other measures. There is also a need to compensate those who lose from liberalization. Developed countries can “buy off” their farmers because only 2–3 percent of the population is in agriculture. In a country like Indonesia, where 50 percent of the population still works in agriculture – many in subsistence farming – that sort of approach is unworkable. “Special products” (allowing certain categories of products to be excluded from liberalization) are necessary when large proportions of the population would be hurt by the liberalization of that product.

Since the failed WTO talks in Seattle, the major developing countries, and some smaller ones as well, have become aware of their negotiating power and are forming coalitions to make their voice heard in the negotiations. One of the reasons previous rounds were unsuccessful, one minister said, was because the large developed countries neglected to include the developing countries in determining elements of the rounds. In setting the agenda for Doha, developing countries, for the first time, were able to negotiate a tough compromise. Why was this the case? Since the failed Cancun talks, various country groupings such as the G-20, G-33, and G-90 have done their homework. Whatever the outcome in Doha, it is critical for developing countries to remain proactive and able to defend their positions, and this is why capacity in preparing positions is crucial.

The proliferation of regional and bilateral agreements in Asia was also discussed. These agreements began to take off around 1999, partly because of the failure of the WTO meeting in Seattle and lack of progress in APEC and ASEAN at the time. Another factor was the uncertainty that followed the Asian financial crisis. Countries like Japan, which had never pursued the path of preferential agreements, began to consider them. Moreover as pessimism increases about Doha, the desire for preferential arrangements is likely to accelerate. Thus, developing countries have to follow a burdensome, multi-track strategy of multilateral, regional, and bilateral negotiations. The speakers acknowledged that the multilateral trading system offers the most fairness and the strongest protection for the rights of developing countries. It offers a small country the ability to challenge the United States through the dispute settlement mechanism. The Ministerial conference in Hong Kong demonstrated that developing countries can have a voice in determining the rules in the negotiations. In contrast, bilateral negotiations are generally less favorable to developing countries. A country negotiating with the United States or Japan is essentially given a model agreement and asked to sign on the dotted line. There is very little maneuvering to be done. Unfortunately, the reality is that developing countries will be forced to negotiate regionally and bilaterally, as well as multilaterally. The challenge is how to avoid becoming ensnared in Professor Bhagwati’s “spaghetti bowl.”

The ministers said they saw no way to stop the growth of regional and bilateral trade agreements. Much of the problem is political, they said, not just economic. When a country signs



a bilateral agreement with another country that affects market access, pressure is placed on the government by the business sector affected. Bureaucrats, too, want to come home with signed agreements. It was cautioned that policymakers should try to use these agreements as building blocks, using some techniques of best practices, such as having the same rules of origin, the same scheduled reduction of tariffs, and the same set of standards. The WTO may also play a role in developing some discipline or rules with regard to preferential arrangements, so that in the end, when all these agreements are added up, the world is still left with a multilateral, fair, and open trading system.

LESSONS FROM EXPERIENCE: OPERATION OF THE PANEL PROCESS AND APPELLATE REVIEW

This session examined the panel process and appellate review with an eye toward the lessons that might be learned. Professor Luiz Olavo Baptista, Member of the WTO Appellate Body, served as Chair for the session. The panelists were: William J. Davey, Professor, University of Illinois College of Law; Valerie Hughes, Partner, Gowling Lafleur Henderson LLP, and former Director of the WTO Appellate Body Secretariat; Mitsuo Matsushita, Professor Emeritus of the University of Tokyo, and former Member of the WTO Appellate Body; Andrew L. Stoler, Executive Director, Institute for International Business, Economics & Law at the University of Adelaide, and former Deputy Director-General of the WTO; and John M. Weekes, Senior Policy Advisor, Sidley Austin LLP, and former Canadian Ambassador to the WTO.

The discussion began with the speakers' assessment of past WTO dispute settlement cases. The implementation rate for these adopted panel and Appellate Body reports was said to be approximately 83 percent. There have been perhaps ten problem cases, four of which have now been implemented, albeit with some transitional problems. In two cases it was unclear whether implementation had occurred. Of those consultation requests that did not lead to adopted panel reports, settlements were made in the vast majority of cases. Some were not reported or were cases in which the measures being challenged were dropped. Overall, the speakers agreed, this is a fairly good record of performance.

This is not to say, however, that the system is without problems. Good faith implementation does not always occur. Settlements don't always compensate the complaining party adequately. Moreover, while the implementation record is generally quite respectable, one speaker argued that "it masks very serious delays in a significant number of cases, raising issues of the need to improve remedies and the need to reduce delays in the general process."

The current process of panel selection was described. In 80 percent of the cases, the panelists come from a governmental background. They also tend to come from certain developed countries such as Australia, New Zealand, and Switzerland or from large, developing countries such as Brazil, India, and South Africa. The panelists have gained experience over time; in the last three or four years nearly 75 percent of the panelists had served on a previous panel; typically two of the three panel members are likely to have already served on a prior panel. Initially, this occurred less than 50 percent of the time. The parties involved in the panel dispute are supposed to determine the selection of panelists, but because they are generally unable to come to an agreement, in the last three years the Director-General has appointed 80 percent of panelists.

Discussion focused on possible improvements in the process of panel selection and on options that would reduce the overall length of the panel process. One speaker proposed the creation of a standing panel body: a pool consisting of 20 to 24 individuals from which



Luiz O. Baptista



William J. Davey
& Valerie Hughes



Mitsuo Matsushita



John M. Weekes

all panelists would be selected. A standing panel body would not only improve the degree of experience of panels, the speaker suggested, but would be better equipped to deal with ancillary issues such as remands, compliance procedures, and preliminary rulings. There would be a greater possibility for standardized procedures. Panel selection would be much faster, as well, with fewer scheduling delays due to the unavailability of panelists. Finally, panelists would be viewed as more independent, particularly of the WTO Secretariat.

The disadvantages were described as minimal. Although some critics have objected on the basis of cost, in fact, it was claimed, the cost would amount to only a few million dollars. Critics have also said that limiting the number of potential panelists could cause a loss of expertise; however a speaker countered that, with only seven members, the Appellate Body seems to have adequate expertise to deal with all WTO legal issues, so a standing body of 20–24 panelists would certainly be adequate. A demographic shift would be likely; panels would no longer be dominated by Australians, New Zealanders, and Swiss, and there would likely be more retired than current government officials. It was speculated that this change could be advantageous. The greatest concern raised was that WTO members might appoint people to the standing panel body for political reasons. It was argued, however, that experience with the Appellate Body demonstrates that the membership would take the responsibility seriously.

Another problem has been the length of time between the establishment of the panel and the circulation of the panel's report. The DSU set a target of nine months, but that time frame has rarely been achieved. In the first four years of operation, the median length of the panel process was 11 months; in the next three years it was 12 months; and in the last three years it has been 14 months. This is a serious concern, the speakers agreed, because it discourages business from using the system. Despite government statements to the effect that the process should be condensed, a speaker noted that, in individual cases, the government officials involved are usually happy to have another month to file a submission, and so there is a tendency, in individual cases, to "let the timeline slip."

The panel discussed a variety of possible adjustments to the current system. One panelist argued that adopting a standing panel body would save two months. The utility of the interim review process was also questioned; in the ten years of the DSU, a significant change in the panel's decision was made in only one case as a result of this process. The process does correct statements of fact on occasion, but such corrections could be handled alternatively by filing a motion to correct the report while the report was being translated. Abolishing the interim review process would save another six weeks. There is also a two-month period in which the parties are allowed to consider whether to appeal the report. Since both parties know the result of the case before the report is circulated to the entire membership, 30 days might easily be cut out at this stage as well. In total, these recommendations result in a time-savings of five months. They restore the original nine-month target without reducing the time allotted for panel deliberation and with little impact on the time allowed both parties to make their submissions.

