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Occasional Papers

Dean Rusk Center

University of Georgia School of Law

Number 5

International Trade Under the Rule of Law

An American Society of International Law Centennial Regional Meeting

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March 23 & 24, 2006
Dean Rusk Center
University of Georgia School of Law

Panel 1: Should the WTO Dispute Settlement System Be Modified or Reformed?

Panel 2: After a Decade of Dispute Settlement Cases, Whom Does the System Benefit?

Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?

Panel 4: Are the Current Methods of Enforcement of Dispute Decisions Effective? What are Alternative Methods of Enforcement?

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International Trade Under the Rule of Law

Organized and sponsored by the Dean Rusk Center and designated an American Society of International Law Centennial Regional Meeting, this conference focused on the Dispute Settlement System (DSS) of the World Trade Organization (WTO) with a view toward discussing the need for a superstructure of international law governing trade and economic cooperation between states.

From the time the DSS was established pursuant to the Uruguay Round negotiations, questions concerning the reform of enforcement measures and the system as a whole, the role of Appellate Body decisions in global governance, and the issue of who benefits most from the system have continued to challenge practitioners and scholars alike. A distinguished group of international panelists – compromised of diplomats, academics, legal practitioners, and government officials – assembled to address and explore these and other questions relating to international trade under the rule of law.

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The Dean Rusk Center

The Dean Rusk Center for International and Comparative Law was established in 1977 to expand the scope of research, teaching, and service at the University of Georgia School of Law into the evolving international dimensions of law. In 2000, it became the Dean Rusk Center – International, Comparative, and Graduate Legal Studies as it merged with the law school's International and Graduate Legal Studies program to capitalize on the combined strength of the two units. Today, the Dean Rusk Center plays an active role in the international arena by hosting conferences and visiting scholars and by undertaking international research and outreach projects. Through these activities, the Center seeks to provide a sound basis for policy judgments, to increase international understanding, and to contribute to the solution of problems and issues of global significance. The Center's impact is evident on a multitude of levels. At the School of Law, it serves as a forum for the exchange of ideas and the development of international projects among students, faculty, staff practitioners, and alumni. For UGA, the Dean Rusk Center works to expand academic synergy between law and other disciplines. To aid the State of Georgia, the Center seeks to be a complementary resource for collaboration on trade issues and their impact on the state and region as well as for promoting Georgia's effective involvement in international trade and investment. At the national level, the Center collaborates with academic, professional, and governmental legal institutions to promote the integration of parallel efforts in international and comparative law. Globally, the Dean Rusk Center plays an active role in exchange and outreach; collaboration with universities, judiciaries, and governments around the world has bolstered institutional reform, capacity building, and legal scholarship.

Further information regarding the Dean Rusk Center – International, Comparative, and Graduate Legal Studies is available on the Center's web page: *www.uga.edu/ruskcenter*

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International Trade Under the Rule of Law

Thursday, March 23, 2006

Welcome

Rebecca H. White, Dean, School of Law, University of Georgia*

C. Donald Johnson, Director, Dean Rusk Center,
School of Law, University of Georgia**

Rebecca H. White: Good afternoon. My name is Rebecca White. I am the dean of the School of Law, and it is my pleasure to welcome you to the University of Georgia, to the Dean Rusk Center and to our conference, *International Trade Under the Rule of Law*.

Here, at the University of Georgia, we understand the value and importance of having an international perspective of the law. This understanding is reflected in our outstanding international curriculum and in our faculty and through events such as this conference. The Dean Rusk Center, through conferences such as this, provides an excellent way for our students and our faculty to learn about the practical aspects of international law and policy. The contributions of panelists, such as those we have with us today, help broaden the perspectives and increase dialogue related to international law between and among our law school community members. Thank you so much for taking the time to be with us today.

As the world becomes more connected through technological advances and globalization, we continue to see increased activity in international trade and commerce. The World Trade Organization (WTO) is an important institution, providing structure and direction related to this increased activity. The path toward progressive international trade liberalization continues to be filled with both challenges and opportunities, and it is our hope that this conference will provide a valuable venue for discussion related to these issues.

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** Director, Dean Rusk Center – International, Comparative, and Graduate Legal Studies, University of Georgia School of Law; Moderator (*Panel 2: After a Decade of Dispute Settlement Cases, Whom Does the System Benefit?*).

As with past conferences, the dedicated staff of the Dean Rusk Center, under the direction of Ambassador Don Johnson, has worked very hard to put together an excellent group of international participants. I know you are looking forward, as we all are, to an exciting two days of discussion and presentation during this timely conference on international trade and the Dispute Settlement System (DSS) of the WTO. Again, I thank you so much for taking the time to be with us here in Athens.

C. Donald Johnson: Thank you, Dean White. On behalf of the Dean Rusk Center, I would also like to welcome you to our conference, *International Trade Under the Rule of Law*, which I hasten to point out, is also an American Society of International Law Centennial Regional Meeting. This, for those of you who might not remember, is the 100th anniversary of the American Society of International Law, which has honored us in allowing us to hold a regional conference in celebration of that centennial.

In recognition of the growing importance and evolving dimensions of international law, the Dean Rusk Center for International and Comparative Law was created in 1977 in honor of the late Dean Rusk, who served on this faculty for nearly a quarter of a century, and was a mentor and teacher to a generation of students who came through here, following his service in the Johnson and Kennedy administrations as secretary of state. In addition to holding conferences and lectures, other activities of the Center include research, graduate legal studies, international judicial training, and summer abroad programs – we have a new summer abroad program in China beginning this summer – and Professor Gabriel Wilner has been running the Brussels Program on the Law and Institutions of the European Union for over thirty years. But it is through conferences such as this one that we perhaps play our most active role in the international arena, as we seek to increase the understanding of international law and policy decisions, and contribute, we hope, to the solutions of issues of global significance. In doing so, we think it is very important to bring not only academics to these conferences but also people who are actively engaged in the process, as well as those who are sometimes affected by the process. In other words, this is not a conference that is simply for academic discussion, although I am sure we will have a lot of interesting academic discussions because we have a number of eminent scholars with us here.

Today, we have assembled, in addition to the distinguished scholars, a distinguished group of diplomats, government officials, and practitioners.

Therefore, we hope that this will be a comprehensive review of the first ten years of the WTO DSS. It is a period that has enjoyed quite a bit of controversy from time to time, particularly in the political world in which we all currently reside. It should be a very lively and interesting discussion, and we, of course, look forward to having the participation of the audience at the appropriate times. As many of you who attended the Seattle ministerial meeting and other ministerial meetings know, some people like to speak out during inappropriate times. I do not see any of those people here at this time, but we are happy to have the discussion and look forward to that dialogue.

I also want to give a word of thanks, as Dean White did, to the staff of the Dean Rusk Center. Assistant Director André Barbic has done a lot of great work in putting this together, as has Nelda Parker our general office manager. Also, I want to thank Rebecca O'Grady, who is our administrative associate, and Maria Giménez, who is our associate director, for all the work they have done, as well as Professor Gabriel Wilner, who will be joining us. He is associate dean and head of the graduate legal studies program, as well as executive director of the Dean Rusk Center. He and visiting professor Kim Van der Borght, who will also be on one of the panels a little bit later, were instrumental in arranging for a number of our panelists to come, and helped in the organization of this conference. So, I would not want to neglect to thank them for their work.

Without further ado, I turn the first panel, which is on reform of the WTO in general, over to our moderator Peter Spiro, who is the Dean & Virginia Rusk Professor of International Law here at the University. He also serves as associate dean for faculty development. He has had a great record in areas of his specialty, which of course are international law and constitutional aspects of foreign affairs, as well as immigration and nationality issues. He is a former clerk of the United States Justice of the Supreme Court David Souter. He also served as director for democracy on the National Security Council in the White House, has been an attorney advisor in the State Department's legal advisor office, and is a resident associate for the Carnegie Endowment for International Peace.

Should the WTO Dispute Settlement System Be Modified or Reformed?

Moderator: *Peter J. Spiro,* Associate Dean and Dean & Virginia Rusk Professor of International Law, School of Law, University of Georgia

Dencho Georgiev, Ambassador of Bulgaria to the WTO

Stephen Kho, Associate General Counsel, Office of the United States Trade Representative

Amy S. Dwyer, Of Counsel, Stewart and Stewart

Peter Spiro: I would like to echo Don and the Dean's welcome. We are delighted to be hosting such a distinguished group and, as Don said, such a mixed group. There is great virtue in bringing together academics, government officials, and practitioners by way of exchanging thoughts on important issues such as this one. And, on this panel, we have each sector represented. The way we will proceed is as follows: each of the speakers will open with twenty or twenty-five minutes of introductory remarks; I will introduce all three before we get started. Then, I hope we will have some time for discussion following their remarks.

Today, we have on this panel Dencho Georgiev. He is ambassador of Bulgaria to the World Trade Organization (WTO), but I would offer him as our academic representative on this panel – if that is fair – or one who has crossed the divide, at least. He is a "sometime" professor of international law in Bulgaria and has published widely on issues related to both trade and international legal theory.

We then have Stephen Kho, who is our government representative. He is Associate General Counsel in the Office of the United States Trade Representative (USTR). For purposes of our discussion today, he was, in effect, at the center of the action as the legal advisor at the U.S. Mission to the WTO in Geneva before assuming his current responsibilities as the principal attorney at USTR on all China matters.

And then from the practice sector, we have Amy Dwyer, who is an international trade attorney and "of counsel" to one of the country's leading trade law firms, Stewart and Stewart in Washington, D.C. She has had an extensive and varied practice in trade matters, both in the domestic institutions of international trade as well as in the WTO, since 1990. So, I would like to welcome all three of our panelists. We will proceed first with Ambassador Georgiev.

Dencho Georgiev: Thank you very much. I would first like to start by thanking the Dean Rusk Center for inviting me. It is a pleasure and an honor to be here. I am delighted to hear that you want to have a mix of academic, governmental, and other expertise, because I think that that is exactly why I find this conference a very useful and timely initiative.

WTO matters affect a much broader range of people than just government representatives, with whom I am communicating most of the time now. People are interested in WTO matters, and governments are influenced by what people think about WTO matters. In Seattle, during the WTO ministerial conference in 1999, we heard the demonstrators' argument that important matters are decided by three officials somewhere in the dark in Geneva. As a result, we saw governments coming out with proposals for transparency, etc. Who speaks out is important, and I think that lawyers and academics and universities should also speak out. It is a subject matter which affects economies at large – not just businesses, but also employment and development.

The question before this panel is: *whether the WTO system should be modified or reformed,* which seems a simple and straightforward question – and I guess there are simple and straightforward answers possible – but in fact, matters may not be that simple. There is an agreed answer to this question, and the answer in the Doha Declaration is that it is not to be fundamentally changed but only "clarified and improved."[1] That is the mandate in the Doha Declaration, which seems quite simple. Nevertheless, the proposals which have been submitted in the course of the negotiations on the reform of the Dispute Settlement System (DSS) are contained in fifty-four papers. The compilation of proposals is at one hundred and something pages, whereas the Dispute Settlement Understanding (DSU) itself is only about thirty pages.[2] The proposals cover all articles of the DSU except three of them.

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[1] World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

[2] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

So, on the one hand, governments did not want to change the system fundamentally (and they said so: *it has to be clarified, modified and improved*), but they have submitted a large number of proposals. These are not the only possible proposals; proposals continue to come in. We had last week, just before I came, a few other proposals, and there are other possible proposals. Kim Van der Borght and I have co-edited a collection of essays where there are a number of other proposals, which are not governmental – some of them probably never will be.[3] But I think that a debate on whether and how the DSS of the WTO should be improved or modified should not be limited just to discussion within the negotiations. As I said, it is a matter which affects wider circles.

The answer to the question – *What should be changed in the system?* – is contained in those proposals which have been submitted so far, or could be submitted, and many of the proposals contain their own motivation. But apart from this, it makes sense to put the question in a more general sense: *What should be the aim of the changes and modifications; what should be their purpose?* I will try to address some approaches to the more general question of whether it should be changed or not.

One way of expressing an attitude about whether the WTO DSS should be changed or not changed, is by saying that we should only have the necessary – the absolutely necessary – changes. It could be argued that even such problems, which have been generally acknowledged, like *sequencing* (the problem of whether you should go through a panel determination of whether a Member has complied with the recommendation of the Dispute Settlement Body (DSB) or not and then go to retaliation, or whether you can go directly to retaliation) should be solved through the present system. And, indeed, practice has tried to solve this problem in some way on a bilateral *ad hoc* basis. So you could argue that nothing is necessary. The general approach of some was: *If it ain't broke, don't fix it;* an approach that comes from an uncertainty – which was there in the Uruguay Round and after the Uruguay Round – and which is the effect of having created something absolutely unique – never before seen – and people were not sure how it would work.

But on the other hand – and this is what my own view is – dispute settlement in the multilateral trading system has been the product of constant

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[3] Reform and Development of the WTO Dispute Settlement System (Dencho Georgiev and Kim Van der Borght eds., Cameron May Ltd., 2006).

reform. It did not exist in the GATT '47.[4] Or, what existed there were a few texts which did not envisage the development of such a system. So the DSS is, in fact, the result of constant reform and improvements. At the same time, the possibilities, the opportunities which are there for reform of the system, are not there all the time. We do have, now, such an opportunity in the Doha Round; why not use it? And we should make not just the necessary changes, but all those changes which are reasonable and which can attract consensus.

My answer to the general question about the aim of improvement and clarification (or, if you want, of change) is that it is reasonable to make the system more effective and more equitable. What is more effective, and what is more equitable? There is no easily available general standard which would allow you to go from this very general formulation to the specific, but I think that professionals – and that is the use of having such a conference as this one – can say, or, at least, can argue what is better and what is not better – from certain points of view, of course. Distinctions are being made by academics, and I think that academics have much to say about the improvement of the system.

This transition from the more general motivation – the aim of the improvement of the system and the specific technical changes – has been, by the way, an issue in the negotiations themselves. The chairman (the previous chairman of the special session of the DSB, Ambassador Balás from Hungary) was complaining that there was no mandate; there were no aims – including those of having a more effective and more equitable system – in the mandate of the Doha Round, so there were some attempts to have a preliminary general discussion in the negotiations in order to specify some objectives. This has not worked, however, and the negotiations focused on the specifics rather than on the generalities.

There has been an individual attempt by the Mexican delegation, which is very active in the dispute settlement reform (and we have with us here today Ambassador Perez Motta, who was personally very active) and has offered a diagnosis of the current state which could enable us to draw some conclusions and, on their basis, go into the specifics. But, this exercise did not multi-lateralize to become a mainstream endeavor to move from the general to the specific, so, basically now what we have is just the specifics.

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[4] The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

If we talk about generalities (and this will be the last generality about which I will be speaking) there is this major difference of attitude towards the WTO DSS, which existed before its creation and which still persists: whether we have a judicial system or some intergovernmental type of system. This has an influence on people's attitudes and approaches, and it does play a role. I personally think that it is a judicial system in – probably – everything but name.

So, for example, you could say that under the DSS, cases are decided just for themselves and that formally they have no precedential value like in a judicial system. In fact, however, it does not work like this, and Appellate Body decisions and panel reports do play the role of precedent. By the way, I come from the so-called continental system, which is different from the common law system and where the theory is that legislation is done by legislators, and, in the judicial system, the courts only apply the law, they do not create it and there is no precedent. In practice, however, precedent does play a role even in our system. It works the same way in the WTO.

The question of whether we have a judicial system or some sort of intergovernmental form of decision making is important for the directions one could take in order to improve it: if it is judicial, then it is worth exploring the experiences of judicial systems; and if it is more intergovernmental, then methods for improvement of intergovernmental decision making could be explored. My view is that we should improve the DSS as a judicial system because the problems we are dealing with are problems of a judicial system.

There is no single answer to the question of whether and how the DSS in the WTO should be improved. The answers are specific. What I could do is give examples of what I think could become part of a reasonable package of improvements, which would correspond to the wish of having a more effective and a more equitable DSS on the one hand, and on the other hand could, in my view, attract consensus.

Some of the issues which could, I think, attract consensus are: *sequencing, third-party rights,* and *remand*. In spite of the different solutions offered, the question itself, whether to have improvements on these issues, did not seem controversial. And these issues were part of the Balás text,[5] which was not adopted when it could have been adopted. Balás himself says that his

[5] Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee,* TN/DS/9 (June 6, 2003).

proposal was not accepted because of reasons, which delegations themselves indicated. First, some delegations, whose proposals were not included, were against the text of his draft. Secondly, unfortunately, these are mercantilistic trade negotiations – including the dispute settlement negotiations; this is how things are. The third reason was the drafting, which, of course, could be improved. But ultimately, as he himself pointed out, the political conditions were not ripe for adoption of a package on dispute settlement.[6]

The issue of *timeframes* is another interesting issue. I happen to have worked against the shortening of *timeframes* in this DSS when it was proposed together with *sequencing*. It was about the shortening of *timeframes* before the adoption of the panel report, not after. And some Members – the smaller ones, those with limited administrative capacity and expertise – felt that they had too little time to prepare, especially when in a defensive position, if they were respondents. Unfortunately, this has not been fixed in any of the proposals so far. The time left to the respondents to prepare their first submission is too little.

But, I have to say that, actually, two of the proposals now on the table are reasonable: [1] the establishment of panels at the first DSB meeting, not at the second, as it is now, and [2] the shortening of the time for consultations. Instead of sixty days, it is proposed to have thirty days, but if the respondent is a developing country, they will be allowed more time – which I do not think is fair because the division here is not between developed and developing countries, but between big and small, rich and poor. For instance, Albania, Kyrgyzstan, and Armenia are considered to be developed countries. If they had a dispute, let us say, with Mexico (a country with considerable expertise in WTO dispute settlement), they would be disadvantaged. Developing countries have been insisting, and they have a point, on reducing the *timeframes*, especially for compliance after the recommendation of the DSB. They are not satisfied with having a long period in which a WTO inconsistent measure would stay in place, and they are right. Some shortening of some *timeframes* should be undertaken.

I am being reminded of my "timeframes" (*laughter*), so I will just enumerate what else I think would be reasonable. A permanent roster of panelists would serve a good purpose. It would make the system more effective. It would contribute to the improvement of the quality of panel decisions. It

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[6] *Id.*

would enhance the legitimacy of the system. It would not be some "three officials from somewhere," but it would be three permanent judges – chosen in a legitimate process. *Third party rights* are important because we have a judicial system, and because legislation in an international legal system has certain impediments. The law – want it or not – is being, if not created, then at least refined and developed by the judicial system of the WTO – by panels and the Appellate Body. But, the participation of Members in that system is restrained just to those who are participating in specific disputes, so, from the point of view of the legitimacy of global governance, it is important to enhance *third party rights.* External transparency is also something that contributes to the legitimacy and effectiveness of the DSS. *Remand* seems to be a technical matter which is undisputed. The strengthening of remedies also seems important. Thank you.

Spiro: Thanks very much. I did not mean to impose on you by pegging you as an academic, but maybe that reflects my own institutional bias. Our next speaker is Stephen Kho.

Stephen Kho: Thank you, and thank you for the opportunity to be a part of this conference. Before I begin, I would like to – I am obligated to – confirm that my remarks are, for media purposes, off the record. That is probably not at issue here, but I have to say it anyway; no quotes or attributions. My views are my personal views and not necessarily the views of the U.S. government.

Let me begin by saying that for those of us who have argued cases before the WTO, and for those of us who have been Geneva delegates for heavy dispute settlement users (dealing with the minutia of these rules day in and day out), the topic of this panel is near and dear to our hearts. We argue about the rules among ourselves, among our colleagues; we think about them in the shower; they become punch lines to our jokes. It sounds pretty pathetic, but a conference like this just feeds our insatiable appetites for all things DSU. So thank you, Ambassador Johnson and the University of Georgia.

I want to respond to the question of whether the WTO DSS should be modified or reformed by first asking a slightly different question, and that is: *Does the WTO Dispute Settlement System need to be modified? Is it so broken that it cannot be fixed – that it must be fixed?* I think the resounding answer to that question is: *No.* Most WTO Members agree that the system is currently functioning quite well. More and more Members are using the system, and disputes are being resolved. This last point, by the way, is of utmost impor-

tance because the main purpose of the WTO dispute settlement mechanism is, in fact, to resolve disputes. I will speak more on this later.

So what does this mean – that the system is perfect? By no means. As with all dispute resolution systems, adjustments can be made to make the system better. And with that premise in mind, my answer to the question posed to this panel is: *Yes, I think the WTO system could do with a bit of tinkering.*

So what kind of tinkering would be useful? It should come as no surprise that my personal views in this case pretty much parallel the views of my employer, my client, the U.S. government. At the WTO, Members have been engaged in an extended review of the DSU since 1998. Many amendments have been proposed, affecting, as I have said, almost every single provision of the DSU, and yet no consensus has been reached on which amendments should be adopted. Some would say that this supports the general notion that the system is actually working quite well as is. Others would simply say that this is just showing that it is difficult for 149 Members to reach consensus. There is truth to both of those views.

For its part, the U.S. has proposed two sets of amendments, and I want to focus on those. The first involves transparency. I think greater transparency in the dispute settlement proceeding would benefit the system. It would improve and strengthen the operation of the system. How so? Well, I think that experience has shown that WTO dispute decisions can affect a large sector of civil society. With the increased membership of the WTO, this only means that more people will become more interested in WTO decisions. And yet, currently, civil society and even WTO Members (those that are not parties or third parties to the dispute) have been unable to even observe the arguments or proceedings that lead to the decisions that affect them – save one exception, and I will get to that in a second. We have all heard criticisms about how the WTO is nontransparent; how the WTO process is in fact a "black box;" and how the public can not be confident about decisions being made by the Appellate Body.

Frankly, being more transparent, in my mind, is a "no-brainer." Letting the public observe the panel and the Appellate Body proceedings and hear the arguments that are being made can only improve confidence in the fairness of the system. Public confidence translates into greater support for implementing the decisions that are made. At the same time, non-party WTO Members would benefit from being able to learn more about the process without having to become third parties, which, as some of you may know,

requires some active participation and additional burdens. Moreover, transparency in international tribunals is not unique. The International Court of Justice, the International Tribunal for the Law of the Sea and the European Court of Human Rights – just to name a few – all hold public hearings.

The U.S. proposal is to allow the public to observe all substantive panel, Appellate Body, and arbitration meetings with parties; to make all submissions and statements public; and to have final panel reports made available to the parties, to other WTO Members, and to the public, all at the same time. The proposal also takes into account the need to safeguard confidential information as it arises in disputes.

Again, a "no-brainer," right? But there have been concerns raised. The most common one being that greater transparency means that the "government-to-government" nature of WTO proceedings might somehow be compromised. To be frank, I do not get this argument. Allowing the public to watch the proceedings and read the submissions does not mean the public can then participate in the proceedings. The public has no rights under the WTO agreements to make submissions or to make statements, and being more transparent does not change any of that.

Another concern raised is about the logistics of opening these hearings. This is a legitimate concern, and when the EU, the U.S., and Canada recently agreed to open up the panel proceedings in the *Beef Hormones* case,[8] we all struggled with this question. What we ultimately decided to do was to set up a closed circuit television feed from the panel room to a larger, nearby auditorium. The public could then sign up to watch the proceedings on a first come, first served basis. In the future, we might perhaps consider web-casting. It would be like watching CBS's broadcast of *March Madness,* except, instead of basketball, you would see guys (a bunch of men and women) in suits talking to each other. I know it is equally as exciting – it is; I assure you.

As for making written submissions public, with the exceptions of those with confidential information, it is already happening. When WTO final reports are made public at the end of proceedings, a party's submissions and statements are essentially public at the same time. So, the only issue with regard to the transparency of submissions, really, is when they become public.

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[8] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, (Jan. 16 1998) (*adopted* Feb. 13, 1998).

Is it at the time when they are submitted to the WTO or at the end of the proceedings? I simply do not see a reason why they cannot be made public from the outset.

Similarly, final panel reports are currently made public at the end of the proceedings. So again, the only issue there, with regard to transparency, is when those reports should be made public. Should it only be after first being issued on a confidential basis to the parties, which is what the rules currently require? Or, should they be made public at the same time that reports are made to the parties? I would argue the latter. The current rules only encourage misunderstanding, since the public is often fed selective information through speculation and leaks. To be fair though, the current rules are intended to ensure that the reports are officially available in all three official WTO languages. But, I really do not see the goal of translating panel reports conflicting with the goal of enhanced transparency so long as there is sufficient time for the disputing parties to analyze the report in any of the three WTO languages that they wish.

The second main proposal of the United States involves providing flexibility in dispute proceedings. As I noted earlier, the central aim of the WTO DSS is to resolve disputes. It is not to produce comprehensive reports or to create law, and I think that is where my view and Dencho Georgiev's might diverge. In fact, the DSU is quite clear about this. Not only is prompt settlement of the disputes the main objective, but the system, "cannot add to" – and I am quoting here from the DSU – "or diminish the rights and obligations" of Members that are already provided in the text of WTO agreements.[9] My personal opinion is that these stated goals have sometimes been brushed aside, intentionally or unintentionally, although I am sure not by anybody in this room that has been on a panel before. Therefore, it would be useful to introduce flexibility into the system, which would assist in ensuring that all of the WTO stays true to the goal of the DSS as envisioned and agreed to by the parties, by the Members.

In that regard, the United States has proposed six procedural mechanisms for consideration. The first is to provide an interim review stage at Appellate proceedings, similar to the stage currently provided for in panel proceedings. In other words, just like a panel, the Appellate Body would issue an interim report for the parties to comment on before finalizing their report. As with the panel, this would serve to ensure that the Appellate Body reports are of

[9] DSU, *supra* note 2, art 3.2.

the highest quality, particularly given the goal of resolving disputes. Mistakes would be caught; unclear reasoning could be clarified; unintentional inconsistencies could be rectified. This is a win-win situation for the Appellate Body, for the parties to the dispute, and for the membership as a whole. Also, given that there is no appeal to Appellate Body decisions, such a mechanism would be particularly important.

Some have argued that an interim review stage during the appellate proceedings is unnecessary, or would not be advisable because the Appellate Body deals with law and not with facts. In response, I would first say that this is inaccurate. The Appellate Body often deals with facts, particularly as the law applies to those facts. Also, even legal analysis would benefit from being reviewed. Another argument put forward is the suggestion that somehow the Appellate Body's independence and authority would be compromised by such a review. I do not see the basis for this argument. In fact, to make that argument is to suggest that panels, with their interim reviews, are somehow "unobjective," or their reports are less authoritative. And, if less authoritative, does this mean that WTO Members must always appeal a report in order for that report to become authoritative? Frankly, having an interim review process can only further assure parties that the Appellate Body acted impartially and with authority by allowing the Appellate Body to respond to any questions the parties may have regarding its findings, or to fix any inadvertent mistakes (which is inevitable, given that the Appellate Body members are, themselves, human).

The second procedural mechanism the United States proposes is to allow parties, after review of the interim report, to delete – by mutual agreement – findings that are not necessary or helpful for resolving the dispute. Related to that, the United States also proposed a "partial adoption" procedure, whereby the WTO membership as a whole could decline to adopt certain parts of the report that are not helpful for resolving a dispute – while adopting those portions that allow the parties to secure the panel and Appellate Body rulings necessary to resolve the dispute. These two proposals are similar in that agreement is needed for the mechanisms to kick in. They are different in that the deletion of findings at the interim stage is contingent upon agreement just between the two disputing parties, whereas the deletion of portions of the report (be they findings or reasonings) at the adopted stage requires the agreement of all 149 WTO Members.

Regardless, these agreement requirements should alleviate any fear that any single WTO Member could misuse these procedures. In fact, I would

expect that the mechanisms probably would not be used at all, maybe infrequently. The mere fact that they exist, however, could help to ensure that the panel and the Appellate Body reports are written with a single-minded focus towards resolving disputes. To the extent that the agreement is reached and that these mechanisms are used, they can only benefit the system by – as I said before – obviating the need to appeal panel reports because unhelpful findings can be deleted.

Also requiring agreement by the disputing parties is a proposal to provide parties with the right to suspend panel and Appellate Body proceedings, in order to allow parties time to return to the settlement table should they want to. Currently, there is no provision for suspending Appellate Body proceedings once they have begun. In the panel proceedings they can only be suspended if the panel accepts the request of the complaining party.

The fifth mechanism proposed by the United States is one that would ensure that individuals serving on panels have the appropriate expertise to appreciate the issues presented in the dispute. Experience to date shows that it is helpful for panelists to have the appropriate expertise concerning particular issues in a dispute, such as: intellectual property, services and trade remedies. I would note that that is different from the EC (European Community) proposal for a Standing Body.[10] Currently, there is no provision in the DSU providing for this.

Finally, the United States has proposed that Members provide guidance to WTO adjudicatory bodies regarding certain legal procedural issues that recur again and again in the disputes. To date, the United States has only identified the issues for consideration, and it is consulting with other WTO Members to try to establish a shared view for purposes of providing this guidance. The issues identified, by the way, have played important roles in the outcome of past disputes, and yet the Members have not yet expressed views collectively about them. Many of the issues are "inside baseball" stuff, like: what constitutes a measure under review; when should panels engage in judicial economy; the use of the so-called mandatory discretionary distinction. Two issues, however, might be of interest to some of you. The first involves a relationship between the WTO and other public international law. This is the topic for tomorrow morning's session, so I will not get into it

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[10] Special Session of the Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding,* (Mar. 13, 2002).

here. The second involves the interpretive approach to be taken by WTO adjudicatory bodies. Generally speaking, the interpretive approach, in common law countries, tends to lean towards making law, towards filling in the gaps of existing laws; whereas the interpretive approach in civil law countries tends to focus more on clarifying the existing text, the existing statutes. So the question is: *which interpretive approach should the WTO panels and the Appellate Body take? And, as has been mentioned, should they be modified to be more judicial or much more of an intergovernmental process?* I think we can see the difference in views there.

Obviously, the WTO membership has not reached a consensus on this view, but as I mentioned before, the DSU is quite clear that the dispute process cannot diminish and cannot add to a Member's rights and obligations. The Appellate Body has confirmed this itself by noting that the principles of the interpretation of the DSU – and I am going to quote from the Appellate Body here – "neither require[s] nor condone[s] the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[11]

With that context in mind, here are some questions that the Members are currently asking themselves as they wrestle with this particular issue:

1. What significance should be attached to the fact that the WTO agreements are a result of negotiations and compromises among sovereign nations and autonomous customs territories?
2. What significance should be attached to the fact that the agreements are sometimes imprecise and susceptible to more than one interpretation as a result of those compromises?
3. What significance should be attached to the fact that the agreements are not comprehensive and, oftentimes, silent on certain issues?

I, for one, will be very interested in the membership's collective answers to these questions.

In conclusion, these are what I think would be useful tweaks to the WTO DSS. It could do with a little tweaking and a little tinkering, but it has worked pretty well so far, for the most part. Indeed, at the end of the day, trade disputes are and continue to be resolved using the system, and that is what is important. Thank you.

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[11] Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS79/R (Aug. 24, 1998).

Spiro: Thanks very much, Steve. Our final speaker is Amy Dwyer.

Amy Dwyer:[12] Thank you. My name is Amy Dwyer, and I have been with the law offices of Stewart and Stewart in Washington, D.C., for over fifteen years. My boss, Terry Stewart, was unfortunately unable to make it this afternoon and asked me to fill in for him. Over the years, we have done a fair amount of thinking and writing on the question before this panel, which is: *Should the WTO Dispute Settlement System Be Modified or Reformed?* In October 2004, we had the opportunity to prepare a short chapter for a compilation of essays on the reform of the system. That chapter will be published by Cameron May in June of this year. I should mention that Ambassador Georgiev, on this panel, and Professor Van der Borght, on Panel 3 tomorrow, were the co-editors of that compilation. Many of my remarks today are based on that chapter, so with the permission of the publisher, I have made available a limited number of copies of our chapter for you today, and I think they are by the door if you want to pick them up for perusal.[13]

The question for the panel is: *Should the WTO Dispute Settlement System Be Modified or Reformed?* And the short answer is: Yes. While most Members support and recognize the system as a significant achievement, reform is necessary to maintain the proper role of disputes in the WTO. In 1995, the system was viewed as a great experiment. Members agreed that it should be reviewed within four years so that a decision could be made to "continue, modify, or terminate" its rules and procedures.[14] Most WTO Members are generally pleased with the functioning of the system. A number of trends in decisions, however, raise questions that should be reviewed and addressed in the context of the DSU negotiations.

On this slide, I have listed a series of questions concerning whether the system is functioning as intended. My comments will review some of these questions and then turn to a select group of proposals made in the context of the ongoing DSU negotiations.

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[12] Remarks were complemented by a PowerPoint slide presentation.

[13] Terence P. Stewart, Amy S. Dwyer, & Elizabeth M. Hein, *Proposals for DSU Reform that Address, Directly or Indirectly, the Limitations on Panels and the Appellate Body Not to Create Rights and Obligations,* in Reform and Development of the WTO Dispute Settlement System 331 (Dencho Georgiev and Kim Van der Borght eds., Cameron May Ltd., 2006).

[14] Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1125, 1259-1260. (Aug. 26, 2002).

[Question 1: Why is there such a high WTO violation rate?]

The facts are that the complaining parties successfully establish at least one WTO violation in ninety percent of the cases that result in decisions, compared to a sixty percent win/loss rate in GATT days. The fairly high win/loss rate raises a number of questions. For example, does the trend reflect the novelty of the system, or does it reflect the development of a plaintiffs' court? Is it reasonable to think that only WTO panels and the Appellate Body know what the covered agreements mean? Does the success rate encourage litigation over negotiation, and, if so, how is that consistent with the WTO system?

