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Symposium Address: The Role of Lawyers in the WTO*

*James Bacchus***

I want to begin by offering my regrets for the fact that I am going to disappear as soon as I finish here this morning. I have to go back to Geneva this weekend. There is an appeal pending in a dispute involving several countries. The defendant in the case is a small country called the United States of America. We will see how they do.

And I want to acknowledge a few old friends.

Certainly I want to acknowledge Peter Ehrenraft. He may or may not recall this, but we first met when he was already a very distinguished member of the bar and I was a young lawyer right out of school, working at USTR and reading the GATT, and trying to figure out what it was all about. I looked a lot like some of you out there who will soon be in your first year out of law school.

I hope that you will give my regards to the Dean, who is traveling today, looking for a college for his son. I am glad to be here also with Jon Charney, truly one of the great international law scholars in the entire world. And also, it was good this morning to be with my old friend and Vanderbilt classmate, Bob Thompson, who has just returned to Vanderbilt after thirty years, joining the law faculty. It was a homecoming for him, and as he knows, this is a homecoming for me.

I was born three blocks from here. Indeed, my family has had an even much longer affiliation with Nashville. The Loews Vanderbilt Plaza Hotel is on the site of what used to be a gas station where my grandfather pumped gas in the 1920s, and, in the late 1940s, my mother used to walk this site before the law school was built on her way from nursing school to classes at what was then a separate Peabody College.

* Transcript of remarks delivered on March 26, 2001.

** James Bacchus is one of seven members worldwide, and the only North American member, of the Appellate Body of the World Trade Organization, in Geneva, Switzerland. The Appellate Body is the newly-created "supreme court" of world trade that judges final appeals about trade disputes among the more than 140 member nations of the WTO. The WTO has jurisdiction over more than ninety percent of world commerce. Previously, he served as a Member of Congress, from Florida, and as special assistant to the United States Trade Representative.

And, most important to me, this is my alma mater. Vanderbilt had the wisdom and the foresight and the generosity to pay every penny of my undergraduate education. So, I am happy to return to Vanderbilt at any time and try to repay the favor. I also give a little money from time to time when I have it. Among other things, I am paying tuition right now for my son Joe, who is a sophomore here at Vanderbilt. I have promised not to say whether he is in the audience right now.

Vanderbilt also, you should know, has a long history of involvement, as does Middle Tennessee, in promoting the growth of trade. Nashville was put here in the first place because it is on a river that leads down toward the Mississippi and out into the rest of the world. This is probably what made Cordell Hull a free trader. It is what inspired one of his protégés, Albert Gore, Sr., to advocate free trade. And they inspired me along the way, along with a professor of history here named Charles Delzell, who first taught me about the Smoot-Hawley tariff years ago. Probably he taught Professor Thompson as well when we were classmates together. He also taught another young man from Nashville—two years older than I am, I like to remind him—about trade. His name is Mickey Kantor. And it was Mickey Kantor who got me into the WTO business.

I had decided to leave the Congress and give up politics and go straight. And Mickey had this notion that I could stay involved even if I was not up on the Hill. His initial idea was that I consider something up in Washington, other than “Congressing,” and I explained to Mickey that the idea was to get out of Washington. So he said: “What about Geneva?”

They were forming this new outfit called the World Trade Organization and they were creating something called the Appellate Body, and he and others wanted to know whether I would be willing to serve. Mickey said at the time that what excited him about the prospect of my going to the WTO and serving as one of the founding members of the Appellate Body was the fact that I would be “present at the creation.” As you know, this was not an original phrase with Mickey, and it is certainly not with me. It was Dean Acheson who talked about being present at the creation when he and others developed the United States containment policy that led to the ultimate victory in the Cold War. But when I began to do what I do with the WTO, we were beginning the post-Cold War, and we were present at a new creation of an institution that we all hoped would serve that new world in a new way. So I think that Mickey’s phrase was the right one. And now, six years have passed, and I find that I spend half of my life in Geneva and much of the rest of my life reading legal documents relating to what I do in Geneva.

What have we been doing in the past six years and why? What does it have to do with the role of lawyers in this “globalism” that we are here to discuss?