The panel expressed concern that the length of the current panel process may encourage the perception that the rules can be violated with impunity for some time.

To be fair, one panelist insisted, it is important to recall the turmoil that preceded the WTO. Reference was made to the oilseeds case, a dispute that dragged on for years: arguments about it in the GATT Council ran five days, uninterrupted. The panelist concluded that "while there is always room for tinkering at the margins, there is no doubt in my mind that the panel process has been dramatically improved." This panelist suggested it would be wise to explore how the dispute settlement system fits into the management of trade relations and negotiations. Taking a dispute to the WTO may sound like the ultimate threat in the system, but it was a part of the "mercantilist rhetoric" of trade relations. In effect, the panelist said, "taking a dispute to the

WTO often creates a kind of de facto truce in the battle over a particular issue, at least during the period that the matter is being looked at by the panel and by the Appellate Body.” The aggressive sound of such a move can be useful in domestic politics, but even more important, he argued, “it is a practical matter, turning it over to a body to make an impartial assessment of the facts based on the arguments made by both parties.” In the meantime, senior officials of the competing countries are relieved of having to argue the issue at every bilateral meeting on the grounds that they are awaiting an outcome. He added that the finding will usually, though not always, help the parties work toward a solution. Binding interpretations effectively resolve the political debate about who is right. They also set useful parameters for members seeking to resolve a bilateral dispute; once a definitive ruling is received, government officials can accept it in front of their domestic constituencies without being accused of capitulation. The interpretations also provide baselines for trade negotiators. The speaker recalled a statement by the Chairman of the agricultural negotiations in the Doha Round that there was no point in having discussions on a particular issue until the Appellate Body report in the upland cotton case was out, “because you wouldn’t know how to begin the discussion in terms of knowing where the real baselines were going to be.”

In turn, trade negotiations and legislation, the panelist speculated, can take some of the pressure off the dispute settlement mechanism. Trade negotiations are the legislative arm of the WTO, where members can make new rules or modify existing rules in the light of experience, including the recommendations and rulings of the DSB. Members may like a finding adopted by the DSB and want to codify it to clarify that the ruling should apply in all cases. Conversely, they may dislike a finding and want to legislate a change to make clear that members had not intended such an interpretation in their original negotiation. One of the problems with a failure of the Doha Round, he pointed out, is that it would put more pressure on the dispute settlement system. If the credibility of the WTO is weakened by a failure of the negotiations, difficult panel and Appellate Body findings would be harder to implement. By and large, he declared, negotiated outcomes are better than relying on the implementation of dispute settlement findings. Negotiated outcomes, by definition, are outcomes that are agreeable to the parties involved.

There was some discussion of the influence dispute settlement findings have had on negotiations. It was explained that many of the GATT panel findings in the 1980s helped shape the Uruguay Round outcomes. These findings included the oilseeds case, which contributed to the Blair House agreement; the AG-12, a series of US agricultural cases against Japan, which was an important step in reaching agreement on universal tariffication; and the Foreign Investment Review Act case, which became the foundation of the *Agreement on Trade-Related Investment Measures*. The situation mentioned earlier, in which a panel had difficulty in determining whether serious prejudice was caused by subsidies in a particular case, had a major influence in the Uruguay Round agriculture and subsidies negotiations.

Panelists also explored the WTO appellate review process. They agreed that the broad acceptance of the system, by developed and developing countries alike, is fulsome praise. One panelist noted that the Appellate Body had heard a variety of disputes, many with a significant economic impact. The strengths of the system were reiterated, including its impartiality and objectivity, the broad consensus achieved in the reports, and the collegiality discussed in an earlier session.

In addition, panelists reviewed the Appellate Body’s contributions to the jurisprudence on a variety of issues. Discussion touched on subjects such as due process, burden of proof, defining the standard of review, approaches to Article 11 of the DSU, and the evolving jurisprudence on *like products*, among other issues. Panelists also discussed and supported the concept of greater transparency in the dispute settlement system. One speaker praised the opening to the public of

panel proceedings in the European Communities' challenge to the countermeasures applied by Canada and the United States in the hormones case. There is no reason to keep these hearings closed, he argued; allowing observers does not have a negative impact upon a case.

One speaker lamented the reaction by WTO members in November 2000 to the Appellate Body's adoption of an additional procedure for the handling of *amicus curiae* briefs in a dispute between Canada and the European Community on asbestos: "It's hard to imagine how so many people could have seriously misunderstood each other's motives and the real impact and intent of what the Appellate Body had done." Amicus briefs were perceived as an issue both of transparency and of participation. The original concern of the Appellate Body was that it would be "deluged" with *amicus curiae* briefs in the asbestos case. Thus, the Appellate Body decided to adopt an orderly approach to dealing with this potential problem through an additional special procedure. The situation was aggravated when a staff member of the WTO Secretariat misread the intent of the Appellate Body and issued a bulletin to NGOs characterizing the additional procedure as an invitation to submit *amicus curiae* briefs in this particular case.

The panelist asserted that the additional procedure adopted in the asbestos case was well reasoned. It entailed creating a first phase where "friends" apply for leave to file a written brief. Far from being an open invitation to submit briefs, the requirements were quite stringent. Even if an organization were ultimately granted leave to file, the Appellate Body made clear there was no guarantee the submission would be taken into account, and it strictly circumscribed the nature of the brief that could be filed. The additional procedure makes plain that the parties and third parties to the dispute would be given a full opportunity to comment on and respond to any briefs accepted by the Appellate Body. The additional procedure was designed to ensure a very restrictive approach to consideration of such briefs and to provide maximum transparency to the parties of the dispute and the *amici* as to how their arguments would be taken into account, if at all. It would be good to apply this rule generally, a panelist argued; without it, WTO members are essentially asking to be kept in the dark about *amicus curiae* briefs.

WTO CASE-LAW IN INTERNATIONAL LAW CONTEXT

Professor Georges Abi-Saab, Member of the WTO Appellate Body, served as Chair for this session. He opened the discussion by noting the variety of possible interpretations of its title: WTO Case-Law in International Law Context. One could evaluate the case-law of the WTO from the perspective of general international law, he suggested, or ask how the case-law of the WTO perceives international law and its relationship to it. Interaction between the two might also be explored. Professor Abi-Saab pointed out that these different approaches are relevant in examining the rules themselves as well as the institutional agencies applying them. He then introduced the five speakers: Jose E. Alvarez, Hamilton Fish Professor of International Law and Diplomacy, Columbia Law School; Florentino P. Feliciano, Senior Associate Justice (ret.) of the Supreme Court of the Philippines, former Member of the WTO Appellate Body, and Senior Counsel, SyCip Salazar Hernandez & Gatmaitan; Martti Koskenniemi, Professor, Academy of Finland and University of Helsinki; Pieter-Jan Kuijper, Director-Principal Legal Advisor, European Commission; and Patricia M. Wald, Judge (ret.), US Court of Appeals.