[Question 2: Can a complaining party increase the likelihood of success by soliciting others to join in the dispute?]

Another trend that is hard to ignore is the tendency of WTO Members to band together to pursue cases against the same measure to increase their odds of victory. Does it work? Well, they say there is power in numbers. In this case, it looks like that might be true. The success rate of cases with multiple complaining parties increases to 100 percent of cases brought, which raises the concern that individual WTO Members lacking a strong WTO case can, and do, enlist the help of others to challenge unpopular laws to improve their success rate. The "pile-on" effect of multiple complaining parties can give the appearance of broad Member concern with a trading partner's measure. Note that, of the fifteen disputes brought by multiple complaining parties, the U.S. or the EC was a responding party in eight of those cases.

[Question 3: Why are Members fixated with challenging trade remedy measures?]

A third trend is the high number of trade remedy disputes compared to their effect on trade. As of September 2005, almost fifty percent of WTO disputes involved trade remedies. Forty-eight percent of requests for consultations involved the WTO Agreements on anti-dumping, subsidies and countervailing measures or safeguards. Forty-two percent of all decisions involved trade remedy measures. The U.S. was the responding party in sixty percent of those trade remedy disputes resulting in decisions.

The trend raises a number of questions when trade remedies typically affect a tiny percentage of total trade and WTO Members. For example, is it reasonable that trade remedy disputes should account for almost fifty percent of disputes when they typically affect a tiny percentage of total trade

and WTO Members, generally less than one percent? Or, is it reasonable to expect that a single WTO Member – the United States – would be the responding party in sixty percent of trade remedy disputes resulting in decisions but only account for fifteen percent of all anti-dumping, countervailing duty, or safeguard initiations? Of course, the United States is a major importer and user of trade remedies, but it also has one of the most transparent trade remedy systems in the world. Query whether the transparency that our country demands from the U.S. government is the same transparency that makes it easier to challenge? The trend has raised a red flag for Congress. In the Trade Act of 2002, Congress specifically expressed its concerns with the trend in trade remedy decisions and objected to the imposition of new obligations and restrictions on the use of anti-dumping, countervailing duty, or safeguard measures.[15]

[Question 4: Is gap-filling and the construction of silence in covered agreements consistent with DSU limitations?]

The fourth trend, and one of the most serious problems facing the dispute system, is the extent to which WTO Members consider that panels or the Appellate Body have overreached their authority by creating new obligations for Members – which raises the question: *Is gap-filling and the construction of silence in covered agreements consistent with DSU limitations?*

Prior to the DSU, as a general matter, GATT panels did not construe silence or fill gaps. The Uruguay Round negotiations to change the GATT dispute system were focused on expediting the process and providing consequences for adverse decisions. There was no indication that the DSU would change the nature of the dispute system. Under the DSU, panel and Appellate Body decisions are automatically adopted unless Members decide by consensus not to adopt the reports. Likewise, modifications to covered agreements require consensus. As a result, it is virtually impossible to correct erroneous panel or Appellate Body decisions.

Now, as a general matter, WTO panels and the Appellate Body do construe silence and fill gaps in covered agreements. Compared to GATT panel decisions and early Appellate Body decisions,[16] there has been a rather unexpected and fundamental shift in the operation of disputes. The Appellate Body has

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[15] 19 U.S.C. § 3801 (2002).

[16] *See, e.g.*, Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R, para. 45 (Dec. 19, 1997).

become reluctant to accept the silence of an agreement text. Instead, it will try to determine whether the requirement was intended to be included by implication.[17] Nothing in the DSU, however, authorizes the Appellate Body to read the negotiators' minds. If the agreement is silent, there is no obligation.

The Appellate Body has also indicated that panels should follow its decisions.[18] Although the system does settle trade disputes, it does not serve as a trade court. The system does not give panels or the Appellate Body the power to make law by issuing interpretations of covered agreements binding on all Members.[19] For that reason, it is disturbing that the Appellate Body now expects panels to follow its decisions. Query how binding decisions will affect the rights of those WTO Members that are not participants in panel proceedings? Nothing in the DSU authorizes the approach taken by the Appellate Body.

Yet, panels in the Appellate Body do have limits on their authority. First, they are not permitted to provide authoritative interpretations that are binding on all Members.[20] That exclusive authority resides in the Members. Second, they are not permitted to "add to or diminish the rights and obligations" in covered agreements.[21] Instead, the role of panels and the Appellate Body is to preserve the rights and obligations in the covered agreements, and to clarify existing provisions in those agreements.[22]

Existing limitations in the DSU, however, are proving to be insufficient. Roughly a third of all WTO Members have officially objected to instances of panel or Appellate Body "overreaching" in response to particular disputes or in the context of negotiating changes to the DSU. The fundamental shift in the operation of disputes has changed the way Members think about the role of disputes in negotiations. For instance, it is a widely recognized belief that Members are frequently choosing to litigate rather than negotiate issues, despite the opportunities presented by the ongoing Doha Round of

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[17] *See, e.g.,* Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* WT/DS213/AB/R, para. 65 (Nov. 28, 2002).
[18] *See, e.g.,* Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina,* WT/DS268/AB/R, para. 188 (Nov. 29, 2004).
[19] *See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8, 10, 11/AB/R, Section E (Oct. 4, 1996).
[20] *See* DSU, *supra* note 2, art. 3.9; Marrakesh Agreement Art. IX:2.
[21] DSU, *supra* note 2, arts. 3.2 & 19.2.
[22] DSU, *supra* note 2, art. 3.2.

multilateral trade negotiations. Members are filing more panel requests than under the GATT system. Members are frequently alleging multiple WTO violations in a single challenge, perhaps to increase their odds of establishing a violation. Members are pursuing disputes in the absence of a clear violation of a covered agreement. Members' behavior in daily negotiations has been affected by the operation of the dispute system.

[Question 5: Can the system survive without substantially increased transparency and public access?]

Another question that has been raised is whether the dispute system can survive without substantially increased transparency and public access. Although the WTO website is updated with formal requests for consultations, establishment of panels, or final reports, the public only has access to those written submissions voluntarily posted on Members' websites. There is basically no access to oral hearings or transcripts. There is no public file room with copies of panel or Appellate Body working procedures or timetables in particular disputes.

The current lack of transparency has the effect of denying actual, interested parties even the opportunity to observe the process and generate confidence in the system – which raises the serious question of whether society should accept the creation of new rights and obligations by an unelected entity. Can the lack of transparency in the decision-making process encourage confidence in the system when society is being directly affected by decisions of an unelected entity?

Dr. Claude Barfield, with the American Enterprise Institute, recently testified before Congress that the system is ultimately unsustainable as currently structured.[23] The system now operates with an imbalance of power. On the one hand, you have a powerful dispute system run by the unelected, and [on the other,] a weaker and slower negotiating body unable to respond effectively to erroneous decisions. Dr. Barfield concluded that, eventually, the system would create major questions of democratic legitimacy when the judicial bodies "'legislate' new rights and obligations through judicial interpretation."[24]

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[23] Senate Subcommittee Hearing on Securing American Sovereignty: A Review of the United States' Relationship with the WTO, July 13, 2005, at p. 3. (Statement of Dr. Claude Barfield, Resident Scholar and Director of Science and Technology Policy Studies, American Enterprise Institute).

[24] *Id.*

[DSU Negotiations]

This leads us to the question of whether proposals made in the context of the DSU negotiations will reform the system to address some of these questions. Since 1997, WTO Members have made over fifty individual submissions, which suggest changes to almost every DSU provision. In the interest of time, my remarks will focus on only two groups: the proposals which address, either directly or indirectly, the series of trends identified earlier.

The goal of any reform should be to restore balance to the WTO system as a whole. Like most treaty-based systems, the WTO is a Member-driven organization. No independent power is given to the DSS to create rights and obligations. A group of proposals in the DSU negotiations do attempt to restore some balance to the system by reinforcing limitations on panels and the Appellate Body and by improving transparency.

[Proposals – Group 1]

In group one we have a series of proposals made in five general areas to reinforce existing limitations on panels and the Appellate Body. First, a number of proposals have been directed at reforming the panel selection process to improve the quality of panel decisions. Indeed, the EC has argued that the most important systemic issue is the improvement of the panel composition process. Therefore, a number of proposals suggest establishing a roster of panel chairs or a roster of permanent panelists with demonstrated expertise. In addition to emphasizing that panelists should have the requisite expertise, there has also been a proposal to increase the pay rate for panelists.

Although improving the panel selection process or the panelists' expertise would likely improve the system and the quality of reports issued, there is no guarantee that those panelists will not make flawed decisions, especially if the system itself does not provide adequate guidance or allow for the correction of errors. It is not clear that the proposals would improve the quality of the Appellate Body's decisions. Right now, almost fifty percent of decisions are issued in the trade remedies area, yet not one Appellate Body member has a strong trade remedy background. The WTO's consensus-based structure makes the correction of erroneous decisions difficult and, basically, possible only in larger negotiations.

Second, another set of proposals has been made to address the treatment of amicus or other unsolicited submissions. These proposals were prompted by the Appellate Body's decision to develop working procedures to permit

the receipt and consideration of amicus submissions. Some WTO Members interpret the current DSU as not giving the Appellate Body the authority to accept such submissions. Proposals on amicus or unsolicited submissions, however, would only address the treatment of those submissions. As such, they would correct only one instance of prior overreaching instead of providing additional guidance for the development of other working procedures. Guidelines for the submission of amicus or other unsolicited submissions, however, could give affected private parties the ability to be heard.

Third, a number of proposals would allow the parties or the dispute settlement bodies to refer certain questions to the General Counsel or the International Court of Justice. The downside of a referral procedure would be that it would only offer guidance in individual disputes, instead of providing guidance in the DSU to parties, panels, and the Appellate Body for each and every dispute.

Fourth, some of the most creative proposals in the DSU negotiations are those aimed at strengthening Member control and flexibility in the dispute settlement process. Through the use of procedural roadblocks, the proposals give the parties more control by requiring Appellate Body interim reports (on which the parties could comment and request a meeting), by allowing parties to agree to delete specific findings or the basic rationale behind findings in particular cases, by allowing a report to be partially adopted by the DSB, and by permitting the parties to suspend panel and Appellate Body procedures. These proposals attempt to correct a systemic imbalance caused by a powerful dispute system without effective oversight. Practically, it is not clear that parties with opposing interests would be able to mutually agree to invoke the new procedures. Nor do the proposals, on their own, offer guidance to panels or the Appellate Body to avoid overstepping DSU limitations in future cases.

Finally, the proposals to provide additional guidance to dispute settlement bodies have the greatest potential to affect future decisions. In addition to establishing a negotiating history of DSU revisions, DSU proposals identify the following areas for providing additional guidance: judicial economy, use of public international law, the interpretive approach, and measures under review.

Specifically, the United States has submitted a paper which articulates a number of guiding principals. With respect to the use of public international law, the paper explains that "it is not the function of the WTO dispute

[settlement] system to adjudicate rights and obligations beyond those in the covered agreements" and that consideration of how other bodies approach procedural issues "is not a question of interpreting a covered agreement in accordance with public international law."[25]

The paper also offers some guiding principles as to what might or might not be a proper interpretive approach. In doing so, the paper addresses the Appellate Body's decisions reviewed earlier by clarifying how to address silence or ambiguity in the covered agreements.[26] The proposal states that the panels and the Appellate Body cannot fill the gaps in covered agreements. The proposal also addresses the Appellate Body's decision to elevate its own decisions to the level of binding international trade agreements by stating that prior reports are not covered agreements.[27]

Finally, the United States has articulated a number of principles concerning the reviewability of measures under the system.[28] The principles caution panels against gratuitous or advisory pronouncements of law outside the context of specific disputes. The principles also emphasize that panels are not permitted to presume that a Member will choose to breach a covered agreement when it has the discretion to avoid such a breach.

Another proposal suggesting an agreed negotiating history could offer some guidance to panels and the Appellate Body in interpreting the scope of their authority under the DSU, but is unlikely to be binding unless adopted as such by Members. Providing additional guidance on such areas as the interpretive approach and the measures subject to review offers the best opportunity to address the major underlying cause of what Members consider to be overreaching.

[Proposals – Group 2]

The second group of proposals would improve the transparency of the DSS. They would require public access to written submissions and hearings, as well as give parties prompt access to the information the Secretariat pro-

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[25] Special Session of the Dispute Settlement Body, *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement,* TN/DS/W/82 (Oct. 24, 2005).
[26] *Id.*, TN/DS/W/82/Add.1 (Oct. 25, 2005).
[27] *Id.*
[28] *Id.*, TN/DS/W/82/Add.2 (March 17, 2006).

vides to panels and the Appellate Body. Timely access to a public file room (preferably online) for written submissions and non-confidential correspondence to and from the panels and the Appellate Body would significantly address transparency concerns. It is not clear, however, that a fifteen-day period for public summaries would be "timely" access. The level of concern expressed regarding the Secretariat's input indicates that changes should be made to increase the transparency of the decision-making process.

To recap: *Should the WTO Dispute Settlement System Be Modified or Reformed?* And the answer is: *Yes.* While most Members support and recognize the system as a significant achievement, reform is necessary to maintain the proper role of disputes in the WTO. Significant proposals have been made along these lines in the DSU negotiations to reinforce limitations on panels and the Appellate Body and improve transparency. Improvements in both areas could resolve questions concerning the high violation rate, multiple complaining parties, and the fixation with trade remedy measures. Improvements to the system, however, should go hand-in-hand with measures that encourage self-restraint on the part of Members using the system. For example, there should be some procedural consequences for Members that bring cases without regard to the strength of their case or without strong trade-related interests in the resolution of the issue. This concludes my presentation. Thank you.

Spiro: Thanks very much, Amy. So, we have some time for questions and discussion. So Paul, you want to lead things off?

Paul Heald:[29] Hi, I am Paul Heald. I am on the faculty here at UGA; I teach international intellectual property law. I have an argumentative comment and a quick technical question. The comment has to do with transparency; two points about that. First of all, if the major reason to have more transparency has to do with increasing confidence in the system, I am not entirely sure it is a "no-brainer" given our experience with televising the O.J. Simpson trial and what that did to erode public confidence in the criminal justice system here. Letting people watch what is going on does not necessarily breed more confidence.

But I have a more serious point to make, too. That is, it seems to me that if two sovereign nations have a dispute between themselves over whether one is complying with an international agreement or not, what they certainly

[29] Allen Post Professor of Law, University of Georgia School of Law.

could do is sit down in a conference room behind closed doors and try to resolve that dispute. In that situation, we would not expect there to be any transparency, and we really would not probably call for transparency. And we could all probably give quite a lot of reasons why we would not want there to be transparency because it might interfere, in fact, with the chance of an agreement being reached. I am not entirely sure why our expectations about transparency should change when those same two sovereign states decide to submit their dispute to a panel before the WTO. It is a choice that they – in effect – make *ex ante* by joining the WTO.

Second – quick technical question – should the Appellate Body have the power to remand back a case to a panel when insufficient factual findings have been made and they have decided what the law is, but they cannot decide the case because the facts are unclear?

Spiro: Responses?

Dwyer: With respect to confidence in the system and transparency, I think what you have to recall is who the real party may be in some of these disputes, especially in a trade remedy case. You will have domestic industry involved. You will have, perhaps, foreign producers involved in a lot of the issues that are crucial to their businesses. So, they will have a strong interest in making sure that the process is fair when decisions are being made at such a high level. The U.S. government is pretty much their attorney and they have a limited amount of contact with the U.S. government in making certain arguments. For private parties to, at least, be able to watch the process might diffuse a lot of the tension concerning what goes on behind the closed doors and give them confidence that the process is fair and that the rule of law does have meaning. I think that that would be one of the reasons why transparency is so important. With respect to the *remand* power, I cannot see why we would not want to remand to the panel for further factual findings. I think it would be expedient.

Kho: Just quickly on your comment on transparency – I think if the NGOs (non-governmental organizations) and the public and those on Capitol Hill share your views, then the way that it was originally set up was to *not* be transparent. But, in fact, what we hear is the opposite of what you have expressed, and so we are trying to respond to what the public is reacting to. If there was full confidence, we would not be talking about transparency, but there is not. And those are just the facts. We are trying to work something out to make sure that there is more confidence; we are hoping it will work.

The power of *remand* – that is one. There are several proposals on *remand* right now in DSU review, and we are all considering these proposals. There is no one specific view.

On your specific question about insufficient factual findings – currently the system works those things out by itself already. In a situation, for example – the one I am thinking of is *Canada Dairy* – in which, basically, there were new issues, and a new theory by the Appellate Body came up. They said: *Well, there is a lack of factual findings to support this,* and then it got kicked back.[30] There is essentially sort of a *remand* process as it is, and nothing bars a party from going and asking again for another panel. The question then becomes: *Well, should you have a process that is much faster*? And then there are a lot of procedural questions that come with that as well. For example, if you have three findings and you want to remand a fourth because you cannot make a finding, do you adopt three findings immediately or do you wait until the *remand* process is done and then adopt all four findings together? And if you separate them, what happens with the timing issue of being able to implement? And if there is no implementation, what happens there with respect to trying to figure out what the level of compensation is? Do you just take two of the three findings that go forward, or do you have to consider the fourth? So those are things that Members have proposed – the *remand* proposals are still trying to work out. The questions have been asked.

Georgiev: I think that there is some tension between stating, as the theoretical basis of an approach to dispute settlement, enhancing its intergovernmental character on the one hand, and transparency on the other. Actually, the argument against transparency, which has been expressed during the negotiations, was pretty much of an intergovernmental character. And there is some irony that there are governments which are proposing reform in terms of transparency (which I would support) on the one hand, and at the same time these same governments seem to favor, theoretically, an intergovernmental approach. I think that enhancing transparency would enhance the judicial character of the system. It goes with the logic of enhancing the judicial character of the system.

On *remand*, I do not think I can add anything. It is a technical question. It seems that there is unanimity on the necessity for having *remand*. But there are those technical questions which have to be answered, so it is not

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[30] Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and Exportation of Dairy Products,* WT/DS103/RW2, WT/DS113/RW2 (July 26, 2006).

very easy to fix it. There are two proposals now. The first is by six countries, and there have been questions to them – pretty tough questions, informally, because this is all informal – and it seems that they have not given real convincing solutions to some of the problems of *remand*. And there is another proposal pending by Korea – who is proposing a solution – and pretty much it would look like suspension of the process. But then, of course, *timeframes* are important, so it is not clear how this will be solved. My guess is that this is something which deserves, and has a chance of, getting into a final package.

Kho: Maybe. Let me just add one thing to that. (I have been away from Geneva for six months, so things are starting to come back to me.) The one question I have always had with respect to the *remand* proposals is: *do the Members that are proposing it really understand what they are asking for? What is remand in their minds?* They give examples and situations where a party with a dispute basically chooses not to follow a certain legal theory. They follow another legal theory that gets to the Appellate Body. The Appellate Body says: *Well, your legal theory does not work. This other legal theory should be followed, and frankly, you do not have the facts to back up that legal theory.* Is that a *remand* situation, or is that basically just bad strategy on the part of the party? And should they then deserve to be allowed a faster mechanism in order to speed up the process for them? Again, questions that need to be answered.

Spiro: Professor Davey?

William J. Davey:[31] I have a couple of questions and a comment. A comment: I wonder if the high rate of dispute settlement with respect to trade remedy cases, particularly involving the U.S., can simply be explained by the fact that those cases are seriously over-lawyered in Washington. With the annual review process of the U.S. countervailing and dumping laws, there is litigation almost every year in the controversial cases. And if you look at the WTO cases, most of them have parallel U.S. litigation. So I think it is just part of the typical case – you bring a case in the court of international trade, and you bring a case in Geneva as well. I think it is just the way these things are lawyered in the United States, combined with the fact that the U.S. has absolutely no discretion to compromise those cases. It has to be to be told by the court or panel to change.

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[31] Edwin M. Adams Professor of Law, University of Illinois College of Law; Former Director of the Legal Affairs Division of the WTO; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?*).

A couple of questions: On the permanent panel body idea, I have kind of long supported that; but the most serious question I have heard raised is that if you actually tried to implement it in Geneva – once you took account of the WTO's need for regional balance in everything and the possibility of political tradeoffs – that you would probably end up with less qualified individuals than you now get in the use of Australian/New Zealander type trade diplomats. I am just curious about the panel's reaction to that. If they think that the way in which it might ultimately be chosen might be worse with people thinking: *Oh well, the Appellate Body will correct any serious mistakes.*

My second question is: although governments say everything is working fine – and that suggests that everyone should be happy with the system, and it only needs tinkering with – the number of consultation requests in 2004 went down from a prior average of around thirty, for the preceding five years, to twenty or so and then, last year, to about a dozen; and I am wondering if countries are actually starting to vote with their feet and leave the system because they are not really, in fact, so happy with the results they obtain.

Spiro: Reverse order.

Georgiev: I will try to have a short answer to the first question about a permanent panel body. You cannot base your answer – whether you should have a better system, as such – on a hypothetical answer or solution as to how that permanent panel or body would be selected. You would probably not have a better system than you already have for the Appellate Body; that is for sure. It would probably not be better. Is the system for the Appellate Body good enough? I do not know, and I do not know the answer to your question because of that. But I have an answer to the question whether (and you, I think, are a proponent of a permanent panel body) it is better to have a permanent panel body, even with a system which would be hypothetically as good as the system of selection of Appellate Body members. I would be curious to know your answer to that question, but my answer would be, that, probably, yes.

Kho: I will just take Professor Davy's questions in order, starting first with the comment. I understand the point that you are making, but I tend to agree a little more with Amy's view with respect to the U.S. system being a bit more transparent. When you look at the types of cases that are being brought and the claims that are being made, a lot of it is with respect to, for example, the methodology – some sort of review policy. Things like that are fairly transparent in the U.S. and much easier to get at when you can see the rationale (or lack thereof, depending on what your argument would be) in front of you.

There are other heavy users of AD (antidumping) systems – China, India come to mind – but the big problem there is the lack of transparency; you are not quite sure what to go after. And cases against some would be cases such as – you know there is a lack of transparency – and that is it. You would not be going after, for example, Article 2 issues, Article 3 injury issues.[32] So you would be going after Article 6 procedural issues, perhaps Article 12.[33]

You know – in our example, the United States – we recently were close to bringing a case against China, and it frankly was on one particular investigation. And they –overnight – terminated the investigation, so we did not have to bring the case. But when we were working on the case, we were thinking: *We do not have a whole lot of information here. All we are going to be going after is the lack of transparency.* It is a good thing that they decided to terminate, because we were just curious how cases like that would go. We had a solid case on the lack of transparency, but beyond that – to go after particular problems – that was a little harder for us to do. So, if you look at the substantive claims, there is a lot more to go after under the U.S. system than others. That is my view.

The permanent panel body idea – some would argue that that is already in effect. In situations where – as you know, when parties cannot agree – the DG (Director General) picks with consultations with the relevant divisions within the WTO, and you see the same names come up over and over again. They have people that they rely on – that they choose – that come up again and again. Some would say: *Well that is almost like a permanent panel body.* But the difference would be – at least in the first instance – you are giving the parties the opportunity to try to pick ones that they can agree to, and again, that goes towards building confidence in the system. In fact, if two parties can agree to it, you can say to your constituents back home: *We chose them. We think they are solid. We think they are unbiased. And we think that whatever decision they come out with is going to be the right decision.* So I think that is the advantage of not doing a permanent panel body.

With regard to your last question: *Is everything fine?* Consultation requests went down in 2004; that is true. But speaking with respect to the U.S., it was more of a political decision among our "politicals" to focus on free trade agreements and negotiating those. So I do not know if you can say: *Well, there are hardly any more disputes.* But also, if you look at the way it has

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[32] *WTO Antidumping Agreement,* art. 2 and art. 3, *available at* www.wto.org/english/docs_e/legal_e/19-adp.pdf.
[33] *Id.*, art. 6 and art. 12.

been working out – in the beginning when WTO came out, the developed countries were all excited: *Look at this – a pure rule of law system*. And most of the cases were "developed versus developed" countries. Then that started going down because, frankly, they realized it is just a fact of life that in a system of sovereign nations you are going to have some diplomacy; that is an undercurrent of all these decisions, of all transactions. Then through this process, developed countries are able to work things out a lot better.

In the next panel, I think I am going to talk a bit about this, but sometimes, the DSS works in ways that we cannot quantify in the sense that once there are decisions that are made, you can go to your trading partner if there is a dispute and say to them: *Look, this measure that you have in place is similar to another measure that previously was found to be inconsistent. So you know what? Save us all a lot of time, a lot of trouble, a lot of resources – let us just agree to this compromise*. And a lot of that is happening.

What you do see is that developing countries are getting more and more involved; they are starting to have confidence in the system; they are starting to sue each other; they are starting to sue developed countries. And those numbers are going up. You know in the beginning of the first year, I think it was like 104 – I cannot remember, not that high – but there was a big number of disputes just that first year, and it was "developed versus developed." So, I do not know if I would take a lot away from seeing the numbers go down last year, but who knows? Now that the gloves are off, for example, on China, would the disputes go up? Maybe.

Dwyer: Just with respect to the comment about "over-lawyering." I understood that comment to recognize that, yes, there has to be a certain degree of forum-shopping when you have such a complex set of agreements, especially for anti-dumping, countervailing duty and safeguards, and you get results at the WTO. It is a much faster process than going the domestic route, and you have a clear answer, and they require you to implement. So I can see how that might lead to a number of disputes in that area.

With respect to panelists, I cannot help thinking that it might help to be "on the job," and you learn a lot when you are "on the job." Professor Davy, have you not been a panelist? And going through that process, I can only expect or anticipate that you would get better and better at doing it, and doing it multiple times. Just as anything you do, the first decision that you write is not the same as the last one, and you will have slumps. But I just think that the juggling of other demands on panelists might be difficult. I do not know

if it is even doable in some extremely fact-intensive cases to juggle a full-time job and be a panelist – or do you just stop everything? So having a permanent set of panelists might improve things quality-wise.

Spiro: I think we have time for one last question from Niko Zaimis, please.

Nikolaos Zaimis:[34] Thanks. Niko Zaimis. I work for the European Commission. First of all, a small comment about the title of the panel. When I saw the title: … *the system should be modified or reformed,* my first reaction was really to do what most panelists and Appellate Board members would do, which is to take their *Webster's English Dictionary* and find out what is the difference between *modify* and *reform*. Did the Dean Rusk Center ask us to address different things? But I am glad to see now that everybody thinks that *reform* is perhaps the correct word.

Now, I think that what we have heard from the panelists this morning is that the criticism of the procedures and the need for reform can be grouped in two groups. The first are the procedural ones, and the second are the substantive ones. On the procedural ones, I have to say that I fully agree with what Stephen Kho has said about the need to link with the public. We may not agree in all our proposals – you know, with the U.S. proposal on that – but I think there is a gap. And there is a lack of communication with the public, especially on technical issues such as international trade negotiations. There is a terrible need right now to be more transparent and try to connect once more with the wider WTO membership.

My comment, though, is on the second group, which is about the substantive changes. And my question would be: *what is the purpose of modifying the rules?* It would be, of course, to resolve disputes in a better way. And the question is: *has the system failed, so far, to resolve disputes? Has the Appellate Body, for example, failed to resolve a dispute it should have resolved? Has it over-resolved disputes? Has it resolved disputes it should not have resolved because the text was, perhaps, silent? What is it we want to achieve with the substantive changes?*

Spiro: Thoughts and closing observations.

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[34] Counselor, Head of Trade Section, Delegation of the European Commission; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?*).

Georgiev: I think these questions are better addressed to Steve and to Amy than to myself.

Kho: I guess the first thing I would say is the Appellate Body would actually pick up the *Shorter Oxford Dictionary*, not the *Webster's*. So I think you have been in America too long, and I think you will be chastised when you go back to Europe. *(laughter)*

But on your question, I agree the system has not failed so far. This is going back to Professor Davey's question, too – disputes are being resolved, but you have to expect that there is going to be one happy party and one unhappy party. Being unhappy does not mean that the dispute is not resolved. And the U.S. has been on the end of being unhappy a lot, but again, our view is that the system works. I liken it more to arbitration than to a legal proceeding – arbitration where you put before an arbitrator a limited scope of what to review, of the measures and of the claims, and they make a decision within that scope. So even though there are unhappy people out there, I think, at the end of the day, business gets done and disputes are resolved.

Dwyer: I do not have too much to add to that except that, yes, I do think that they certainly have resolved disputes. Have they over-resolved disputes at times? I cannot imagine that we would have such a list of questions if they had not – one or two or twenty-five times over – resolved a dispute by providing an advisory opinion that we do not appreciate or leading us in a direction or just telling us where they are going. And the result has been, you know, displeasure on the receiving end, to a certain extent. But is the dispute resolved? Would it have been resolved? Most of the time, yes; they do resolve many, many disputes in a completely satisfactory manner. I am only talking about the outlier cases that you just remember because they make you want to change the system a little, make it better.

Spiro: Very good. Well, I think this is a very interesting leadoff to the conference. We are going to have more opportunity, in the subsequent panels, to follow up on some of these introductory observations. So I would like to thank the panelists very much for their participation.

After a Decade of Dispute Settlement Cases, Whom Does the System Benefit?

Moderator: *C. Donald Johnson,* Director, Dean Rusk Center, School of Law, University of Georgia

Raj Bhala, Rice Distinguished Professor, School of Law, University of Kansas

Stephen Kho, Associate General Counsel, Office of the United States Trade Representative

Eduard Pérez Motta, Chairman, Mexican Federal Competition Commission, Former Ambassador of the Permanent Mission of Mexico to the WTO

Johnson: The subject of this panel is certainly an interesting one for me, from a political standpoint. Having been in politics, I know that the question of who is winning and who is losing in the WTO is a very important one. Pursuant to the Uruguay Round implementing legislation, we have – every five years – a vote in the Congress on whether the U.S. should be in the WTO, or whether it should withdraw. Last June, this vote came up, and there were more people who voted against staying in than there had been the previous time.[1] It was still a safe margin – the vote was 338 to 86[2] – but I have to say that, in Georgia, we did not have quite that same result.[3] The majority of members of Congress in Georgia voted to withdraw from the WTO, so

[1] *Compare* H.R.J. Res. 27, 109th Cong. (2005) (resulting in a vote of 86 – 338 in favor of withdrawing approval of United States from Agreement Establishing World Trade Organization) [hereinafter Res. 27] *with* H.R.J. Res. 90, 106th Cong. (2000) (resulting in a vote of 56 – 363 in favor of withdrawing approval of United States from Agreement Establishing World Trade Organization).

[2] Res. 27, *supra* note 1.

[3] Representatives from the State of Georgia voted 7 – 6 in favor of the resolution to withdraw (yeas: Barrow, Deal, Gingrey, Marshall, McKinney, Norwood, Westmoreland; nays: Bishop, Kingston, Lewis, Linder, Price, Scott). Final Vote Results for Roll Call 239, http://clerk.house.gov/evs/2005/roll239.xml (last visited Feb. 6, 2007).

this may be a continuing problem.[4] This is a comment more, I think, on our delegation and their politics than the success of the U.S. in the WTO, but it certainly points to a growing political problem that should concern us.

As we discuss the developments over the past ten years, we are not going to have a box score to review – as the sports pages review baseball games – showing us who is winning and who is losing, and more particularly how things are going with the players. We do have an excellent panel here today to discuss these issues in a more sophisticated manner.

Let me briefly introduce our members here again. Immediately to my left is Professor Raj Bhala, who holds the Raymond Rice Distinguished Professor of Law at the University of Kansas Law School. I first met him in Washington when he was at George Washington University, and I was working at my law firm on the *Bananas* case.[5] Raj is an expert on that case. He has written a very lengthy treatise on it called *The Banana War,*[6] and I commend it to your reading. He is also a prolific writer in many other areas of international trade. He has a textbook that he is working on the third edition of – it should be out in 2007, I believe.[7] Every month or so, I receive something in the mail, a new publication that he has written, so last night I urged the *Georgia Journal of International and Comparative Law* to get to know him well, because he can certainly add to the prestige of our Journal.

The second panelist is Stephen Kho, and, of course, he was introduced to you in the previous panel. Stephen is the Associate General Counsel in the Office of the United States Trade Representative (USTR) where he currently is in charge of all issues relating to China, and he touched on that a little bit in the last panel. Of course, this is an area of great interest to all of us. There have not been any cases, except for maybe one, where China was involved, I believe.[8] But there may be more in the near future. In fact, we hear every day that there is going to be a case on intellectual property. We will see how that transpires. Prior to this position, Stephen was in Geneva, where he was

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[4] *Id.*

[5] Appellate Body Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas,* WT/DS27/AB/R (Sept. 9, 1997) [hereinafter Bananas, DS27].

[6] Raj Bhala, *The Banana War,* 31 McGeorge L. Rev. 839 (2000).

[7] Raj Bhala, International Trade Law: Theory and Practice (Matthew Bender 2000).

[8] As of the date of the Conference, China was the respondent in one case, DS 309. Mutually Agreed Solution, *China – Value Added Tax on Integrated Circuits,* WT/DS267/8 (Oct. 6, 2005).

the legal advisor to the U.S. mission to the WTO and managed the dispute settlement portfolio. He has also participated in every stage of the WTO dispute settlement process, as well as reviewed submissions and formulations of litigation strategies, so he is certainly well-qualified to present on this panel.

