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WTO APPELLATE BODY ROUNDTABLE*

Sponsored by Baker & Hostetler LLP

Moderator: Steve Charnovitz, George Washington University Law School
Commentators: John H. Jackson, Georgetown University Law Center; Cherie O. Taylor, South Texas College of Law
Former WTO Appellate Body Members: James Bacchus, Greenberg Traurig; Julio Lacarte-Muró, Ambassador of Uruguay; Mitsuo Matsushita, Seikei University College of Law, Tokyo
Rapporteur: Michael Snarr, Baker & Hostetler LLP

STEVE CHARNOVITZ:

Welcome to the World Trade Organization Appellate Body Roundtable. The Society would like to thank the sponsor of this panel, Baker & Hostetler LLP. We are honored to have on our roundtable today three members of the original WTO Appellate Body as composed in 1995. Let me acknowledge the Honorable Jim Bacchus, Professor Mitsuo Matsushita, and Ambassador Julio Lacarte. Two of the original members of the panel, Claus Ehlerman and Florentino Feliciano, are members of the Appellate Body who had planned on being here and learned recently that they would not be able to travel to the United States. Also participating on our roundtable this morning are two scholars of WTO law, Professor John Jackson and Professor Cherie Taylor. They will be posing questions to the Appellate Body members.

Two hundred and eighteen years ago in the *Federalist Papers*, No. 22, Alexander Hamilton explained the need for a judicial power at the national level. Hamilton wrote: "Laws are a dead letter without courts to expound and define their true meaning and operation."[1] In my view, the same principle may operate at the international level. In the first decade of the WTO, we have seen how panels, and especially the Appellate Body, have sought to clarify the meaning of provisions in the WTO Agreement and to infuse them with vitality.

Today's roundtable will give us a window into how the first Appellate Body conceived its unique role and accomplished its task. Like many fields of law, trade law has its jargon and acronyms. Let me just define one that might be helpful. The DSU stands for the Dispute Settlement Understanding.

JAMES BACCHUS:

I always wondered what that means. Why didn't you tell me that years ago?

STEVE CHARNOVITZ:

Let's start with Professor Jackson who, more than anyone else, has helped scholars, policymakers, students, and the public understand the value of the world trading system and its complexities.

* This is a shortened version of the transcript of the roundtable, reduced to the space allotted for publication. The full transcript is posted at <http://www.law.georgetown.edu/iiel>.

[1] THE FEDERALIST No. 22 (Alexander Hamilton).

JOHN H. JACKSON:

It is indeed a privilege to be here with these Appellate Body members who are all very close friends of mine, and I enjoy seeing them. My shared task this morning is not really to do the talking myself, but to provoke and encourage the discussion.

I am going to propose three questions at the outset. They are common, but tough, questions, with a somewhat broad context, and I leave it up to each of you as to how you may want to handle them. I use them as sort of a springboard to get you to give us your reflections after having been part of this very exciting development in international law. Many commentators feel that the dispute settlement process of the WTO is today the most significant, profound, and impact-laden of all the international tribunal processes that exist. Because we do have a complete acceptance, a consent acceptance, for all disputes that involve the so-called covered agreements of the WTO, and that includes a 26,000 page treaty at the end of the Uruguay Round done in Marrakech in April 1994. That acceptance also includes an appeals process that is virtually unique, certainly unique in its breadth of coverage of all issues of law, for instance, and at the end of the line we find a binding international law obligation. This is something seldom found around the world. Of course, that very aspect has presented something of a power problem within the organization because the dispute settlement system is deemed powerful enough so that some diplomats are a bit frightened by it. So there is a certain backlash possibility and various other potential complexities.

Having said that, let me pose three questions to our judges. Of course, they can't reveal some of the inner secrets that would be most interesting to us, but nevertheless, I hope they can be reasonably candid and give us a flavor of the intricacies so that we can also have some exchange back and forth after the three opine.

The first question is: What do you think is the major legacy of the WTO dispute settlement system as of now, after ten years of practice, and going forward, and particularly the legacy of your terms (the first six years or in some cases eight years, of the process)?