One of the panelists launched the dialogue by saying that "simply stating that WTO panelists and Appellate Body members need to consider their decisions in the greater context of international law" does not say how this should be accomplished. To this end, the panelist proposed a focus on four principles that, he argued, accord opportunities for interaction between WTO law and international law, but also limit that interaction as well. These "Janus-



Georges Abi-Saab



Jose E. Alvarez



Florentino P. Feliciano



Martti Koskenniemi



Pieter-Jan Kuijper



Patricia M. Wald

faced" influences, he asserted, prevent WTO law from being read in "clinical isolation" from international law, but also protect WTO adjudicators from being scorned as "judicial activists" who would use international law to rewrite the treaties they are charged with merely interpreting.

The first principle is that of *compétence de la compétence*. WTO adjudicators, like all international judges and arbitrators, can determine their own jurisdiction and give concrete effect to the treaties they are interpreting. Combined with other general international law principles, such as the principle of *effectiveness*, adjudicators can broaden the scope of GATT rights, while also providing opportunities for incorporating other aspects of international law. It was argued that *compétence de la compétence* underlies some WTO decisions and can trigger a judicial response, even in the absence of explicit violation of the covered agreements.

Discussion also ensued regarding Article 3.2 of the DSU, which states that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. This technical limitation acts in combination with what was described as "the WTO adjudicators' awareness of their own need to perpetuate their legitimacy."

A second broadening, yet limiting idea, is *non liquet*; the presumption against there being no law. The panelist asserted that it remains anathema for judges or international law scholars to resort to *non liquet*: "To throw up our hands in the face of a complaint would be in the views of most . . . a defeat for the dispute settlement system, as well as for the general hopes of constructing a rule-oriented regime that is not so dependent on power." Yet, despite the reluctance to find *non liquet*, gaps do remain. There is substantial disagreement among States concerning the applicability or basic definition of economic, social, and cultural rights and whether these rights can or ought to be applied in the WTO. Those opposed to incorporating these rights have contended that the weaker forms of dispute settlement for economic and social rights that exist in other institutions "reflect States' preferences for much weaker forms of enforcement on such issues." That reality, the panelist said, cannot be ignored. In this way, the need to avoid *non liquet* by resorting to non-trade norms is limited.

The third principle is the mind-set, the self-perception, of international judges, which includes the general rules of international procedure some claim are emerging from the various tribunals. As the previous session made clear, judges want to produce fully reasoned opinions. They feel the pull of precedent, if not *stare decisis*. The panelist speculated that judges also crave self-legitimation and career success, as well. These various "pulls" drive WTO adjudicators to reach for general international law. Yet, other characteristics of their judicial role, such as the political fragility of States' consent, the fears of non-compliance, even, he asserted, "the competing pull of specialization, that this is a regime built on an epistemic community of free traders," pull them back. There is also the traditional reluctance "of all adjudicators, national or international, to acknowledge that they engage in law making," a reluctance that provides a counterweight to the tendency to resort to general international law.

The panelist advised care in borrowing from other principles of international judicial procedures. International tribunals vary sharply from one another and from the WTO, as do the principles they use. *Essential security*, for example, is defined differently in the WTO, and, according to the panelist, in the WTO "it sounds more self-judging than it is in bilateral investment treaties or friendship, commerce and navigation treaties." Aside from different usages of objective language, there are differences in the subject matter addressed by the tribunals, different connections with national law, different degrees of openness to nongovernmental actors, different checks on judicial power, and different principles underlying distinct areas of law. Human rights regimes, it was pointed out, are necessarily less protective of sovereignty than the WTO is likely to be. Nor can different forms of judicial remedy be adopted wholesale in the WTO context.

The panelist predicted that to the extent WTO adjudicators employ public international law, they will necessarily change it. He described the Appellate Body's decision in the shrimp/turtle dispute as a landmark case, "not only because it showed an acute awareness of the interconnections between the *lex specialis* of this regime and the rest of international law, but because it contained the extraordinary suggestion that the United States erred in not negotiating multilaterally prior to taking unilateral action." Many international law practitioners find, in that decision, an emerging duty toward international cooperation and even multilateral negotiation.

Another panelist affirmed that general international law performs at least two functions in the development of the case-law of the WTO. First, it is a source of general principles that can be applied to fill the gaps that inevitably exist in treaties. Second, general international law provides the context within which interpretation of particular provisions takes place. The basic requirements, for example, of what general international law calls "due process," "fundamental fairness," or "natural justice" must be observed at all times, even where not specifically mentioned in a particular treaty.

The panelist classified three levels of context in which treaty interpretation takes place: micro, meso, and macro. The micro level comprises the context of specific provisions being interpreted, as described and referred to in Articles 31(2) and 31(3) of the *Vienna Convention on the Law of Treaties*. The particular dispute taking place between the parties to a particular case constitutes the meso level of context. A dispute brought before the dispute settlement system must be an actual controversy between the members. In principle, the Appellate Body cannot render advisory opinions. This is an important requirement, because the pressures and realities of an actual dispute that impose certain disciplines upon the judicial decision-maker are not as prevalent when an advisory opinion is what is required.

At the macro level, the dispute settlement mechanism is itself the context within which specific decisions take place. The Appellate Body, he explained, as interpreter of the treaty, is required by the system to take special account of the need to balance certain competing considerations in the course of its deliberations. One balance is between the rights and obligations of the member States. Another balance is between the competencies member States have reserved to themselves and those they have ceded to the system as a whole. The third balance relates to the functional allocation of power, referred to as the constitutionalization of trade law. The competencies given to the legislative body are distinguished from those given to the dispute settlement system. The function of the dispute settlement system is quasi-judicial; its task is to interpret and apply the law. The panelist qualified this statement by noting that "the task of the treaty interpreter" is not "a mechanical one. To the contrary, that task always involves human choice, human judgment and ... some space for creativity."

One member of the panel took issue with the idea of international law as merely one area of law; this speaker said it was not one context among others, but rather "the context of all contexts." It "covers, regulates and submerges all other legal systems," be they related to trade, human rights, environment, or other areas. The panelist traced this conception of international law to Immanuel Kant's 1784 essay, "Idea For a Universal History With a Cosmopolitan Purpose." The essay, he explained, "views history as a process in which humanity becomes conscious of its unity in the political institutions it creates for itself." To achieve this, the panelist said, Kant proposed "the form of universal rules of law understood as a constitution of free republics." It is this proposal that became the inspiration for international law, the panelist added. Historically, international lawyers have not seen the separate legal orders of nation States as possessing any independent validity. On the contrary, any validity they have is derived from international law. States exercise sovereignty, not in a rejection of a universal order, but because the legal order provides for sovereignty. Thus, that sovereignty is limited by the legal order.

The separate orders States have created among themselves are made by treaty. The various regimes of diplomacy, the law of the sea, human rights law, and environmental law, in fact, make up international law; they are not separate from it. The panelist referred to the constitutional nature of Article 103 of the UN Charter, which “expressly proclaims that the obligations of the UN members override their rights and obligations under any other treaties.”

The panelist summarized the contents of a forthcoming International Law Commission report that addresses three ways in which the contexts of international law and trade law interact. The first interaction is the way in which trade law derives its validity and legally binding character from public international law. WTO members are bound to follow the DSU, because it is an international agreement, and the *Vienna Convention on the Law of Treaties* and customary international law dictates that such agreements are binding. The panelist echoed earlier remarks, noting that international law simultaneously validates and places limits upon WTO case-law, citing as one example the fact that a State undergoing severe economic crisis is nevertheless bound by the WTO treaties, unless it can plead a fundamental change of circumstances as provided under customary international law and in Article 62 of the *Vienna Convention*. The second interaction is that international law continues to fill the normative gaps, to which previous speakers also referred. There are no special WTO rules on such issues as statehood, jurisdiction, immunities of diplomats, and freedom of the high seas, for example. The third interaction is that international law provides hierarchical criteria within the WTO system, as well as between WTO rules and other rules, such as the recent affirmation made by the Court of First Instance of the European Communities: “From the standpoint of international law, the obligations of member States of the United Nations under the charter of the UN clearly prevail over every other obligation of domestic and international treaty law, including their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the EC Treaty.”