Last, but certainly not least, is Ambassador Eduardo Pérez Motta. Ambassador Pérez Motta obviously has a strong background in this area as well. He is currently the chairman of Mexico's Federal Competition Commission, but he previously was the Permanent Representative of Mexico to the WTO, in charge of preparing Mexico's participation in the Doha Ministerial Conference. He served as a Mexican chair at the Cancún WTO ministerial meeting, and although that meeting ended in a stalemate, things have picked up on Doha since that time. He has written quite a bit on this subject and we look forward to hearing from all of these men. I will start with Professor Bhala.

Bhala: Thank you for that kind introduction, and thanks to all of you for coming. It was very nice of Ambassador Johnson to invite me, and I am grateful to him and also to André Barbic. They have worked very hard in putting together this conference.

Ambassador Johnson has actually posed a very hard question about winners and losers. I suppose it is also a very American question and a very *March Madness* kind of question. One way to approach that is from a macro sort of level and take a look at statistics – try and identify trends and make some general statements – see what we can sort of deduce from the data. There are many different comments that have already been made on the last panel that suggest who some of the winners are or what some of the winning things might be, and maybe what some of the losing things might be. For example, it has been suggested that the rule of law has been a winner from the system, but different and perhaps opposing views have been suggested as to why. Those who favor a stronger judicial-type function and like a precedential system – and I would count myself in that group – would point to those sort of successes. Others who favor a more arbitration-style system say that, to the extent the system is going that direction, it has advanced the rule of law. We have also heard some discussion about major countries benefiting from the system, and I will say a little bit about some of the smaller countries and how they may begin to benefit from it. I think one thing we can all agree on is that the winners include students and teachers of international trade law – if there is really a distinction between the two – because there is a lot of material for us to study, write about, and practice in.

I would like to take a different approach to the winner-loser question – more of an inductive or inferential approach – and look at a few cases and see what we can infer from the cases as to who, or what, some of the winning and losing trends are. Now, I subtly changed the ambassador's question a little bit – he said: *Who are the winners and losers?* And now I am sort of adding *who* or *what*. So, some of the losers or winners are processes. The three cases I propose to chat a little bit about are the *Cotton* case[9] (and I know there was some discussion about that last year), the *Antigua Gambling* case,[10] and the *Mexican Rice* case[11] – the *Cotton* case being an Ag case, the *Antigua Gambling* case being a GATT case, and the *Mexican Rice* case being a POI (period of investigation) case in the dumping world. I will just take a look at some of the arguments and findings in the Appellate Body reports in those three cases and then maybe tease out a few observations about who, or what, is winning and who, or what, is losing.

I will start with the toughest case, the *Cotton* case. This case was brought by Brazil during the period in which the Peace Clause applied[12] in the Ag agreement.[13] And the first thing Brazil knew it had to do, and it did so successfully, was to knock out the American defenses under Articles 13(a), 13(b), and 13(c) in the Peace Clause.[14] In particular, Brazil had to show that two kinds of subsidies, production flexibility contracts and direct payments, were not eligible for Peace Clause immunity under 13(a).[15] That is because they were not "green box subsidies."[16] And then Brazil had to show that the

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[9] Appellate Body Report, *United States – Subsidies on Upland Cotton,* WT/DS267/AB/R (Mar. 3, 2005) [hereinafter Cotton, DS267].

[10] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Antigua Gambling, DS285].

[11] Appellate Body Report, *Mexico – United Definitive Anti-Dumping Measures on Beef and Rice,* WT/DS295/AB/R (Nov. 29, 2005) [hereinafter Mexican Rice, DS295].

[12] The "Peace Clause" is more formally known as Article 13 of the Agriculture Agreement, which "protects countries using subsidies which comply with the [A]greement from being challenged under other WTO agreements." Phase 1: The Peace Clause, http://www.wto.org/English/tratop_e/agric_e/negs_bkgrnd13_peace_e.htm (last visited Sept. 29, 2006). The Peace Clause expired at the end of 2003.

[13] *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 (1994) [hereinafter Agriculture Agreement].

[14] *See id.* at Art. 13 (detailing non-actionable and/or exempt actions and measures).

[15] *See id.* at Art. 13(a) (making non-actionable and exempt domestic support measures that comply with Annex 2 of Agriculture Agreement).

[16] Generally, a "green box subsidy" is one that is permitted by the WTO. Agriculture Negotiations: Background Fact Sheet, http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm (last visited Oct. 6, 2006).

other remaining six of the eight challenged subsidy programs were not eligible for 13(b) immunity and could be challenged as "yellow light subsidies" causing serious prejudice.[17] And then, finally, it had to get out – Brazil did – from under 13(c) on "export subsidies."[18]

Now, if you look at the arguments on each of those, they tell you a little bit about the sophistication of the argumentation that we are now seeing in many WTO cases. For example, on the "green box" issue, with regard to whether production flexibility contracts and direct payments were green box or not, Brazil had to take a careful look at those two subsidy programs, so it had to come to grips with the Commodity Credit Corporation;[19] it had to take a look at the U.S. statute and see that, in fact, those two subsidy programs were not completely decoupled from output because the statute said to farmers: *You can plant anything you want or nothing at all and get payments, as long as you do not plant fruit or vegetables.* Therein was the coupling, and that was the argument Brazil won on. Now the U.S. made a fairly robust counterargument – that a negative limit and positive limit can have the same sort of effect, depending on how broad the positive limit is or how narrow the negative limit is. The U.S. might have gone a little further on it and made a GATT analogy and talked about positive lists and negative lists. The point of this is that you saw a high degree of argumentation on a very technical legal matter, and that is something that is coming out on a number of cases, this being a good example of it.

To give you the 13(b) Peace Clause issue – there, Brazil had to basically rebut an American argument that support to a product is not the same as product-specific support. Here, with that argument, we saw a little bit of – maybe – the losing side of what is going on in the Dispute Settlement Understanding (DSU). Mind-numbing paragraphs going on for, I do not know, pages and pages about whether or not support for a specific product, which is the language under 13(b) is the same as product-specific support. Finally it was concluded that no, they are not. In fact, support for a specific product covers both product- and non-product-specific support; therefore, all of

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[17] Generally, a "yellow" or "amber light subsidy" is one that should be reduced. *Id.*

[18] *See* Agriculture Agreement, *supra* note 13, at art. 13(c) (exempting subsidies that conform to provisions of Part V of Agriculture Agreement). *See also id.* at art. 8-art. 11 (containing provisions that detail exempt subsidies).

[19] The Commodity Credit Corporation (CCC) is a division of the Farm Service Agency (FSA) of the United States Department of Agriculture (USDA). Farm Service Agency, About the Commodity Credit Corporation, http://www.fsa.usda.gov/FSA/webapp?area=about&subject=landing&topic=sao-cc (last visited Oct. 6, 2006).

the challenge and subsidy schemes come under the measure of support and can be challenged by Brazil. We heard about the *Oxford English Dictionary* and the use of that. This is not fun reading. For those of you who have not taken a look at this *Cotton* case, it has – I think – about 1,500 footnotes, or something like that, and it goes on for about 400 pages. Actually, I had to read it in preparation for a case review that David Gantz[20] and I do. I was on the plane (the world's longest commercial flight, which is Singapore Airlines' Newark to Singapore), and it took me the whole flight to read that. But that is a good place to read it, where you are just in an enclosed space. You get some sophisticated argumentation when you look at some arguments. You get some really mind-numbing arguments in other instances.

What else can we say from the *Cotton* case? I think we can say that one of the losers was the English language. I do not want to sound like *Miss Manners* or some perfect writer; by no means am I. We are always getting better writing, but it is really atrociously written. It is endlessly redundant. Many times things are defined and then redefined fifty pages later. Sometimes the same footnote is plopped down forty paragraphs later. You almost get this feeling that the Appellate Body members e-mailed in their different parts, and then it was just assembled. I would not care so much myself about it if we were not trying to advance the rule of law. The quality of writing really does matter if we are trying to develop a body. Whether they are judicial opinions or arbitral decisions that people can learn from – having a good written opinion matters. It also matters with respect to legal capacity.

One of the, perhaps, losers in the system so far has been the lack of participation by least-developed countries (the forty-nine least-developed countries); some of the developing countries, aside from Brazil and India and Mexico. I am not sure that an opinion like *Cotton* has much pedagogical value to lawyers in the "Bangladeshes" of the world – to teach them how to write, how to litigate cases. I think that is something that could be worked on. One reason for this, and I realize that this may be creeping back into the previous panel, is the need for translation. Some Appellate Body members have said privately that, unless they get an extension of time in which to issue their report (the ninety days), they lose about a week or two because of the need to translate into French or Spanish. I do not want to be insulting to any language, but we all know the statistics on the "widespread-ness" of English,

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[20] David A. Gantz, Samuel M. Fegtly Professor of Law; Director, International Trade Law Program; Associate Director, National Law Center for Inter-American Free Trade, University of Arizona James E. Rogers College of Law.

and if you add people for whom English is a second language you easily top Mandarin, which is otherwise the most widely spoken. So, we should think about why not having just one good official text issued in one language and then others can translate as they need to.

Another loser that comes out of the *Cotton* case is the U.S. Ag committee – that is, the House and Senate Ag Committees. They proclaim that they checked with Brazil and the WTO before drafting the different challenged measures in the farm bills in 2002.[21] Well, either they got it wrong still, or they were misled, but they certainly feel like they were losers from this. You might also say that one other loser might be the *Cotton Four*: Benin, Burkina Faso, Mali, and Chad. How much will really change for them?

Back to one last comment on that case to tease out something; for those who like a more judicial-style system. There was a pretty clear example of *de facto stare decisis* operating when the U.S. trotted out its argument from the *Foreign Sales Corporation (FSC)* to defend its export credit guarantees in *Cotton*.[22] It trotted out the same argument that it lost on when defending *FSC*, specifically the remedial legislation, the Extraterritorial Income Exclusion Act.[23] The argument is that – well, the export scheme does not benefit just exporters; it benefits a broader universe of people: lost in the first case, the *FSC*; lost again in *Cotton*. You knew it was going to be the next paragraph that the Appellate Body was going to cite to them. Okay, enough about *Cotton*.

A couple of slightly easier cases, technically. The *Gambling* case – what can we get out of that? The winners: one of the winners is the "mice of the world," if you will; this is *The Mouse That Roared*, if you saw the movie.[24] This is Antigua challenging the United States. I read some statistic that Antigua's economy is .007 percent of the American economy, and its population is 80,000. That is about the size of Lawrence, Kansas. Antigua showed gumption in challenging the U.S. on this.

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[21] Farm Security and Rural Investment Act of 2002, 7 U.S.C. §§ 7901-8002 (2002).
[22] Cotton, DS267, *supra* note 9.
[23] FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519 (Nov. 15, 2000), 106th Cong., 2d Sess.
[24] THE MOUSE THAT ROARED (Columbia Pictures 1959). The movie to which Prof. Bhala refers is one in which the small fictional Duchy of Great Fenwick declares war on the United States, setting out to lose so that it may win in the end by receiving foreign aid.

Another winner in this case was clarity, especially in GATT's scheduling, because, as you probably know, much of the case turns on whether or not the U.S. did in fact make a commitment on gambling services. The question became whether or not gambling services is an "other recreational service" (and the Appellate Body said it was and, therefore, the U.S. had made a commitment), or whether gambling services was "sporting" (in which case the U.S. would have won because the U.S. said it was sporting, and the U.S. did not make a commitment on sporting).[25] And so, we got some reminder of how important it is to be clear on GATT scheduling.

We also have as a winner, specificity. The Appellate Body said: *You cannot just challenge a total prohibition. You cannot just throw all measures together and call it a total prohibition.*[26] You have got to be specific or, to put it differently – for proceduralists among us – you have got to be very clear and specific in your pleadings as to what you are complaining about.

Another winner in that case was consistency in methodology. For the first time, the Appellate Body was faced with the question of how to evaluate a GATT Article 14 defense?[27] The U.S. defense was public morality; banning offshore gambling from coming in because it is immoral. The Appellate Body looked to the same two-step test it uses under GATT Article 20.[28] So, we saw some sort of legal methodology being applied in a consistent manner.

All of those points about small parties willing to challenge big parties – clarity, specificity, and consistency in legal methodology – those all advance the rule of law. The losers – for those who are more philosophically or theologically inclined and wanted a definition and grand discussion of morality – forget it. It is not there. You keep reading the report, hoping that the Appellate Body will issue some *obiter dicta* saying: *This is what we think morality in trade is about, and this what we think a legitimate invocation of GATT's Article 14(a) would be.*[29] There is nothing like that. They just do not even want to get close to it.

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[25] Antigua Gambling, DS285, *supra* note 10.
[26] *Id.*
[27] *See* General Agreement on Tariffs and Trade art.14, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (containing exceptions to rule of non-discrimination) [hereinafter GATT].
[28] *See id.* at art. 20 (enumerating general exceptions); *see also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R (Apr. 29, 1996) (applying two-tiered analysis when applying Article 20).
[29] *See id.*, art. 14(a) (listing exceptions to rule of non-discrimination).

Also, maybe more on the losing side is the strength of rationale. The Appellate Body logic, which ultimately sinks the U.S. in the case, is pretty weak. It is a few conclusory paragraphs that basically say the Interstate Horse Racing Act,[30] which is not one of the challenged federal statues, created some discrimination against foreign gambling service providers. The U.S. could not justify that, and that is why the U.S. ultimately lost the case. So, we could have hoped for better reasoning in some of the cases.

Finally, the third case from which you can maybe draw some broad points is the *Mexican Rice* case.[31] This is a case where, basically, Mexico used 1997, 1998, and 1999 as the three-year period from which it collected data on both dumping margin and injury.[32] The subject merchandise was long-grain rice from the U.S., but for the injury determination, it used only six months of those three 12-month periods.[33] It discarded the other six months of data. The U.S. said: *You cannot do that,* and the U.S. won.[34] Here, we saw victory for due process. The Appellate Body does go fairly far down the line, saying: *Look, procedurally these anti-dumping investigations have to be fair. How can you say they are fair, or, for that matter, even transparent, when you are collecting data for three years, but then selectively using six-month periods?*

I guess the flipside would be that the losers from *Mexican Rice* would be all the investigating authorities around the world that are still sloppy. You might recall the *Thailand-Poland H-Beams* case, where there was also an issue of sloppy investigation.[35] I guess the overall point, in trying to answer Ambassador Johnson's question, is that we can sort of look "top down" at some broad data trends, and we can also sort of look from the "trenches view." We can look at specific cases to see what we can get out of them in terms of who, or what, is winning.

Ambassador Johnson: Great. Thank you, Raj. Stephen?

Kho: Good afternoon again. As before, I will just go ahead and mention, as I am obligated to do, the ground rules with respect to – probably

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[30] Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 1811 (codified at 15 U.S.C. §§ 3001-3007 (1988)).
[31] Mexican Rice, DS295, *supra* note 11.
[32] *Id.*
[33] *See id.* (noting that data collected came from March-August of relevant years).
[34] *Id.*
[35] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland,* WT/DS122/AB/R (Mar. 12, 2001).

irrelevant here – the media. My remarks are off the record with no quotes or attributions, and my views are my own and not necessarily those of the U.S. government.

The question posed to this panel – *Whom Does the Dispute Settlement System Benefit?* – can be viewed through several different prisms, in my opinion. One can certainly respond from the point of view of the general public or from society as a whole. Or, one can respond from the point of view of particular interest groups. For me, given my experience as a government official representing the United States at the WTO, I would like to respond from the point of view of the WTO membership. From that point of view then, the question could be rephrased as: *After a decade of dispute settlement cases, whom in the WTO membership does the system benefit?* And, I would also add that I have not thought of benefit in terms of winning and losing or winners and losers. There are times, obviously, when losers can also benefit from the system.

I will answer this question in three parts. First, everyone benefits. Every country and every separate customs territory that is a member of the WTO benefits from the Dispute Settlement System (DSS). This is because, in my view, the DSS, for the most part, promotes the rule of law. I say for the most part because, as I mentioned before, when sovereign nations deal with each other, you have to expect diplomacy to continue to underlie every transaction.

Nevertheless, the WTO rules ensure that diplomacy does not overrun the DSS. For instance, in the old GATT days, Appellate Body decisions could be ignored simply by having one country – and usually it was the loser country – block the adoption of a report. In the WTO, the negative consensus rule applies,[36] which means that, now, the only way a report can be blocked from adoption is if all 149 WTO Members agree not to adopt the report. Having the rule of law, in my view, benefits everyone. It upholds agreements that have been made by the Members through negotiations, it ensures that the WTO trading system is secure and predictable; it encourages Members, even within their own domestic systems, to abide by the rule of law.

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[36] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (embodying "negative consensus" principles in Articles 6.1, 16.4, 17.14, and 22.6) [hereinafter DSU].

Second, and this might be a surprise to some, I believe that the DSS really benefits the smaller countries. Consider this: the first WTO dispute settlement case established that it is possible for a smaller economy, like Venezuela, to force one of the largest economies in the world, like the United States, into a dispute in the WTO and win.[37] The WTO DSS puts every Member on a level playing field when it comes to resolving disputes. It is one giant equalizer. This is why I sometimes cannot understand why some continue to argue that the DSS only benefits the big actors.

Perhaps early on most of the users of the system were the larger trading countries, but that was probably because there was more trade between these countries; they had disputes among themselves because with more trade comes more disputes, invariably. It is a fact of life in every trading relationship. In fact, it is quite normal in trading relationships to have disputes, and as the world trading system expands, more trading is done between "developed and developing" countries, as well as between "developing and developing" countries. One expects more and more economies to become frequent users of the DSS and, in fact, that is what is happening.

In 1997, for example, 16 percent of the disputes were initiated by developing and least-developed countries. In 1998, the number rose to 19 percent. In 1999, it was 33 percent, and in 2000, it jumped up to 54 percent. In fact, by 2005, 63 percent of the disputes were initiated by developing and least-developed countries. Also, of the 336 disputes initiated in the WTO since its inception, 78 of them were brought by developing and least-developed countries against developed countries, while 53 of them were brought by developing and least-developed countries against other developing and least-developed countries. Compare this number against the number of disputes brought by developed countries against developing and least-developed countries, 77, which is comparable. You can see that the developing and least-developed countries are quickly recognizing the value of the WTO DSS for themselves and utilizing that system for their own benefit.

Third, the DSS benefits the WTO multilateral trading structure as a whole. As more and more disputes are resolved, and this is what I mentioned in one of my responses in the previous panel, the DSS itself becomes more and more of a prevention mechanism. It prevents future disputes, and from my point of view, it does so in two ways. It does so externally, and it does so internally.

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[37] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

First, it prevents future disputes externally by making it easier for a complaining Member to talk a responding Member into withdrawing a measure that is similar to a previously determined WTO-inconsistent measure. This can happen either before a dispute is officially initiated or after a dispute is initiated. In the latter situation, the parties – usually during the consultation stage but sometimes even in the middle of the panel proceedings – agree to what we call a mutually acceptable resolution, and then the dispute is diffused. In fact, of the 336 disputes initiated so far, 79 of them have never reached the panel phase, and were either resolved or abandoned during the consultation phase. As a parenthetical, by the way, this does not mean that 257 disputes have gone through panel proceedings. This number, 257, would include disputes that are still actively consulting, or disputes that are currently in the panel process.

Second, the DSS prevents future disputes internally. It does so by forcing Members to think twice before implementing laws that are similar to other laws previously found by panels and the Appellate Body to be WTO-inconsistent. Let us take, for example, the United States. The office of the U.S. Trade Representative is tasked with representing the U.S. in the WTO, and as such, our staff has built an expertise in the field of WTO law. Often, we are consulted by members of Congress when they are drafting laws and by various administrative agencies when they are drafting regulations – requesting that we review the draft laws and regulations so as to ensure that the U.S. is complying with its WTO obligations. This internal consultation process within the U.S. government helps to prevent questionable WTO laws and regulations from ever seeing the light of day, and this benefits the global trading structure.

The prevention aspect of the WTO DSS is, of course, not something we can easily quantify (or even at all), but we should not underestimate its value. I cannot tell you the number of times USTR has had to weigh in heavily to prevent what we perceive to be WTO-inconsistent domestic rules from being implemented. I also cannot tell you the number of times we, as U.S. delegates, were able to convince a trading partner to not implement a possible WTO-inconsistent law or to remove an apparent WTO-inconsistent measure based on positions established in previous disputes. These are all future disputes that have been avoided; all due to the existence of the WTO DSS.

So, the WTO DSS is, therefore, in my view, beneficial. It benefits every WTO Member; it certainly benefits the smaller economies and the developing and least-developed countries; it benefits the multilateral trading regime

as a whole. As more and more members join the WTO and as the WTO itself matures, there is no doubt that the DSS will remain beneficial for years to come. Thank you.

Johnson: Thank you, Stephen. Our final speaker is Ambassador Pérez Motta.

Pérez Motta: Thank you very much, and thank you very much for this invitation. Well, there has been some time since I left Geneva. This is the first opportunity that I have had in a year and a half to go back to my previous life, so I am very happy to review some of the documents that I promoted when I was in Geneva.

Let me first say, just to briefly answer the basic question of this panel, that the net beneficiaries from a strong dispute settlement mechanism are the consumers from developed and from developing countries. If you start from the assumption that the international trading system is a system that promotes a more open trading mechanism among the different countries on services and on manufacturing goods and on primary goods in general, well, the net beneficiaries of that system are going to be the consumers. So, you have a strong DSU and, actually, the people who are going to benefit most are going to be the consumers.

Now, if you divide the system between developed and developing countries, I would say that – and I think that this is consistent with what Stephen Kho was saying – in general, as in any rule of law system, the guys who are going to have more benefits from that system are going to be the weakest ones. So I would say developing, and especially the least-developed countries, are going to benefit more from a strong and solid dispute settlement mechanism.

So the question then goes to the issue that was discussed in the previous panel: *Do we have an optimal system, or should we have minor reforms of the system? What should we do with the system? How to do it?* I think that the diagnostic that we had about two years ago in Geneva is still valid today. From what I have heard from this panel and from my colleagues from the Mexican mission in Geneva, I think the main problem is a lack of focus in the whole discussion of the dispute settlement negotiation. My impression is that each country is basically trying to use its own history in the system and trying to solve its specific problems through these negotiations, instead of looking at the system as a whole and looking at what could be the international or public interest of the reform; I mean, what would be the benefit for the whole

system of reform of the dispute settlement mechanism? I think that is the main problem. So, when you ask each and every delegation what they perceive to be the problem the DSU, and what reforms they would be following or trying to pursue, they are going to tell you whatever they have been experiencing in their particular cases in which they have been participating.

What we did in the Mexican mission, and what we basically offered in the article of the book that is going to come out in the next few weeks, was basically to try to use a more academic mechanism, a more scientific analysis of the problem.[38] Let us make a diagnostic; we have an experience of more than ten years already, so let us look at that experience in general, and let us see if there is a problem that we should solve. That is precisely what we did.

We divided the problem into three basic areas: first, access to the system; second, an issue of compliance; third, let us say, procedural issues. So in the third basket, we put basically anything else, everything else. Let me just briefly tell you what our main result was, and what we got from that analysis – and I want to repeat that I think this is still valid today, two years after we made that analysis.

In terms of access to the system, we have three issues: first, the access of the developing countries, especially the least-developed countries; second, the issue of internal transparency; third, the issue of external transparency. In terms of access of developing countries – I will go basically to the main conclusions without going into the details – but our findings are that this is not an issue, frankly speaking. Even if you look at what developing, or even less developed countries, would have to pay to go to these cases – to use the dispute settlement mechanism – and considering that we have the Advisory Centre,[39] it is not really expensive to use the system. So that is not the problem. LDCs (Least-Developed Countries), at least until two years ago, had never used the system, and maybe there have been one or two cases after that,[40] even though developing and LDCs are much more exposed to trade in relative terms than developed countries.

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[38] Eduardo Pérez Motta, *If the DSU is "working reasonably well", why does everybody want to change it? in* Reform and Development of the WTO Dispute Settlement System (Dencho Georgiev & Kim van der Borght, eds., 2006).

[39] The Advisory Centre on WTO Law (ACWL). For more information, see Advisory Centre on WTO Law, http://www.acwl.ch/e/index_e.aspx (last visited Oct. 5, 2006).

[40] Bangladesh is the only LDC to have used the Dispute Settlement System; it did so by making a complaint against India in January of 2004. Dispute Settlement: Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Oct. 9, 2006).

Let us compare Mexico with the U.S.; in the U.S., trade is about 25 percent of GDP (Gross Domestic Product). In the case of Mexico, it is about 60 percent of GDP. If you look at the exposure of African countries – we have the statistics for African countries, and the average was 72 percent – they are much more exposed to trade. So, if there is a lack of compliance for any developed country on the WTO rules, that would have more of an affect, in relative terms, on developing countries than anyone else. That is consistent with the statistics that you were seeing before, and those are exactly the statistics that I have.

In terms of access then, it is not really an issue, frankly speaking. In terms of internal transparency, in more than 90 percent of cases Members have participated as third parties – and I mean for panel reports. For Appellate Body reports, Members have participated as third parties in almost 85 percent, so public submissions can be obtained from many active players. The average delay between issuance of final paper reports to parties and circulations to the other Members is about 28 days. Frankly, I do not think this is a big issue either.

External transparency – it would be much better to have more transparency, of course. I would agree with the basic proposals that the U.S. has been making, but I do not think this is the main problem of the DSU – even though I think it would be good to have more transparency of the system than what we have today.

I think the main problem is compliance. In my view, this is the crucial issue. I am not going to spend too long here. I see this problem more as an economist – I am not a lawyer even though my work today is with lawyers all the time, so I try to understand them better as I work with them – but I think this is a problem of economic incentives. I have many notes here, but I am going to try to explain it in a much easier way.

I think the problem here is that if there is a country that does not comply and there is a panel, after three years, it might have to comply – either by retaliatory measures from the other country or through compensation. But it is going to take more than three years; on average, it is going to be a little bit more than three years, so that means you basically have a free lunch for three years. If the panel goes against you, then the only thing you have to do is change your rules, and that is it. And I think that is the main problem of the DSU. I think that if we do not change the system of economic incentives to make lack of compliance costly, from the beginning, there is going to be, basically, a long-term problem of the working of the system. And this

problem is going to go much more against the weakest of the system; in the end, the big guys, if they do not have the DSU, can solve their problems politically. In the end, if the U.S. and European Union have problems – I am characterizing this a little bit, of course – they might solve their problems politically. But when you have a big problem – or you have a lack of compliance between a big guy and a very small country – if you do not have general rules that can make the big country comply, then you have a problem. And I think this is the main issue here.

How to solve this? Well, actually, we made a proposal that was not very well accepted by very many countries, including developing countries, and this is an interesting issue – i.e., why some developing countries did not like this proposal.[41] My impression is that many developing countries, especially the developing countries that are closer to being developed – the emerging countries, we might say – want to have some flexibilities as well. They prefer not to have a system that is strong enough so that the incentive not to comply disappears. That is why when you say, Dencho Georgiev, that we never got the multilateral support from this analysis, this is the answer that I could have; because when we made this proposal in Mexico, I would have to say that we had to do it even against the opinion of many people in Mexico. That is the point – that the big interests in our countries, developing countries, are the same in that they want to have these flexibilities in place.

What was our proposal? Well, our proposal basically had three parts: first, early determination and application in nullification and impairment; second, retroactive determination and application; third, preventive measures.[42] That was basically the whole concept, which could completely change the structure of incentives. We also added what we called negotiable remedies, which is an interesting concept because it would be similar to making a market for remedies.[43] We have to understand that, for many countries – let us take Ecuador and the case of *Bananas*;[44] the last country interested in retaliation should be Ecuador because it would be like shooting your own foot. So, why not be able to sell the possibility to retaliate? I know this is, politically, a bump, but from a market point of view it would be much better. Just sell that possibility. Just sell your rights and see – maybe Japan would like to use it, or any other country, against the European Union.

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[41] Proposal by Mexico, Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding, TN/DS/W/23 (Nov. 4, 2002).
[42] *Id.*
[43] *Id.*
[44] *See* Bananas, DS27, *supra* note 5.

I would like to stop here. And thank you very much for this invitation.

Johnson: Thank you, Ambassador Peréz Motta. We will just open it up now to the floor for questions. We have plenty of time for discussion, and this is an interesting topic for discussion. If I could be so bold as to call on one member of the audience who I had hoped to be on the panel, and that is Nikolaos Zaimis, who is the head of trade at the EU Mission in Washington. I thought maybe we might like to have just a general comment about your perspective.

Nikolaos Zaimis:[45] Well, I would certainly have a comment. When I was working, before coming to Washington, in the dispute settlement unit in Brussels, one day, the Director General asked us that very same question (I think he wanted to report to the European Parliament): *How many cases have we won? How many have we lost?* And believe me, it was one of the most formidable tasks we ever had to do because how do you count wins/losses? How do you define victory or loss? Do you count as a win a case when you have won only on one claim (and have lost on all other claims), or, if you are the defendant party, when the complaining party has won three out of five claims? How would you classify such a result? So it was a very difficult and complex table that we had to produce to show that we had won most cases.

And for the benefit of our audience – if you want to know the answer – never, never look into the websites of the European Commission or USTR, because we both always win, of course. Even in disputes between us, you get these press releases on both sides, which are, of course, very victorious. But if we think about something that Ambassador Pérez Motta said, that the DSS is there to serve a purpose, to resolve disputes; if the dispute is resolved, I think the benefit goes to the system. We have seen from the previous panel discussions that the system does work. It does resolve disputes. Therefore, if the system works, then it is a benefit to all, whether you are a defendant or a complainant party.

Johnson: Thank you very much. Other questions or comments? Ambassador Georgiev?

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[45] Counselor, Head of Trade Section, Delegation of the European Commission; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?*).

Dencho Georgiev:[46] When I looked at the panel agenda, I linked it also to the question of the first panel (whether the system should be modified), and then I predicted what would be the outcome of this panel – that people would say that the system would benefit everyone. Then, I thought that it is legitimate to ask this question from the point of view of: *What should be changed? Should we look at who is benefiting and who is losing as a result of certain changes?* I thought that this question should be asked because if you find, through some modification, that someone – a definable group of countries, a category of countries – would be losing, and another would be winning, then that would be a good argument not to have this modification. So, approaching it from the negative, it is a good question. Thank you.

Johnson: Thank you for the comment. And I would like to respond to the comment, especially to the extent of having posed the question. I addressed this a little bit in my introduction, but there is a great question amongst the populace, I think, in all countries, certainly in the U.S. I remember talking with the Indian ambassador to the WTO about his political problems in India – from my perspective, when I was in the U.S. government at USTR, I thought that India was gaining quite a bit by being a Member, not only in disputes, but also in negotiations. But in talking with him, he said that every time he came back to Delhi and other parts of India he would get mobbed by the people who thought he was caving in to everything that developed countries wanted, and that he thought the general population there did not think the WTO was a good thing for India. I suspect that is the case in many other countries. I would like to hear your perspective on Mexico.

Pérez Motta: This is a very interesting issue. What I said at the beginning was that the main beneficiaries of a stronger DSU are the consumers, and I really mean it; I really believe that. The problem is that the only voice that we never hear in the WTO is the voice of the consumers. If you go to the general counsel, to any discussion of any negotiating group, you never hear the argument of what is the benefit for, or what is going to be the effect on, the consumers. So what Dencho Georgiev is saying is right; as long as the consumers are not on the radar of discussions – and what you hear are basically the interests of domestic interest groups – then you are going to never have any real, let us say, engine to discuss the public interest impact on the reform of such an important issue or such a crucial instrument like the dispute settlement mechanism.

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[46] Ambassador of Bulgaria to the WTO; Panelist *(Panel 1: Should the WTO Dispute Settlement System Be Modified or Reformed?)*.

That is how I can explain why this discussion on the rules area of the WTO is not moving. It might not move at all, or it might have some changes, but they are just going to be a minor change here and there just to say there was a reform or there were some modifications according, of course, to the mandate. And that is going to be it. In the other areas, those domestic interests move you in the right direction most of the time because, in the end, you have the balances of power of different producers in different countries that, through their pressure, are going to liberalize here and there; maybe not enough, but at the end, it is going to move in the right direction.

In this discussion, I do not see that balance, and that is a problem. This is a problem which is inserted in the heart of the system, which is the problem of compliance. Let me just give you an example: Maybe people would not like to see it, but in the case of Mexico, in the case of *Fructose*[47] (a recent case that we finally lost, which started while I was ambassador in Geneva), I told them we are going to lose this case; of course we are going to lose it. But, it was a decision by the Congress; the Congress knew that what they could gain was time. This is exactly what has been happening, and you know the erosion goes through the system. If they knew that they could pay from the beginning for an action that is clearly against the commitments of the country, they would have thought twice about it; at least they would have thought twice. But, if this is going to be for three years or more, let us do it. Somebody is going to pay for that.

Johnson: I think it is a very good point. Number one, consumers are generally the greatest beneficiaries of freer trade and trade liberalization, but they do not have much of a voice in many countries, certainly in this country; primarily because they do not build up interest groups. They are just not as effective as what you call the special interests, which really are particular industries that know how to impact their congressional delegation and impact USTR, impact the White House and have a greater impact than do the consumers who are the overall beneficiaries of, not only the DSS, but also trade liberalization. For example, China is the 800-pound gorilla in trade these days, but there are many studies that show that trade with China has reduced our inflation rate by 1 percent. There are obviously great benefits to consumers, but what is the impact of imports on industry? Because it is the voice of the opposition to imports that is usually the most effective.

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[47] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States,* WT/DS132/AB/RW (Oct. 22, 2001).