The second question is: It has been observed that the Appellate Body, particularly in those early years (although it may still be true today), has been extremely textual in its operation. It has tried to follow the text of the treaty language very strictly, and it is virtually exclusively treaty language that we are talking about. That raises a related issue: the interaction of international law generally, and customary international law, although we might leave that a little bit until later because mostly we are talking here about treaty law. The Appellate Body has been very textually oriented, resonating off of the language of the Vienna Convention on the Law of Treaties,[2] which is not treaty-applicable in these cases, for the technical reasons many of you are familiar with, but is deemed to represent customary international law on the subject. So the question is: Why were you as textual as you were, and do you think that is particularly relevant for the first years of a new system but might change over time? Do you think this will in fact change and be more relaxed in terms of textualism?

The final question is quite politically laden, but it is one that has been raised in many contexts. Although, I must say, most of the time this question is raised in the city that we are now sitting in, Washington, D.C., and almost no place else. Has the Appellate Body directed the jurisprudence of the WTO in a way that could be reasonably argued to be overreaching, or going beyond its mandate and extending beyond the parameters of its control?

[2] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 ILM 679.

With those three questions, rather simple in expression but obviously designed to open up many doors, let us turn to each of the judges.

JULIO LACARTE:

What is the major legacy of our term on the Appellate Body? Well, it is a difficult question to answer. Perhaps I might recall that the *New York Times* once published an article which made me happy indeed.[3] The writer referred to the WTO dispute system; he said that the process had proved to be "impartial and unflinching." That's certainly how it was, and I'm quite certain it's going on in the same way with our successors on the Appellate Body. I don't think any one of us concerned himself as to what would be the public opinion repercussions of what our rulings could lead to. We just went ahead and ruled in terms of our own view, of our own earnest and hopefully very honest approach and analysis of the subject matter that was submitted to us. If that goes on, and I know it is going on with the present Appellate Body, that in itself is a great legacy because if you don't have impartiality, if you don't have courage, if you don't have dedication to the duty, then you cannot have a successful Appellate Body.

Now have we been extremely textual? I would say no, because the WTO's provisions are binding. They are binding, and the 492 pages of provisions that Steve Charnovitz was waving at you a minute ago, which I am now waving at you, are 492 pages of hard law. Who drafted that law? It was the governments. Who approved these 492 pages? It was national parliaments. So this is the will of the countries that the Appellate Body is dealing with. This is what the countries and the governments wanted. Then this is what they are going to get from the Appellate Body. The Appellate Body, in my view, is not there to decide what governments should have said or might have approved. The Appellate Body is there to determine what governments did do, did approve, and did want to put into application.

Number three: a politically loaded question. Well, we didn't expect anything else from John. Has the Appellate Body gone beyond its mandate, has it overreached? My answer is no. Why has it not done so? The Appellate Body has no remand powers. It is obliged to rule on whatever is thrown at it. Whatever claim is launched on appeal with the Appellate Body, the Appellate Body is obliged to respond. That immediately determines a certain scope of the Appellate Body's activity. It must respond.

Has it gone beyond its mandate? I think not, because it cannot ask the Dispute Settlement Body (DSB) what a particular provision means. As you all are well aware, since you all are participants in this deadly art of drafting, the negotiators will sometimes fall back on what's called "constructive vagueness, constructive ambiguity" to pull together different positions when you have to come to a final deal at the end of the conference, and you have to do something, and you know your text is not very clear, but it's the only text that everybody would approve, so in the end you take it. But then, that is that kind of text that the Appellate Body eventually has to interpret. There are some examples of creative ambiguity in the 492 pages which I also keep waving at you. But the Appellate Body can't go back to the members and say "Oh, well, you're being ambiguous, please tell me what you mean."

Because, as you well know, in ten years the membership of the WTO has never even made a gesture towards interpreting a provision, let alone approved an interpretation, and let alone made an amendment to the WTO Agreements. The texts are there in hard granite.

[3] Michael M. Weinstein, *Should Clinton Embrace the China Trade Deal? Some Say Yes*, N.Y. TIMES, Sept. 9, 1999, at C2.

No comma has been altered since the first day, so there is no leeway there. The Appellate Body has to rule on what is thrown at it. And because it has to rule on what is raised on appeal, it rules. It has no choice.