The panelist concluded that “international law coordinates forms of behavior and establishes and limits competencies to decide, but it rarely says what those decisions should be and this is part of international law’s heritage.” It is not entitled to impose a single image of a universal morality. Naturally, there are basic moral values, such as those of fairness, honesty, and the prevention of deceit, injury, and coercion. Differences remain, however, in the perception of what constitutes fundamental rights, democracy, and the rule of law. For those engaged in international law, the panelist asserted, moral virtue lies in universalizing legal procedure: “International law was and is a civilizing project, with all the connotation that those words bring with them.” The panelist suggested two ways to view the contextual relationships of WTO case-law and international law. One is the Kantian effort to understand WTO case-law as part of international law and thus as “a part of the effort to bring about the perfect constitution at the universal scale, realizing freedom within self-determining communities linked by a cosmopolitan law.” The alternative construct sees the WTO context and the international law context as “separate and self-regarding systems of problem management and *ad hoc* accommodation.” These views posit very different professional sensibilities, ideas of history and politics, and at root, the panelist suggested, very different faiths in humanity.

The panelists agreed that a great deal of progress had been made in terms of how WTO case-law has dealt with international law. Under the GATT, treaty interpretation had been heavily based on the negotiating history. As one panelist joked, “it was basically a game of who’s got the best archives.” The Uruguay Round negotiators were far more focused on asking questions about the basic sources of international law and technique of interpretation. The dispute settlement system today, the panelist submitted, is engaged in “a less rigid sort of ticking off of text, context, object and purpose, subsequent practice, etc.”

Improvements have also been made in the area of remedies. An attempt was made to

create a system that would no longer allow States to determine their own remedies for alleged breaches of WTO rules. This likely emerged in response to use of Section 301 of the US Trade Act. Article 23 of the DSU closed access to other courts as an avenue for the resolution of WTO disputes and sought to exclude the use of unilateral remedies that run contrary to WTO obligations. There was a lively discussion as to whether this provision rules out reprisals in response to breaches in other agreements.

After emphasizing the serious responsibility the Appellate Body bears, given the consequences of its decisions, one panelist emphasized that it is inevitable that overriding attention be given to “the general principles of public good, or at least the avoidance of public harms, that are incorporated in this amorphous thing called public international law.” The panelist doubted that it would even be possible for the Appellate Body to operate in isolation from the growing body of international treaties, agreements, and customary norms that have arisen in the past two decades. The interpretive dilemmas facing the dispute settlement system are similar to those encountered by other national and international courts. All have textualists, evolutionaries, and consequentialists. In both international and national courts, there are those “who would look for guidance at the drafting history of the agreement and those who would vigorously oppose such forays as, ‘ransacking through the ash cans of history.’” The panelist commented that as the Appellate Body moves closer to becoming a “judicial creature,” the distinctions between arbitration and adjudication become clearer. Where an arbitrator confines his duty largely to honoring the intent of the parties to a dispute, a judge is always conscious of the duty owed to the greater legal community “to ensure that every judgment fits into, and doesn’t represent an aberration in, the broader rule of law context.”

The Appellate Body’s role as the final decision-maker also carries disadvantages by minimizing exposure to decisional options. The panelist remarked that even the US Supreme Court, by the time it chooses to make a definitive ruling, “usually has had access to the best and the brightest of the lower appellate court jurists.” International treaties, too, are generally interpreted by many of the courts of the parties involved before an authoritative interpretation emerges. The panelist saw it as prudent for the Appellate Body “to assure itself more vigorously than a national court, or even than other international courts, that it has arrived at an interpretive result that not only accommodates parties’ intent, but does so with no unnecessary harm to international norms of behavior in other vital areas.” The Appellate Body is not there to defend the national interests of the parties involved – these are, after all, sovereign governments committed to a voluntary agreement. However, when there is disagreement about what these agreements require, the consequences may affect global trade. The rule of law, the panelist avowed, cannot be rigidly compartmentalized.

MANAGING THE CHALLENGES AHEAD

Welcoming remarks at the evening’s keynote dinner were given by David M. Schizer, Dean and Lucy G. Moses Professor of Law at Columbia Law School. Hugh T. Patrick, Director of the Center on Japanese Economy and Business, and R.D. Calkins Professor of International Business Emeritus of Columbia Business School, then introduced the keynote speakers: Hyun-Chong Kim, the Republic of Korea’s Minister for Trade; Susan Schwab, then-Deputy US Trade Representative; and Christine Lagarde, the French Minister of Foreign Trade. Professor Patrick next introduced the panel of distinguished discussants: Albert Fishlow, Professor of International and Public Affairs, and Director of the Institute of Latin American Studies, as well as Director of the Center for Brazilian Studies, Columbia University; Arvind Panagariya, Bhagwati Professor of Indian Political Economy,



David M. Schizer



Hugh T. Patrick



Hyun-Chong Kim



Susan Schwab



Christine Lagarde

School of International and Public Affairs, Columbia University; and Joseph E. Stiglitz, University Professor and Executive Director, Initiative for Policy Dialogue, Columbia University.

Professor Patrick also served as moderator for the evening, and opened the discussion by suggesting that any discussion about “Managing the Challenges Ahead” would most certainly focus on the Doha Round negotiations and the proliferation of bilateral and regional preferential or free trade agreements.

A key theme expressed in the evening’s discussion was the belief that free trade agreements are an important part of a country’s economic liberalization and trade relations. To some degree, the keynote speakers differed in their assessment of the reasons behind the simultaneous pursuit of multilateral and bilateral or regional arrangements. Asserting that it was a matter of “being able to walk and chew gum,” one speaker maintained that bilateral and regional arrangements were an opportunity to push ahead with reforms that were lagging multilaterally. Others suggested that the trend toward preferential arrangements related to a “recalibration” in multilateral ambitions. The keynote speakers emphasized the concrete effects of bilateral or regional free trade agreements (FTAs) on economies – including gains in trade surpluses and in purchasing power for consumers, in foreign direct investment, even in prestige – and pointed to the increased ratings by agencies such as Standard & Poor’s for countries completing FTAs with the United States.



Albert Fishlow

In contrast to the keynote dinner speakers, the distinguished discussants generally lamented the trend toward preferential arrangements, affirming Professor Bhagwati’s analysis of the “spaghetti bowl” effect.

Another theme of the discussion was expectations for the Doha Round of negotiations. All speakers and discussants agreed that negotiations were at a pivotal moment. One discussant suggested that the reason negotiations were stalled had little to do with time and posturing, but rather that the countries involved have different visions for their economic futures. The GATT began with 25 advanced economies, and today there are 149 incredibly diverse participants, with very stark differences in development and interests, all of whom are engaged in a process of trying to determine “what approach they want to take to trade when they grow up.” Nevertheless, with political will, it remained possible to move “from tactical positions to frank exchanges,” one of the discussants said. None of the discussants expressed the view that Doha was doomed to fail.