Another example is the *Bananas*[48] case – we do not produce any bananas in this country, but it was the biggest WTO case that we had in the '90s, as I recall, and it was driven largely by one company, Chiquita. In full disclosure, my firm represented Dole Food Company, who also had an interest in it, but Chiquita was the driving force on that case, and it had very little to do with anybody else much, except, of course, the Europeans and the ACP countries[49] and other non-U.S. interests.[50] The political influence of Chiquita was enormous in affecting our trade policy. But back to the point of the people who walk into the Wal-Marts and retail stores who benefit from these lower prices based on freer trade. They do not really express their voices and do not have an impact on trade in the same way that labor and domestic industry do.

Bhala: Maybe two comments: one on access and one on retrospective remedies. I think defining what we mean by access is important, and one indicator could be: *who are the lawyers in the room? Are the lawyers that are arguing the cases for poorer countries from those countries, or are they law firms that are from developed countries?* I think we are all familiar with this legal capacity issue, and we have heard officials from major developing countries say they still have to hire counsel in Brussels or in Washington. So, in effect, for them, and therefore for smaller poorer countries, the DSU is a system that causes sub-contracting back to developed countries – if you get the point. And we do not know the answer to that question because we do not, as far as I know, have statistics on which lawyers from which places are arguing which cases in the room – we cannot go in the room. We have heard, as in the *Bananas* case, that we have had QCs (qualified counsels) and others argue cases.

On the retrospective remedy issue – that is one worth a lot of thought, too – it certainly would, perhaps, lead to greater deterrence generally (general deterrence and specific deterrence), but if we think about what the other theories of punishment are, one of them is revenge – aside from deterrence and rehabilitation, is revenge. Would we want to have any sort of vindictiveness in our remedial system, and if we go to retrospective remedies, would that inject a bit of a revenge element? I do not know the answer to the ques-

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[48] Bananas, DS27, *supra* note 5.

[49] ACP Countries are those in Africa, the Caribbean, and the Pacific. ACP Countries, http://ec.europa.eu/comm/development/body/country/country_en.cfm (last visited Oct. 8, 2006).

[50] For instance, North, Central, and South American countries, such as Belize, Canada, Ecuador, Nicaragua, and Venezuela. *See* Bananas, DS27, *supra* note 5.

tion. I am just trying to throw out the idea that the theory of punishment is going to be as important as an economic-based incentive analysis of the punishment.

Johnson: Yes, Professor Davey?

William J. Davey:[51] A couple of things on compliance and remedies. In thinking about compliance, it strikes me that the problem of compliance, so far, has not been developing countries not getting compliance, as much as other developed countries mainly not getting compliance from the United States.

If you think of all of the long-term cases of non-compliance, they, typically – with the exception of the *Brazil-Canada Regional Aircraft* case[52] – involve the U.S. And the ongoing ones that have not been corrected at all are relatively minor cases, involving the EU against the U.S., such as the *Trademark and Copyright* cases,[53] and the *Japan Anti-dumping* case.[54] I am not sure that compliance, so far, has been a problem for developing countries. They seem to have gotten the U.S. to at least remove the measures, which were typically safeguard measures.

A comment on retrospective remedies – I think that you have to be careful about how you put them in place. If you think in terms of still giving a country a reasonable period of time to comply, and if they comply – no retrospective remedy – you do not have to worry so much about the revenge idea. They do have a period in which they can take action. It is only when they do not take action that they are likely to be punished.

You can argue that retaliation does not work all that well, but the fact is – and in most of the cases where it has actually been applied – it has led to change, usually fairly promptly. The *Hormones* case is the one long-term

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[51] Edwin M. Adams Professor of Law, University of Illinois College of Law; Former Director of the Legal Affairs Division of the WTO; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?*).

[52] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft,* WT/DS70/AB/R (Aug. 2, 1999).

[53] Panel Report, United States—Section 110(5) of U.S. Copyright Act, WT/DS160/R (June 15, 2000).

[54] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R (July 24, 2001).

counter-example, I suppose.[55] In any event, I think over time the system has to improve its timely compliance record, or countries will lose faith in it. Some form of retrospective remedy, I think, is essential in order to achieve that.

Kho: I feel like I have to defend the U.S. government once in this process, and the only thing I would say in that respect is that I would agree that, generally, compliance is not as big an issue as some have made it out to be. With respect to the U.S., we have complied. There are more cases brought against us than most other countries, and in most of those situations, we have complied.

I will touch upon that in just a second, but I do want to mention, with respect to compliance, the retroactive remedy proposal. I also agree that we have to be careful with that because that is really shifting the fundamental nature of the dispute (of the WTO, really), which is this notion that you are not really in violation until you have been found to be in violation. The DSU is actually quite clear – you cannot go out there and say, one country cannot say to another: *You are in violation.* That is a violation, in fact, of an obligation of the DSU, Article 23.[56] That was a case the EC brought against the U.S. and won on, based on that theory.[57] So then, now to all of a sudden say: *We have found you to be in violation and then you are going to have to pay all the way back to…* when? – the inception? Well, then questions are asked: *the inception of the time the measure was put in place? What if it was put in place before the WTO? What if it was put in place after the WTO? Also, the inception of a panel proceeding? Do you count when consultations occurred or afterwards? And then how do you quantify all of that?* Those are all questions I think, at the end of the day, really go against the nature of the current WTO system.

I think if you want to change that, fine. If the membership decides that they want to change that and make it, frankly, more of a punitive action, okay. But I do not see it going there right now, and really we are looking at countries that generally act in good faith towards each other. Like I said, when disputes occur, you do not necessarily say: *Well, somebody is acting in bad faith.* Disputes occur just because there is a lot of trade and you are going to have issues.

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[55] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998).
[56] *See* DSU, *supra* note 36, at art. 23 (providing that Members shall not make determinations to effect that violation has occurred).
[57] *See* Bananas, DS27, *supra* note 5.

Are there preventive measures – this notion that you can sell your rights to other countries because they have a better ability to retaliate? I do not know about that. That is really – we are getting down to bringing as many cases as you can so you can sell it to make money. It just sounds problematic. And this early action proposal, this notion of having a preliminary injunction – frankly, the WTO is not set up as a court right now. We can argue as we modify it in the future – do you want it to be more like a court or more like an arbitration as Professor Bhala mentioned? But right now, it does not have the capacity to make these determinations to enforce preliminary injunctions, and those kinds of notions, again, are coupled with the fact that the DSU specifically says that nothing is in violation of the WTO unless it has been determined through the panel proceeding, through the Appellate Body proceeding, to be in violation.

All of that raises a lot of questions about the current nature of the system. The big question behind all of that, too, is: *can developed countries do these things against developing countries?* And, would that not really hurt developing countries if the developed countries came to them and said: *Look, you have a measure that is in violation, and we are going to retroactively seek remedies.* It may be a small measure, it may be something that does not hurt a whole lot, but given the fact that it is a small economy, each measure is going to affect them. So those are questions I think people are going to have to ask when they think about this proposal.

The last thing I will say – the voice of consumers sometimes is the responsibility of the government. I mean, being in the government myself, our client is, in fact, the government as a whole. We are not talking about just industry. We are not talking about just the politicians. We are also talking about consumers. There are agencies within the U.S., for example, whose sole purpose is to be the voice of consumers, like the CEA (Council of Economic Advisors) and Treasury to a certain extent. So, for example, the issue of gray market goods – the importation of gray market goods – that is a big Treasury issue because, frankly, gray market goods are helpful for consumers.[58] Whereas industry would probably want to prevent gray market goods from coming into the U.S. because they would like to keep markets segmented, so they could continue to keep prices at an arbitrarily high level.

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[58] A gray market good is "a foreign-manufactured good, bearing a valid United States trademark, that is imported without the consent of the United States trademark holder." *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 285 (1988).

Issues like that, where the government is in fact responsible for consumer voices as well – for the U.S., for example, there are certain actions that I can think of in the past that we have not taken because the agencies responsible for the consumers say: *Look, you just really need to think twice*. And that is difficult, I think, in situations where, as you mentioned, Ambassador Pérez Motta, you are also going to have constituents within your government who do not care about international obligations; all they care about is domestic. We have it in Congress as well. People say: *Well, you know, who cares about the WTO?* You are going to have to balance all that, and it is tough to be a Member of the WTO. It is tough to be a sovereign government and to have to deal with all these issues, but we trust and we hope that each of the governments will take all of that into account; when they put forth a proposal, they will have to, to the best that they can, balance the voice of all the various constituents that they are representing. Thank you.

Johnson: Professor McRae?

Donald M. McRae:[59] Just a comment, first of all, carrying on from Raj Bhala's point about students and professors benefiting. I think one can make the case more broadly that the whole system of public international law has benefited from an active DSS; both in the fact that it actually works when other dispute settlement systems in public international law do not work as efficiently and effectively, and also in terms of some of the jurisprudence – the development of the treaty interpretation rules, a vast body of jurisprudence that really has no parallel elsewhere in public international law. One of the things I think that this is doing is making public international lawyers a bit more aware of what is happening in the international trade law field, and causing a bit more cross-fertilization in disciplines that really did not have a lot to do with each other historically.

The question I wanted to ask the panel to talk a bit more about was the one that was raised by Ambassador Johnson – his comment about India and the Indian delegate going back and getting a lot of reaction. I wonder – if we had people from a variety of different countries here, we might get a different picture of the WTO from what we get in North America, including Mexico, where there is an active involvement with the issues. It is said, for example, that a number of African countries after the *Cotton*[60] case said: *Okay, the case*

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[59] Hyman Soloway Professor of Business and Trade Law, Faculty of Law University of Ottawa; Panelist (*Panel 4: Are the Current Methods of Enforcement of Dispute Decisions Effective? What are Alternative Methods of Enforcement?*).
[60] Cotton, DS267, *supra* note 9.

is over; we now expect automatically the markets to be open. But, the DSS does not have that sort of immediacy. A few years ago – rather like the Indian comment – I was on a panel with a Korean lawyer who was very negative about dispute settlement. It had not worked at all for Korea. They had paid lots of money to Washington lawyers, and they kept on losing. Now they are not losing as much. They are probably paying as much money, but they are not losing as much, and they may have a different view about it.

For many countries, dispute settlement is just inaccessible. Morocco filed an amicus brief,[61] and that is an indication to me that they really were not on top of the third-party process. They got behind the ball and, therefore, they filed an amicus brief – it is normally professors who do that and trade associations and NGOs. So I think that there is probably less understanding of dispute settlement. I am not sure that the Advisory Centre gets to a vast number of states that probably cannot afford the US$100,000 fee to start with or the rates of the Centre.[62] They can barely afford to have a Mission in Geneva to keep up with the WTO on an ongoing basis. So I wonder whether or not there is not a larger group of countries out there to which the dispute settlement process is not accessible, and I wonder what can be done to make it more accessible to them and what needs to be done to provide a better understanding for a number of countries about what dispute settlement can do for them in fact.

Pérez Motta: What I would like to say is that there is, of course, a cost of accession to the system. It is not free, of course. My point is that, in relative terms, I would prefer to have a reform that imposes big costs to the country that is going to make an action that goes against its own commitments rather than trying to lower a little bit more the cost of access of using the system. And this is the whole point of the proposal that we were making.

This is how the system works today. An early determination and application of unification or impairment would be to start from the adoption of the panel or the Appellate Body report. So, basically, I am assuming that, from the point of view of the system, you have not violated unless it is demonstrated that you violated the system. You are just moving the point where the action can be taken, instead of waiting over three years that, in the case of the *Bananas*, cost – for a country as small like Ecuador – almost US$400

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[61] *See* Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R (Sept. 26, 2002) (mentioning Morocco's filing of amicus brief on July 22, 2002).
[62] *See supra* note 39.

million. Now, if you take from those trade flows, if you see what would be the cost of using the lawyer from the Advisory Centre, it would cost you about US$10,000 or something like that – which is, from what you are losing, absolutely reasonable.

If you have the possibility of retroactive determination and application, you could start from where the measure was taken. You will have to develop, of course, the rules of how you could use this mechanism, but that possibility would completely change the whole structure of incentives. You could also add the possibility of preventive measures as well, as in a case where you have the possibility of an injury that has to be taken into account from the beginning. In the case of negotiable remedies, I understand that, especially to lawyers, that is an issue that takes some time to digest. I understand it, but from an economic point of view it is absolutely clear. There are a whole lot of analysis, papers and documents that have been made.

You can just take the case of environmental issues – in the U.S., the possibility to develop a market of rights of contamination is just a clear application of debt. It is just the same – actually, here is how we would develop this idea (we got it from somewhere else, but I think it makes a lot of sense) – the point is, in the end, to provoke a sales restraint, this is the whole issue. I mean, we do not want people not complying. What we want is for people to think twice before they decide not to comply. This is the whole issue, and what you are going to see with these kinds of reforms is a very strong reduction of cases. And you might say: *Well, the system is not used*. Well, that is much better because if the system is not used, it is because the system is working well. If you are not using the DSU, it is because the system is working well. Actually, if we take into account the number of cases that never go into a panel, that shows much more how the system works and how positively the system is working than the number of panels that you are finding.

Johnson: Ambassador Georgiev?

Georgiev: On this same thing – access to the system – you were asking: *Are there other solutions*? I want to pose a question to Bill Davey because what the DSU says in Article 27 is that, to this end, the Secretariat shall "make available a qualified legal expert from the WTO technical corporation services to any developing country member which so requests."[63] This is

[63] DSU, *supra* note 36, art. 27.2.

absolutely clear language. I do not think that anything must be added in the DSU or that the system has to be changed. It simply has to be implemented; the WTO Advisory Centre appeared because this was not implemented. It is very clear.

The argument was that – and Bill Davey will correct me, of course, if I am wrong – but the argument was that you may, if you implement this provision, somehow compromise the neutrality of the WTO Secretariat. And I agree that this is very serious. And that is why I think that if you want to strengthen the system, if you institute a permanent panel body, you simply take the legal division out of the Secretariat and give it to that independent, impartial body. Then you would not have the problem of implementing that text which is quite definite. There is nothing elsewhere about the neutrality of the Secretariat giving legal advice. I am curious about how you would respond to this.

Davey: As a former member of the Secretariat, I, of course, would first say that the WTO is a member-driven organization, and since certain powerful Members were all upset with the idea that the WTO would be staffing cases against them I think the Secretariat felt, and they made the argument, that it would compromise the basic position of the Secretariat, which is to be a neutral body that helps bridge differences between Members in negotiations and so on. Because of that opposition, I do not think that it was ever seriously contemplated that the WTO would go so far as to have its own people argue cases. There are people in the technical cooperation division that do give advice to countries before litigation.[64] There are consultants hired on a long-term basis, for decades, who are available, who do not make appearances before the panel or the Appellate Body generally speaking, but do advise on the submissions that countries make, and, in that sense, are playing a fairly important role. And there are additional consultants hired in specific cases.

The Secretariat has gone quite a ways in providing some form of this. The line that generally has not been crossed is paying for people to actually appear in the meetings and make the arguments. Getting advice and comments on submissions or extensive help in making submissions has been

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[64] Overview of the WTO Secretariat, http://www.wto.org/English/thewto_e/secre_e/intro_e.htm (last visited May 15, 2007). One of the Secretariat's "main duties [is] to…provide technical assistance for developing countries."

done. And it is a question of language, like all language – what does it really mean? If you have powerful Members saying: *Well, it does not mean providing actual lawyers to argue cases before a panel* – then the Secretariat is unlikely to go down that road.

Georgiev: Yes, but this line is not in the DSU, so I continue the question because I have been told by other people: *Well, the Secretariat has simply to provide the money and – I would add – then cross that particular line of litigating before panels.* How would you comment on that? Is it purely a budgetary question? Or, is that line really so enshrined in the DSU system itself?

Davey: The way that you describe it, it becomes a budgetary question if the only issue is that outsiders are okay as long as – if the person does not work full time at the WTO, it is okay for them to provide any service; then it is only a question of funding. But the WTO budget has always been extremely tight, and the idea that the WTO budget would pay anywhere near rates charged for legal representation by your typical law firm that does this sort of work is just out of the question. Would law firms work for what panelists get paid, which is roughly US$350 to US$500 a day? I am not sure. That is less, I think, than what the Advisory Centre is paying its lawyers, so it would cost a lot of money, and I am not sure that the membership is going to approve it.

Georgiev: Let me ask you this question then: Do you agree with me that the Advisory Centre and other solutions which are being asked about are coming into the picture only because this particular provision of the WTO DSU is not being implemented?

Davey: Well, there is a question of what it means, of course. But it is true that the Advisory Centre came into existence, I think, because there was a perceived need for cheap legal advice for developing countries and Article 27 was not meeting that need. Had Article 27 been providing Advisory Centre-like assistance, the Advisory Centre never would have come into existence. But it took a lot of money to set up the Advisory Centre from the developed countries that backed it, and if you remember the discussions, the major players – the U.S. and the EU – are not interested in funding this sort of legal assistance. Some member states of the EU were, but the EU itself was not. The U.S. kind of stayed out of the argument, actually, but I do not think it was interested in that sort of funding.

Johnson: Nikolaos Zaimis has another question or comment.

Zaimis: Just to clarify one perception, especially for the students. It is not that governments would actually decide one day: *Okay, now we are going to implement a measure which is in violation of the WTO.* Usually what happens, in real life, is that you try to develop a law, a measure, which is WTO-compatible. It might not be immediately obvious, however, that there are angles that may render that measure incompatible with WTO law. Raj Bhala explained a few minutes before that many people in the U.S would not have foreseen, perhaps, that countercyclical payments could have been challenged because of the exception for fruits and vegetables,[65] or the U.S. GATS gambling commitment because of the *horse racing* exception?[66] Most of measures are in the gray area. It takes WTO experts within governments to be able to analyze and see if there is or is not a WTO violation.

Which brings me then to the second question on access to the system: I think that the biggest problem for the developing countries is not the financial cost – you can hire a law firm even though they are extremely expensive – I know this, I used to be a lawyer (good news for law students who plan to practice in trade) – but rather it is a matter of human resources. How many developing countries really have the manpower, have the experts within the governments who can sit down, who can review measures taken by developed countries or other developing countries, analyze them, identify a WTO violation, and proceed then to Geneva? It does not happen. We see that from a practical perspective now during the negotiations for the Doha Development Agenda.[67] A lot of developing countries do not have the right experts who are able to negotiate the agreements that they would have to agree upon. So the lack of expertise is not something that can be easily resolved by the Advisory Centre, and it is not only a financial issue. I would like to know what the panel thinks about this.

Johnson: Who would like to take that?

Kho: I will venture an answer, and also plug the U.S. proposal for transparency. I think one way to develop experience and expertise is to do things

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[65] *See* Cotton, DS267, *supra* note 9.
[66] *See* Antigua Gambling, DS285, *supra* note 10.
[67] *See* Doha Development Agenda: Negotiations, implementation and development, http://www.wto.org/English/tratop_e/dda_e/dda_e.htm (last visited Oct. 9, 2006) (containing Doha texts and relevant news updates).

over and over, and to watch it. If you open up the panel and the Appellate Body proceedings, I think that goes in the right direction towards getting that sort of expertise, that sort of comfort level. I do know of countries that join as third parties in panels quite regularly in order to get that expertise, in order to get that experience. They do it not because they have a substantial interest, which is the so-called requirement to join as a third party;[68] rather, they do it because, well, I guess you can call it a substantial interest in getting to know the system. That is why they do it.

But those that do this are typically ones that can afford to have some manpower to actually sit through the process and to send the right people to think through it. Even though they do not need to submit much, or they give a very short third-party statement, that is all they do. I think if you open up the process for all to see, it is easier to learn from that process. It is easier to be accustomed to it and to feel comfortable with what is going on and to be able to predict how you could best deal with situations as they come. I think that would go a long way towards getting that sort of experience.

In terms of the monetary costs, that has always been an issue and a question, and we are appreciative of the Advisory Centre for being there and being able to support developing countries should they have a legitimate issue. Also, the Advisory Centre recently has partnered with some major law firms, including some U.S. law firms, because, frankly, U.S. law firms who want to get a piece of the action in the litigation are realizing that some countries just cannot afford them, so they are willing to take a price cut. Some of these law firms also, in generating future business, have provided free advice to these countries as well. White and Case, for example, very recently – was it the *GSP* case? I cannot remember, or *Cotton*, but they were there on a pro bono basis, representing Zimbabwe, I believe it was. These are all ways, I think, that we can get around the system. I think Professor Davey is right. I mean, who is going to pay money so that somebody else is going to bring a case against them? I am not sure that that is a viable path toward resolving this question.

Pérez Motta: Just briefly, just one reaction to what you said at the beginning of your presentation. I think we should distinguish between two types of actions. There are some, let us say, public policies which clearly are in the gray area where you are not sure you are complying or not because the

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[68] *See* DSU, *supra* note 36, art. 4(11) (enumerating "substantial interest" requirement to be joined as third party).

WTO – I mean, when you see these specific articles sometimes, as a result of a negotiation, they are not so clear; they are not so clear precisely because negotiators were not able to agree in clear-cut language. As a result, you have to consider that, basically, public policy is in that area because of lack of clarity in the language. But there are many other actions that countries take, that they know are against their commitments, and they know it perfectly well. They know that it is going to take a long time to pay for that action, and they just do it because the system allows them not to pay for that decision. So, even for the first type of situations, to have a stronger DSU in terms of compliance would be good because negotiators would have to be more careful when they close the deal in that particular language since they know that they are going to be, in many cases, liable to a dispute settlement decision. So, I think it would be good for the two situations to have a much stronger dispute settlement mechanism at the end of the day.

Bhala: Let me go further out on a limb, which I think goes back to Professor McRae's question about what specific steps we could take to make the system more accessible. At least a few years ago, when they happened to look at it, the largest division at the WTO Secretariat was the translation division, both in numbers and budgetary consumption. Now that may have changed, and I may be getting the statistics wrong, but it is a very sizable part of the budget. So, before we even talk about expanding the pie, we might want to look at what we are doing with the existing budget.

As we all know, the translations go into French and Spanish. There are 128 million speakers of French in the world; that puts it at ninth in most commonly spoken languages. If you take out the French population, that is in France – about 61 million – so then the balance, say 60-70 million, would be in poor countries where we are theoretically translating the documents for them. Spanish places fourth at 417 million, so we would have to look at how many Spanish speakers are in developing countries for whom we are doing these translations. The point is – could we think about lessening some of the translation and reallocating those funds to the Advisory Centre or to implementing DSU 27?[69] I recognize that it is going to be politically incorrect to talk this way, but the demographic trends are what they are; we have 2 billion more people expected to learn English in the next decade, and in fact, many of the teachers of English now are non-native English speakers. Go to China or to India, and you have got non-native English speakers teaching English

[69] DSU, *supra* note 36, art. 27.

to the Chinese and Indians. So we have got a clear linguistic trend going on, and yet we have set up a system that is consuming a lot of resources that is based on 19th century-like demographics.

Johnson: Stephen Kho?

Kho: I am sorry, but I just think it would be really interesting to see how the French would react to your proposal. *(laughter)* Just very quickly, responding to Ambassador Pérez Motta's concerns about compliance: I just wonder whether the premise of that thinking might be a little bit off, in the sense that it is not really my experience for most governments – where they make a calculated decision – to say: *We are just not going to comply; we have the choice whether to comply or not, and we are going to choose not to.* Oftentimes, it is a lot more complicated than that. Oftentimes, you have various factions within the government; some saying: *Look, we are putting much more value in international obligations than others.* Others saying: *You know what? I have got to get elected next year, and my constituents are not really going to like what is happening here.* Then query whether that situation, let us say, is going to cost more in retaliation. We all know that retaliation is a cost, not just for those being retaliated against, but also for those doing the retaliating because, frankly, trade is disrupted from both ends and people just get hurt from both sides. Just having a larger number of retaliations – I am not sure that fixes the situation. We know, for example, the FSC's retaliation is huge.[70] The EC has decided to "un-retaliate" because from both sides we both feel the pain. So, I think this "choosing to comply" issue is not as simple as merely one country saying yes or no. I recognize that there are those of us who do put a lot more cachet in abiding by our international obligations, certainly. Some of us would say: *Gee, why do we not comply?* In some of our cases, as you know, the Administration is out there saying to the Congress: *Look, you have got to change the law. Frankly, we are not in charge of amending laws.*

I think those are more complicated issues, and I am not sure merely jacking up the volume or the price of retaliation will fix them. Changing the economic incentives will really be, in fact, an incentive at the end of the day. Those are interesting options, and we are thinking about those things. But from our experience, I am not sure it would work.

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[70] *See* WTO Decision of the Arbitrator on E.C. Complaint Concerning U.S. Tax Treatment for "Foreign Sales Corporations," WT/DS108/ARB (Aug. 30, 2002).

Pérez Motta: As an economist, I always think that this is just a matter of the net present value. The politicians are going to evaluate this, of course, in a different way if they have to pay the cost rather than not paying any costs of doing that action. I agree with you that, in the end, this is an internal struggle within the government, and you will have to fight with the Congress and with the different interests within the executive power as well. My only point is that if you could have a much higher and a clear cost of taking that action, there is a better way to sell the right public policy rather than the wrong one. That is the only point.

Johnson: Professor Wilner?

Gabriel Wilner:[71] I am just wondering whether one could think in terms of an asymmetrical system, in the sense that developing countries have smaller economies and have more to lose by violations of the rules committed against them. And much like the system of preferences in reducing barriers – is it possible that one could think of more appropriate means of enforcement of their rights against violations by economic giants such as the U.S. and the EU?

Pérez Motta: I did not understand the question clearly. Could you please just repeat the question?

Wilner: I do not know whether I can repeat the question, but I can repeat the idea. The idea is that there should be consideration of how violations of trade rules can be dealt with when they are aimed at a poorer country by a powerful trading state. When Japan violates the rules with respect to Malaysia or East Timor, could a differential system for dealing with such violations be found?

Kho: Just in response – my understanding of your idea is somehow premised on the notion that Japan would actually take a finding of a violation or a case brought by East Timor to be of much less consequence than a case being brought by, let us say, the United States. But that is not the case. I do not think countries go there and think, well, it is just some dinky little country suing me, so I really do not care. I do think countries are interested in abiding by their

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[71] Associate Dean and Charles H. Kirbo Professor of International Law; Executive Director, Dean Rusk Center – International, Comparative and Graduate Legal Studies, University of Georgia School of Law; Moderator (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreement?*).

international obligations generally, and they recognize that this is the WTO – 149 Members – and it is a single undertaking. I know we, for example, will take cases brought by us seriously regardless of the size, regardless of who it is, regardless of the issues. So I just do not see that – I mean, your remedy to the problem – I do not see the problem. I do not see countries distinguishing between a small country suing them and a larger country suing them.

Wilner: We have been talking not about the process of making claims or the expense of making them. Rather, we have been discussing the loss or the extent of privation to the country which has suffered the violation of the rules by a big country. The issue here would be whether reform in the enforcement of the mechanisms, such as retroactive retaliation or payment, should not only give rise to the opportunity to bring a complaint, but, more important, to recognize and repair the actual harm done to the particular economy which has been injured by a violation of the rules by the big country. Such countries may then be less ready to engage in "inadvertent" violations of the trade rules, knowing that the remedy against them will be more direct, broader, and of longer duration than previously.

Kho: Well, that is what we have been talking about, really. This goes to my point before – no country makes an easy decision one way or another to say: *We are not going to violate – we have a choice one way or not. It is easy; it is either a turn-on or a turn-off issue, and we just choose to turn off.* Nobody makes that decision. In fact, the violations that the United States is having difficulty in bringing into compliance – as I mentioned before – are mostly against the EC, and they are mostly small dollar amounts. So again, when a country sues another country, I do not think that goes into the thinking; the size of the hurt, or the size of the pain of it. In fact, as far as the pain issue goes, you are already permitted under the WTO to retaliate based on your trade values. That is already being addressed in the WTO, so I am not certain, in addition to that, what kind of scenario that you are mentioning.

Johnson: Would you like to add something?

Pérez Motta: Well, I have always been against the idea of having a symmetrical mechanism, especially in this area of the WTO. I normally do not like giving special, differential treatment because I think that generates so many distortions that, in the end, it goes against even developing countries. The only area where that could be at least an area of thought is in the case of retaliation because when you have a very small country that has the right to retaliate, in fact, it has the right to go against its own interests. If this small

country is going to retaliate against Japan, or even against another developing country – it does not matter by the size of the country against whom you are going to retaliate – I think that then you have a problem there. And that is why I think the possibility of a market for retaliation – let us put it that way – could be useful, at least to sell the right to someone else. In the end, it is not a good idea to retaliate. It is not the best action you can take. It is just the second best in any case. But it would be better to be able to sell it to someone else instead of shooting your own consumers with that action.

Johnson: Professor Van der Borght?

Kim Van der Borght:[72] Just to add something along the lines of Professor Wilner's suggestion. There was a proposal that was published last year in the *Journal of International Economic Law* by Marco Bronckers[73] that does exactly what is suggested by Professor Wilner. And what he is proposing – I am misrepresenting him slightly here because I am picking only one element out of quite an extensive and complicated system, the element that is relevant here – but what he is proposing is that if the developing country wins in a case against the developed country, the developing country could choose to opt for monetary damages instead of retaliation. However, it would not work the other way around; the developed country could not demand monetary damages from the developing country. That is the only really concrete proposal I have seen along these lines.

Johnson: Professor Davey?

Davey: There is a modification that I have endorsed at times, which would be that you could have it go both ways – but you would use a sliding scale adjustment based on per capita GNP so that the amount payable by the developing country would be relatively small. Switching to monetary compensation would solve the problem to the extent that you could enforce it, which would be dependent on the fact that the developing countries cannot really effectively retaliate.[74]

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[72] Professor, University of Hull School of Law; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreement?*).

[73] Marco Bronckers, *Financial Compensation in the WTO—Improving the Remedies of WTO Dispute Settlement,* J. Int'l Econ. L. 2005.8(101) (2005).

[74] William J. Davey, *Proposals for Improving the Working Procedures of WTO Dispute Settlement Panels in* Preparing the Doha Development Round: Improvements and Clarifications of the WTO Dispute Settlement Understanding (Ernst-Ulrich Petersmann, ed., 2002).

Johnson: Let me ask you this question, the two of you, since you are familiar with this. Does that just apply in the asymmetrical case of the developed versus developing, or would it apply in the case of the EU versus the U.S.?

Davey: I would let it apply in all cases. It is interesting that the U.S. now puts in its free trade agreements a provision on the respondent's right to choose to compensate as opposed to suffer retaliation, at least in its recent free trade agreements.[75]

Kho: Does this work also between "developing and developing"?

Davey: It would not work very well. It would be in very small amounts, I suppose.

Kho: But the proposal that I have heard applies only to "developing versus developed" but never to "developing versus developing". That is just a variation on the proposal that I have heard.

Van der Borght: To diminish my misrepresentation of Marco Broncker s, what he also proposes is that, if it is a case between two developing countries, it would then be a choice of whether you demand or not, and there could be mediation to decide whether it would be appropriate between two countries.[76] As I said, it is quite a complicated proposal.

Johnson: Well, it is an interesting one. I assume that someone will bring this up tomorrow in alternatives to enforcement measures.[77] Thank you so much, panelists, for a very interesting discussion.

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[75] *See, e.g.,* Australia-United States Free Trade Agreement, May 18, 2004, U.S.-Austl., art. 21.11, *available at* http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html (providing for dispute resolution by negotiations to determine mutually acceptable compensation).

[76] *See supra* note 73.

[77] Panel 4: *Are the Current Methods of Enforcement of Dispute Decisions Effective? What are Alternative Methods of Enforcement?*

To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?

Moderator: *Gabriel M. Wilner,* Associate Dean and Charles H. Kirbo Professor of International Law; Executive Director, Dean Rusk Center, School of Law, University of Georgia

William J. Davey, Edwin M. Adams Professor of Law, College of Law, University of Illinois; Former Director of the Legal Affairs Division of the WTO

Kim Van der Borght, Professor, University of Hull, School of Law

Nikolaos Zaimis, Counselor, Head of Trade Section, Delegation of the European Commission

Johnson: Welcome to everyone. We have an interesting program for this morning, and I appreciate all of you being here.

I want to introduce the moderator for this panel, and that is Gabriel Wilner. He has very many titles, and so I have to look at my notes here to make sure I catch them all. He is, first of all, the Charles H. Kirbo Professor of International Law; he is the executive director of the Dean Rusk Center; and he also is the associate dean of the University of Georgia School of Law, and he is in charge of the LL.M. program in that capacity. He, of course, specializes in international law. He has been here longer than most of us have – longer than most of you have been alive *(laughing)*. Not really, but he arrived about when I was leaving the law school in my law school days, and I am sorry that I missed all the programs that he had.

Professor Rusk actually brought him from the UN. He was very impressed with him, and he brought him down here, and we have all been

happy ever since. All of the alumni who have gone through our international program have great loyalty toward him. Of course, he teaches a broad range of international law courses. We have been trying to get him to slow down a little bit, but he will not do it. He teaches several courses each semester, quite often, and, of course, he runs the Brussels program, which was started back in 1973, and you can count up those years. It has been a very successful program. We have one of the largest, in fact maybe the largest, alumni groups in Brussels, and I think it is largely due to the Brussels program. If you are ever in Brussels during July, be sure and drop by and see him because he can introduce you to a lot of our graduates over there, as well as to the professors who teach European law in his course. He has also been an adjunct and visiting professor at the Free University of Brussels ever since 1976, and he has been a visiting professor at the University of Paris, served as an arbitrator of international disputes, and he was the author of the arbitration code in Georgia. It is my pleasure to introduce Professor Wilner, who will introduce the panel. Thank you.