JAMES BACCHUS:

Let me add a few words of thanks to those who organized this event, and a few words also about some others who are here and not here. John was kind enough to mention the fact that two of the founding members of the Appellate Body have gone on, and they I think very much deserve to be mentioned, Christopher Beeby of New Zealand and Said El-Naggar of Egypt, who were great jurists, great thinkers, and great champions and defenders of freedom as well as trade. Also, we have here today two real live members of the Appellate Body who are not has-beens like those of us up here: Georges Abi-Saab, who, in the fifty-fifth year of his consideration of international law, has discovered the virtues of the antidumping agreement, and Merit Janow, who, like me, is an American and was kind enough to allow her name to be submitted in nomination a year or so ago.

I agree with Julio, which is not unusual. He sat at my right side for six years kicking me under the table to make certain that I agreed with him, and I ordinarily do. Mitsuo sometimes goes along with us. Building on what he said, I think it could be argued—I would not agree with this—but it could be argued that the system is overreaching. It could be argued that the members, in bringing disputes, are sometimes overreaching. I would certainly not argue for the infallibility of the Appellate Body. Like all human institutions, it is surely fallible, but I don't believe the Appellate Body has engaged in overreaching. When one considers the constraints facing the Appellate Body, this becomes all the more clear.

There is an automatic right to the establishment of a panel by any member. Ask any member of the WTO whether there was even one other member who agreed with India that that drug case should have been brought against Europe.[4] Fortunately, I got out of Geneva before they had to litigate that case. But India had an absolute right to litigate that case. India alone under the Dispute Settlement Understanding was free to decide whether it was fruitful to bring that case. And then, of course, there is an automatic right of appeal. I often hear my former colleagues in the House and some in the Senate saying, "Why didn't the Appellate Body just turn down this case? Why did they accept this appeal?" Julio has explained that. The Appellate Body has no discretion not to accept an appeal. There is an automatic right of appeal not only by the prevailing party at a panel level, but also by any other party. The parties themselves choose the legal issues that are raised on appeal. The Appellate Body doesn't choose those issues.

Frequently, I have said, "Well, the Americans had a good claim here—why didn't they bring it?" But I am not free to say that or India or the European Union or any of the others. They make their own decisions about what issues they want to raise on appeal and then when those issues are raised under Article 17 of the DSU.[5] Under that provision, the Appellate Body is required—"shall address"—every legal issue that is raised on appeal. I have heard one or two law professors argue that the Appellate Body, despite this clear language, is not

[4] WTO Appellate Body Report on European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, AB-2004-1, WTO/DS246/AB/R (Apr. 7, 2004).

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 17, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404, 417–19 (GATT Secretariat ed., 1994), 33 ILM 114, 123–24.

required to address those issues. But I do not know of any member of the WTO that feels that way. If the European Union or Japan or the United States raised a legal issue on appeal and the Appellate Body refused to rule on it, I think you would hear about that in the DSB meeting afterwards, and rightfully so.

Now, in terms of the textual approach, as Julio says, it is mandated in that book. The Appellate Body is instructed by the members of the WTO to use the customary rules for interpretation of public international law and this is a textual approach, as you all know. Consider the other ways in which jurists around the world interpret treaties. The other approach that can be used is a teleological approach—please don't tell them in the Fifteenth Congressional District of Florida that I know that word. But in plain English, the teleological approach is one in which the juror says, "Well, this is what I think the treaty should mean." So it is hard for me to see how the Appellate Body could be accused of being too textual, and at the same time imposing its own views on the treaty, and yet that is what often happens. Does this approach have continuing relevance? You bet it does. And I think it does, in part, because of some of the other constraints facing the Appellate Body. I have heard some suggest that there ought to be more reliance on the negotiating history, and I see those who have actually been trade negotiators and argued WTO cases in the audience smiling, because we all know there is no negotiating history. There certainly is nothing that rises to the level of what would be considered preparatory work under Article 32 of the Vienna Convention.[6] In the absence of negotiating history, you have to do the best you can to discern what the words mean in the text in their context and in light of the object and purpose of words in the treaty.

Now beyond that, I would try to ask and answer John's third question, and I think it is a very important one, and that is what is the major legacy of the system. I think the major legacy of the first decade of WTO dispute settlement is twofold. First of all, in establishing an institution that can uphold the rules of world trade, we have furthered the cause of lowering barriers to trade in the world and maintaining security, predictability, and stability in the world trading system that has been established for those countries that are members of the WTO. This is valuable in itself because of the connections between trade and freedom and trade and prosperity in the world. But beyond that, a second legacy, and the other reason why I chose to spend most of the past decade doing this, is because by establishing that there can be such a thing as the rule of law in trade, we have established an example of what the international rule of law can be more broadly. I happen to believe in the international rule of law, not only in trade, but in other areas of common global concern beyond trade, and those are the reasons why I chose to serve for eight years on the Appellate Body.