Arvind Panagariya

The discussants advanced various perspectives on the US and European positions on market access and disciplining subsidies in agriculture. It was agreed that a very real stalemate exists between the developing world, which is struggling to get real gains in market access for agriculture and textiles, and the Europeans, who want greater concessions in services. To succeed, Doha must be considered a win-win proposition for both the developing and developed economies. One discussant emphasized the substantial gains developed countries would enjoy from opening their markets. A discussant speculated that the agricultural issue has become heated largely because it had gone so long unaddressed, despite the promises made in the Uruguay Round to tackle such liberalization. Moreover, the rise in commodity prices in the last three years has made the issue of real importance to agricultural exporters.



Joseph E. Stiglitz

Another discussant found some points for optimism in the agricultural negotiations. The discussant noted the appeal of technical assistance and stressed the importance of clarifying the benefits of the reforms to the developing economies. Another discussant said there was little hope of making progress in agriculture, pointing out that the agricultural exceptions have been mocked as the “everything but farms” initiative.

Several discussants emphasized the importance of building the consensus for open trade. Restructuring is a painful necessity of globalization requiring a clearer explanation of the rationale for open trade policies. The needs of those domestic constituencies that are negatively affected by trade must be addressed, and the electorate must be persuaded that open trade is

a public good that brings jobs and sustainable growth. This consensus building also involves proving that the benefits of liberalization will be widespread and will not accrue only to a small number of multinationals. To accomplish this, more transparency is needed. It should be easier to read, understand, and talk about trade policy with business, NGOs, the general public, and national parliaments. One speaker noted the importance of improving the use of analytical tools, models, databases and long-term surveys to help everyone understand the benefits of open trade. More attention should be paid to the interests of small and medium-size enterprises, something that is being emphasized within the European Union. The keynote speakers also addressed the importance of managing the costs of adjustment. Openness will necessitate structural adjustment in many industries. Korea, for example, has recognized the importance of helping aging farmers; Europe has put in place a new Globalization Adjustment Fund. One discussant agreed strongly with this position, denying the effectiveness of “trickle-down” economics. This perspective generated, in turn, a lively exchange among the discussants.

CONSIDERING REMEDIES

Professor Kyle Bagwell, Kelvin J. Lancaster Professor of Economic Theory, and Professor of Economics and Finance at Columbia University, served as Chair for this session. Professor Bagwell reminded the audience that, under the WTO, when a party fails to meet its obligation, the preferred remedy is that it remove the offending measure. Failing that, some form of compensation may be agreed between the complainant and the infringing party. Failing that, the complainant could be authorized to retaliate. While the record on compliance is good overall, several issues remain and a number of proposals have been made to improve remedies. The Chair welcomed the speakers for this session: Gary Horlick, Partner, Wilmer Cutler Pickering Hale and Dorr, LLP; Robert Lawrence, Albert L. Williams Professor of International Trade and Investment, John F. Kennedy School of Government, Harvard University; Bruce Wilson, Director, WTO Legal Affairs Division; and Alan Wolff, Partner, Dewey Ballantine LLP.

It was noted that aside from a single case involving the United States and the European Communities in the copyright arena, compensation has never been granted under the WTO system. This means that the WTO’s model for remedies has generally relied upon compliance and retaliation. However, retaliation has rarely been used, having been requested in only seven out of one hundred cases. All seven requests went to arbitration, retaliation was authorized in six cases, and it was ultimately imposed in only four cases.

Several general concerns about compliance have been raised. Some have argued that the system should attempt to ensure complete compliance, which would necessitate more punitive responses, particularly retaliatory responses. Others have charged that members take too long to comply, that they violate the rules with impunity for considerable periods of time, and that an element of retroactivity is thus required in the response to violations. At the same time, these concerns are balanced by a corresponding fear that protectionism would worsen if the response was made more punitive and if retaliation was authorized more frequently. Although retaliation cases are few in number, the amounts involved are substantial. It was noted that the Europeans, in the Foreign Sales Corporation case, could have imposed 100 percent tariffs on perhaps as much as \$4 billion of trade, essentially negating the liberalization that occurred between the European Communities and the United States as a result of the Uruguay Round. This suggested to one speaker that a preferable response might be some form of compensation, perhaps even monetary compensation. But monetary sanctions might threaten the legitimacy of the WTO because members’ constituencies will view



Kyle Bagwell



Gary Horlick



Robert Lawrence



Bruce Wilson



Alan Wolff

it as a “foreign organization” imposing fines on them, threatening their sovereignty, and causing them to withdraw their support of the WTO. Another problem with expanding the use of retaliation as a mechanism for remedy is that the impact can be negligible when smaller countries are retaliating against large ones. Proposals have been made either to collectivize retaliation or to allow countries to sell or trade retaliatory rights.

The panelists responded to this set of concerns, evaluating some of the proposals made to improve compliance and adding suggestions of their own. One panelist felt there was too much emphasis placed on punitive responses, suggesting that overall compliance is so positive because the parties believe it is in their interests to comply with an agreement they have already signed, and because they need to maintain a reputation for acting in good faith since they are involved in ongoing negotiations for new agreements. Every WTO member knows that other members are unlikely to be accommodating in respect of a new agreement if the member has broken the last one. Another panelist questioned how much compliance there actually was, saying that a great deal of “hidden noncompliance” could be found. The panelist specifically pointed to the practices of delaying compliance through litigation and ignoring the applicability of decisions made in particular cases. Another form of noncompliance occurred when a country removed the offending instrument of violation and replaced it with yet another instrument in violation of the *WTO Agreement*.

Everyone agreed that expanding retaliation was a poor option because it would encourage protectionism in a system trying to eliminate it. Most panelists felt that selling rights for retaliation was not a good option. Some thought it would aggravate tensions in the system, particularly as only the large countries would be willing to buy the rights. Others suggested there would be little market for retaliation rights, given that countries don’t use their option to retaliate, even when it is free. Paying for the option appears counterproductive since it would involve persuading one’s population to view protectionism positively in order to get them to pay for it. Aside from being generally destructive to trade, it can also have unfortunate internal consequences for the member adopting the retaliation. Retailers whose businesses rely on particular foreign imports, for example, may be unable to use alternative sources and could be at risk of being driven out of business entirely. Similarly, the panelists rejected a proposal to take away rights to enter into dispute settlement, arguing this would lead to more noncompliance.

Some attention was given to the question of cross-sectoral retaliation, that is, when a sector other than the one where the violation occurred is penalized. The panelists agreed that such retaliation appeared to be effective in certain cases, noting that Ecuador certainly gained the European Communities’ attention when it threatened retaliation against intellectual property rights. It was generally agreed, however, that this kind of retaliation was not desirable, since it was essentially an invitation to members to avoid their obligations.

The panelists also considered whether other options were better or worse than retaliation. Opinion regarding retroactivity was mixed. Panelists who believed the violations are largely a result of ambiguities in the rules felt it was unfair and counterproductive to impose retroactive penalties on members who were generally acting in good faith. Those who felt that a failure to comply was more willful argued that retroactive measures could be useful in making failure to comply increasingly painful for the offender. As a practical matter, some speakers noted that claimants may allege that a violation had gone on for 10, 20, even 30 years. How would the determination of time, and therefore, of the dollar amounts involved, be made? The panelists rejected proposals that the losers be made to pay for legal expenses, noting that frivolous cases were not being brought into the dispute settlement system and that governments consider carefully all the consequences, political, legal, and otherwise, before bringing forth a dispute.

The panel also discussed the issue of monetary compensation at some length. Some argued

that it is advantageous because it can be used to compensate the injured. One speaker cited the additional benefit of improving the system by turning it into a more contractual arrangement. He argued that retaliation reinforces the status quo. Monetary compensation, he suggested, is a more traditional response to breach of contract. This comment returned the speakers to a debate about whether the WTO is a contract-based or a constitution-based system.