Wilner: Thank you very much, Ambassador Johnson. You are very kind, but of course my background has really nothing to do with what we are going to be doing today, and so we will move right on. This panel is entitled: *To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance?* – in the large sense, and – *Should the Appellate Body Look to Sources Outside the WTO Agreements?* These are sentences loaded with meaning and, perhaps, controversy, and we have a panel of experts on the subject who have been – like everyone else here – extremely active either in the academic and/or the practical pursuit of the work in the World Trade Organization (WTO).

The first of our speakers today will be Professor William Davey, who is the Edwin Adams Professor at the University of Illinois where he has taught international trade, European Union law, international business transactions, and corporate and securities law. From 1995 to 1999, he served as director of the legal affairs division of the WTO. We know that he has authored a number of very important texts and casebooks on the subjects of international trade and, of course, on European Union law.[1] He is a member of the American Law Institute and serves as a member of the international trade committee of the International Law Association and on the editorial board of the *Journal*

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[1] *See, e.g.*, William J. Davey, Legal Problem of International Economic Relations (4th ed. 2002).

of International Economic Law, the Columbia Journal of European Law, and the *Indiana Journal of Global Legal Studies.* I think this is a very shortened version of a very distinguished curriculum vitae.

Our second speaker today is Kim Van der Borght, who is a professor of law at the University of Hull and a fellow of the Center of Economic Law at VUB (Vrije Universiteit Brussel) in Brussels. He is also a fellow of the Dean Rusk Center. He has had an extremely active, although still young, career in the international trade law field. He has written a very, very interesting doctoral dissertation, which is on the very subject of the legal nature of the WTO dispute settlement, and which will be published shortly.[2] In fact, Professor Davey had a lot to do with the preparation and publication of that book since he served as co-director of Kim Van der Borght's dissertation. Professor Van der Borght has been teaching dispute settlement at the WTO here at the law school to a rather large class this spring.

Our third distinguished speaker this morning is Mr. Nikolaos Zaimis, who is currently the head of the trade section of the European Commission's delegation in Washington and is very much a specialist in EU-U.S. relations. Previously, he was the deputy head of the WTO dispute settlement and trade barriers unit at the EC's Directorate-General for Trade, and before that he worked for a number of years in private practice in Brussels, focusing on EC and international trade issues. He joined the Commission in 1995 and initially worked in the anti-subsidy policy area and became head of the section dealing with trade barriers. He is a member of the Athens – Greece, of course – Bar. He, in fact, studied in Greece and in the U.K.

These three gentlemen will discuss the very important issue of the role that the Dispute Settlement System (DSS) has in the general system of governance in the economic side of international relations. And, of course, with respect to the second question, this hides perhaps the issue of whether or not the Appellate Body is strictly – what some consider to be – part of a unique arbitral system or whether there are judicial elements to its makeup and to its work, which, of course, would have an effect on the first question. But to explain this further, I would like to call on Professor Davey, who will tell us much about the issues on the basis of his experience as an academic and his practical experience at the WTO Secretariat.

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[2] Kim Van der Borght, The World Trade Court: An Analysis of the Legal Nature of the Dispute Settlement System of the World Trade Organization (2006).

Davey: Thank you very much for that kind introduction. It is a great pleasure to be here. Athens is a beautiful place, and the campus is quite delightful. I want to thank the Dean Rusk Center for inviting me to what, so far, has led to some fascinating discussions. As the chair indicated, the general topic for this panel is: *To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance?*; with a subtopic of: *Should the Appellate Body Look to Sources Outside the WTO Agreements?* I will try to offer some tentative thoughts on these issues, some of which are quite complex and, to some degree, relatively unexplored in WTO dispute settlement.

As to the general question of the role of the WTO itself in global governance, Director- General Pascal Lamy gave an interesting speech last week in Geneva, at the Graduate Institute, on: *The WTO and the Archipelago of Global Governance*.[3] It is an interesting speech, better done than speeches by his recent predecessors, and I would recommend it to you. It is available on the WTO website, currently half in English half in French, but I am sure it will all be in one language before too long. Among other things, Lamy distinguishes governance (in the sense of what is today provided by the government of a sovereign state) from that term as used in international law and governance (in the sense of dialogue and compromise in a system where there is no supreme power). Lamy likens the current international system as similar to this latter concept – thus, his topic of the WTO in an archipelago – in a chain of islands that are related.

Now, to the extent that global governance refers to the idea of a central directing authority – the first sort of governance that Lamy talked about – the WTO is obviously not that authority and will, likely, never be. As such, its DSS cannot and should not have a role in that sort of governance. However, to the extent that the latter concept is used – the idea of a system in which there are various power centers that engage in different aspects of regulating international relations – then the WTO can be seen, I think, as part of a larger system of global governance. If this latter view is accepted, then it is clear that the WTO has a role in that global governance, one shared with other international organizations and states.

To the extent that the WTO has such a role, then it is inevitable of course that the WTO DSS is going to be involved in the WTO's role. As such, the

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[3] Director-General Pascal Lamy, The WTO in the Archipelago of Global Governance Address at the Institute for International Studies (Mar. 14, 2006) *available at* http://www.wto.org/english/news_e/sppl_e/sppl20_e.htm [hereinafter Lamy].

WTO and its DSS each have an important role to play in promoting the coherence of the international system. I use that term "coherence" – which in WTO-speak usually refers to the relations between the WTO and the World Bank and the IMF (International Monetary Fund) – more generally, because I think it is, and should be, a broader concept. If that is the case, then our question becomes: *What is the role of the WTO Dispute Settlement System in promoting coherence in global governance?* And, to a large extent, this is a question of how the DSS, in dealing with claims raised under the WTO agreements, should deal with other international agreements and international law more generally.

It seems clear that the WTO agreements and their detailed rules cannot be applied in clinical isolation from the rest of international law. While there were suggestions that GATT was some sort of self-contained regime, the Appellate Body expressly and categorically rejected that idea in its first report, *U.S. Reformulated Gasoline*.[4] I agree with that position, although I probably have a more restrained view than the author of the Gasoline Report on how significant a role international agreements and law should play in WTO dispute settlement. If WTO agreements cannot be considered in clinical isolation from the rest of international law, my topic seems to involve two distinct issues: *(1) How should the WTO handle conflicts with other international regimes?; (2) How should the WTO Dispute Settlement System otherwise make use of international law principles and practices?*

As to the first issue – *how should the WTO handle conflicts with other international regimes?* – I would offer the following thoughts: first, to a large extent, conflicts can be avoided through effective treaty interpretation, and obviously that approach should be followed wherever possible. Second, the problem of inter-regime conflict, that is conflict between two international agreements, can often be handled indirectly by giving appropriate deference to measures adopted by governments for the sort of reasons outlined in the general exceptions clause of Article 20 of GATT, or GATS Article 14.[5] To the extent that this is done, it is likely that cases of real conflict will be minimized. Third, to the extent that a conflict with another regime cannot be avoided through general interpretation or reliance on exceptions, it is useful

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[4] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) [hereinafter Gasoline, DS2].

[5] General Agreement on Tariffs and Trade art. 20, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], General Agreement on Trade in Services art. 14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1869 U.N.T.S. 183 [hereinafter GATS].

to consider whether customary rules of treaty interpretation can be applied to resolve conflicts. For reasons I will expand on later, they may not be all that helpful, I think, in resolving many conflicts. But, let me talk about these three points in a little bit more detail.

As to the first approach, conflicts – to a large extent, as I mentioned – can be avoided through effective treaty interpretation. In other words, it may be possible to interpret the WTO obligations at issue so as to avoid the creation of a conflict in the first instance. In this regard, I think it would be appropriate, in interpreting WTO agreements, for the treaty interpreter to be cognizant of the impact of a particular interpretation of the WTO agreements on other international agreements. I should stress, however, that the proper method of interpreting the WTO agreement remains to apply the basic approach outlined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[6]

As we have all learned from the Appellate Body – although I would note that the same approach was applied by GATT panels prior to the Appellate Body – the Vienna Convention provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in light of its object and purpose."[7] The Vienna Convention defines "context" to include only the treaty itself and agreements made at the time of its conclusion that were accepted by all of the parties.[8] In addition, subsequent agreement, subsequent practice, and international law rules may be taken into account, but only to the extent that all WTO Members have agreed thereto or are subject thereto.[9] As such, this sort of context would not often be relevant. In particular, the fact that some WTO Members are party to other agreements would not make those other agreements necessarily relevant to the interpretation of the WTO agreements. Similarly, the fact that another international agreement authorizes a violation of a WTO agreement would not be directly relevant to interpreting the WTO agreements.

The terms of the WTO agreements would still need to be interpreted in light of their ordinary meaning. However, in determining that meaning, I think reference could clearly be had to sources such as dictionaries, a resort

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[6] Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].
[7] *Id.* art. 31.1.
[8] *Id.* art. 31.2.
[9] *Id.* art. 31.3.

which has been a hallmark of Appellate Body jurisprudence; so much so, that some have joked that the new *Shorter Oxford Dictionary* is now essentially a covered agreement. *(laughter)* But, surely that dictionary is not the only possible source to look to for assistance in divining the ordinary meaning of terms, and, in that connection, I would argue that reference to other international agreements or principals of international law as interpretive aids would be appropriate. It would not, of course, be appropriate to apply another agreement as such, but it is appropriate to assume that governments generally do not intend to create conflicts. Thus, considering other agreements may sometimes be helpful in divining the correct interpretation of WTO provisions. I would therefore suggest that there may be ability, perhaps somewhat limited, on the part of panels and the Appellate Body to interpret the WTO agreements so as to avoid conflicts. But it is important to remember that the WTO agreements assume that their rules may sometimes impinge unduly on governments, and that there are exceptions provided to deal with those cases.

A second approach to avoiding conflicts with other international agreements is to give deference to WTO-Member governments and to their interpretation of the WTO's "general exceptions" clauses. To a significant degree, I think the Appellate Body interpretation of GATT Article 20 and GATS Article 14 have provided a significant amount of "policy room" in which WTO-Member governments may maneuver, such that they can follow policy preferences to a large extent – at least in those areas where the WTO might otherwise be expected to impinge on their freedom to do so. This, of course, is not a matter of resolving conflicts with other international regimes, but – nonetheless – because the subjects of other international agreements that are likely to raise conflicts with WTO rules often relate to the subject matter of the general exceptions clauses in the WTO, appropriate interpretation of those clauses also provides a significant pathway to avoid conflicts between the WTO agreements and the other international agreements. I think that this, in fact, has occurred – in particular the Appellate Body's interpretation of the public morals and public health exceptions of GATT Article 20 and GATS Article 14 have provided considerable policy space for WTO Member governments.

To be specific, the term "necessary," a qualifier for measures seeking the public morals, public health or enforcement exceptions, has been interpreted so as to favor WTO Member discretion in choosing the level of protection for public health; for example, in the *Asbestos* case.[10] For public morals, you

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[10] Appellate Body Report, *European Communities – Measure Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R (Apr. 5, 2001).

can think of the *Gambling* case.[11] While the Appellate Body applies a sort of balancing test, contrasting the importance of the policy goal with the severity of the restriction on trade, it seems willing to accord considerable importance to the policy goals in these two areas. Where measures have not been able to meet the terms of the exception, it has typically been because of the presence of unjustifiable or arbitrary discrimination against foreign products, not because the measure did not fall within the general scope of the exceptions provision.

There has been decidedly less deference given in cases where countries have tried to invoke the Article 20(d) enforcement exception, but the issues at stake in those cases, in my mind, are typically more economic in nature, and the defenses raised under Article 20 have often seemed rather strained. In the case of the "conservation" exception, which does not require that a measure be necessary for conservation but rather that it be "related to" conservation, that exception also has been interpreted more broadly than it was in GATT practice, such that there is considerable freedom on the part of governments to act in that area as well. The key point is that in a number of areas where international organizations might have been, or might be, expected to be active in the future, the existence of these exceptions means that conflicts may not be so likely to arise. Of course, I realize that there are not exceptions that can be applied to all areas where conflicting international obligations may arise; thus, what I have discussed so far is not a complete answer to resolving conflicts in global governments and promoting coherent approaches.

That leads to the third subtopic: *How to resolve conflicts that cannot be interpreted away or finessed through the application of an exception?* Deferring for a moment the question of whether WTO panels and the Appellate Body should use them, it is instructive in the first instance to consider standard rules of international law on dealing with conflicts between two international treaty regimes. In my view, they often are not all that helpful in resolving such a conflict when the WTO agreement is involved.

The basic rule to be applied per Article 30 of the Vienna Convention on the Law of Treaties is the *lex posterior,* or "last in time" rule.[12] But, as Joost Pauwelyn of Duke University has noted in his book on conflict of norms, that rule is not particularly useful in dealing with many modern treaties, par-

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[11] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Service*, WT/DS285/AB/R (Apr. 7, 2005).
[12] Vienna Convention, *supra* note 6, art. 30.

ticularly one like the WTO agreement.[13] The reason is that such treaties are regularly revised and regularly welcome new members. A "last in time" rule would lead to the odd result that for some WTO Members the WTO agreement might be last in time vis-à-vis another agreement, but for other WTO Members it would be subsequent. Moreover, a change in the agreement gives the agreement a new date – the WTO agreement, in fact, is often modified on a weekly basis if you look at the schedules that are changed by action of the Director General. And, of course, it welcomes new Members several times a year. Such conflicting or unstable results that would result from this *lex posterior* rule make no sense, and I agree with Pauwelyn that it is not appropriate to place very much reliance on this principle. It sounds simple, but in practice it may simply be too simplistic to be useful.

A second conflict-resolving rule is *lex specialis*, the idea that in the event of a conflict priority should be accorded to the more specific rule as opposed to the more general one. Pauwelyn would place considerable emphasis on this rule for resolving conflicts. I have more doubts on that score. While I like the *lex specialis* rule – the rule seems simple and logical – I think, in fact, it is rather difficult to apply in practice. In the event of a conflict between two provisions of two different treaties, the provisions will always be more specific than the agreements in general, and I am not sure how one decides the relevant degree of specificity. For me, the idea is difficult enough to apply in a single treaty regime, such as that of the WTO – which I should mention, as an aside, has serious conflict resolution issues of its own, internally – but it becomes quite indefinite when multiple regimes are involved. While I would not rule out its use in interpreting WTO agreements themselves, I think it will often be the case that there is no truly principled way to decide which provision is more specific.

Indeed, within a single treaty regime in particular, the idea of effective treaty interpretation – ensuring that all of a treaty's provisions are given meaning – while somewhat vague, often seems to be more useful. Pauwelyn, I might mention, suggests another rule: giving priority to what he refers to as "integrated" as opposed to "reciprocal" regimes.[14] I also doubt its efficacy, though, largely because, in my view, the WTO agreement can no longer be

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[13] Joost Pauwleyn, Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law (Cambridge University Press 2003).
[14] *Id.*

viewed as simply a "reciprocal" arrangement, thus the basis for his distinction would not be particularly useful.

The result of all that which I have been saying is that there will be cases – more under my view perhaps than under some other views – where there may be a conflict that cannot be resolved. In that case, it seems to me that a panel and the Appellate Body have no choice but to apply the rules of the WTO agreement. The fact that a country cannot comply with two conflicting obligations is in the end the fault of that country for entering into those conflicting obligations. The two regimes themselves are not at fault. It is, in essence, for the country that entered into the conflicting regimes to resolve the matter or suffer the consequences. It could, of course, be argued that this unfairly advantages the WTO regime because, as noted by Lamy in the speech I mentioned earlier, the WTO has a more effective DSS than virtually any other international regime.[15] It seems clear to me that the role of panels and the Appellate Body is not to resolve these conflicts between international regimes, but rather perform their defined function under the WTO agreement and, in particular, under Articles 7 and 11 of the Dispute Settlement Understanding (DSU).[16] The DSU's function is to examine the claims made by the complaining WTO Member in light of the relevant provisions of the covered agreements, that is the WTO agreements, and reach appropriate conclusions in respect thereof.[17]

Thus, I think the role of WTO dispute settlement in global governance is somewhat a passive one. It cannot resolve the conflicts that may arise except insofar as they can be avoided by appropriate treaty interpretation – bearing in mind that I mean interpretation of the WTO agreements in accord with standard treaty interpretation rules, which focus on the meaning of the WTO agreements. And, secondly, by appropriate interpretation of the "general exceptions" provision – so as to give appropriate deference to the government policy decisions of WTO Members, so as to enable them to adopt, individually or collectively (pursuant to another agreement), measures relating to matters covered by the WTO exceptions. Where conflicts exist, it is not for the WTO DSS to resolve them, but rather for the WTO Members involved to reconcile those conflicting obligations.

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[15] Lamy, *supra* note 3.
[16] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].
[17] *Id.*

When serious conflicts arise, I think that the governments probably will be able to resolve them. While much is made of the inability of the WTO decision-making process to take action, I would note that with regard to probably the most serious kind of conflict that has risen so far – the lack of clarity in the TRIPS agreement[18] with respect to the exception for compulsory licensing of drugs in public health emergencies – in fact, the WTO membership was able to act and is in process of amending the TRIPS agreement.[19]

I think my time is starting to run out, but I want to add a few words on the second topic, which I have not addressed quite as much: *Should the Appellate Body Look to Sources Outside the WTO Agreements,* as indicated? I think there is some role for using those agreements as sources to help interpret the WTO agreement. It should be stressed that there are many other occasions where panels and the Appellate Body can appropriately look outside the WTO agreement. For example, to get ideas on how to handle evidence, to decide what are concepts of due process in proceedings before the WTO, and so on. To date, I do not think panels and the Appellate Body have made that much use of such outside sources, but I think they probably will make more use in the future and that that is appropriate. So far, I certainly do not think that has caused any particular problems for WTO dispute settlement. And with that, I think my twenty minutes have expired, and I thank you for your attention.

Wilner: Thank you very much indeed. I am sure there will be comments and questions as soon as the opportunity arises. Let me then pass on to Kim Van der Borght.

Van der Borght: Thank you very much. I would first like to thank you for the invitation to this conference, and also to the Dean Rusk Center for inviting me to give a short-course on WTO dispute settlement, which I have enjoyed doing, as I always enjoy coming here.

It is difficult to speak after the person who guided me through my PhD, because I can hardly disagree with him….

Davey: Feel free.

(laughter)

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[18] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1869 U.N.T.S. 299.

[19] Amendment of the TRIPS Agreement, WT/L/641 (Dec. 6, 2005).

Van der Borght: …so I will – *(laughs)* – only slightly. I think we agree on the basics, but I disagree somewhat on the conclusions. And I want to approach the question from the other side. I want to approach the question from the negative. The question has been: *What is the role of the WTO in international governance, and should the WTO Appellate Body, especially, look to outside sources to settle disputes*? The answer in many cases has been: *The WTO has no real role in international governance, and it should not look to outside sources.* And that is the position I want to take – to look at whether this makes sense.

Is it possible that the WTO has no role in international governance? Is it possible that the WTO can settle disputes by disregarding the rest of international law? By disregarding the rules of public international law? By disregarding the other treaties dealing with environmental issues, social issues, human rights issues? I think we have to start at the beginning; the beginning is a preamble to the WTO agreements, and I would like to read to you the first two paragraphs of the WTO agreement – the preamble that gives us guidance as to where the system stands with regard to the rest of international law, and that gives us guidance on how to interpret the WTO agreements. The first paragraph of the preamble reads:

> Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development;
>
> Recognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."[20]

This does not indicate isolationism. It does not indicate that the WTO is here to deal with trade liberalization for the sake of trade liberalization, but

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[20] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1867 U.N.T.S. 154.

rather, that the WTO is here to deal with trade liberalization to support and to complement the other organizations' international governments. How else could the WTO make any effort in reaching these broader objectives: sustainable development; making positive efforts for developing countries? This is not within the legal framework of the WTO itself; it cannot reach these further goals without having due regard for the other international organizations and the rest of international law.

This is, largely, the view of the Appellate Body – sometimes very explicitly, but lately a bit more discreetly. The *Gasoline* panel Appellate Body report has already been referred to because it is very explicit; it states that you cannot reach WTO agreements in clinical isolation from public international law – even clearer, it says that you cannot read that the WTO agreements have to be interpreted in the real world – the real world where people live and work and die.[21] It is not an optimistic message, but it is a clear message. It is not just about trade; it is about a lot more. It is about an encompassing view of what international trade does, and how it fits in with the rest of international law and international governments.

Now, what is the argument against it? Why would it not be the case that WTO is part of the system of international governance? Is there a legal basis to exclude the rest of international law? Could we say: *We do not care about human rights? Or, we do not care about environmental protection? What we want is liberalization of trade – to have that as the prime, almost constitutional, value of international governance – disregarding all the rest?* Is that possible? Well, some argue that it is possible, and they argue that on the basis of legal provisions in the DSU – particularly on three provisions which I would like to discuss with you.

The three provisions are taken from, firstly, Article 3 and secondly, Article 7 of the DSU. Start with Article 3: Article 3 states that WTO agreements have to be interpreted in accordance with the customary rules of interpretation of public international law.[22] Note the reference to public international law – this could mean that public international law is part of the WTO system; it helps us to look outward, look outside of the system. It could also mean this is an explicit inclusion of public international law, and all the rest is excluded. We only look at what is particularly referred to or expressly referred to as outside of the system, and nothing else is included; the idea of a closed

[21] Gasoline, DS2, *supra* note 4.
[22] DSU, *supra* note 16, art. 3.

list, a closed list excluding all the rest of international law with the exception of those rules of international law that are either co-opted into the system or explicitly referred to. This closed list – is that what the drafters of the WTO agreement, the DSU particularly, want to achieve? To exclude the rest of international law by including one rule explicitly? No. Why not? Because this cannot be done implicitly.

The exclusion of the rest of international law as a rule of international law is possible. An international agreement can exclude the rest of international law. It can exclude further developments beyond the treaty you have agreed to, but that has to be done explicitly. This has been confirmed by the International Court of Justice in several cases – the *Chorzów Factory*[23] case, the advisory opinion on Namibia[24] – and this case is not explicit. The DSU does not explicitly say: *We have excluded the rest of international law, and the only rule that is relevant are the rules that we have explicitly entered into the DSU or the rules where we allow you by specific reference to go outside of the agreement itself.*

If that is not what it means – if it is not an explicit exclusion – then why is it there? Because if it is not that, then this is a very odd inclusion. If it is not to exclude the rest, then it seems to be meaningless. The customary rules of interpretation of public international law would be applicable in any case. How else would you interpret the WTO agreement? It automatically refers you to the customary rules of interpretation. So, if the reason why this provision is there is not to exclude the rest of international law, it seems meaningless. This would be an incorrect interpretation. We cannot interpret the treaty in a way that makes the words meaningless, so there must be another interpretation.

The Appellate Body (again, in my favorite *Gasoline* report) states that we must give meaning and effect to all the terms of the treaty. What is the meaning and effect of customary rules of interpretation of public international law? Well, there was a very specific reason – and it is quite a technical reason – for why customary rules of interpretation of public international law are explicitly included in Article 3, second paragraph of the DSU.[25] It has to do with its predecessor, with GATT. And here I have to disagree slightly

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[23] Case Concerning the Factory at Chorzów, 1928 P.C.I.J. (ser. A.) No. 17.
[24] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16.
[25] DSU, *supra* note 16, art. 3.2.

– only slightly – with my promoter; that is in the sense that GATT had its own system of interpretation, and interpretation paid some lip service to the customary rules of interpretation, particularly in the way that was codified by the Vienna Convention on Treaties in 1969.[26] But, the real interpretation under GATT had little to do with adhering to strict rules of interpretation; it actually had little to do with strict rules of law in general. The emphasis in GATT was much more on finding a way to ensure that the decisions made in dispute settlement did not displease anybody too much, and that had to do with the way in which the decisions were adopted because you could block a decision at every stage.

If a decision in a dispute settlement displeased anybody too much there was too much risk of blocking. So, the interpretation that it took of the agreement was not the real interpretation that we now see as the customary rules of interpretation as codified in the Vienna Convention[27] – which is, look first of all at the ordinary meaning of the terms – but rather what is known as the "founding fathers school of interpretation of law." The "founding fathers school" naturally became part of the GATT tradition because in the early days of GATT, who interpreted GATT agreements? – It was largely the drafters of the GATT agreements, and they really did not feel much of a need to look at the ordinary meaning of the words because they had written the words. They knew what was in it, and reference to the text was not their prime concern because they knew what they had written and what these words were supposed to mean, even if that was not quite what they said. The tradition started in GATT of interpreting the agreement on the basis of the "founding fathers school of interpretation," rather than the textual interpretation of the meaning that is now the prime method of interpretation.

The GATT agreement – GATT 1994 – encompasses both the text of GATT 1947 and all the interpretive practice and decisions made on the basis of that legal text, known collectively as the *acquis GATTois,* all the practice surrounding the agreements.[28] Those two elements, the legal text of 1947 and the *acquis GATTois* together make up GATT 1994. It imports the interpretive practice of the old GATT into the new GATT agreement, and thereby into the WTO. Had there not been the explicit reference in Article 3 stating that WTO agreements would be interpreted in accordance with customary rules of interpretation of public international law,[29] there would have

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[26] Vienna Convention, *supra* note 6.
[27] *Id.*
[28] GATT, *supra* note 5.
[29] DSU, *supra* note 16, art. 3.

been a real risk that the interpretive practice on the WTO would continue the old practice of GATT. The old practice of GATT played fast and loose with the rules of customary interpretation of public international law as codified in the Vienna Convention and placed an undue amount of influence on the "founding fathers school of interpretation," the intentions of the drafters' method of interpretation.

So, in my view, the reason why it is there is not to exclude the rest of international law, but rather to ensure that interpretation of the WTO agreement is in accordance with contemporary standards of interpretation of international law as codified in the Vienna Convention. The Appellate Body has confirmed again and again that customary rules of interpretation are codified in the Vienna Convention, and thereby, this is now the standard of interpretation, and not the old standard of GATT. That is the first basis on which attempts have been made to exclude international law from the WTO agreements and from dispute settlement in the WTO.

There are two more – staying in the same article – two more reasons why international law in the broader sense of the word could be excluded from WTO dispute settlement, thereby denying it a role in international governance. The same provision, Article 3: "the rulings and recommendations of the panel and Appellate Body cannot add to or diminish the rights and obligations of the Members" has been described by earlier panels as a warning not to overreach.[30] There I agree. It is a warning not to overreach. It is a warning against judicial activism in the same way that Article 38 of the Statute of the International Court of Justice emphasizes that the International Court of Justice does not make law, but that its decisions are only binding on the parties and not on the rest of the international community.[31] In that sense, it is a clear indication that panels and the Appellate Body should not go beyond their mandate and that their mandate is limited. Their mandate is to settle disputes in WTO law.

Does it mean that it has excluded international law? Does it mean that you can only look at WTO rules? Does it mean that nothing else matters beyond WTO rules? Well, no, it does not mean that. It does not mean that because that would be a rather hypocritical position and one that is not in good faith, which is more legally relevant than the first reason. It is not in good faith

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[30] *Id.*

[31] Statute of the International Court of Justice, Art. 38, 59, June 26, 1945, 59 Stat. 1031.

because it disregards the real legal position of the disputing parties. The legal position of disputing parties is determined not only by the obligations it has under the WTO but by the many other obligations it has and commitments it has under international agreements, including environmental agreements, human rights agreements, and many others. If you disregard the obligations the Member has under other agreements, in a way, you add to the rights and obligations; you change the legal position by giving primacy to their rights and obligations under the WTO.

One very concrete example – it is a rather reduced existing conflict (the *Swordfish* case[32]), but in a simplified version. There was a dispute between Spain and, by extension, the EU and Chile. Spanish fishers were trying; well, they were not trying, they were successful in catching swordfish off the coast of Chile in contravention of their obligation under the protocol attached to the UN Law of the Sea Convention (UNCLOS) – the protocol on highly migratory species, signed both by Spain and by Chile – which made catching swordfish in those conditions illegal.[33] Now, what is the legal position of Spain and, by extension, the EU?

If you look at only the WTO agreements, there is a right of transit. What Spain was asking for was – these were factory ships, so the fish was processed on board, frozen, and the idea was then to transit it through Chile and fly it back to Europe – so that was what they were demanding, transit through Chile. And Chile said: *No*. They said: *Yes, you have the right of transit under the WTO agreements and the GATT, but what you have caught is illegal. We have both signed these agreements that we are going to protect highly migratory species, and your catch is illegal*. If the view is that the DSU cannot add to or diminish the rights and obligations of the Members, and this means you can only look at the WTO rights and obligations and not at the rights and obligations of the real legal position of the Members in international law, then you could argue that Article 5 is the only thing that is relevant in this case.[34] We simply decide this case on the basis of WTO rules, disregarding the rest of the legal position, thereby giving new rights to Spain – the EU by extension – to transit illegally caught fish; a right you do not have in international law because they had agreed – they had signed the protocol on highly migratory species.

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[32] Request for Consultations by the European Communities, *Chile – Measures Affecting the Transit and Importing of Swordfish,* WT/DS193/1 (Apr. 19, 2000) [hereinafter Swordfish, DS193].
[33] *See id.*
[34] DSU, *supra* note 16, art. 5.

Is that what it means? No, because that makes no sense in international law, and it is not in good faith, which is the requirement under the DSU. The reason it is there – and let me repeat that I am in agreement with what Amy Dwyer said yesterday – is that this is an agreement against judicial activism – a warning that they should not overreach. They are not there to make general rules or to create new law, but only to apply the rules that are relevant. But, the WTO rules may not be relevant in a dispute; that has to be determined by looking at the broader legal context. They can only apply the rules that are really relevant for a dispute, and not only the WTO rules, disregarding the rest of international law.

The reason why this is also important is – and this is also still in the same paragraph of Article 3 – because what the WTO DSS is supposed to do is add predictability to the system. Looking only at WTO rules and disregarding the rest of the real international legal position of a WTO Member would not add to the predictability, and certainly not the security, of rights; it would create a flux in the international legal position of individual states by sometimes emphasizing the WTO rules. Others would then accept the real legal position and come up with a completely different judgment, thereby really exacerbating the international legal conflicts.

The third reason why it is claimed that the WTO has excluded, largely, the rules of international law – why only WTO rules are relevant for WTO dispute settlement – is based on Article 7, the terms of reference.[35] Here, I am fully in agreement with Professor Davey – the mandate of WTO dispute settlement is limited. Article 7 states that disputes have to be settled on the basis of the covered agreements.[36] What WTO dispute settlement does is settle WTO disputes. It does not settle other disputes. It has no mandate to settle environmental disputes or human rights disputes. It is a court of specialized jurisdiction, if we can call it a court. It has no general jurisdiction. It has no mandate to enforce any other rule of international law. It has no mandate to enforce environmental law. It has no mandate to enforce human rights standards. In that sense, it is not, as the speech of Pascal Lamy seems to indicate, a central government.[37]

It is not a mechanism for the enforcement of international law in general, but that does not mean that it should not respect the rest of international

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[35] DSU, *supra* note 16, art. 7.
[36] *Id.*
[37] Lamy, *supra* note 3.

law. It has a role in international governance that is a limited role; a role that is there to respect the other international organizations – the rest of international law – and to play its limited role in settling only WTO disputes; settling WTO disputes where WTO rules are relevant. If they are not relevant, they should not settle the WTO disputes but accept that they are not relevant; that the dispute is being brought to the wrong forum, that it is not a WTO dispute.

Those are the three main reasons why some argue that public international law – in the broader sense – is excluded from WTO dispute settlement, and why the WTO should not have a role in international governance. In short, I can only disagree. I think there are real reasons to deny the WTO its just position as part of the international government structure, but this proper role is a limited role. It is a role in international trade law – but accepting that international trade law is only part of public international law and that there is no real distinction, no real boundary between international trade law and the rest of international law. The WTO dispute settlement plays its role within its field of international law, but with full respect of the rest of international law. Thank you.

Wilner: Thanks very much. And now we move on to Mr. Zaimis, who will put all of this together and give us the answer. (*laughter*)

Zaimis: Thank you. You were about to say *Professor* Zaimis, eh? I would like to thank the Dean Rusk Center. Ambassador Johnson, I am really honored to be here with you, especially sitting at such a high level panel. As I said, I am not a professor. I am a government official, and I noticed that if there is room for disagreement between professors, then maybe there is room for a bit more disagreement between government officials and the academic world.

The question that we were invited to address today, I think, has two dimensions: One, is a political dimension – *if the DSU can have a role in global governance?* – and the other, a legal dimension – *whether the Appellate Body can look to sources outside the WTO agreements?* We tried to address both of these issues with a caveat – one has to be very careful when using the words "global governance" with governmental authorities, so as to avoid heart attacks. To avoid heart attacks back in Brussels, I would be obliged to say that what I will be saying to you now does not necessarily reflect the views of the European Commission.

With that in mind, let me start with the first – let us say – "political" dimension of the question. First of all, soon after the conclusion of the Uruguay Round, WTO Members started realizing that the effects of the agreement they had just signed went far beyond the areas – the classic areas – of trade policy (which were tariff protection, border discrimination) to touch upon a number of issues principally affecting domestic policies and lawmaking. Suddenly, issues such as what food standards to develop and apply for internal health controls or whether subsidies favoring local producers can be granted, were open to challenges from other WTO Members to an extent that had not been seen before the Uruguay Round years.

Government authorities and WTO Members realized that the number of previously considered purely domestic issues could be challenged by other WTO Members, as they had an effect on trade. This development occurred with a parallel realization that a dispute settlement had been established through which measures could be challenged, while the rulings delivered through this dispute settlement could be enforced through trade sanctions. Thus, it was realized that WTO law, trade law, was gaining unprecedented importance in comparison to other public international agreements. And this, in my view, to a very large extent, was thanks to the existence of the dispute settlement mechanism.