MITSUO MATSUSHITA:

Thank you very much. Jim Bacchus wrote the book entitled *Trade and Freedom*,[7] in which he has seven chapters on the former members of the Appellate Body, including myself. In the chapter in which he describes me he says that every time when I spoke in a conference, I would say "I agree with everything you say, but ... ."

[6] Vienna Convention, *supra* note 2, art. 32., 1555 U.N.T.S. at 340, 8 ILM at 692.

[7] JAMES BACCHUS, TRADE AND FREEDOM (2004).

JAMES BACCHUS:

This is why we let him go last.

MITSUO MATSUSHITA:

So I'm going to say that I agree with everything that Jim and Julio said, but ... a couple of comments. About the legacy that John Jackson raised, it seems to me that there is a fundamental difference between the trading system before the Uruguay Round and after the Uruguay Round. Before the Uruguay Round, there was a diplomacy-oriented or power-oriented international trading system, as exemplified by the voluntary export restraints that were common in the 1980s and also the unilateral application of Section 301 of the U.S. Trade Act of 1974.[8] But all of that changed dramatically after the WTO came into force. This means that the WTO was successful in establishing a rule-oriented rather than power-oriented international trading system. I think our Appellate Body has played a very important role in establishing this new trading system. That's a very brief comment about the legacy issue.

Another comment is about the second question, that is, the textualism of the Appellate Body. A question is whether that is a predominant feature of Appellate Body decisions. I think it is. But I would like to mention that, in some cases, the Appellate Body interpreted the text liberally. For example, I recall the Canada *Aircraft* case, where the Appellate Body held that the term *should* in Article 13 of DSU should be interpreted as "shall."[9] So that raises an interesting question of when *should* ought to be interpreted as "should" and when it ought to be interpreted as "shall." This case presents an example of flexibility of interpretation by the Appellate Body.

But by and large, I agree that there is a strong adherence to texts in the sense of grammatical analysis. As my colleagues already said, adherence to text is mandated by the DSU and the Marrakech Agreement. The text is something that reflects the content of international negotiations, and so the Appellate Body needs to abide by the text. I don't think there is anything wrong with textualism as such. However, I would recommend that the Appellate Body keep textualism and interpret the text according to Vienna Convention Article 31.[10] But when necessary or possible, the Appellate Body should add some sort of economic context or economic foundation or a policy explanation so that rulings are more easily understood by non-lawyers. So for example, in a case like the Chilean *Price Band* system,[11] I think that some of the economic rationales as to why this textual approach is justified would have made the ruling of the Appellate Body more persuasive to a general audience.

One other point I want to make is that there is continuity between the law and policy. Of course, the Appellate Body does not interpret the texts according to policy. The Appellate Body interprets provisions of the WTO Agreement according to legal principle. But as one goes higher in the ladder in the judicial hierarchy, policy issues become more important. For example, in the *Shrimp-Turtle* case, the Appellate Body reversed a part of the panel's

[8] Trade Act of 1974 § 301, 19 USCS § 2411 (2005).

[9] WTO Appellate Body Report on Canada—Measures Affecting the Export of Civilian Aircraft, AB-1999-2, WT/DS70/AB/R at ¶ 187 (Aug. 2, 1999).

[10] Vienna Convention, *supra* note 2, art. 31, 1155 U.N.T.S. at 340, 8 ILM at 691–92.

[11] WTO Appellate Body Report on Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products, AB-2002-2, WT/DS207/AB/R (Sept. 23, 2002).

ruling with regard to GATT Article XX.[12] The panel said that the U.S. measure was contrary to the chapeau of Article XX and so it was not necessary to examine whether the measure fit under Article XX(g). The Appellate Body reversed this ruling, and said in effect, "No, it's not the right way to do it." The Appellate Body said that one has to start with Article XX(g) and then move up to the chapeau later. This ruling is not only because of grammar and logic. There is some policy consideration behind it. The environmental issue is so important that it has to be recognized within the framework of GATT Article XX. This is a mixture of legal interpretation and policy consideration. I think it is not accurate to say that our Appellate Body has just been doing textual interpretation only.