In practical terms, monetary compensation was viewed as problematic. One problem is assessing the amount of compensation, which one speaker alleged has itself been quite arbitrary in bilateral trade agreements. One suggestion was to use a sliding scale based upon the wealth of the countries in question. The real problem, however, was that the national legislators would be forced to appropriate that money. Such appropriations raise the problem of triggering concerns about “sovereignty” and potentially diminishing support for the WTO. Certain panelists speculated that monetary compensation could lead to a form of “ambulance chasing” in which enterprising international law attorneys might encourage developing countries to lodge disputes as a money-maker. Another panelist noted, however, that monetary compensation was a better approach than retaliation and could be used to encourage compliance by adjusting the “fine” so that it rises over time. He rejected the notion that rich countries would be able to buy their way out of compliance, describing the idea of going to the US Congress every year with a rising amount as “an appalling idea.”

Many panelists offered their own suggestions on the current operation of remedies. One panelist supported treating subsidies like other violations and using the equivalent of nullification and impairment, rather than “appropriate countermeasures,” arguing the term “appropriate” leads to too much confusion. Others felt that retaliation should clearly be limited to situations where violations had an effect on trade.

One panelist proposed the notion of “contingent liberalization commitments.” The speaker suggested that countries be allowed to choose to negotiate beforehand the sectors they would liberalize, or the manner in which they would follow a particular liberalization rule, in the event they are found guilty of a violation. Even the smaller countries, he explained, could avoid being subject to retaliation, helping to determine, themselves, how a “buyout” would work. The panelist advocated that the responses should occur on a most-favored-nation basis, and that the commitment should be negotiated as part of a multilateral round. He added that a domestic lobby for compliance would also be created through these contingent commitments, in the form of the sector that is placed in the liberalization “security deposit.” He suggested this could work as an implicit form of trade negotiation, with others willing to match commitments being made. He noted that critics have said his proposal could be misused as an excuse to avoid liberalization in certain sectors, encouraging them to liberalize on the basis of contingency, rather than outright. While acknowledging this possible outcome, he asserted it is certainly more workable and realistic than the proposal that the “victim” select the sector to be liberalized by the violator. The session’s participants found the idea worth examining more closely. They were also united in their belief that any attempt to perfect enforcement and compliance should avoid foremost any result that would discourage participation in the WTO system.



Julio A. Lacarte-Muró

THE DISPUTE SETTLEMENT SYSTEM IN THE NEXT TEN YEARS

The Chair for this session was Julio A. Lacarte-Muró, former Member and Chairman of the WTO Appellate Body. The discussants were: Jane Bradley, Adjunct Professor and Deputy Director of the Institute of International Economic Law, Georgetown University Law School; Steve Charnovitz, Associate Professor, George Washington University Law School; Robert Howse, Alene & Allan F. Smith Professor of Law at the University of Michigan Law School; and David Palmeter, Senior Counsel, Sidley Austin LLP.



Jane Bradley

The session began with a discussion of the numerous factors likely to influence the dispute settlement system in the coming years, including the proliferation of bilateral and regional arrangements, the perceived legitimacy of the system, the record of compliance by members, and the results of Doha, both in terms of the development agenda and DSU review.

There was some speculation that, should Doha fail, more disputes will be brought to the system, and they will likely involve attempts to achieve through adjudication what members are trying to achieve in the current negotiations, such as the elimination of agricultural subsidies.



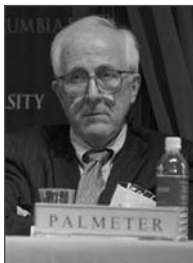
Steve Charnovitz

One panelist noted that future disputes arising out of any new agreements concluded in Doha will depend on the extent to which there are omissions and ambiguities in these agreements, unintentional or deliberate, and whether there is a reliable negotiating history that can serve as a secondary source for interpretation. The willingness of the disputants to experiment was cited as an additional factor shaping the process. Should the DSU remain essentially unchanged, it would be up to the parties involved to exercise creativity to achieve goals that were not reached in the Doha Round.



Robert Howse

A panelist noted that such creativity is apparent in the dispute involving the European Communities' challenge to the countermeasures applied by Canada and the United States in the hormones case, where the parties worked together to persuade the panel to adopt working procedures that would allow the public to view the panel proceedings via closed-circuit television. Similarly, in the Irish music dispute, which challenged US copyright law, the European Communities and the United States resorted to binding arbitration to temporarily settle the dispute with monetary compensation, rather than following the sequence of DSU procedures that relate to compliance. In the hormones-countermeasures case, the transparency was possible because Article 12.2 of the DSU permits a panel to depart from the procedures after consulting the parties to the dispute. In the Irish music case, the disputants were able to negotiate a monetary settlement because Article 25 essentially allows parties in agreement to design mutually acceptable approaches.



David Palmeter

Indeed, the panelist argued that Article 25 allows parties in agreement to structure a binding arbitration process that could include greater transparency in the proceedings, open hearings, public briefs, *amicus curiae* briefs, more or less participation by third parties and other features. While this approach may not be optimal or likely in all circumstances, it is available and could serve as a testing ground for procedural changes that the membership as a whole is not ready to adopt.

Panelists commented on the increasing complexity that is likely to emerge in coming years as a result of technological progress and growing global economic interdependence. Basic concepts of trade law will likely undergo redefinition and reinterpretation to cope with these changes. Another complicating factor is the fragmentation of international law and the interaction between the WTO rules and those of the mushrooming bilateral and regional arrangements. Although no particular economic model is imposed by the WTO treaty, one panelist pointed to the underlying assumptions about economics and market behavior and predicted that the system would pay more attention to economic reasoning in future dispute



settlement. Corporations were also considered likely to make greater use of the WTO as part of their business strategies. A panelist postulated that as the role of private parties increases, national court systems will find themselves making more frequent reference to WTO obligations.

One panelist agreed that dispute settlement proceedings had displayed a great deal of ingenuity and creativity, but expressed concern that the rules and exceptions might be interpreted in a way that would encroach upon the members' policy space. He gave as an example the provisions of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which he hoped would be interpreted to permit national experimentation with safeguarding intellectual property rights. He also speculated that, as the dispute settlement mechanism matures, the judicial and adjudicative part of the WTO may defer more to the WTO's political organs.

The panelists were in general agreement that the growing complexity and globalization of world trade necessitates a greater attention to transparency in the operation of panels and the Appellate Body. A variety of recommendations to further transparency were offered. Panelists called for greater attention to *amicus curiae* briefs; suggested that more documents, particularly government briefs, be posted on the WTO website; and asked that the background and qualifications of panelists be released when a panel is appointed. Additional suggestions included a webcast of the monthly surveillance process, a WTO parliamentary assembly to help legislatures understand the need for compliance with DSB rulings, and a greater use of conferences such as this one to promote understanding of WTO law, particularly among national judges. Should the legislative arm of the WTO fail to promote a new plan for world trade, one panelist argued that it is likely the dispute settlement mechanism will need to increase the professionalism of panels by appointing more judges or providing professional development courses on issues such as fact-finding.

It was also suggested that the need for remand would become more apparent. The dispute settlement system lacks a remand procedure; there is no process by which the Appellate Body can return a case to the panel with instructions as to what proceedings should then follow. Instead, the Appellate Body has used a process called "completing the analysis," in which, if the record permits, the Appellate Body decides the issue itself. Juridically, the panelist argued, this is not an ideal solution because the Appellate Body decides the issue for the first time and there is no possibility of appealing that decision.