Today, international negotiations are currently taking place with a view to further expand and deepen the reach of WTO law – and I am referring to the Doha Development Agenda (DDA).[38] Negotiations are currently taking place, and they are, in theory, expected to end at the end of this year. Under these negotiations, for example, rules on development aid or internal regulations on the movement of foreigners would be affected through any agreement on the aid for trade chapter or the services mode 4. Mode 4 is the part of the services negotiations which talks about the citizens of one WTO Member going to work temporarily in the country of another WTO Member to offer their services.[39] It is one of the more controversial issues of the negotiations.

With this, therefore, broader context, I think it would be a fallacy to expect that WTO law can remain an isolated element in a self-contained environment – what the Appellate Body has described as "clinical isolation."

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[38] Doha Development Agenda (2001), *available at* http://www.wto.org/English/tratop_e/dda_e/dda_e.htm.
[39] *Id.*

I have always liked this term "clinical isolation;" it reminds me of hospitals, doctors in white robes, but, of course – if one thinks of it – hospitals are the places where you find most of the viruses around. If you want to get in touch with a virus, a hospital would be the place to get it. Clinical isolation does not exist, not even in the real world.

Another reason is that even though, as we have said, the WTO impacts a number of domestic policies, the WTO does not have a real mechanism to update the covered agreements so as to keep in touch with international developments. The only real legislative function is that of international negotiations. I just referred to the DDA negotiations, which, however, occur far apart from each other – easily more than ten years apart. The last round was the Uruguay Round, concluding in 1995. Now we are in the middle of a new round.[40] We do not know when it will be concluded, probably the end of the year. To be frank with you, this deadline looks increasingly difficult to meet, so we could easily be speaking about a round being concluded in 2008 or 2009. So we may see even fewer rounds in the future, and this is provided that the current round succeeds. If there is no success in concluding the DDA round, we may not be seeing a new round for many, many years to come.

In this context, the DSU remains the only effective mechanism which can take into account, in the interpretation of WTO agreements, international developments. A so-called dynamic, updated interpretation of WTO rules, I think, would ensure that WTO law and the DSU rulings remain in touch with reality in a global context. These are developments, therefore, that mandate a political need for WTO law, through the DSU, to play a major role in the development of a consistent and coherent web of international agreements. The question, therefore, is not whether the Appellate Body should have a role in global governance, but rather how it should play this role.

Now, with regard to the more legal dimension, WTO case law clearly indicates that both panels and the Appellate Body have not limited themselves to the four corners of the WTO covered agreements. They have referred to general principles of law – good faith, standing, legal representation – to customary international law, and even to other non-WTO treaties. For example, just to remind you of a recent case – the *Brazil Frozen Chicken* case that the EU lost – where the harmonized system convention concerning the inter-

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[40] *Id.*

national classification of goods was characterized as "context."[41] Moreover, as we have heard also from both panelists before, DSU Article 3.2 explicitly confirms that WTO covered agreements must be clarified in accordance with customary rules of interpretation of public international law.[42]

In this respect, I will remind you again that Article 31(3)(c) of the Vienna Convention on the Law of the Treaties, which is part of the rules of interpretation referred to before, directs that in interpreting a treaty account must be taken, not only of the treaty itself in context of the WTO treaty, but also of any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, as well as any relevant rules of international law applicable in the relation between the parties.[43] Accordingly, I would say that the EC is quite happy about the WTO jurisprudence, which has so far refused to leave the multilateral trading system in clinical isolation.

But of course, the above is the easy part. The difficulty arises as to how far can WTO panels go in that direction. To be more precise, the even more difficult part is to what extent WTO panels or the Appellate Body are at liberty to "dis-apply" WTO law on the basis of a defense premised on non-WTO law. So far, WTO panels and the Appellate Body have avoided this question with the exception of developments we are going to discuss in a few moments.

On this hard issue, I think that we would be favoring an open approach. For example, to consider that conflict rules – like *lex specialis, lex generalis* – apply, and, generally, to recognize that the WTO is not a self-contained regime. Of course, the procedural question, I recognize, is much more difficult. One example: whether panels can set aside Article 11 of GATT[44] because, for example, the Basal Convention prohibits the export of hazardous waste.[45] I realize that there will be some tension within the DSU, which on the one hand mandates the panels and the Appellate Body to find whether or not there is a violation of Article 11, and on the other hand allows a panel to say that Article 11 is not applicable.[46] But, of course, if one wants, everything is possible.

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[41] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts,* WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).
[42] DSU, *supra* note 16, art. 3.2.
[43] Vienna Convention, *supra* note 6, art. 31.3(c).
[44] GATT, *supra* note 5, art. 11.
[45] Basal Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 [hereinafter Basal Convention].
[46] GATT, *supra* note 5, art. 11.

The advantage of an open approach would be the avoidance of WTO rulings which are made and enforced even though they do not correspond to what international law says as a whole. Its disadvantage would be that WTO panels would have to rule in the course of their reasoning on matters of non-WTO law, for which there are sometimes specialized international organizations. So, all sorts of things could be drawn into the WTO. And just to clarify, I am not sure whether the EC line is firm on this, so I express personal views. In any event, the answer does not need to always be the same; this can be examined on a case-by-case basis.

In that context, let me talk to you about two recent developments: the first is the *Mexico Soft Drinks* case, or *Fructose* case, as you may know it.[47] The Appellate Body noted that it saw no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes and that the WTO DSU could not be used to determine rights and obligations outside the covered agreements.[48] This Appellate Body reasoning raises some concerns. Of course, panels and the Appellate Body do not have the function to adjudicate non-WTO disputes. I think we are all in agreement on this. But, interpreting and applying non-WTO law and ruling on non-WTO applications where this is legally relevant for deciding a WTO dispute does not necessarily mean adjudicating a non-WTO dispute. In its submissions before both the panel and the Appellate Body, the EC – and I refer to the European Communities because as you know, for the WTO, we are the European Communities and not the European Union – had consistently maintained that panels and the Appellate Body have an incidental power to interpret non-WTO international law, and we had asked that the dispute should not be decided on the basis of any such jurisdictional limitations.

It remains to be seen how far-reaching the Appellate Body findings are, and what practical effect they may have for further cases. In particular, a question remains about what precisely the Appellate Body understands by determining rights and obligations outside the covered agreements or adjudicating non-WTO disputes. In other words, whether the above-cited paragraphs would also preclude interpretations of rights and obligations under non-WTO agreements when such agreements relate to issues governed by Article 20 of GATT, or when bilateral or multilateral agreements binding on the parties to a WTO dispute are invoked in the context of a WTO dispute. I

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[47] Panel Report, *Mexico – Tax Measure on Soft Drinks and Other Beverages,* WT/DS308/R (Oct. 7, 2005) [hereinafter Soft Drinks, DS308].
[48] *Id.*

think that it is unlikely that in this case – *Mexico Soft Drinks* – that the Appellate Body wanted to reverse its case law – that the WTO agreements are not to be read in clinical isolation from public international law. Therefore, it can still take into account international law when applying the WTO agreements. However, where, precisely, lies the borderline between taking into account international law and adjudicating non-WTO disputes is likely to remain a contentious issue for future cases.

Beyond this concrete case, the relationship of WTO and non-WTO law is, of course, a highly complex question which can come up in numerous different constellations. As I said before, I guess we can say that we believe that the WTO system should be open to relevant rules from outside the WTO, and, to the extent that such rules are relevant in a dispute before the WTO, panels and the Appellate Body should have incidental jurisdiction to interpret and apply them. Of course, the big question is: *When can non-WTO law be said to be relevant in a WTO dispute?* I do not think I have a hard and fast rule on this, and I think that really depends on the specific facts of the case and the specific provisions involved. I had prepared an example, but I will not take your time with it. Perhaps we can refer to it at the discussion.

What should a panel decide if it is confronted with a WTO Member raising a bilateral agreement in a WTO dispute which would have given a different conclusion to the dispute had it been applied? What should a panel decide? As I said before, I would favor an approach which would take into account these other international agreements, as only a global approach would really give expression to the will of the two WTO Members concerning their trade economic relationship. Under an alternative approach – under the absence of conflict provisions – a WTO Member may end up with two different and conflicting international obligations. I think this was an issue that was discussed and raised by the previous panelists. In that particular case, in the *Mexico Soft Drinks* case, there is an anti-exclusion clause which has not been invoked by Mexico;[49] that is Article 2005.6.[50] It would have been interesting to see whether, if Mexico had invoked that clause, it would have informed the conclusion of the panel and the Appellate Body.

An outcome which would ignore other bilateral or international agreements would weaken and discredit WTO law at a time when it is – as I was

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[49] Soft Drinks, DS308, *supra* note 47.

[50] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

just explaining at the beginning – politically imperative that WTO law actively contributes to a stable and coherent web of international agreements. Perhaps the answer could partly lie in the explicit recognition in other agreements of the importance of WTO law and the central part this law plays in global affairs. I will bring you one recent example, which I think is of big interest. In the recently approved UNESCO Convention on Cultural Diversity (UNESCO Convention) there is a specific provision, Article 20, which recognizes the peaceful coexistence of WTO law with the UNESCO Convention.[51] This Article 20 is called Relationship to Other Treaties, Mutual Supportiveness, Complementarity, and Non-Subordination, and it says very briefly:

> Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster their mutual supportiveness between this Convention and the other treaties to which they are parties… and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
>
> Paragraph 2:
>
> Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.[52]

I am sure that lawyers will have a field day in interpreting Article 20.

Let me close by saying that, panels could use non-WTO law as context for interpreting WTO law when this non-WTO law is directly or indirectly referred to in one of the covered agreements. An obvious example would be the indirect reference to the Organization for Economic Co-operation and Development (OECD) export credit arrangement in Annex 1 of the Subsidies Agreement.[53] So, following what we have seen happening with the UNESCO Convention, I think it would be interesting to see to what

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[51] United Nations Educational, Scientific and Cultural Organization Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005 [hereinafter UNESCO Convention].

[52] *Id.*

[53] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

extent the panels and the Appellate Body will take a similar approach with non-WTO law, which itself, directly or indirectly, refers to the WTO. These are difficult legal questions which are raised, and I think that for WTO law fans there will be guaranteed hard and interesting work for the years to come. Thank you.

Wilner: Thank you very much indeed. We have had three talks and approaches that looked at the issues involved in the application of non-WTO law in various contexts and have dealt with them in very specific ways. I wonder whether there is anyone among the conference panelists who takes, let us say, a more restrained view. All three panelists seem to give some scope for the application of other treaty rules and public international law, in general, in the work of the panels and, particularly, the Appellate Body. Is there anyone who would want to take a tack that, in fact, the WTO system is somewhat closed and refers only to the DSS? That it is specific only to these substantive provisions and that, therefore, the panels do not have, nor does the Appellate Body have, the jurisdiction or the competence to deal with other law, other approaches, or even other bases of interpretation except for the rather obvious ones of, perhaps, treaty law? Does everyone agree with the members of the panel's approach? I think Mr. Kho was not in the room when I made this offer to anyone on the panels who might want to have a more restrained view – that is, supporting the notion of a system which does not include references to sources other than the agreements themselves. Well, then we are all agreed and that is that. Are there further comments or questions?

Zaimis: One question to Professor Davey: You discussed the possibility of a conflict between two different international obligations and said there may be cases where it may be very difficult to compromise and find a solution, something that would be able to satisfy both agreements. Then you suggested that it would be a Member's error that it had to face two different and conflicting obligations. Let us assume that this stands and this is correct. What would be the advice to governments, considering that there is already a vast number of international agreements which are already in place and are part of the WTO? What would be the advice with regard to future agreements in order to avoid this question?

Davey: I do not know. Be more careful? *(laughter)* I mean, you can see what governments try to do. They try to do what was done in the UNESCO Convention; these provisions that say (a) we are consistent with everything else; (b) this does not affect any other obligations – nothing we have said so far suggests that we, in this new convention, are in any way subordinate to

anything else. In other words, everybody wins. And the hard issue comes up when you do have a case where there is a real conflict and the question is, is it a defense to a WTO violation? That is a hard question. Is it a defense to a WTO violation to invoke another agreement and say that agreement somehow trumps the WTO obligation or there is a general principle of international law that trumps the WTO obligation? I tend to think that the situations where you can make the argument that the other obligations trumps WTO are probably going to be – there will not be that many where you can make that argument. Now if it is *jus cogens* – you can say that under the principles of the Vienna Convention it is context and, therefore, you can use that context – maybe you could.

What I was trying to do – what I was saying – is come up with practical ways to avoid these issues a bit through interpretation of the obligations to begin with and then the exceptions. I think, actually, for most of what would be *jus cogens* you can imagine the public morals exception would cover it – human rights or something like that if you really had that conflict. For the *Swordfish* case, you could argue that Article 20(g) actually gives Chile the right to do something, and that is actually a more practical way to approach the case than to try to figure out which of these two agreements was earlier or later in time, or which is more specific.[54] Is the agreement on fisheries more specific than the agreement on shipping goods when the issue is about the shipment of goods at that point, when the fishing is over? The fish was packaged, basically, so it is not really fish anymore. It is cut up fish parts or something like that. So, how would you say what is the more specific agreement?

Often, I think you can interpret the agreements to avoid a conflict – that is the way, as a practical matter you try and avoid this sort of thing. But, there probably will be cases – and you can imagine with these provisions like in the UNESCO Convention – I mean, what are you supposed to make of that if you are a panel? If you read that, how would you interpret that? You have the same problem within the WTO complex of agreements that we were talking about yesterday. There are ambiguities where the negotiators could not agree. Well, this is another example of where negotiators could not really agree as to what the relationship of the UNESCO Convention is going to be with other agreements, so they kept writing until they had covered everyone's position and then they said: *Well, that is fine*. But, for a dispute settlement mechanism, that is very difficult to deal with.

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[54] Swordfish, DS193, *supra* note 32; GATT, *supra* note 5, art. 20(g).

I will make one further comment. I suspect that the Appellate Body's comments in *Soft Drinks* were a way to deal with that case. They do not indicate that the panels cannot ever look at other international obligations in deciding WTO rights, because – and you can think back to the *Bananas* case – in some instances, how do you interpret the Lomé waiver without looking at the Lomé Convention?[55] It would be impossible to know what it meant. So, I think they overstated – they wanted to dispose of the Mexican argument – that the unproved U.S. violation of NAFTA was a defense to whatever we did to them in the WTO; they did not want to address it directly, and this was an easy way to dispose of the argument[56] – I do not think they will go very far along that line in the future.

McRae: I just want to take that a little bit further because it seemed to me that you are saying that most cases can be resolved through interpretation, but there may be difficult cases where you do have a conflict. Surely, all cases have to be resolved through interpretation. That is, where there is a conflict – as long as there is an allegation of a violation of a provision of the WTO, even though the defense may be that there is a conflict with some other treaty or rule of international law – the WTO panel or the Appellate Body cannot say that there is conflict but that they cannot resolve it. They still have to find a way of interpretation. It may be, as you say, very difficult to do in some cases, and the UNESCO Convention would lead people to scratch their heads and say: *To what extent is that something the Appellate Body can actually interpret?* But, nevertheless, it has to resolve the case. Or, do you think the panel or the Appellate Body could say: *The conflict is too great; we cannot interpret it?* I know you say *lex specialis* is not really helpful and *lex posterior* is not very helpful. Nevertheless, even though they are not very helpful, at the end of the day, can a panel or the Appellate Body say: *We cannot decide this case even though there is an allegation of violation of WTO law?*

Davey: That is where I would say that, in the end, if there is a real conflict that they would go with WTO rule. The violating country would be in the unfortunate situation of having conflicting obligations and be found, perhaps under both regimes, to have violated its obligations. So in the end, I would not say we cannot decide it. I guess what I meant was that you could not interpret your way out of the conflict problem through interpreting the obligation or interpreting an exception. You would still have to interpret what the

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[55] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R (Sept. 9, 1997).
[56] Soft Drinks, DS308, *supra* note 47.

obligation was, and if there was a violation and no defense available, then the respondent loses. I think in WTO dispute settlement that, ultimately – unless you can find one of those rules of interpretation; i.e., all the parties to the WTO are also parties to this other agreement, and therefore it is part of the context and you can work further with it in that regard – you may just have to find that the country violated the WTO agreement and reject the defense, even though it is true that it has a conflicting obligation. So, if it complies with the WTO, it is going to violate this other obligation.

Wilner: Does not the fact that you are in a WTO-specific forum give an advantage to the view that, in fact, the conflict has to be settled in accordance with the basic rules set out in a system to which the parties have been referred?

Davey: The question is: *how far do you go in using some interpretive principles to recognize a defense that is somehow outside of the WTO?* This is a conservative panel. I would say, actually, most people agree that there is some application of international law that is going to get into the WTO – but, there are those that would argue *no*. They would use things like *lex specialis* to say, well, this regime is more special than the WTO and more specific than the WTO in this specific instance, so the WTO loses, and the WTO panel should say that.

Wilner: Perhaps not only that but, as Kim Van der Borght said, there may be situations – if the WTO system is part of a more general international system – where the WTO DSS really has to resort to using other conventions and acts as a dispute settlement body of the general international system rather than only that of the WTO. I think that is what Professor Van der Borght had in mind. Do you have any further comment on that?

Van der Borght: Maybe just shortly on the proposed solution to the *Swordfish* case, saying: *Well, essentially, it is no longer fish it is foodstuff because they have been processed*. In that case, there is not really any defense anymore on the basis of the protocol on highly migrated species within the WTO context. You have solved it by excluding the protocol and by disregarding the illegally caught fish, which is really disregarding the bad faith of bringing this claim because it is a claim to transport this foodstuff that it now is – a right that they do not have because they should not have caught it in the first place.

Davey: You could have a rule that said we do not allow anything derived from something caught in violation of international agreements to transit. That is relating to the conservation of exhaustible natural resources; Chile could still invoke the 20(g) exception.[57] I do not know enough about the facts to know whether or not the case would be good for that, but it sounds initially like it could be possible.

Van der Borght: I think it is possible in the future because now they know they should do this, but it is unlikely to be in their law already.

Davey: Right. That may be true. That is just an implementation issue.

Georgiev: I want to react to your last remark, which seems to be shared by Professor Davey, that the WTO Appellate Body or the DSS should apply WTO law if there is conflict at the end of the day. Well, that takes me to the remark of Kim Van der Borght, who said in his initial intervention that you can do this only if you accept that there is a primacy of WTO law over other international law, because otherwise it will not work. It is a general concept which you apply because of these general considerations. Nothing shows that there has been this general view that by creating the WTO and dispute settlement, you also institute the primacy of WTO over other international law. This conclusion from 'unsubstantive' law – the primacy – is about substantive law and you cannot derive it from a procedural provision or system of provisions, contrary to what substantive analysis, like Kim Van der Borght's, has shown of the WTO agreement, preamble, et cetera, et cetera – I do not need to repeat that. I find it problematic, Bill Davey, to say: *Well, at the end of the day, that is what the WTO Appellate Body and DSS has been instituted for, to apply WTO, so it has to apply WTO.* No, it is not that. It is you, in fact, enforcing a primacy of one set of rules over another set of rules.

I would probably belong to those whom you have mentioned at the end of your last conversation – as trying not to sort of discard the principle of *lex specialis*, but look at it more seriously and not apply it only when it obviously cannot be applied. This whole dispute reminds me of what you had in the EU in the '60s. And here, all of you are specialists in European Community law; there was this similar debate about the concept of European Community law as a separate legal order.[58] And this concept was in fact invented by

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[57] DSU, *supra* note 16, art. 20(g).

[58] *See, e.g.*, Case 26/62, N.V. Algemene Transport v. Netherlands Inland Reveu Admin, 1963 E.C.R. 1, Case 294/83, Parti Egologiste 'Les Verts' v. European Parliament, 1986, E.C.R. 1339.

the European Court of Justice.[59] It is a judicial creation, this concept. But can you do the same thing now? That is the question. Well, I think that after all you cannot do what the European Court of Justice has done by positing that European Community law is separated from international law because you have the explicit provision of WTO law that it operates within international law. And then, in the European Community, look what you had subsequently – primacy was, in fact, accepted, first implicitly and then also explicitly, by the member states, by the masters of the treaties, the *Herren der Vertraege*. So, the situation is different. You cannot do what has been done in European Community law in WTO law. That would be my view.

Davey: One reaction is – what we are actually talking about is a wide variety of situations. If you actually have what you can constitute as international law – international law in the sense that it is binding on all governments – then the Vienna Convention allows you to take that into account as context in interpreting the WTO agreement. What is more likely to come up is not that sort of international law, unless you are willing to recognize principles of international law quite easily, but rather where you have international agreements that conflict, where you do not have identical membership. There are interpretive principles that can solve a problem if the dispute is between A and B, and A and B have entered into another agreement in conflict with the WTO that does not – and enforcing that agreement in the relation between them – cause any third parties to be hurt under WTO rules. There is actually a Vienna Convention provision that would arguably allow that sort of interpretation; 41, I think.[60]

The problem is when you have A and B, part of the WTO membership, in a separate agreement that has a conflict with the WTO, but there are other Members of the WTO that are not parties to that arrangement, and they are complaining about a problem. And that is what most people are concerned about when the issue is: *do you give WTO primacy?* That is the actual case that they are thinking about. Some of the Members of the WTO have entered into a separate agreement on the environment, an action is challenged by a WTO Member that is not a party to that agreement, and some people would say it should be a defense – that there is this other agreement that is more specific perhaps to the provision giving rise to the WTO violation. But if the complaining WTO party is not a party to that other agreement, I would say that you would apply the WTO rule…

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[59] *Id.*

[60] Vienna Convention, *supra* note 6, art. 41.

Georgiev: …Unless the other is qualifications of customs or international –

Davey: – International law, which it could be. There you get into an issue as to how willing you are to recognize general principles of international law. Is it a very narrow thing? Piracy is bad; slavery is bad; there are certain human rights. Or, is it kind of a broad range of things that are – what some people, what the U.S. – would view as potentially emerging principles but not yet generally accepted? I do not know.

Zaimis: Just one reaction to the point you mentioned about European law: I think the situation is, as you said, quite different in terms of, for example, judicial activism – which we are trying to condemn in the WTO. If it were not for judicial activism, the EU would not exist today. I would not be here talking to you if it were not for these first decisions of the European Court of Justice about direct effect. So there is room for judicial activism in international life and the result can be positive.

Georgiev: Yes, but what I referred to was that there is a difference. You have a subsequent blessing – in the case of European Community law – you have the subsequent blessing, implicit or explicit, by member states of the European Union, which here you do not have. And I have doubts whether, in the legal system of the WTO, you can have it at all, in any form other than explicit; which is, I guess, not possible. There is a difference, for the purposes of the separation of one legal order or legal system, from international law; this is the age-old conflict between the monists and the dualists in international law.

Professor Bodansky:[61] I wonder whether it might be helpful to distinguish between situations where some other part of international law *requires* a state to do something inconsistent with a GATT obligation and situations where international law merely *permits* a state to do something that is inconsistent with GATT obligations. It seems to me the first situation is an easier one than the second. It is hard for me to imagine that if a state is required by a multilateral environmental agreement to do something – under the Basal Convention or the Convention on International Trade in

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[61] Emily & Ernest Woodruff Chair in International Law, University of Georgia School of Law; Moderator (*Panel 4: Are the Current Methods of Enforcement of Dispute Decisions Effective? What Are Alternative Methods of Enforcement?*).

Endangered Species[62] – that that requirement would not be considered to fall under Article 20(g) and therefore be a defense to a GATT violation.[63]

The harder case, I think, is where some other part of international law permits a state to do something. For example, under the precautionary principle, states can do things even in the absence of scientific certainty.[64] They are not required to do so, but they are permitted to. But if some aspect of WTO law imposes some other requirement involving science, then you have a conflict, and that seems to me, perhaps, the more difficult case – where simply relying on the kinds of approaches that Bill Davey mentioned might not end up leading to a solution. Thanks.

Davey: That is a problem within the WTO agreements as well. What is a conflict? Do you have a true conflict, which is, *you are supposed to do A under one agreement and not A under another agreement*? Or, is it, *you have permission to do A under one and are prohibited from doing A under another*? The Appellate Body really has not been real clear about that, but panels have taken differing approaches to that – whether or not the second example of a conflict is really a conflict or not. One panel report basically said it is not a conflict because you can comply with both obligations. But, sometimes if you – as the principles of what, broadly, you could say effective treaty interpretation would suggest – follow that, that basically writes whole sections of the one agreement out of existence by basically saying: *You cannot do it because you have got this other obligation*. So, part of it is defining the conflict, and then part of it is, what is the multilateral environmental agreement? Do all WTO Members belong to it, and is that the case? Or, are there some WTO Members that do not belong to it and are they involved in the case? There are a lot of permutations that forever make it hard to generalize.

Wilner: I suppose there is another permutation where states – it is conceivable, in the area of trade or a related area – enter into an agreement that is clearly incompatible with their obligations. I suppose you could say, *well, they entered into this in bad faith,* but then it may be so tangential that it is not bad faith but represents another concept, another view of international trade law. If you were to talk about *lex specialis* or "later in time," and give primacy

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[62] Basal Convention, *supra* note 45; Convention on International Trade in Endangered Species, Mar. 13, 1973, 12 I.L.M. 1085, 993 U.N.T.S. 243 (1973).
[63] GATT, *supra* note 5, art. 20(g).
[64] *See, e.g.*, Commission Communication on the Precautionary Principle, COM (2000) 1 final (Feb. 2, 2000).

to any of these concepts, states could, over a period of time, diminish their obligations towards the international trading system by entering into these special agreements. This, I think, is an argument for saying that there is in fact a hierarchy of norms and rules in the area of trade, and that the area must be occupied by the WTO system and its substantive conventions.

If, in fact, we want to broaden the system, then the treaties themselves must be broadened to include considerations other than just the specific trade rules themselves. I would think this would be the most useful and the most direct way of dealing with the problem of the wider obligation of states. I understand there are some practical difficulties in including human rights and labor standards, and matters of that sort, in the WTO system. It seems to me that the most direct way of broadening the competence of the WTO dispute system is by specific reference to, and incorporation of, treaties on other aspects of the international system. This approach would be the best way of broadening the reach of the dispute settlement of the WTO system.

Johnson: Let me just ask a specific question about trade and labor that Professor Wilner just mentioned. Let us take two countries, A and B, who are both members of the WTO and also members of the International Labor Organization (ILO). Country A decides to embargo, or put some tariff that is prohibitive on Country B's products, based on A's claim that B is violating ILO core labor standards. Country B claims that it is not violating the ILO standards and takes A to the WTO and the case ultimately gets to the Appellate Body. If you are on the Appellate Body, what is your position?

Zaimis: We are glad we are not the Appellate Body. *(laughter)* That is a real situation; labor standards have been used in a positive way by WTO Members. For example, the EU is now using labor standards in its new general system of preferences program, whereby GSP preferences are available to a number of countries; but if certain of them have signed certain ILO conventions, then they will get extra benefits under the GSP.[65] That is the new system that is currently being applied since the first of January. And of course, in the future one of the beneficiaries – that does not get the GSP plus benefit – may challenge this by saying: *I meet ILO standards without having signed the convention*. I do not want to invite trouble, of course, but this is something that is in our thinking. That is a way of using labor standards in a positive way. But I understand your question relates to trade sanctions for a

[65] Council Regulation 2501/2001, 2001 O.J. (L346) 1 (EC).

country that does not meet labor standards. To what extent this can be taken into account, and if there is an Article 20 defense – this is an open question, and I do not think I have a black and white answer to that.

Davey: I think "public morals" is the first exception as the one that might apply. There might be some issue as to whether or not consumers distinguish the products that resulted from that – such that you could justify a finding of "non-likeness" – but that would probably be kind of difficult. I think that most people think that would be a problem these days, but there are a couple of avenues you could argue.

Johnson: But the Appellate Body would not be in a position of interpreting the ILO standards as to whether or not Country B has violated – so you would argue against that, I presume.

Davey: Well, at the moment, given what they said in *Soft Drinks*,[66] they would probably not want to do that. The declaration in Singapore says you should leave these matters to the ILO, which does have a system of imposing sanctions on countries. It is seldom used; Burma, I think, is the only one that has ever been so targeted. But there is a different mechanism available that all WTO Members said ought to be used, instead of the WTO, to solve these. You could argue that. That would be another reason why the Appellate Body would try and avoid this. Certainly, I do not think they would rule on whether or not there had been ILO violations.

Van der Borght: They would not have to rule on it if there was a decision of the ILO because the ILO procedure is basically "naming and shaming." So, once the report is out at the ILO, you would not need a ruling of the Appellate Body of whether there was a violation of labor standards. They could do it on the basis of the ILO report.

Zaimis: I think perhaps, politically, it would also depend on what violation we are talking about.

Johnson: Let me just add, on behalf of the U.S., we actually had an agreement with Cambodia where we also used the "carrot approach" as opposed to using the negative approach in offering additional quotas to Cambodia – but Cambodia was not a Member of the WTO, so that is not really

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[66] Soft Drinks, DS308, *supra* note 47.

relevant here. I guess my question is, if you had a clear violation of, let us say, child labor or slave labor – that may get into the moral issue – but if you have a clear violation, and under the WTO there is no real basis for blocking the trade or withdrawing Most Favored Nation (MFN) status to that violating country, I just wonder… that is really what my question is. I think you have probably addressed it, but I just wanted to clarify it in the post analysis.

Zaimis: If it is child labor or slave labor, as you call it, perhaps the public morality clause could be extended to justify a measure under Article 20. I think the interpretation of Article 20, in the future, will be gradually expanded, in line with international developments.

Wilner: Would this be in the same vein as the extension of jurisdiction – of the implicit extension of jurisdiction – through the use of some general WTO clauses or GATT clauses, so as to bring about the inclusion of certain norms in other aspects of international system without ever having to change the actual treaties?

Zaimis: Well, the Appellate Body has already done it – I am sure Professor Davey would know – they have interpreted Article 20 in different ways throughout the last ten years. For example, the concept of "sustainable" development was brought into Article 20 even though the word sustainable is not there. This is simply in keeping with other developments in other fora in the international context. Because environment was not –sustainable development was not – perhaps an issue in 1947, it was not inserted into Article 20. It has become an issue since 1947, and that is why the Appellate Body interpreted Article 20 so as to incorporate this principle. I think that they will be using interpretive tactics to cover new concepts and reflect new political sensitivities that will arise as a result of international developments.

Van der Borght: On the example of labor standards, I think the problem of trying to fit it into Article 20 is really trying to avoid the issue of the way that the relationship works between rules of international law. If there is a claim from a country saying: *Well, we are very disappointed. We cannot get our full advantage from the WTO system because we cannot export t-shirts or shirts that are made by children,* I think the answer of the Appellate Body should be to send them away and say you have no rights under the WTO to do that because there are binding conventions that you have signed in the ILO. The Appellate Body should take a much firmer stand on that and not try and find a way of integrating this through an exception in the WTO – rather than expanding their jurisdiction, keeping it very limited. The juris-

diction of the WTO DSS is on trade, not on trying to gain unfair advantages that the country really does not have.

Johnson: Just to follow up quickly on this point: if there is a question about whether that country – Country B, let us say – has violated the child labor standards (because quite often we have that controversy) or if it has not been adjudicated in the ILO, and if Country B does not happen to be a member of the ILO – so it does not have that obligation under the ILO – in that case, the Appellate Body would have to, in the situation you posed, acknowledge the ILO standards if Country B were a member of the ILO and if it had been adjudicated in some way in the ILO. But if not, that is the more difficult question. Does the Appellate Body then look at the standards – look at the facts – and make a determination that might exempt Country A from providing MFN status to Country B?

Van der Borght: If it is child labor, these core labor standards are seen as a reflection of basic human rights standards. The problem with that is the Appellate Body does not have the competence nor the jurisdiction to enforce human rights standards, so it could not really do that because that is beyond the scope of its competence. What it could do, I guess – because it always has the right to ask for advice or for an expert – is it could ask for the advice of the ILO to see whether these standards are being respected or not and then act on that. But that is really a situation where I do not think I have an answer at the moment. If there is a clear violation and the ILO has acknowledged that there is a violation, then the case is much easier. If the country that is violating core labor standards that are seen as basic human rights standards is not a member, then it is much more difficult because I do not think the Appellate Body can really assess whether these violations have taken place or not. That is not part of the jurisdiction, and enforcing human rights standards is certainly not within the jurisdiction of the WTO.

Wilner: There is of course the initial question of whether, from the very beginning, the Appellate Body or the panel should consider the relevance of a violation of some other norm or another rule in another system given the fact that its jurisdiction is limited to answering, or to dealing with, the very specific question of whether there has been a violation of the WTO treaties themselves. I suppose the Appellate Body could take the position that: *There has been a violation of the WTO rules, of the substantive rules, and there may be a violation of the other rules, but that is not within our jurisdiction. You really need to go somewhere else for that purpose.* Or, do you say that the Appellate Body by its nature, or inherently, can send parties away by saying: *Well, there*

is a conflict but we give primacy to child labor standards over your obligations to adhere to the agreements; that is the basic purpose for this DSS. I think that is a real dilemma that seems to me can only be resolved by a change in the basic rules themselves, rather than by having the Appellate Body try to expand the jurisdiction of the court by its bootstraps.

It remains to me only to thank the panel for this most stimulating morning and also I want to thank the organizer, the brains behind it all, Don Johnson, for having made all of this possible.

Are the Current Methods of Enforcement of Dispute Decisions Effective? What Are Alternative Methods of Enforcement?