Now the question is whether the Appellate Body has done something which is beyond its competence. I don't think so. Textualism itself is a way to keep the Appellate Body within the area that has been assigned to it. Generally speaking, the Appellate Body holdings have not gone beyond the competence of the Appellate Body. My recommendation is similar to the one in the Sutherland Report that was published recently.[13] It recommends that there should be some kind of group in the WTO to review important Appellate Body holdings occasionally and make some recommendations as to the right way of interpretation. What this proposal is getting at is that in WTO dispute settlement, there are panels and the Appellate Body, and then the report is adopted by reverse consensus. So this is automatic adoption. In national governments, there is a Supreme Court and also there is the legislature. If the Supreme Court decision is unacceptable for legal or political reasons, the legislature may be able to adopt a new law or to reverse it. In the WTO context, the legislature is the ministerial conference. Yet it is not operating so well. Therefore, checks and balances are lacking. This is a reason why some people criticize the WTO's dispute settlement system. On the other hand, I wouldn't create a system where the political power is overreaching and reversing the Appellate Body decisions easily. So a soft approach is necessary to incorporate some kind of checks and balances into the system.

CHERIE O. TAYLOR:

Unlike Professor Jackson, I haven't known all of these wonderful Appellate Body members for years. I had the experience of all of us who read all the cases and go, "I'd so love to get inside their minds and understand why they have done what they have done with the institution." So I actually drafted thirty questions and came down to a shorter list that I did share with the people on the panel. So, first, questions about how the Appellate Body has operated as an institution. The Appellate Body has developed this "exchange of views" procedure and it's actually in the working procedures in Rule 4 labeled "Collegiality." Has this procedure aided in serving the DSU goals of providing security and predictability in dispute resolution? With one exception, a concurrence, all of the WTO Appellate Body decisions have been consensus decisions. How was the Appellate Body able to do that, and was the exchange of views procedure responsible for part of that?

Second, was the fact that the first Appellate Body members, a good number of them, were not trade law experts but generalists a plus in how the Appellate Body operated? What values

[12] General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, 262–644 [hereinafter GATT].

[13] PETER SUTHERLAND ET AL., THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM, REPORT BY THE CONSULTATIVE BOARD TO THE DIRECTOR-GENERAL SUPACHAI PANITCHPAKDI (2004), *available at* <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf>.

and/or skills were brought to the Appellate Body from different legal traditions of its members, and did those values and skills impact the decision and the process of the Appellate Body?

JAMES BACCHUS:

Those are important institutional questions, and it's important to understand that from the perspective of the first members of the Appellate Body, and I think also from the perspective of the current members of the Appellate Body, the principle task of the Appellate Body is in institution building. Not institution building of the Appellate Body per se, or in isolation, but of the overall institution of the World Trade Organization so that it can serve five billion people in the world, and what Professor Taylor has mentioned are two key elements of that. First is the exchange of views, collegiality. I think it is important to say for the record that the Appellate Body members did not invent the concept of collegiality, although it is reflected in the rules of working procedure and appeals. This was the invention of the members of the WTO in 1995, and when they began to look closely at what they had created, they realized that they had created the Appellate Body as an institutional check to help ensure consistency in legal rulings and thereby provide for security and predictability in the trading system.

But they had also provided that three of the seven members of the Appellate Body would sit as a division in any particular appeal and make the decision in that appeal. So at the urging of the members of the WTO, the Appellate Body members, in crafting our working procedures, created the concept of collegiality. This means an exchange of views of all of the seven members in any given case. We have never been too forthcoming about precisely how we do this beyond what's set out in the rules, so I won't be too forthcoming today. There is an exchange of views in every case; every member of the Appellate Body participates in this exchange of views. Every member prepares for every case.

Second, in forging this consensus, I think the fact that so many of the members of the Appellate Body have been, in John Jackson's rightful words, generalists and not narrow trade experts has been extraordinarily helpful. I was privileged to sit with a dozen different colleagues who came from all parts of the world and from all kinds of breadth of experience. This helped us in countless ways along the way. Here I think it is important for those out in the world to know that whatever the failings of the Appellate Body, those failings are not caused by the fact that members of the Appellate Body are narrow-minded trade gurus who wear blinders and thus cannot see any values other than trade.