THE DOHA ROUND

Professor Charles W. Calomiris, Henry Kaufman Professor of Financial Institutions, Columbia Business School, served as Chair for this keynote luncheon session. The keynote speaker was Dr. Ernesto Zedillo, Director of the Yale Center for the Study of Globalization, Professor of International Economics and Politics at Yale University, and former President of Mexico. Rufus Yerxa, Deputy Director-General of the WTO, served as the session's discussant.

This discussion traced the path followed before the Doha Round was launched, recounting a certain initial hesitation by WTO members to endorse the Doha Development Agenda. This reluctance was traced to the traditional, purely mercantilist logic brought to past rounds of multilateral negotiations. Many of the key players feared they would be forced to yield concessions larger than those they would receive in return. The keynote speaker argued that the size and diversity of the membership since the Uruguay Round should have made it clear that mercantilist logic could no longer provide sufficient force to drive the round. To persuade the members to move forward with such a task required effective leadership that was grounded in legitimacy, clarity of purpose, and the willingness to move forward unilaterally, if necessary. The tragedy of September 11, 2001, inspired the



Charles W. Calomiris



Dr. Ernesto Zedillo



Rufus Yerxa

United States to take on this role and champion the international market economy as an antidote to terror. Unfortunately, according to the keynote speaker, this leadership was not sufficient to sustain the round. It could not prevent the agenda being overloaded with requests from the members.

A number of requirements necessary to achieve success in the Doha Round were outlined. The developed economies would have to apply substantial and effective reductions in agricultural tariffs and subsidies; the United States would also need to make meaningful cuts in industrial tariffs and in tariffs on textiles and clothing. Important developing countries would also need to come to the table. According to the keynote speaker, the Doha Round's prospects appear bleak. WTO members should realize that it is in no one's interest to further undermine the existing trading system.



Giorgio Sacerdoti

In response to this somewhat pessimistic view, the case was made that the Doha Round continues to be of value and that meaningful progress can still be made in important, but less glamorous areas, such as trade facilitation, antidumping, and even fishery subsidies. Progress can also be made in reducing tariffs on industrial goods, particularly in the developing world, where 70 percent of the tariffs paid by developing countries are on exports to other developing countries. Some gains can also be made in lowering barriers to agricultural exports. The Doha Round need not be a case of all or nothing. The WTO remains the best place to address problems concerning the world's largest trade relationships – those where there are no immediate prospects for regional or bilateral agreements – including US trade relations with the European Communities, Japan, China, India, and Brazil.

Restoring faith in global rules is another challenge. Developed and developing countries, alike, fear that trade liberalization will harm their manufacturers, farmers and textile workers. Restoring faith in the WTO will entail the use of reasoned argument. Advocates should highlight the benefits to the US economy that have resulted from global integration; the benefits accruing to numerous developing economies such as Mexico, Chile, and China, through liberalization; and the fact that many competitive agricultural sectors have limited subsidies.



Ernst-Ulrich Petersmann

IMPLEMENTATION OF WTO RULINGS: THE ROLE OF COURTS AND LEGISLATURES

Giorgio Sacerdoti, Professor of Law at Bocconi University, and Member of the WTO Appellate Body, served as Chair for this session. Participants in the discussion included: Thomas J. Aquilino, Jr, Senior Judge, US Court of International Trade; George A. Bermann, Jean Monnet Professor of EU Law, and Walter Gellhorn Professor of Law, Columbia Law School; Donald McRae, Hyman Soloway Chair in Business and Trade Law, University of Ottawa; Sharyn O'Halloran, George Blumenthal Professor and Professor of Political Science and International and Public Affairs, Columbia University; and Ernst-Ulrich Petersmann, Professor of International and European Law, European University Institute.

The session started with a discussion of the two levels of implementation of WTO rulings. The first occurs at the international level, when sovereign parties agree to follow specific rules on compliance, which can include third-party adjudication when there are disputes about whether, in fact, compliance has occurred. The international level also involves dealing with countermeasures when compliance fails and maintaining proportionality when a WTO member resorts to retaliatory measures. The second level of implementation occurs at the national level.

The session explored compliance with WTO rulings in Canada, Europe, and the United States, by way of a few examples. As mentioned in previous sessions, implementation in the United States is far more difficult when the remedy lies in legislative, rather than



executive, action.

It was stressed that in the United States, the WTO agreements are not self-executing treaties. Therefore, their significance in the American legal order depends on the extent to which the WTO agreements were incorporated through the implementing statute. The implementing statute states that there is to be no private cause of action based on a violation of the WTO or its related instruments.

Discussion turned to how the WTO responds to deficient domestic implementation. The first area discussed related to the granting of a reasonable period of time for the implementation of rulings. Fifteen months is set out as a guideline in Article 21.3 of the DSU, but that period can prove longer depending upon particular circumstances. The standard statement of arbitrators in the Article 21.3 process is that implementation must occur within the shortest period possible within the legal system of the member. There is some attention paid to the way in which implementation occurs in domestic systems; arbitrators distinguish between implementation requiring legislative and administrative action, but they do not adjust the period of time simply because a member has chosen a method of implementation that is especially time consuming. Arbitrators are reluctant to accommodate the particularities of the members' judicial or political processes. It was agreed that in some sense, the arbitrators do not want to undermine the prompt compliance with WTO rulings that DSU Article 21 requires, and that this stance is justified by a longstanding principle of general international law holding that a State cannot use its domestic law as justification for failing to fulfill its international obligations. In another sense, however, by failing to acknowledge the idiosyncrasies of members' domestic processes, the WTO mirrors the lack of respect that national systems are according WTO authority. A panelist speculated that a basic incompatibility was at work here: "Domestic legislatures are not designed to rubber stamp decisions that are made elsewhere. They are designed to reflect diverse points of view, diverse approaches and then decide on their own course of action, but of course, WTO rulings leave no course open other than implementation, other than removal of the offending measure and it seems pointless to go through a complicated legislative process if, in fact, all that has to happen is a predetermined outcome already decided by the WTO." This would seem to lead to the conclusion that some form of automatic effect is required, or that the sole remedy approach be modified. It was agreed that a valuable suggestion had been made in the session on remedies regarding "contingent liberalization commitments" and that this should be explored.

Panelists examined in further detail some of the suggested reforms relating to implementation, specifically with regard to their likely impact in the United States, including: increased cost of noncompliance; executive delegation; fast-tracking WTO decisions; granting courts unilateral ability to enforce WTO rulings *ex post*; and lowering the cost of compliance, for example, through a safeguard mechanism to reduce initial court costs. It was emphasized that tougher rules on implementation would not necessarily increase compliance, although they would likely lead to increased settlement rates. There are also distinct limits to what can be done to try to enforce perfect compliance; otherwise members may choose to exit the system.

It was further ventured that legal legitimacy is but one aspect of the argument for implementing WTO law and rulings. WTO obligations require all branches of government to comply with WTO law. A panelist maintained that one could argue that the *WTO Agreement* is the most important, worldwide transformation agreement concluded over the past 50 years. Provisions in the WTO protocol for the accession of China, requiring China to introduce the rule of law, establish independent courts, and promote private rights are an example of this. WTO law and the dispute settlement rulings can make a claim not only to legal legitimacy, but to democratic legitimacy. There is power in recognizing that non-economic values may be far more important than trade values.