Moderator: *Daniel M. Bodansky,* Emily & Ernest Woodruff Professor of International Law, School of Law, University of Georgia

Charles Owen Verrill, Jr., Partner, Wiley, Rein & Fielding, Washington, DC; President International Law Institute

Marsha A. Echols, Professor, School of Law, Howard University

Donald M. McRae, Hyman Solway Professor of Business and Trade Law, Faculty of Law, University of Ottawa

C. Donald Johnson:* The moderator of this panel has asked me not to "lay it on thick." It would be very easy to do because he has a great background. Professor Daniel Bodansky is the Emily & Ernest Woodruff Chair in International Law. He teaches a broad range of international law courses and his specialty is international environmental law. The old joke is that everybody talks about the weather and nobody does anything about it. Professor Bodansky is the exception because he is in charge of climate control and is one of the world's experts on that subject. He also serves on the editorial board of the *American Journal of International Law* and is actively involved in the American Society of International Law. At the meeting next week we have some controversial issues to take up, and he will be resolving those issues I am sure. Without further ado, I'll turn it over to Dan.

Daniel M. Bodansky: Thanks, Don. I guess as a climate change person I can take credit for the nice weather here today, so you can send me your

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thanks afterwards. This is our last panel of the conference but certainly not our least panel. The topic for the panel this morning is: *Are the Current Methods of Enforcement of Dispute Decisions Effective? What Are Alternative Methods of Enforcement?* In thinking about these questions, it is useful to put them in a wider frame.

Enforcement is a means to an end. The end here is compliance or, perhaps even more broadly, effectiveness in changing behavior in the direction of greater compliance. So, in thinking about the question of enforcement this morning, I think we need to consider: *How much compliance is there currently with World Trade Organization (WTO) dispute settlement decisions? How effective are they in changing the behavior of WTO Members? What are the reasons why states comply or do not comply? How big a role does enforcement play in determining compliance? How much more compliance could we get through alternative, stronger methods of enforcement? And would these stronger methods of enforcement have any costs – for example, to other goals of the WTO Dispute Settlement System (DSS), such as the peaceful resolution of disputes?*

In order to think about these questions regarding the adequacy of enforcement and alternatives to the current approaches, we have an extremely distinguished panel. Since their detailed biographies are in the program, let me just introduce them very briefly. Our first speaker today will be Charles Verrill, who is a partner at the firm of Wiley, Rein & Fielding in Washington, D.C. Mr. Verrill heads the firm's international trade law and policy practice group, and he has had extensive background in that capacity, working on trade issues and dispute resolution issues under the WTO. Our second speaker is Professor Marsha Echols, Professor of Law at Howard University. She has written extensively on trade law issues, focusing in particular on food safety issues. Our final speaker today will be Professor Donald McRae, who is the Hyman Solway Professor of Business and Trade Law at the University of Ottawa in Canada. Professor McRae has worked both as an academic and for the government on trade issues. Without further ado, let me turn it over first to Charles Verrill.

Charles Verrill: Thank you very much. I would like to express my appreciation for the invitation to come here. It is my first trip to the University of Georgia, and I definitely hope it will not be my last. It is such a lovely campus; thank you for having me here.

The topic I am going to address today is: *Are the Current Methods of Enforcement of WTO Dispute Decisions Effective? What are the Alternative Methods*

of Enforcement? From a strictly legal perspective, the obligations adopted in the Uruguay Round leave little room for ambiguity about what is required of Members found to have violated WTO obligations; Article 21.1 of the Dispute Settlement Understanding (DSU) requires "prompt compliance" with Dispute Settlement Body (DSB) rulings,[1] and if it is not practicable for a Member to comply immediately, then Article 21.3 allows a reasonable period of time to comply.[2] Under most interpretations of international law, Members are required to implement these WTO decisions as a matter of international law.

Despite the clarity of these obligations, the record of compliance in the real world of politics and sovereign interests is not unblemished. There have been occasional lapses, but I believe there is sufficient evidence of compliance by Members to conclude that the system we have today is reasonably effective. Indeed, given the legal and practical obstacles to compliance in many instances, it is in fact possibly surprising that there is such a level of compliance.

This morning, I would like to go through a couple of instances where compliance has been very difficult by the United States. I would also like to illustrate how those difficulties delay, and sometimes muddy the water of, compliance. Before doing so, I would like to read to you a comment that WTO Director-General Pascal Lamy made in a very interesting internet chat that he participated in a couple of weeks ago.[3] During this chat, Mr. Lamy took questions from around the world and answered them spontaneously. When asked whether the WTO dispute settlement methods are efficient enough, Mr. Lamy responded:

> I take great pride in the WTO DSS. While it can certainly be perfected, over its first 10 years of existence (and building on the previous experience of the General Agreement on Tariffs and Trade) it has allowed countries, big and small, to bring trade disputes and obtain redress. It compares favorably with other systems of dispute resolution in international law and it is very prompt, even when compared to domestic judicial

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 2.1, Apr. 5, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments–Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].
[2] *Id.*, art. 21.3.
[3] WTO, Transcript of Internet chat with WTO Director-General Pascal Lamy, (Feb. 21, 2006), http://www.wto.org/english/news_e/news06_e/dgchat_21jan06_e.htm (follow "Transcript of Mr. Lamy's Internet Chat") [hereinafter Lamy Transcript].

processes. Despite these successes, one of the challenges is to ensure that small countries can better participate in the system and, particularly, to make sure that when they win a case they can obtain prompt compliance. These are some of the issues being currently discussed in negotiations.[4]

I believe this is a reasonable assessment of the effectiveness of the DSS and the manner in which it works. I would now like to go through a couple of instances where the United States has had a very difficult time complying; yet at the end of the day, compliance won out.

The first instance relates to the Continuing Dumping and Subsidy Offset Act (CDSOA) or *Byrd Bill*, as it is commonly known.[5] This was legislation passed by Congress in the dark of night and at the inspiration of Senator Robert Byrd of West Virginia. The *Byrd Bill* was designed to reward companies that brought anti-dumping or countervailing duty cases. Companies that successfully brought these cases received the proceeds of anti-dumping or countervailing duty revenues collected by the Customs Service. This legislation was very popular in the United States. Millions and millions of dollars of duties that were collected were taken from the General Treasury and given to a variety of American companies, including some of our clients. The largest recipient was a company that manufactures ball bearings, the Timken Company.[6] You can imagine the bill's popularity with the domestic interests that bring trade cases.

The *Byrd Bill*, however, was not very popular with our trading partners. The European Union, together with 11 other countries, initiated dispute resolution proceedings at the DSB, and they eventually won.[7] The panels and the Appellate Body all agreed that the *Byrd Bill* was, in fact, a remedy for dumping that was not authorized by the anti-dumping agreement and, therefore, was WTO-inconsistent. Additionally, the Appellate Body found that the *Byrd Bill* acted as a nullification and impairment of Members' obligations.[8] The Bush Administration promptly announced that it would seek repeal of

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[4] *Id.*

[5] Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. §1675(c) (2000).

[6] *See* U.S. Government Accountability Office, International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act 29 (2005), http://www.gao.gov/new.items/d05979.pdf (graphing CDSOA payments during fiscal years 2001-2004).

[7] Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000,* WT/DS217/11 (Jan. 16, 2003) [hereinafter Dumping, DS217].

[8] *Id.*; Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000,* WT/DS217/R (Sept. 16, 2002).

the *Byrd Bill*, but the supporters of the Administration were unable to move legislation out of the U.S. House Ways and Means Committee (where the Constitution requires this type of legislation to originate). For many people in Congress, the WTO action on the *Byrd Bill* was an affront to U.S. sovereignty, and yet another example of over-reaching by bureaucrats in Geneva. Supporters of the *Byrd Bill* in Congress argued that the United States should be free to spend the revenues from duty collections without WTO oversight. Powerful lobbies rallied in support of maintaining the *Byrd Bill* in force, and they made clear that it did not make any difference to them that there would be retaliation if the U.S. did not conform to its WTO obligations.

After Congress failed to act, the lack of U.S. compliance "within a reasonable time" was referred to an arbitrator at the DSB. The arbitrator determined a methodology for calculating retaliatory duties based on the trade damage caused by the *Byrd Bill*.[9] Pursuant to the arbitrator's formula, the EU and Canada and Japan initiated retaliatory duties of 15 percent on certain exports from the United States with a total value of approximately US$91 million a year.[10] After the retaliation went into effect, a provision repealing the *Byrd Bill* was inserted in the Omnibus Budget Act of 2005.[11] This insertion was almost identical to the way that the *Byrd Bill* was enacted in the first place – slipping it into an omnibus bill, without any hearings or debate on the issue. The Senate bill, which did not contain a similar provision repealing the *Byrd Bill*, was adopted. Because of differences between the two bills, it was necessary to go to conference. Before that conference was initiated, 72 senators signed a nonbinding resolution which instructed the Senate conferees not to accept any compromise or any bill that included a repeal of the *Byrd Bill*.[12] This maneuvering set the stage for compromise in the conference proceedings; a measure that repeals the *Byrd Bill* as of October 1, 2007, the beginning of the next federal fiscal year.[13] Reimbursement of duties will not end then because the bill, as passed, included a provision stating that distri-

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[9] Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000: Recourse to Arbitration by the United States Under Article 22.6 of the DSU, WT/DS217/ARB/EEC* (Aug. 31, 2004).

[10] *See* Dumping, DS217, *supra* note 7 (discussing suspension of applications and concessions under GATT and imposition of additional 15 percent ad valorem duty on imports of certain products from U.S.).

[11] H.R. 4241, 109th Cong. (2005).

[12] *Senate tells Conferees to Reject Byrd Repeal in 72-19 Vote*, Inside US Trade, Nov. 25, 2005.

[13] Deficit Reduction Act of 2005, Pub. L. No. 109-171, §7601, 120 Stat. 4 (2005).

bution of collections would be authorized for all imports into the United States that had entered before October 1, 2007, even though the liquidations occur long afterwards.

This compromise, and the preconference maneuvering, illustrates the difficulty of obtaining passage of legislation to conform to WTO obligations where powerful U.S. interests are in opposition, even if the executive branch actively supports compliance. These circumstances inevitably lead to a compromise that is less than perfect compliance with WTO obligations, but which is necessary to achieve the desired result. The *Byrd Bill* maneuvering is a good example of the kind of trade-offs that go into this compliance activity on the part of the United States. At the end of the day, everybody got something. The supporters of the *Byrd Bill* received an assurance of distribution for years to come. The Administration was allowed to notify the DSB that the U.S. had indeed conformed to its obligations under the WTO; although, of course, there was an objection from the EU and others saying: *Wait a minute, this is not compliance at all because you did not immediately repeal a bill; you left it to be phased out over a period of years.* This situation is similar to the case with the Extraterritorial Income and Foreign Sales Corporation (FSC) – the tax issue which has been so controversial over several years.[14] It is likely that the U.S. will continue to pay retaliatory duties until the *Byrd Bill* is ultimately phased out.

I have other instances of this sort of compliance activity in the U.S., which, given the time, I will not go into. My basic conclusion – based on the response of the United States in the *Byrd Bill* dispute and in quite a lot of others that I have looked at – is that, yes, Pascal Lamy was right. The system is reasonably effective and the evidence bears that out.

The second question is whether there are alternative methods of enforcement available that would be preferable. Here, the issue is one that should be explored further by the WTO, and I am sorry that it is really not being considered in the Doha Round. As you know, typically, dispute resolution involves noncompliance and responsive retaliatory duties on the same products and within the same agreement. In other words, if there is a GATT violation, then you focus the retaliation on similar products that are covered by GATT.

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[14] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Oct. 8, 1999) [hereinafter FSC, DS108].

In one instance where this procedure was not utilized, Ecuador succeeded in obtaining, with the United States, WTO rulings that the banana discipline maintained by the EU was in conflict, not only with GATT 1994, but also with the Agreement on Services.[15] Ecuador is a very small country relative to the EU, and the concept of Ecuador retaliating against the EU (for violation of the obligations of the EU) by imposing duties on imports of European bananas was, of course, not likely to achieve anything because there were no such imports. As to retaliatory duties on industrial goods that are imported into Ecuador, the amount of trade is such that it would seem unlikely to cause a ripple on the European trade scene. For these reasons, Ecuador asked the WTO for authority to retaliate against the EU based upon the suspension, by Ecuador, of its obligations to the EU under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[16]

Ecuador successfully argued to an arbitrator that it would not be appropriate for Ecuador to retaliate by imposing duties on imports from Europe because most of those imports were inputs into manufacturing or assembling in Ecuador; therefore, imposing duties on them would be counterproductive and would actually be harmful to Ecuador. Ecuador also was able to demonstrate that it should be authorized to take this kind of action because of the importance of bananas to the Ecuadorian economy. In the end, the arbitrator agreed that Ecuador could suspend its TRIPS obligations relative to the EU. The panel made certain observations about how Ecuador could and should implement the retaliatory action, including methods that would avoid having a spillover effect in other markets. Ecuador never had to implement this authority because it settled the *Banana* dispute with the EU.[17] I have a very strong suspicion that the settlement was prompted by the arbitrator's decision that Ecuador could suspend TRIPS, which would have been a very dramatic action.

This issue is going to be raised again, and very soon, because Brazil is impatient with the U.S. reaction to the WTO decision which held that U.S.

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[15] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* WT/DS27/AB/R (Sept. 9, 1997) [hereinafter Bananas, DS27].

[16] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1869 U.N.T.S. 299. [hereinafter TRIPS].

[17] Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Art. 22.6 of the DSU, WT/DS27/ARB/ECU (Mar. 24, 2000).

subsidies to the cotton industry violated the Subsidies Agreement.[18] The U.S. has taken partial action to conform to this WTO determination, but other subsidy practices remain unchanged, and compliance is obviously going to be very difficult for the U.S. to achieve given the powerful farm lobby that supports those subsidies. Now Brazil has asked for authority to suspend the TRIPS agreement, and obligations that it has with respect to the U.S., as a way of forcing the U.S. to take action sooner rather than later in responding to the decision of the Appellate Body. That decision is still pending.

My sense is that this is probably going to be a good opportunity for the WTO DSB to explore the parameters of this kind of cross-agreement retaliation. This is the kind of retaliation that could really make a difference for the small countries that seek to enforce obligations owed to them by larger countries but do not have the means to do so; for example, as was the case with Ecuador. Secretary-General Lamy has said that the alternative methods of enforcement are being considered in the Doha Round, but I was unhappy to discover that in the draft text that has been circulated by the chairman of the dispute resolution negotiating group there is no change proposed to Article 22, which is the enforcement section.[19]

I would like to conclude by making reference to what I regard as one of the interesting distinctions between the world of investment and the world of trade. As you all know, the individual in the WTO system has no standing. A person who is injured as a result of the failure of another WTO Member to comply with a WTO obligation – for example, a banana producer in Ecuador – has to rely on its government to assert the WTO obligations. There is no recompense to the banana producer in Ecuador for the violation by the EU, which has an economic impact on the producer in Ecuador.

Interestingly enough, a very different picture emerges when you look at the architecture of investment law, which has emerged without any multilateral body like the WTO. In fact, investment is only minimally touched in the WTO agreements and, a couple of years ago, the developing countries killed a proposal to consider investment commitments in the Doha negotiations. At the same time, there has evolved, since 1959, an investment law archi-

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[18] Appellate Body Report, *United States – Subsidies on Upland Cotton,* WT/DS267/AB/R (Mar. 3, 2005) [hereinafter Cotton, DS267].
[19] DSU, *supra* note 1, art. 22.

tecture based upon bilateral investment treaties.[20] The first one was signed between Germany and Pakistan.[21] It provides, as most of them still do to this day, that investors from Germany will be entitled to fair and equitable treatment in Pakistan, will be entitled to security of their investment, will be free from expropriatory action without adequate compensation, and so on. The interesting thing about these agreements is that most of them require states that are parties to the agreement to consent, in advance, to compulsory arbitration of any dispute arising under the agreement. So, if a German investor in Pakistan finds that its investment has been unfairly tampered with, i.e., denied fair and equitable treatment, that investor can force the government of Pakistan to compulsory arbitration, usually at the International Centre for the Settlement of Investment Disputes at the World Bank. However, lately most of these bilateral investment treaties have included the option of selecting from a variety of arbitral fora.

There are 2,400 of these treaties in effect. About three-fourths of them have been ratified, and the amount of litigation that is ensuing from those is enormous. I am involved in cases against Canada, Ghana, and Zimbabwe of all places. While I do not know that it would be appropriate to even think of incorporating this concept of state liability to individuals in the WTO, I think the comparison between the situation of investors and the situation of traders is such that it deserves a lot of consideration as to whether this should be the next way of enforcing WTO obligations. Thank you.

Bodansky: Thank you very much. Our next speaker is Professor Marsha Echols.

Marsha A. Echols: Thank you very much, and thank you Ambassador Johnson and to the Dean Rusk Center for inviting me here. I am very pleased to be here today. The topic that we have for this panel is fairly broad, like the topics for other panels. In trying to determine how to address the two questions, I thought about my areas of interest, of course, which are agriculture and food-related issues, and trade in agriculture and food. There have been many disputes about agriculture or food before the WTO. I decided to look at a few of those to try to determine whether there are some problem areas, some issues that are worth focusing on.

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[20] *See* Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the World Trade Organization: Are Poor Economies Caught in Between?*, 26 NW. J. Int'l. L. & Bus. 95, 115 (2005) (noting that first bilateral investment treaty was signed between Germany and Pakistan on November 25, 1959.).

[21] Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, F.R.G.-Pak., Nov. 26, 1959, ICSID 92-93 (1992).

I decided to concentrate on the *Hormones* case[22] and the *Bananas* dispute,[23] which have been through years and years of the dispute settlement process with still no real satisfactory outcome. These cases raise several policy issues also. The dispute regarding geographical indications is one that I think has been much simpler and perhaps resolved, but maybe for a different reason.[24] I also considered an ongoing dispute: the existing conflict between the U.S. and the European Communities (EC) concerning biotechnology or genetically modified organisms.[25] We have a fairly recent draft of an unpublished panel report, but there is the possibility of a second biotech case involving different issues.[26] *Cotton* and *Sugar* are major agricultural disputes that have been before the WTO, as Charles Verrill just mentioned, but I decided not to consider these disputes.

As you know, the *Hormones* case – one of the first to be considered by the WTO – was pretty much a classic U.S.-EC dispute regarding food safety. Yet, the case began to raise the whole question of the meaning of the WTO rules for consumers, going beyond the whole question of importers and exporters, and focusing on what is in the interest of the public: *How does a government take into account the interest of the public during WTO dispute settlement proceedings or afterwards? Can the public interest be considered? If part of your population is interested in trade restriction – what would be called "protectionism" – is there any option for the government that is faced with this conflict – a conflict not between two international agreements, but between an international agreement and the desires and the very public furor from its citizens?* Additionally, when considering this conflict, it is important to take into account the fact that we are in democratic systems. So, in that sense, the *Hormones* case begins to look at the WTO rules and their growing importance in domestic issues as opposed to border issues, which used to be the case.

The *Bananas* case raises a different kind of conflict that could have an impact on how you enforce. The case was, again, not a dispute between the

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[22] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter Hormones, DS26].

[23] Bananas, DS27, *supra* note 15.

[24] *E.g.*, Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs,* WT/DS174/R, (Mar. 15, 2005) [hereinafter Geographical Indications, DS174].

[25] Panel Report, *European Community-Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R (Sept. 29, 2006) [hereinafter Biotech, DS291].

[26] *See generally,* Alan Sipress & Marc Kaufman, *U.S. Challenges EU's Biotech Food Standards,* Washington Post (Aug. 26, 2001).

U.S. and the EC, but really a dispute between banana producers in Latin America against banana producers in the Caribbean and Africa. It was almost as if these two trade powerhouses were surrogates for another kind of conflict and dispute that was going on. The dispute also raised the question of the trade preferences and programs – preferences that were given to, of course, the former colonies of a group of countries. The case was one of the first instances in which it was very clear that the interests of developing countries are not always the same, so there may be internal conflicts within that group. So how do you enforce? How do you implement a ruling when these policies, circumstances, and considerations are at play?

The *Geographical Indications* case, again U.S.-E.C., can be considered in a much simpler context.[27] It can be considered in the context of rural development as opposed to intellectual property or agriculture; however, the case can be considered in a more narrow context, and so, the implementation can be a little narrower. If the U.S. is satisfied with the changes to the EC rules announced recently, then perhaps it can be one of the quickest cases to resolve, and it raises fewer questions about enforcement.[28]

In the *Biotech* case, again involving the U.S. and the EC, the biotechnology dispute has a huge spillover effect; this case going on now concerns the EC's delays or suspensions of approvals of imports of food products using biotechnology.[29] That dispute has been addressed by a panel which was a year late in coming up with a draft report.[30] I think it certainly, again, raises the question of the role of the WTO rules – in the context of democratic systems – when a very large portion of a population is not in favor of the result that will come with enforcement of the trade rules. Those are the cases that I thought about in trying to look at the questions that have been posed.

Biotechnology, like *Bananas*, gives you an idea of the spillover effect of a WTO dispute that is to be decided under trade rules – rules whose effect can affect a whole economy and a whole country, certainly for *Bananas*. You have industries in many Caribbean countries, banana-exporting countries, which are being destroyed with the notion that those countries should simply adapt and find other industries to concentrate on. Is that a rational approach? Again, can you look at this legal issue in isolation from the social and economic effect of what is going on? How do you, within the WTO system,

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[27] Geographical Indications, DS174, *supra* note 24.
[28] *Id.*
[29] Biotech, DS291, *supra* note 25.
[30] *See id.* (including issue date of Sept. 29, 2006).

bring into consideration some of these other factors? I think the rules have been intentionally written so that you do not consider them; that it is just a trade issue, it is a spillover effect from *Bananas.* A spillover to enforcement of *Biotechnology* will affect not just the EC members but many countries in Africa, which, until this point, have said that they would not approve other countries' exports of biotech products as imports into, or for production within, their countries. If the United States is eventually successful in the *Biotechnology* case, will the U.S. be able to use that ruling for enforcement, not just by the EC, but in Africa also? The spillover effect of some of these WTO rulings can be very broad and have social as well as economic consequences.

In looking at the issues – we are talking about post-recommendation issues: *How should you act? What is required after there is a recommendation from the DSB?* The question concerns enforcement, and I thought: *Is there any enforcement of a WTO ruling or recommendation?* I think the answer is no. There is no enforcement. Implementation, compliance and trying to restore a balance, yes; but no enforcement in the sense you think of with the New York convention on arbitral rulings and the enforcement powers that would come naturally from a court.[31] There is no legal way to make an offending country change its rules, to change its measures, to actually come into compliance; there is no way of saying that they have to do that.

To me, the delays in some of the disputes that have been ongoing show this failure of enforcement or the lack of enforcement power. An offending country can delay using the rules that exist. There is no way to effectively stop that delay. The counter effect is for the complaining party to suspend concessions eventually, but, to me, that is different from enforcement. What you are trying to do after the recommendation from the DSB is to convince the respondent to come into compliance and to implement the recommendation in some way to restore the balance. The DSU seems to use both the words "compliance" and "implementation," but never "enforcement." So we are looking at different types of measures or actions on both sides that are designed towards compliance and compliance with a recommendation.

The recommendation itself uses very general language, and is basically a direction to the responding country to come into compliance and to fulfill its WTO obligations. Yet, the recommendation is written so generally as to leave it up to that country to determine how it comes into compliance, and

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[31] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3, reprinted in 4 I.L.M. 532 (1965).

that is a good thing. But the general language is also part of the difficulty in attaining compliance because it takes time to determine how to act, how to change a law, how to change your measure with citizens' input, and how to achieve a measure that the complainant agrees is sufficient in bringing the offending country into compliance.

With regard to this compliance or implementation, the objectives – if you look only at the DSU they seem to be fairly limited. One is to have a prompt settlement of the matter. Again, "settlement" is coming into compliance with the recommendation and fulfilling your WTO obligations. Prompt settlement and prompt compliance are two different objectives that seem to be in the WTO DSU. A third objective seems to be to preserve the rights and obligations under covered agreements, as the previous panel was discussing. This reference to covered agreements seems to be a limiting factor as to what the compliance measures should be and the oversight of the DSB for all of these agreements.

Before going on to look at what actually happens, there are some quotes that I would like to read from the DSU to show you the focus there – what I think is a fairly narrow focus, with a few exceptions: "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[32] So, it seems to be to the benefit, not just of the parties to the dispute, but to the benefit of all Members. Is it that you benefit all Members by maintaining a legally oriented system by coming into compliance, or is there another way to benefit all Members? Also, does that give some flexibility to look at the broader context? That is a quote from Article 21.

At the beginning of the DSU, Article 3.5 states, "All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreement, including arbitration awards, shall be consistent with the agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements."[33] Now, again, those objectives can be much broader than the narrow rule that is at issue during a dispute. There is language that might work towards both a narrow and a broader interpretation of obligations of the respondent, and also towards what the DSB can consider as it decides what its recommendation should be. When considering a benefit to

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[32] DSU, *supra* note 1, art. 21.1.
[33] *Id.*, art. 3.5.

all Members and a balance of the rights and obligations of Members, not just the disputants, then perhaps this in an area in which you can think more broadly about what should happen.

The methods of compliance are spelled out in Article 22, and it seems hard to go beyond those in terms of what the respondent should do, but I think it might be possible for the DSU itself to be a little broader.[34] The first choice is withdrawal of the measure, and there is a time limit on this withdrawal.[35] This "reasonable period of time" has been extended very often in disputes. If, again, in a democratic system or in a political context the country believes it cannot withdraw the measure or come up with a solution that is satisfactory to the complaining parties, then you are thrown into compensation and/or – completely – into suspension of concessions.[36] Compensation, I think, is a good alternative in a political dispute – a highly political dispute – but it really is there as an alternative, temporarily; it has to be agreed to – and this never occurs – so, it really is not an option.

I think there are two methods for coming into compliance: the first method entails the respondent who is first to take some action – withdraw the measure or come into compliance; the second method is an option given to the complainant. So, that again is beyond what we normally think of as enforcement. The complainant can suspend concessions, and then parties are in another series of disputes about the level of suspensions that can be agreed or approved by the DSB and for how long. There have been cases which involve disputes that go to this understanding of suspensions of concessions – what can be suspended, the value of the suspensions, how long they can be there in effect, and whether the authorization for them should be ended because there has been the withdrawal of a measure or some action to come into compliance? All of this is not enforcement. It is a mixture of compliance and some kind of authorization for a countermeasure, or some response by the complainant, when that first option of the respondent is not fulfilled fairly quickly.

I think everyone recognizes the role of developing countries – the dispute settlement process and its impact on developing countries is fairly important – and that more thought needs to be given to this subject. I picked from the DSU a few provisions that refer to developing countries, and they again take differing perspectives:[37] *(1) If the party complained against is a developing*

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[34] *Id.*, art. 22.
[35] *See id.; see also id.*, art. 3.7.
[36] *Id.*, art. 22.1.
[37] *Id.*, art. 12.11.

country, there should be restraint in the response. What does that mean? How is it carried out? Is that something that is special to developing countries? (2) There should be particular attention to matters affecting their interest. Again, what does that mean? How do you pay particular attention, and must this be done within the context of a narrow reading of covered agreements? There can be further appropriate action that, again, takes into account developing countries' interests, and there seems to be, within that special consideration, the ability to consider the impact on the economy of developing countries. Again, there is some flexibility, even in the agreement as it is now, in what can be done when the interests of developing countries are involved.

I just pointed out, that in coming into compliance, there are many things going on at once. The respondent country has to make a statement to the DSB about what it intends to do. As I have said, it has a reasonable period of time. There are options available, but the matter stays on the agenda of the DSB and can be raised by anybody over a long period of time until the matter is resolved. If a country who was not a party wants to raise the matter again, within what context? What could they say? What issues could they raise?

In terms of coming into compliance, an issue that has been problematic, and that remains so, is the issue of "reasonable time." If I have to go back in a democratic system and change my laws, what laws should respond to the will of my citizens, my public, what does that mean? How long do I have to do that? Also, suppose what you are asking me to do is contrary to the interests of my citizens; how should I balance all of this and what should I do? So how long do I have to respond under "reasonable time"? Also, what if I try to withdraw the measure and get thrown out of office for doing it? Should this be the result? Why not compensation in a highly political setting?

The suspension of concessions has been problematic because it really hurts, not just the one that will not allow imports, but it hurts industries in the country that is taking the retaliatory measures. It hurts small businesses. It hurts the importers. It hurts the distributors. It hurts the producers in the country who are using these materials as raw products for their manufacturing. I think that the whole compliance situation presents a problem.

Considerations that I think need to be discussed are democracy and dispute settlement. How do you make all of this work together? How do you make this work for developing countries if they are the complainants or when their measures are challenged? What are the broader implications of dispute settlement? The previous panel talked about this issue, but look at the *Ba-*

nanas case; socially, economically, culturally – what are the broader implications of dispute settlement, and is there a way to take them into account? The involvement of other institutions was considered as well. How can you induce them to discuss or consider the broader implications, the broader impact, or even the economic impact? How does the WTO work with some of the regional trade arrangements? How does it work with the World Bank in disputes? Certainly a panel can bring in experts. Should it go beyond the DSB? Should a ministerial council really be looking at the broader implications of disputes? Should we consult with the New Partnership for Africa's Development, Mercusor, the World Bank, the African Development Bank, or the InterAmerican Development Bank, to truly understand what all of this means and recognize that, yes, we have a body of legal rules, but the WTO does not operate in isolation and everybody should be aware of this reality? Thank you.

Bodansky: Thank you very much. Our last speaker is Professor Donald McRae.

Donald M. McRae: Thank you very much. I would like to thank the organizers from the Dean Rusk Center for inviting me. I guess they knew, when they contacted me, that there is always a pretty good chance that if you ask someone from Ottawa in any period between February and March they will jump at the opportunity, and I did. I am very pleased to be here. I should also say that I am not going to give you a tirade on soft wood lumber, which is what you can also expect when many Canadians come south and discuss trade issues.

In looking at how enforcement – if it exists – works in the WTO, I think it is a mistake to simply focus on the issue of retaliation, which is what people think about when they think about WTO sanctioning. Retaliation, when it occurs, comes in only after a period of steps involving implementation; the ultimate goal in the WTO is implementation of the ruling. In most instances, it occurs without any formal reference to sanctions or to retaliation. There is an implementation process, and this process has already been referred to by the two previous speakers.

After a decision by a panel or Appellate Body is adopted by the DSB, a state has a time to indicate how it is going to implement the ruling. The state then has a reasonable period of time to effect that implementation. If a state cannot implement within a reasonable period of time, then there is an opportunity for other states to challenge whether implementation has occurred;

the matter, as has been pointed out, is kept under surveillance by the DSB. Implementation of WTO rulings – or enforcement if you like – is part of a longer process, and if you compare it with other international judicial bodies you find this is really quite unique.

International Court of Justice (ICJ) decisions are binding – *period* – and there is no monitoring process or implementation process for its decisions.[38] There is a possibility you can go to the Security Council to get enforcement of the decisions of the ICJ; however, I am not aware of that actually happening. If you take a look at the International Tribunal for the Law of the Sea, you will find there is also no implementation process.[39] Since the WTO has an implementation process (I will slightly disagree, although perhaps it is a matter of wording, with Professor Echols) it has a kind of enforcement process – that other judicial bodies do not have. In that sense, what we have in the WTO is a fairly novel and a fairly effective process. This is somewhat similar to Pascal Lamy's comments that were mentioned earlier.[40]

When we are talking about enforcement in the WTO context, what are we really talking about? I think that much of the discussion about enforcement confuses a couple of things: One is the remedy that flows from the breach of an obligation under the WTO agreements. The other is what can be done if a party does not live up to its remedial obligations. If you consider a contract law model, the remedy for the breach of contract is either monetary damages or specific performance. Failure to pay damages leads to potential sanctions such as distraint on property. The objective of the remedy is compensation, although it does have a minor deterrent element.

Well, how does this distinction between remedy and enforcement play out in the WTO context? I think the remedy in the WTO context is very clear. The remedy is to remove the nonconforming measure and come into compliance with WTO obligations. Enforcement, to the extent that it exists, is comprised of the other two elements referred to in Article 22: compensation or retaliation.[41] It may sound rather odd to put it this way, but in fact, these are both measures designed to induce parties to come into compliance,

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[38] International Court of Justice, Rules of Court, art. 95 (1978), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20050929.htm (last visted May 20, 2007).
[39] International Tribunal of the Law of the Sea, *see* http://www.itlos.org/ (last visited May 20, 2007).
[40] Lamy Trancript, *supra* note 3.
[41] DSU, *supra* note 1, art. 22.

and they are only in place until a party does come into compliance. Compensation has been mentioned as denoting the making of new concessions in other areas, and withdrawal of concessions involves retaliation – in other words, withdrawing concessions to the other party in breach of the contract. Although it does not look like enforcement in the domestic law context, the idea of sanction has become very much part of the language surrounding WTO dispute settlement. Steve Charnovitz has identified the change from "GATT-speak," which is about rebalancing concessions, to "WTO-speak," which is about trade sanctions.[42]

Although the GATT retaliation process was largely theoretical because only once was it authorized, the sanctioning process of retaliation or withdrawal of concessions is really just an act of self help. If an offending state did not restore the balance of concessions itself by removing the offending measure, the offended-against state could, with the approval of the GATT Council, restore the balance itself by removing concessions equivalent to the level of impairment. Basically, you countered another state's refusal or limitation of market access by refusing or limiting market access to that state. The idea has a simple, contractual rationale. If the other party delivers on only part of the bargain, you do not have to pay the full price. Of course, this contractual rationale makes sense in a reciprocal relationship where A bargains with B, and the resulting agreement involves either concessions on both sides or obligations on both sides; if B fails to perform, then A is relieved of its obligations to B. This kind of model accorded somewhat with the original GATT negotiating practice of offer and request.[43]

Nevertheless, in a multilateral trading system where, for many states, concessions are not gained through bargaining but through the application of the Most Favored Nation (MFN) provision to someone else's bargain, the idea of rebalancing concessions has a real degree of artificiality. Also, it undermines, to some extent, the multilateral nature of a system; while a nonconforming measure applies to all GATT contracting parties, the rebalancing only occurs in respect of the complaining contractual party. So, there is no real rebalancing in any multilateral sense. Again, Steve Charnovitz has referred to the language of WTO scholars asserting that governments and arbitrators have moved away from rebalancing.[44]

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[42] *See* Steve Charnovitz, *Rethinking WTO Trade Sanctions,* 95 A.J.I.L. 792 (2001).
[43] General Agreement on Tariffs and Trade art. 20, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].
[44] Charnovitz, *supra* note 42.