This is not true of the members of the WTO, it's not true of the WTO Agreement, and it's certainly not true of the members of the Appellate Body. Of the fourteen people who have sat on the Appellate Body, I think probably less than half have been primarily trade people or had any particular experience in trade when they went on the Appellate Body. Certainly Julio did, he wrote the GATT before I was born. Mitsuo certainly did. I dabbled in trade along the way, but others have come from completely different backgrounds, and they brought a wealth of understanding and experience there as well. So I think these things have contributed to the consensus and contributed to the credibility of the institution.

And lest I miss the opportunity today, let me get on my hobby-horse and mention something that is of vital importance in my view in terms of improving the trading system. The reasons why all of you may not know this is because you have never had the opportunity to see the Appellate Body work. Indeed, a decade after the establishment of the Appellate Body, it is a fact that most of the members of the WTO, the delegates in Geneva from the countries

that are members of the WTO, have never even once seen the Appellate Body at work. I worked for all of these countries for eight years, and most of the people for whom I worked never saw me do my job. That's because only parties and third parties can get into these oral hearings. So, I have a very strong view that we need to open up the panel proceedings and the oral hearings of the Appellate Body to the view of the press and the view of the public and the view of the world, and especially to the view of the members of the WTO. For eight years I was sworn to uphold the rules as they are, and I did so. I kept the doors closed. It was not my place to say what the rules should be. But the very first speech I gave after I left the WTO was one in which I said we need to open the doors.

The members of the WTO are being short-sighted in not taking the advice of the United States of America and moving toward more transparency in the trading system. If you open the doors, yes, you might have one or two people in turtle costumes show up on the first day, but they would be gone by lunchtime. It is a tedious, boring, exhausting process, and if the world saw it they would be bored. But they would also be reassured because it is also an objective, thorough, and fair process in which jurists consider every argument that's made, however silly it may be, at considerable length.

JULIO LACARTE:

At the Appellate Body, we came down to this formula of consensus and the explanation, the secret for that, is unending toil, unending patience, unending tolerance, and unending inventiveness to work out the right formula within the mandate that one has. That is one thing I did want to stress, and I do so at this moment. As to the different origins of the members of the original Appellate Body, Jim has touched on the fact that I had previous GATT experience. I had been already twice a permanent delegate to GATT, so I had a long experience in GATT. And I had thought, mistakenly, that I would have some kind of advantage over my other colleagues because of my past background. There was nothing of the sort. Surprisingly to me, from the very first moment I found that there was no aspect of any complaint or any appeal that came to the Appellate Body that all my colleagues were not able to deal with in a completely successful way, and very often, I'm sorry to say, even better than I did.

CHERIE O. TAYLOR:

I wanted to bring up some questions of interpretation. The DSU requires compulsory adjudication but doesn't provide remand authority from the Appellate Body to the panels. The Appellate Body has adopted the "completing the analysis" approach to deal with that. Has that resolved all the issues? What are the pros and cons of establishing remand authority? How has the Appellate Body sought to improve fact finding by panels? Is anything more needed?

The Appellate Body and panel reports have been characterized by the Sutherland Report as making "elaborate use of precedent." Has the availability of Appellate Body review changed the concept of precedent in WTO dispute resolution?

Finally, how would you characterize the relationship between general international law and WTO law? For example, you can see that the Appellate Body has cited International Court of Justice cases (in eight reports) and Permanent Court of International Justice cases (in six reports), and member states have also cited those cases in their presentations. Why are those cases relevant to WTO law?

MITSUO MATSUSHITA:

Thank you, those are very difficult questions and I'm not sure how well I can answer those. Let me just take maybe two of your questions.

One is whether the Appellate Body should have remand power or not. I think it is better to have it than not to have it, but my sense is that the lack of remand power has not really caused much problem so far. I just wonder how pressing this issue really is. As I mentioned, for the sake of completeness of the legal system, of course, it's better to have a remand power. All I am saying is that this is probably not a priority issue in reforming dispute settlement process. In connection with it, in order to have remand power, one needs to improve the panel system also. After a panel comes up with its finding, the panel is dissolved. If an appeal is taken to the Appellate Body and if the Appellate Body wants to remand the case, the question is "to where?" The panel may be reconvened, but there is no institutional guarantee that the same panelists are going to serve again. If they say they will not serve again, then what is going to happen? So I think there is some institutional problem there. If you have a standing panel or something of this nature, then I think this type of remand power would work better. Again, this is something that the Sutherland Report recommends.