Grant Aldonas

MAJOR THEMES/CONCLUSIONS FROM THE CONFERENCE AND REFLECTIONS ON THE WTO IN THE CONTEXT OF ECONOMIC GLOBALIZATION

Grant Aldonas, former Under Secretary of Commerce, steered the concluding discussion by panelists: Paul Blustein, Staff Writer for the Washington Post; John H. Jackson, Professor of Law, Georgetown University Law Center; Seiichi Kondo, Ambassador for International Trade and Economy, Ministry of Foreign Affairs, Japan; Keith Rockwell, Director of Information and Media Relations, WTO; and Martin Wolf, Associate Editor and chief economics commentator of the Financial Times.



Paul Blustein

The final session served as an opportunity to reflect upon some of the underlying themes of the conference, with an eye to identifying the challenges of economic globalization. Panelists noted that the last 25 years have witnessed an incredible global push toward market economies and a transformation in the views on economic policy.

The scope of the WTO has broadened beyond manufacturing and includes intellectual property, services, and to some extent, even agriculture. The number of WTO members has risen to 149, all locked in a single undertaking. A panelist marveled at the leap of faith it required for nation States to bind themselves to the WTO and accept its panel process and the judgments of the Appellate Body. Because of that leap of faith, we now have a formal body “that faces cases and controversies, that must dispose of them and has the responsibility to dispose of them, and is issuing rulings regularly, not only within the framework of world trade law, but more generally in the framework of the public international law that provides the decisional backdrop, the context and the rules that drive much of the decision.” One panelist remarked that another measure of the success of the dispute settlement system is the fact that the US Congress, while it may have responded slowly, has indeed responded, and that this has been true for most members. No government has “stiffed the WTO for any lengthy period of time.”



Seiichi Kondo

Moreover, the WTO has penetrated deeply into domestic politics – the panelists pointed notably to the rules on sanitary and phytosanitary measures, intellectual property rights, and services. The WTO today is also more transparent and more responsive to civil society than its predecessor, the GATT.



Keith Rockwell

Not content to rest on the laurels of the WTO's successes, the panelists then addressed themselves to a number of concerns. Foremost among them was the fear that the Doha Round would fail. Some panelists saw signs for hope. At a minimum, there is the fact that earlier negotiating rounds were completed; negotiators may be galvanized by the threat of being known as the trade negotiators who finally ended a major round in total failure. Others evoked more positive reasons for optimism.

One panelist emphasized the opportunity cost of losing the truly substantive negotiations taking place. He objected to the characterization of this round as “Doha Light,” and the implication that intrinsically what is being offered in this round pales when compared with the achievements of earlier rounds, particularly the Uruguay Round. He reminded listeners that negotiators agreed from the very beginning of the round that trade-distorting domestic support will be cut by 20 percent. Such a cut is equal to the total reductions agreed to under the Uruguay Round. Export subsidies for agriculture will be gone by 2013. High and escalating tariffs will be cut by the widest margins, another achievement the Uruguay Round was unable to accomplish, and there is scope for deep reductions in the future. Great progress has been made in services as well. He asserted that it has been beneficial to confine talk on the major portions of the services trading market to 40 countries, rather than the entire membership – an achievement of the Hong Kong ministerial meetings, he said, that has been given little credit.



Martin Wolf

This panelist also disagreed with claims that have disparaged the developmental

component of the round. The gains in participation by the developing countries alone are notable. Cotton, he argues, was not on the Doha mandate until the West African countries fought to get it included. Moreover, the cotton initiative negotiated in Hong Kong reflects an agreement to eliminate export subsidies by the end of 2006 and to allow the duty-free, quota-free import of cotton from the least-developed countries. There is also a pledge to cut trade-distorting domestic support for cotton by a margin greater than the overall cut for agriculture and to implement this more rapidly. These are not negligible gains, the panelist said, and as the ministerial report says, they are only a starting point. The panelist concluded that with all the effort expended by negotiators to make these gains, he doubted they would be willing to “see all of these chips on the table swept into Lake Geneva.”

Discussants also noted that the negotiation process is now running on two tracks, which some saw as a sign for hope. While small groups of ministers from important countries are involved in negotiations regarding numbers for tariff-cutting formulas, for thresholds in the tiered formula for reducing agricultural tariffs, and the like, in Geneva, the negotiators are simultaneously engaged in more definitional, technical discussions on issues such as food aid and green box disciplines. In the past, the latter kinds of issues were put on hold while everyone waited to see what happened politically.

Others felt much could still be done to get the negotiations back on track. They called for a change in mindset, for negotiators to adopt a more accommodating manner, to engage less in open criticism of their counterparts and refrain from encouraging polarization in the negotiations, to avoid drawing lines in the sand, and, finally, to turn away from excessively mercantilist goals and assume the responsibility of representing the interests of an international community.

The role of the WTO Director-General was examined as well. His constructive role in reshaping the objectives of the Hong Kong ministerial meetings was emphasized, and it was argued that he should continue to press the members to reach current deadlines.

Should Doha fail, however, what would be the result? The greatest concern lay in a possible acceleration of the growth of already problematic and proliferating bilateral and regional arrangements. This proliferation is no longer simply an issue of trade diversion; it is a systemic problem. The problems of the system are increasing day by day. It is destroying the most-favored-nation concept, which panelists credited as the central principle of multilateralism. Special interests are turning more often to bilaterals, because they offer the opportunity to force developing countries to agree to their demands. Bilaterals do not offer the support of collective bargaining that can be found in multilateral negotiation, which leaves developing countries vulnerable. Many of the poorest countries, too, will simply be left out of the system entirely if bilaterals become the rule. Hope, for one panelist, lay in the assertion that regionalism was ultimately unsustainable. He calculated that 149 countries could have as many as 10,000 bilateral agreements, never mind regional arrangements. As these agreements accumulate, policy makers may once again see the value of a simpler, more coherent system of negotiation in the form of the WTO.

In addition to the mushrooming of preferential arrangements, discussants were concerned that a collapse of the Doha negotiations could weaken the authority and legitimacy of the WTO itself. Without successful liberalization, some feared the system would go into reverse. The possible specter of regional blocs was raised, as was a potential surge in protectionist sentiments. Dispute settlement would certainly increase as countries, in lieu of progress on the legislative front, resort more to the judiciary. In particular, panelists predicted, disputes over agricultural subsidies would appear with greater frequency. This pressure on the dispute settlement system could lead to further delays and even a systemic loss of legitimacy.

Could multilateralism fail altogether? One panelist ventured that three powerful forces

would continue to drive liberalism onward. The first force is the lack of an intellectually credible alternative to engagement in the world market. The second is the undeniably high costs of protectionism. The third is the role multinational corporations have played in the transformation of trade policy. He hoped that the newly liberalized economies, particularly China and India, would recognize their profound interests in sustaining the liberalizations in which they have taken part and exercise a greater leadership role.

Another panelist agreed that globalization now means that the nation State no longer has the power to achieve by itself what it once could decades ago, a situation that implies the need for an international institutional structure. If this institution is to remain the WTO, he argued, then whatever the outcome in Doha, a reexamination of the WTO's underlying principles will be required – particularly the issues of sovereignty, consensus-based decision-making, and being a member-driven organization.

The WTO at Ten: Governance, Dispute Settlement, and Developing Countries left its participants in agreement that conferences such as this play an important role in promoting a better understanding of the WTO agreements and the operation of the institution itself. Many praised the conference as an excellent forum for exploration of the strengths and weaknesses in WTO processes and structures. The debate generated by conferences such as this is critical to ensuring that the WTO remains true to its goal of fostering cooperation and growth among its members.

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