Today there is a more explicit objective of inducing compliance, and as a result, we now talk about sanctions. But, I think in moving away from the underlying contractual theory of withdrawal of concessions, we have ended up with a degree of incoherency. Essentially, the result of responding to a trade-restrictive measure is the restriction of trade with the offending state. That is, under the guise of promoting freer trade, by placing pressure on the state to maintain its liberalizing commitments, the system adopts a trade restriction. Moreover, as I just pointed out, that sanction has fairly perverse consequences. It targets other industries in the offending state, and it hurts both the exporters from that state and the importers and consumers in its own country. Hence, the perversity of the sanction is that it hits innocent third parties. The argument that a sanction will produce a constituency in one country in favor of compliance is countered by the fact that it produces a constituency in the other country against the use of the sanctions.

These consequences – and not to mention the fairly obvious fact that retaliation, if it is to work at all, is probably only available to larger economies or between economies of similar or equivalent size – have led to searches for alternative sanctioning mechanisms. You see quite a lot in the literature on mandatory compensation, the advance preparation of lists, collective retaliation, the use of domestic courts through which decisions are made self-executing, financial compensation, the withdrawal of related rights to use the dispute settlement process, and – one I rather like that was mentioned yesterday – tradable retaliatory rights, which is the idea that you would sell another country the right to hurt its own consumers in order to open markets for you. It sounds like a pretty good deal. I am not quite sure the exchange will operate very effectively.

Regardless, all of these alternatives have their own problems. In particular, if you take the financial compensation proposal by Marco Bronckers, he identifies the compensation proposal as both a form of compensation and as a form of sanction to put pressure on the other country.[45] Apart from the oddness of describing compensation as a sanction, what happens if the financial compensation is not paid? You still have to have some kind of sanction to force the payment of the sanction, if you like.

When discussing other ways of dealing with this so-called enforcement problem, we have to keep in mind that we actually do not have much of a

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[45] Marco Bronckers, *Financial Compensation in the WTO – Improving the Remedies of WTO Dispute Settlement,* J. Int'l Econ. L. 2005.8(101) (2005).

problem. Bill Davey made the point yesterday and in an article in the *Journal of International Economic Law* a few years ago.[46] His survey of the first ten years showed something like an 83 percent implementation rate. Even where implementation had not strictly occurred and there was not a substantial number of these cases, other ways around implementation had been found. Although technically implementation had not occurred, the parties obviously had worked out some deal. No one really understands how Canada and Brazil seem to have come to a resolution without withdrawing the measures.[47] I now can fly in Canada on *Embraer*, so I suspect you can probably fly in Brazil on *Canadair*. Both Embraer and Canadair are the two aircraft involved in that dispute, so maybe there is some sort of deal that was worked out between the two countries.

The problem of implementation, which Bill Davey addressed and has been mentioned in this conference, is probably more one of delay. It takes a long time for implementation, and that may be part of the difficulty. Furthermore, and I think Steve Kho made this point yesterday, in most instances failure to implement is not simply a willful disregard of WTO obligations. You will find states that have implemented quickly in some instances and taken an extraordinary period of time in other instances. So, we are not talking about states that are simply perennially in disregard of their obligations. We are talking about domestic implementation problems that occur, and often there are political consequences of implementation. Professor Echols made this point earlier. Are you prepared to have the government fall in order to live up to your WTO obligations? These are difficult questions. Simply trying to find new means of pressure, sanctions, or forms of retaliation may not resolve the problem.

In my view, what we need, perhaps, is to think less of sanctions and to try and deal with what I would refer to as chronic problems of non-implementation. I think the only clear example of that is the *Hormones* case.[48] The FSC case may or may not become a chronic problem of non-implementation; maybe it will be resolved.[49] The only clear example of chronic nonimplementation so far is the *Hormones* case. What we need to think about is not a sanc-

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[46] William J. Davey, *The WTO Dispute Settlement System: The First Decade,* 8 J.I.E.L. 17-50 (2005).
[47] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU,* WT/DS46/RW/2, (Aug. 4, 2000).
[48] Hormones, DS26, *supra* note 22.
[49] FSC, DS108, *supra* note 14.

tion, but maybe an alternative remedy – going back to the distinction that I made earlier. In doing this, and I think that in substance what I am going to say has been said by Professor Echols when she discussed compensation, we have to look again at compensation.

The essence of the compensation alternative under the DSU is that Members can negotiate compensation in the form of market access to other areas as a temporary measure until the nonconforming measure is removed. That is the way compensation exists at the moment, and it is hardly ever used; it is an option to provide an incentive for implementation. When you look at the current proposals for DSU reform, people are talking about improving compensation as a mechanism but still keeping it as a temporary measure to encourage implementation. In my view, we should explore the opportunity or possibility of making compensation a remedy and not leave it simply as a voluntary or even mandatory sanctioning device that can be used on a temporary basis until the offending measure is removed. That is to say, in some circumstances, WTO Members should be able to provide market access of an equivalent benefit as an alternative to implementation through the removal of the nonconforming measure. I am not saying that this should be a universal option. I am saying that this may be a way of dealing with a certain limited number of cases.

Now, the arguments against the idea of compensation as a remedy will readily spring to mind, so let me first talk about arguments in support. First of all, compensation does provide an outlet for states that do have a chronic non-implementation problem, where the political cost of implementing is simply too high.

Secondly, such compensation is actually a trade-liberalizing, rather than a trade-restricting, measure. Admittedly, the WTO inconsistent restriction will remain, but instead of countering this with further trade restrictions what would happen is that compensation would, at least, maintain the status quo in terms of overall market access, even though it may not be in the same areas.

The third advantage is that compensation would result in what I would call a "real-rebalancing." Instead of rebalancing in respect only of the complaining party, the market access would be available on a MFN basis for all WTO Members. Also, since the non-complying measure has a potential impact on all WTO Members, the compensatory market access should also be available to all WTO Members, whether or not they are complaining parties.

A fourth advantage is that it ensures the cost of noncompliance is borne primarily by the noncomplying Member. Now, under the existing retaliatory regime, the cost of retaliation, as has been pointed out, is borne in part by the Member that is retaliating. This Member has to bear the cost of the noncomplying measure, and it has to bear the cost of the retaliatory measure to its own imports and to its own consumers. Under a new compensation regime, it is the Member in breach who has the burden of noncompliance. The noncomplying Member has to decide what part of its economy it will now open up to account for the fact that it has now closed off another part of its economy. The question becomes: *Who is going to win and who is going to lose within the state that is in violation, not within the state that is trying to retaliate?*

I think compensation also provides a degree of flexibility if one thinks of compensation in terms of being done partially or wholly. For example, the United States still does not have *FSC* case ruling in place. There is still the grandfathering question that the last Article 21.5 panel found against it.[50] If alternative market access was provided as a substitute to dealing with that final part of *FSC*, could it be one way of finding a solution?

Now, for the arguments against the compensation approach: first of all, finding alternative market access might be a difficult question and it may mean that you will have to look in other areas – in other goods areas or services, perhaps – for that market access, but this issue is no different from the problem of finding where to retaliate. Also, to make this work, you would have to have a system similar to what we have now for retaliation. There would have to be the possibility of arbitration on the appropriate level of market access. The complaining state would need to have input into what the areas of access should be and the right to have at least part of a real benefit stemming from these areas.

Another argument against compensation as a remedy as an alternative to removal of a nonconforming measure, is that it may serve as an incentive for states simply not to implement. This is a potential problem, which is why I am not suggesting that it be a universal alternative. I think it should be a restricted alternative, and maybe it should not be available for certain kinds of violations. For example, I do not think it would be an appropriate alternative in a safeguards case. Safeguards would have to be removed, and you should not have the compensation alternative to removal of a safeguard measure.

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[50] *See id.*

Compensation would be, in a sense, an incentive to implementation because the alternative the state would face is opening up a different area of its economy – a difficult domestic political question itself. So, a state would have to determine which difficult political question it is going to face – dealing with the industry that is benefiting from a noncomplying measure or dealing with some other part of the economy.

A third difficulty with compensation is that there is still a problem if the Member refuses to open its market in another area. This problem relates to the fact that we really do not have, as Professor Echols said, any real kind of enforcement. We do not have any real kind of sanction in the WTO. Frankly, I have a feeling that the search for sanctions – although, as Steve Charnovitz said, the language we use now is a bit illusory – is the same as in any area of international law. Sanctions, at the domestic level, ultimately depend upon the power of the state to exercise force. We do not have that power at the international level – maybe such a power was part of the original conception of the United Nations Charter. But, it has not worked and it is not likely to work. We have to accept the fact that there is no magic form of sanctioning out there. Therefore, what I am suggesting is that we think of alternatives to implementation as a way of promoting the objectives of the WTO.

A further objection to compensation is, to some extent, a technical legal objection, and it gets into the debate between Professor John Jackson and others about whether there is an obligation to comply with a WTO dispute settlement.[51] Is there a legal obligation to comply? Originally, it was a debate between Professor Jackson and Judith Bello.[52] More recently, as Bello has more or less acknowledged, the debate is between Jackson and one of his coauthors, Alan Sykes.[53] Alan Sykes and Warren Schwartz have suggested that there really is no legal obligation because the WTO encourages efficient breach.[54] The WTO says you can violate your obligations as long as you pay compensation for it because it provides this compensation alternative.

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[51] John H. Jackson, Comment, *The WTO Dispute Settlement Understanding – Misunderstandings on the Natue of Legal Obligation,* 91 Am. J. Int'l L. 60, 62-63 (1997) ("The DSU language…strongly suggests that the legal effect of an adopted panel report is the international law obligation to perform the recommendation of the panel report.").

[52] *Compare id. with* Judith Hippler Bello, Comment, *The WTO Dispute Settlement Understanding: Less Is More,* 90 Am. J. Int'l L. 416, 416-17 (1996).

[53] *See* Judith Hippler Bello, Book Review and Note, 95 Am. J. Int'l L. 984, 987 (2001) (reviewing John H. Jackson, The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations (Cambridge University Press 2000).

[54] *See* Warren F. Sykes & Alan O. Schwartz, The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization, 31 J. Legal Stud. 179, 181 (2002).

Therefore, you do not have any legal obligation. Professor Jackson has rather convincingly pointed out that there are a variety of reasons supporting the assertion that there is a legal obligation to comply with a WTO dispute settlement. I have a feeling that in this debate there is some confusion between the nature of the remedy and the legal obligation to comply. I do not think the fact that domestically contracting parties are able to breach and pay damages without getting jailed or receiving some other sanction should lead us to conclude that there is no legal obligation to carry out your contract. The law does impose a legal obligation to carry out your contract, and it imposes consequences if you do not. In any event, as I previously stated, the ability to compensate through market access would not be available as a remedy across the board.

A final concern people may have is that this proposal sounds somewhat like a backdoor way of renegotiating your concessions. Under Article 28 of the GATT if you want to get out of certain concessions you have made, you have to go through a process of negotiating an agreement.[55] Compensating through market access would be a different way of doing what Article 28 tries to set limits on. Again, if it was a wholesale allowing of compensation as an alternative, then I think that might be a greater concern. If it is circumscribed and constrained, then perhaps it is a lesser concern of getting around the obligations imposed by Article 28.

I do not think the objections to the proposal are overwhelming. I think that the search for a better sanction in the WTO is illusory. Therefore, we should start to think of alternative remedies to deal with those cases where implementation by removal of the offending measure is simply too difficult for a state, where the domestic political costs are too high. In these circumstances, we should think in terms of mandatory compensation, or opening market access, as an alternative. Thank you.

Bodansky: Thank you all very much. At this point, I would like to open it up to comments or questions from the floor. Perhaps I could exercise my chair's prerogative and ask an opening question to kick things off. It is for Professor McRae. My question may have a simple answer. Does your proposal involve displacing the sanction of removal of concessions, or would it be supplementary? It seems to me that your proposal addresses the problem of a state that would like to comply but finds it difficult to remove the specific

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[55] GATT, *supra* note 43, art. 28

offending measure. Thus, this state would welcome an opportunity to have some alternative means of compliance. But, there may also be some situations where you need more of a stick; in such cases, there might still be a role for removal of concessions as a sanction to try to induce countries to change their behavior.

McRae: I was not suggesting that you have to get rid of retaliation. I was really looking at what are alternative ways of ensuring that we get more compliance. Therefore, this was a route that provides an opportunity for states. But, states that still want to use the retaliation option, and think they can, should not have this option taken away.

Gabriel Wilner:[56] Would retaliation or compensation be alternatives that either of the two states involved, or the various parties involved, could decide upon, or would these alternatives be open only to the complaining party who won in the panel? Perhaps an alternative would be to allow the parties to negotiate as to whether one or the other remedies would be better for both.

McRae: It seems to me that there are two ways of proceeding. What I had in mind was that a state that has been unable to implement would, after a certain period of time, be able to choose compensation as an option. The *Hormones* case strikes me as a possible case; how many years are we going to go on with the *Hormones* case being unimplemented? There reaches a certain time where the state should be able to declare that it is not going to be able to implement, and therefore, in a sense it would choose the mandatory compensation option. You would also have to think of arbitration (this would make lawyers happy), in other words – arbitration: whether it is appropriate to take the option at that stage or whether it should be circumscribed in some way. The other approach would be to simply change the existing compensation option in Article 22 to a final alternative and not just a temporary measure. This would mean that compensation would have to be agreed to by both parties. So there are two ways of getting at it.

Echols: I think the parties have not been able to agree on compensation in most instances, so in terms of your last scenario, I think you would

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[56] Associate Dean and Charles H. Kirbo Professor of International Law; Executive Director, Dean Rusk Center – International, Comparative, and Graduate Legal Studies, University of Georgia School of Law; Moderator (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreement?*).

be just where you are now. The parties would not reach the point where it could be used. Now compensation has to be agreed upon by the two parties and suspension of concessions has to be approved by the DSB, so you are trying to change that option. Who has to agree to this other proposal, and do you take away this last option of retaliation? If the WTO is about market opening, it seems that if a country is willing to open its market that should have more weight than allowing someone to basically retaliate. You are left with a measure that does not comply, and what do you do about that? Should the compensation be a "super-compensation"? You have talked about it being multilateral. Maybe that is what makes it all right, but I think that if you say that both parties have to agree to compensation as it is now, it will not work.

Nikolaos Zaimis:[57] I have just a couple of comments and two small questions. One concerns what happens once a WTO Member claims that it has complied with a specific recommendation: *who is responsible for determining whether the Member has complied?* Let us assume there is a case where a WTO Member was condemned for not having complied, and then a trade sanction is taken against it. Then one day this Member complies, or claims it complies. Who is to decide whether it is complying? In my view the obvious answer is: an *Article 21.5 panel initiated by the complainant.* Yet, what happens if the complainant has imposed sanctions and simply does not want to go to an Article 21.5 panel, but rather wants unilaterally to continue with trade sanctions? It is apparent that that is more or less the situation in the *Hormones* case that you mentioned.[58]

My second question relates to the actual size of the problem. We have seen cases where the economic size of the problem is in itself problematic because the amounts involved are so small that there is a certain degree of inertia on both sides. In such a case, on the part of the complainant, you do not want to take sanctions; indeed, it would be ridiculous to impose sanctions for US$2 or US$3 million, for example. On the other hand, the loser, the party that has not complied, would argue that because of the insignificance of the amount there is no real political will to take action. This is a catch-22 situation, so I want to ask if you have any comments or recommendations.

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[57] Counselor, Head of Trade Section, Delegation of the European Commission; Panelist (*Panel 3: To What Extent Does the WTO Dispute Settlement System Have a Role in Global Governance? Should the Appellate Body Look to Sources Outside the WTO Agreements?*).
[58] Hormones, DS26, *supra* note 22.

Echols: When you are thinking about compensation, there is a point at which you say you will not change the measure but rather open your market for some other products. I think the idea of letting the retaliation go on and on simply undermines the credibility of the WTO system. That said, I think we are talking about a very small number of disputes. I agree that most of the recommendations have been complied with. Whatever we talk about, we should realize that the solution should not be disproportionate to the fact that we are only talking about either very small cases or very big ones. What do you do in those two instances?

McRae: In respect to your first question, it seems there is a bit of a gap in the existing procedures where you do have one party saying it has complied and the other party is not prepared to take it to an Article 21.5 panel but is still saying that there has been no compliance. I would have thought that if one was designing a new system, one might provide that, at a certain point, the party in compliance can go to the DSB and say: *We have complied*. The DSB can then formally set up a panel to make that determination. However, the idea of bringing a panel against yourself, is a rather odd concept.

Echols: I think the option is to challenge the party that is continuing to impose the retaliation. It is a new case. I said dispute about a dispute. That is basically what you can have, and you can do it as an Article 21.5. If it does not happen that way, maybe you can do it as a new dispute. Why are you imposing extra tariffs or measures against my export? It is again a market access issue.

Steven Kho:[59] Professor Echols does raise a good question and one that is worth a lot of discussion. A lot of what Professor Echols and Professor McRae have said is in fact happening now. The EC, in the *Hormones* case, essentially has a new dispute.[60] I believe the EC in the past has also sued itself with respect to *Bananas*.[61] I cannot remember the exact name, but there was a case in which the EC had challenged itself in order to show compliance. This is an area that I think certainly is worth further consideration.

I am particularly interested in Professor McRae's initial thoughts and proposal of compensation because in the past when people talk about compensa-

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[59] Associate General Counsel, Office of the United States Trade Representative; Panelist (*Panel 1: Should the WTO Dispute Settlement System Be Modified or Reformed?; Panel 2: After a Decade of Dispute Settlement Cases, Whom Does the System Benefit?*).
[60] Hormones, DS26, *supra* note 22.
[61] Bananas, DS27, *supra* note 15.

tion, you immediately think monetary compensation. Here, you are proposing a sort of market access compensation which is focused more on those agreements that have a traditionally market access element – those that can somehow be put in certain tariffs, like the GATT related to goods and plurilateral agreements and the government procurement agreement,[62] which also has sort of a market access bent to it. But, I am curious to know what you are thinking is behind retaliation and compensation. When you have retaliation it is often limited to the party that has brought the case, and it is focused on the trade levels of that party and how it is affected. Compensation is solely focused on the party that has brought the case and yet, in your proposal as I understand it, market access compensation would all of a sudden become a "most favored nation provided for all" kind of situation. Now, if you can quantify that compensation, it seems to go above and beyond. I am just curious why you would suggest in your proposal that that particular remedy should go beyond simply between the parties but to the membership as a whole.

McRae: Well, it is partly a theoretical point and partly a practical point. Theoretically, what a state has done by not complying with its obligations is a wrong to all WTO Members; if it is a denial of market access, then it is a denial to all WTO Members. It may be that most Members do not have that trade and therefore, they are not going to bring a complaint. However, in *Bananas*, the United States' partial justification was that it had a potential or future trade interest in bananas.[63] Essentially, by imposing a limitation on market access, you are denying something to all WTO Members. Therefore, if you are going to do something to replace the market access you have denied, you should consider all WTO Members.

The practical problem is, of course, finding market access that does not just open markets for a whole lot of Members who were not interested in the original dispute. But, maybe this is the price to pay for not living up to the obligation that you made in the original commitment. You made a commitment in the Uruguay Round and you are not prepared to fulfill this obligation, so you have to make an equivalent commitment to all WTO Members to do something else. That is the sense in which I think it is more justified. Under the current remedy of removal of the measure, those who bring the case are seen to get the benefit from the case. In fact, everyone benefits be-

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[62] *Agreement on Government Procurement,* Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), Legal Instruments–Results of the Uruguay Round (1994), *available at* http://www.wto.org/English/tratop_e/gproc_e/gp_gpa_e.htm.
[63] Bananas, DS27, *supra* note 15.

cause if the provision is removed, it is removed for all member states. Thus, it seems to me that where compensation is provided through market access it is appropriate to provide market access for all Members. As I previously mentioned, the idea of retaliation is simply based on a simple bilateral model, but that is not what we are operating under here.

Bodansky: Any other questions or comments? Don?

Johnson: I would like for the panel to address the question of cross-agreement retaliation that has been brought up in the Brazil *Cotton* case[64] and others. I can certainly see where retaliation might not work for Brazil and for other countries like Ecuador, mentioned earlier today in the *Bananas* case. However, I thought that was a fairly unique approach. I do not know that it is, but it was unique in my mind in any case. I just wonder what you think the implications might be of that alternative, and whether we could get a comment also from our EU and the United States Trade Representative (USTR) attendees as to what the position might be from the EU and the U.S.?

Verrill: Let me see if I can respond to that question. The Ecuador case that I mentioned in my talk was the first time that cross-agreement retaliation was considered by any panel or arbitral group. They went to great lengths to demonstrate that Ecuador had made a convincing case that cross-agreement retaliation was the only option that would be effective because of the disparity in the size of their economies and the fact that any retaliatory duties imposed by Ecuador would be a self-inflicted wound because those products are generally used by Ecuadorian manufacturers.[65]

The problem, of course, in dealing with cross-agreement retaliation, particularly with TRIPS, is: *what are the boundaries of the problem?* If Ecuador, or Brazil in the case that is now pending, is allowed to suspend TRIPS obligations relative to the U.S., does that mean that Brazilian product producers can, for example, incorporate U.S. intellectual property in their manufacturing and then re-export those goods to other countries so that there is a spillover effect of the suspension of the liquidation? In the Ecuador panel, the suggestion was made that this result would not be a problem because every country is obligated under TRIPS to have border measures in place to prohibit importation of intellectual property, whether trademarks or patents,

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[64] Cotton, DS267, *supra* note 18.
[65] Bananas, DS27, *supra* note 15.

that has been used without the consent of the owner. So, there would be potential avoidance of a spillover because of the way the TRIPS obligations work.[66] I think that this is something that needs to be explored much more thoroughly than it has been because, as Pascal Lamy stated in the excerpt I quoted earlier,[67] there needs to be a way to make it more opportune for small countries to obtain redress for WTO violations when the other country is a much bigger and more powerful trading entity.

Wilner: Do you not think that this may encourage small states who now think that the advantages they might gain are too ephemeral or perhaps counterproductive? Would this type of cross-agreement system in terms of remedies help? Is a compensation scheme needed as well? Is there need for further compensations and further schemes for effective relief for smaller countries to consider – to render the expense worthwhile?

Verrill: I think obviously it would. Ecuador felt the only way they could really protect their banana industry and its exports was by doing something other than simple same-sector, same-agreement retaliation. I think a country like Ecuador, or a country of similar size, would be encouraged to be more assertive of its WTO rights.

Zaimis: Cross-sectoral retaliation, e.g., to suspend TRIPS rights, could be a powerful tool for smaller developing countries. But in one way, it is easier said than actually done. In practice, what does this mean if you want to suspend, for example, trademark rights? A company will have the right to produce, for example, fake Gucci bags? For how long? Somebody will be doing that job for the period of the suspension, or, in terms of a patent, somebody will be using a patent and not paying royalties – who would that user be and how would you evaluate or quantify the amount of retaliation? In terms of copyright, this would mean allowing the unauthorized copying of DVDs, books, and CDs. The number of intellectual property rights involved in a book or DVD could be quite diversified in terms of nationalities so even if, say, you target a movie made in the EU, you might discover you are violating intellectual property rights linked to the U.S., Japan, Switzerland, or Norway. Cross-retaliation is not very easy to do in practice. Moreover, it might be limited by the size of the market of the retaliator. For WTO Members with big domestic markets, suspension of IPR rights might make sense (it might be profitable). For WTO Members with small domestic matkets

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[66] TRIPS, *supra* note 16.
[67] Lamy Transcript, *supra* note 3.

(who rely on export markets), this might not be an interesting option. So, appealing as it might seem, there are practical problems linked to it.

Echols: In the Ecuador case, I believe one of the options given to Ecuador was to infringe geographical indications, of which I am in favor, which is something that is more manageable. Consider a potato or a cheese. Suppose they could make a cheese and call it Parmesan or a ham called Parma. Are these goods just for the Ecuadorian market or could they export it to the communities? What does all of this mean? I think it might be possible to find little sections of this broad authorization given to Ecuador that they might be able to manage. Then again, as you said, is it for the internal market, the domestic market, or would this authorization also affect the European market, which would make a big difference?

Kho: My personal views actually are very similar to Professor Echols. I think there are a lot of practical problems, even in a situation of geographical indications. Professor Echols' point is well taken, which is if Ecuador makes Parma ham and starts to export it to other countries – let us say, to the United States – the United States does have obligations under the TRIPS agreement to enforce geographical indication rights.[68] For example, if the EC then comes to the U.S. and seeks redress in that way, the U.S. will have no choice but to follow its own laws and its international obligations; at this point, the Parma ham that Ecuador is exporting may not be able to find markets in the world. There are a lot of difficulties with cross-retaliation, and it is something that looks good on paper and people have to think about it. There might be situations in which it would be useful. However, with respect to intellectual property, specifically, and how to quantify it and then ensure that you are not over retaliating, these are all difficult questions and part of the reason why I think Ecuador ultimately did not do anything. It did not utilize the cross-retaliation authority at the end of the day.

Verrill: I agree that there are very real complexities. In fact, even the Minister of Foreign Affairs of Brazil has acknowledged that there are what he called "hurdles to cross" before it could implement any kind of intellectual property suspension as a means of retaliating against the United States. My point is that rather than leaving this issue to be resolved by panels who have to work through these issues and resolve the difficulties, I would rather see this be placed squarely on the table. It is probably too late to do it in the

[68] See TRIPS, *supra* note 16.

Doha Round, but it seems that this is an area where there should be and could be solutions found much more readily in the negotiation context than in the litigation context.

Bodansky: We have time for one final comment if anybody would like to take the floor.

Unidentified Speaker: In terms of trespassing the TRIPS agreement as an alternative remedy, I have not heard big pharmaceutical companies come up. The pharmaceutical industry comes to mind when I think of remedies that would really make a strong statement and would perhaps run the risk of overcompensating but at the time would be effective sanctions or remedies for lack of a better term. Would that not fall under TRIPS? Is that not on the table because these are transnational corporations? How does that figure into the picture as you see it? Drug patents when we are talking about intellectual property, would that not be a very powerful card?

Verrill: It is certainly my position that it would be a very powerful card, and it would put pressure on the U.S., if it is the country retaliated against, to comply because there would be domestic interests presenting a very strong case for the U.S. to come into compliance because its economic interests are being jeopardized.

Unidentified Speaker: Would that fall under TRIPS? Would it be an automatic?

Davey: Brazil is surely thinking of the pharmaceutical patents.

Verrill: Yes, I am sure they are.

Bodansky: Unfortunately, our time is up, but I wanted to thank the panelists again for a very excellent presentation. I wanted to thank the audience for coming on a beautiful Friday morning. Also, in particular, I wanted to thank the Rusk Center and Ambassador Johnson for organizing what has been a really interesting two days. Thank you all.

INTERNATIONAL TRADE AND THE RULE OF LAW

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About the Speakers

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Daniel M. Bodansky joined the School of Law as Emily and Ernest Woodruff Chair in International Law in 2002. He teaches public international law, international environmental law, and foreign affairs and the Constitution. Professor Bodansky is internationally recognized as one of the premier authorities on global climate change. Previously, he was a faculty member of the University of Washington School of Law. He served as the climate change coordinator and attorney-adviser at the U.S. Department of State in addition to consulting for the United Nations in the areas of climate change and tobacco control. Professor Bodansky also clerked for Judge Irving Goldberg of the Fifth Circuit U.S. Court of Appeals. His vast scholarship includes publications, book reviews, papers and presentations. Currently he serves on the board of editors of the *American Journal of International Law.*

William J. Davey is Edwin M. Adams Professor at the University of Illinois College of Law, where he has taught courses in international trade law, European Union law, international business transactions, and corporate/securities law since 1984. While on leave, from 1995-99, he served as Director of the Legal Affairs Division of the WTO. Professor Davey has authored several books and numerous articles on international trade and European Union law. He is a member of the American Law Institute and serves on the International Trade Committee of the International Law Association. He

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Amy S. Dwyer is an international trade attorney and of counsel to Stewart and Stewart, a Washington, D.C. law firm focusing on international trade matters (litigation, negotiation and policy), customs, international transactions, and administrative law. Since 1990, she has been actively involved in numerous international trade matters, including U.S. antidumping, countervailing duty, and safeguards proceedings representing a variety of industrial and agricultural industries. For the past four years, Ms. Dwyer has served as a co-editor of the loose-leaf *Handbook of WTO/GATT Dispute Settlement.* She has also authored or co-authored a number of books, chapters and articles on WTO issues, including a forthcoming chapter in *Essays on the Reform of the WTO Dispute Settlement System* to be published in June 2006.

Marsha A. Echols is a recognized expert in the field of international trade and development. She studied and worked in Belgium and Switzerland before joining the law faculty at Howard University. She served as an international trade negotiator for the U.S. Government and specialized in international transactions while engaged in the private practice of law. Dr. Echols is a member of the Council on Foreign Relations, the Liaison to ECOSOC for the American Bar Association and has served as a member of the United Nations Administrative Tribunal. She has written articles and books on Food Safety issues within the WTO. She teaches courses in International Business Transactions, International Sales, International Economic Law, and technology transfer and development, and in 2003 Dr. Echols received the Distinguished Faculty Author Award from the President and Provost of Howard University.

Dencho Georgiev is Ambassador of Bulgaria to the WTO. He was Deputy Minister of Trade and chief negotiator for the accession of Bulgaria to the WTO. Ambassador Georgiev is Senior Research Fellow at the Bulgarian Academy of Sciences and former Director of the Centre for European Studies in Sofia. He taught at the University of Sofia, the University of National and World Economy in Sofia, and the Free University of Bourgas; was a visiting scholar at the American Society of International Law in Washington, D.C. and at Monash University in Australia. Ambassador Georgiev is Vice President of the Bulgarian Association of International Law, and is a member of the Committee on International Trade Law of the International Law As-

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C. Donald Johnson, former U.S. congressman and ambassador, joined the Dean Rusk Center–International, Comparative, and Graduate Legal Studies in June 2004 as Director. Previously, he specialized in international trade and foreign policy issues as a partner at the law firm of Patton Boggs LLP in Washington, D.C. From 1998-2000, he served as chief textile negotiator in the office of the U.S. Trade Representative. His tenure included the U.S. China WTO agreement, the U.S.-Cambodia Textile Agreement, WTO dispute cases, and the Trade Act of 2000. Johnson previously served as Member of Congress for the 10th District of Georgia, where he concentrated on national security issues on the Armed Services Committee and on international trade, including NAFTA and the WTO implementing legislation.

Stephen Kho is Associate General Counsel in the Office of the United States Trade Representative (USTR) where he is the principal attorney on all China matters. His responsibilities include ensuring China's compliance with its international obligations, dealing with WTO dispute settlement issues as they pertain to China, and developing strategies on recent China *hot topics* (IPR enforcement, tariff and non-tariff trade barriers, and subsidies). Previously Mr. Kho was the Legal Advisor at the U.S. Mission to the WTO in Geneva, Switzerland, where he managed the U.S. dispute settlement portfolio. He has participated in every stage of the WTO dispute settlement process, as well as reviewed submissions and formulated litigation strategies in all cases involving the United States. In addition, he has been involved in the Doha Round negotiations, several free trade agreement negotiations, and the review of WTO dispute settlement procedures.

Donald M. McRae holds the Hyman Soloway Professor of Business and Trade Law, and was former Dean in the Common Law Section of the Faculty of Law, at the University of Ottawa. He advised the Department of Foreign Affairs and International Trade of the Government of Canada, and has been counsel for Canada in fisheries, maritime boundary and investment arbitrations. He was the Chief Negotiator for Canada for the Pacific Salmon dispute. He also advised the Government of New Zealand on international trade law and other international law matters. Professor McRae chaired and sat on dispute settlement panels under the Canada-U.S. Free Trade Agreement, the U.S.-Israel Free Trade Agreement, and NAFTA. He appeared as counsel before WTO panels and the Appellate Body and has been a member

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Charles Owen Verrill, Jr. is a partner and head of the international trade law and policy practice group of Wiley, Rein & Fielding, in Washington, D.C., where he regularly represents clients on all aspects of international trade law and policy, including import and export regulation; import trade remedies; international negotiations, both bilateral and multilateral; international arbitration; mediation in commercial disputes; and regulation of foreign investment in the United States and abroad. Prior to joining that firm, he was a partner with Patton, Boggs & Blow. Mr. Verrill has served as a Trustee of the International Law Institute since 1981 and President since 2003, as an Adjunct Professor teaching International Trade Law and Regulation at the Georgetown University Law Center since 1978 (named Charles Fahy Distinguished Adjunct Professor in 1993), and as Senior Lecturing Fellow (International Business Transactions), Duke University Law School, since 2000.

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