I want to respond to one other part of your question you posed: the relationship between general international law and WTO law. This is a very difficult question, but I think it's going to be a very important question in the future, especially in things like environmental protection and food safety. In food safety, there is the Cartagena Protocol,[14] which contains the "precautionary principle." Nevertheless, the precautionary principle is not well recognized in WTO law. The SPS Agreement contains the precautionary principle only in a limited way. It is easy to say that the WTO Appellate Body and panels are obligated to interpret only the WTO agreements and not other international agreements. On the other hand, the Cartagena Protocol is signed by a great number of nations. It has its own legitimacy. This is true with the Kyoto Protocol on climate change.[15] So the question is whether the WTO can ignore them so easily. Probably right now, one will have to say that the panels and the Appellate Body cannot apply the Cartagena and Kyoto Protocols if these would de facto overrule WTO agreements. However, this presents a very important issue of what should be the relationship between the WTO Agreements and other international agreements which incorporate non-trade values. That probably should be resolved by negotiations. However, lawyers and judges should try to work out some sort of interpretation to strike a balance between these agreements.

JAMES BACCHUS:

Let me add a few words. In terms of the notion of precedent, there are several people out in the audience who have argued before the Appellate Body, and they have quite effectively done precisely what I am about to describe. What happens in terms of the use of previous case law in any Appellate Body oral hearing is this: a party that has the case law on its side will argue the case law. The party that does not have the case law on its side will quite rightly remind the division of the Appellate Body that there is no stare decisis in public

[14] Cartagena Protocol on Biosafety, Jan. 29, 2000, *available at* <http://www.biodiv.org/doc/legal/cartagena-protocol-en.pdf>.

[15] Kyoto Protocol to the United Nations Framework on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 ILM 22.

international law. The next week the same two parties will be reversed in a different proceeding. The party over here now has the case law on its side, and it will argue the case law, and the other party with the case law no longer on its side will quite rightly remind the Appellate Body that there is no stare decisis in public international law. Everyone goes on then and applies the case law. Furthermore, the members of the WTO expect the panels in the Appellate Body to apply to case law. Because, guess what? They want national treatment to mean, whatever it means, the same thing every day in every part of the world. That's why they have created the system, and that's what they mean by security and predictability and stability in the trading system.

As Mitsuo has pointed out, in increasing numbers of cases where trade bumps up against other considerations out there in the wider world, it's necessary to do so. *Shrimp-Turtle* is a good example of that.[16] Now, there are difficulties going forward that pose problems for the Appellate Body in future appeals. There are reasons why I am glad I am a former member of the Appellate Body. In *Shrimp-Turtle*, for example, we were relying primarily on the CITES[17] and all of the parties to that dispute including the respondent, United States of America, were parties to that agreement and they acknowledged at the outset that they were.

Not all the members of the WTO are parties to the Cartagena Protocol or the Kyoto Accord. Does this matter? I will let George, Merit, and the others figure that out. A caveat here: I do not agree with most of the criticisms that have been heard in DSB meetings about the Appellate Body relying too much on public international law. I think a lot of them are politically motivated back home, without saying more, and are obligatory and can safely be considered as political speeches, but here is one substantive point that I think is important to keep in mind.

There are a lot of people out in the world who would like to see the WTO not only enforce the WTO Agreement, but other international agreements in other areas of global concern: environment, human rights. I too would like to see many of those agreements upheld. I believe they are real law and they need a place where they can be upheld. But I fail to see how we can shoehorn that into the WTO dispute settlement system. If, as with certain intellectual property conventions, they are incorporated by reference into one of the covered agreements, the TRIPS agreement, yes. If, as with the SPS Agreement, there are standards that have been established by global standard-setting organizations such as the Codex, yes. But unless there is a clear claim that can be made on the basis of an obligation that is found under the WTO Agreement, I do not believe it can be a claim in WTO dispute settlement. This issue, I think, is going to have to be addressed in the future, and on this issue I'm perhaps a bit more conservative than some public international lawyers, but I think it's important that this consideration be kept in mind so that we can preserve the WTO dispute settlement system.

