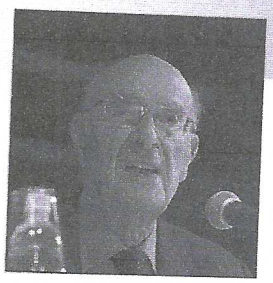


Julio A. Lacarte-Muró

The Dispute Settlement System in the Next Ten Years

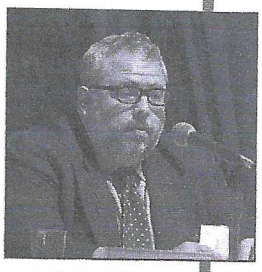
The Chair for this session was Julio A. Lacarte-Muró, former Member and Chairman of the WTO Appellate Body. The discussants were: Jane Bradley, Adjunct Professor and Deputy Director of the Institute of International Economic Law, Georgetown University Law School; Steve Charnovitz, Associate Professor, 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.

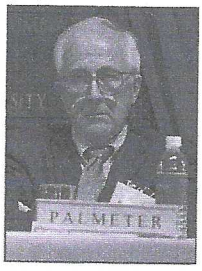
Steve Charnovitz

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.

Charles W. Calomiris

Dr. Ernesto Zedillo

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

Rufus Yerxa

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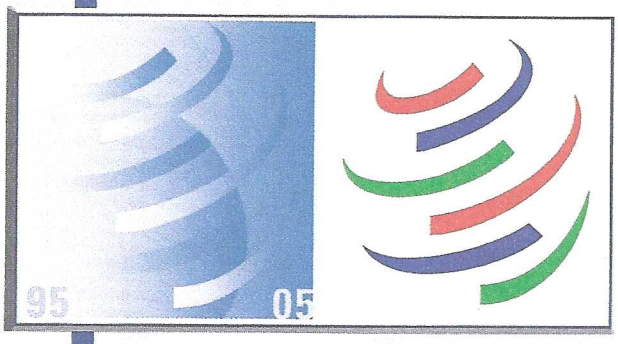

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