CHERIE O. TAYLOR:

I couldn't resist one last question about changes to the WTO system. Should the WTO adopt some version of "political question" doctrine?

[16] WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (Oct. 12, 1998).

[17] Convention on International Trade in Endangered Species of Wild Fauna and Flora, July 1, 1975, 27 U.S.T. 1087, 993 U.N.T.S. 243.

JAMES BACCHUS:

If I understand her question correctly, what she is asking is whether there should be some discretion given to the Appellate Body on some legal issues that are raised on appeal to simply say we shouldn't rule on this issue, it should be resolved by the members through a negotiation. That is nothing that the members really have considered doing in a broad context to my knowledge as part of DSU review. And I'm hesitant to support it, although I'm thinking about it in the context of some things that I'm writing now. I certainly identify with what Julio said, which is that legal decisions should not be made for political reasons. Furthermore, I think it would be tempting for the Appellate Body to avoid difficult issues by simply kicking them back to the members of the WTO, and this might well lead to stalemate on those issues. Many of you know our friend Claude Barfield. I agree with him on most issues relating to trade but I disagree with him on some conclusions he has reached about the dispute settlement system. He looks at the system now, and he says we have a dispute settlement system that's effective to this level. It's a very effective dispute settlement system. I would argue it could be more effective, but it's quite effective. So, therefore, we have a very effective system for clarifying existing rules. But we have a very ineffective system down here for revising those existing rules or writing new rules.

It's been difficult for the members of the WTO to reach consensus on anything else other than what comes out of dispute settlement. Claude's answer is to roll back dispute settlement to the pre-WTO days and unravel the binding nature of the dispute settlement system. I look at the same situation, and I give another answer: raise the level of the effectiveness of the ability of the WTO members to revise existing rules and to write new rules.

I have never heard one word of nationality expressed to the table in eight years on the Appellate Body. And I have never heard anything but legal arguments in dispute settlements. But once you adopt the panel report, as amended by an Appellate Body report, then politics begins again in terms of implementation.

STEVE CHARNOVITZ:

Would anyone from the audience like to ask a question?

QUESTIONS:

[Inaudible]

MITSUO MATSUSHITA:

I am going to respond to two of the questions. One is the civil law/common law issue that was raised. It seems to me that even in civil law jurisdictions—I'm from a civil law jurisdiction myself—the role of precedents is very important, and courts can hardly deviate from precedents, unless there is an overwhelming reason. Legally, civil law courts are not bound by precedents. However, I wonder whether the difference between civil law jurisdictions and common law jurisdictions regarding the role of precedent is as great as some people think. It seems to me that the WTO jurisprudence is something similar to civil law principles of statutory interpretation. Rules of interpretation incorporated in Articles 31 and 32 of the Vienna Convention are quite familiar to civil law judges.[18]

[18] Vienna Convention, *supra* note 2, arts. 31 and 32, 1153 U.N.T.S. at 340, 8 ILM at 691–92.

Now about judicial economy: The DSU says that the Appellate Body needs to address each issue that was raised. Thus, compared with panels, the Appellate Body needs to deal with every issue. So judicial economy is not a privilege of the Appellate Body, at least in theory. But as far as the practical aspect is concerned, if you have, say, twenty issues, you might deal with some important issues heavily and deal with some other issues lightly.

JOHN H. JACKSON:

I shall try very hard to exercise professorial restraint, if you will, instead of judicial restraint. But there are a couple of final things I definitely want to say. The discussion this morning is incredibly rich with some very important problems. If I were to single out one very troublesome problem, it is the relationship to general international law. I was intrigued by the comment expressed today, that you don't expect other issues—human rights, environment and so on—to be the subject of a claim, and I think that's probably right. But, of course, maybe those other subjects will affect the interpretation of the agreement. There are some other very big problems looming. For instance, how do we use "good faith" in some of these contexts, because good faith is a huge bottle into which you can pour an awful lot of things. Thus, obviously the area is very complex, but as demonstrated by this panel's comments, we are all enormous admirers of the WTO dispute settlement system that has been put in place. Despite the fact that there may be some skepticism or worry in the world about that system, this morning's panel has been very illuminating and helps to at least shed more light on those concerns.