The Appellate Body of the WTO has released three new rulings in the past two weeks. In the more sedate days of international law, you might get three rulings in a decade from an international tribunal. It is perhaps not an exaggeration to say that the WTO settlement system is the busiest international tribunal in the world and, perhaps, in the history of the world. We have now rendered forty decisions on appeals in five years of work on the Appellate Body. There are seven members of the Appellate Body, and we have half a dozen lawyers who work with us. We have a lot to read already, and we will have an ever-increasing amount because the appeals are going to keep coming. There have been several hundred cases brought to the WTO in the space of just half a dozen years. The best news, perhaps, is that many of these cases are, so to speak, settled out of court. The disputes are resolved. I have read some interesting law review articles speculating that the mere presence of the dispute settlement system, and the mere existence of the Appellate Body, helps resolve disputes—because sinners against the WTO rules decide to reform rather than end up in dispute settlement. I hope that is so. But, we are certainly busy there, and increasingly so.

There are, at this point, 140 member countries of the WTO. We have, at last count, about twenty-seven thousand pages of rules that we are charged with helping the members implement, interpret, and, through their good auspices, enforce. And it appears that there will be no end to the exponential growth in our workload. Why should that be so?

There are two reasons, at least. One is that, in lawyer-like vernacular, we have compulsory jurisdiction. If you are a member of the WTO, and if you have therefore signed the WTO treaty, then you are duty-bound under the treaty to take any dispute arising from matters relating to the treaty to the WTO for resolution. The other reason is that, perhaps alone among all international tribunals, and perhaps alone among all such systems that have ever existed, the WTO dispute settlement system has the ability and the authority to see that its judgments are enforced. This makes all the difference.

In the state circuit court in Orlando, Florida—where I live—people go to court when they think they can get a decision that will work in the real world. That's supposedly the purpose of courts. I believe that countries are coming to the WTO for resolution of their disputes because they know and believe that those disputes can be resolved there effectively. And this has led to the growth in our caseload and to the concomitant growth in the case law that has emerged from the WTO settlement system in a very short time.

I cannot even begin to keep up with all the law review articles that are written about our cases. I do, however, read as many as I can. And I was pleased to see that one of our rulings is the subject of a commentary in the current issue of the *Journal*. A very good

commentary, I might add. But I was struck by the fact that when we released our opinion this past Monday in the appeal in the dispute between the European Communities and Canada over the French ban on the import and sale of asbestos, within an hour, there was an elaborate Internet exchange of commentaries by law professors on what we had said and did not say and what it meant and what it did not mean. So, at this point, we are seeing the growth, exponentially also, not only of case law, but also of commentaries on the emerging case law in this emerging area of international law.

Why is all this needed? It is needed because the world economy is increasingly one place, because technology has brought us here, because distances have died, and because the world just is not going to return to the way it was before.

The world has changed irreversibly, and yet—crucially—that change can take many forms. We can create a world in which power is exercised arbitrarily and capriciously, a world in which economic power is concentrated and magnified, a world in which might makes right. Or we can create a world in which right makes might, a world committed, like the Members of the WTO, to the rule of law.

I remember when I was taking Western Civilization as a Vanderbilt freshman up the hill, in Neely Auditorium, a few years ago. I was assigned to read “The Melian Dialogue” in the history written by Thucydides of the Peloponnesian War. I am sure you all read it. If not, you should: it’s short, and it has very few footnotes. “The Melian Dialogue” is a case study in human nature, and I am one who believes that law must emerge from an understanding of the reality of human nature.

If you do not recall the episode from your own freshman reading of Thucydides, it was basically this: The Athenians had defeated the people of the small island of Melos. They came to them to impose certain terms. The terms were pretty harsh. The Melians said, as my nine-year-old daughter does when I impose harsh terms, “This is not fair. You should not do this! This is not justice! What gives you the right to do this?” And the Athenians replied: “What gives us the right to do this is the might we have. Might makes right.” As Thucydides put it, if I recall correctly: “The strong do what they can, and the weak suffer what they must.” And I think it can be argued that all of history, in all the time since, can be seen as a commentary on this episode in Thucydides.

All that we have tried to accomplish in the making of civilization has been aimed at trying to prove that might does not necessarily make right. And, in the world of commerce, that is precisely what the WTO is all about. In our work for 140 countries in Geneva, we are trying to prove that right can make right through the rule of law.

The rule of law means simply this: the law is written to apply to all equally, and all are equal before the law. This has not always been the case in the world economy.

The 140 member countries of the WTO have now come together to write rules to begin to make it possible for right to make might in the world economy. Our job, the jobs of the seven of us who are on the Appellate Body, the seven of us who are at the end of the procedural pipeline in the WTO, is to help the Members of the WTO make certain that, so far as WTO rules are concerned, we have the rule of law.

Now, where do lawyers come in?

This symposium is about the global practice of law and the role of lawyers in the newly emerging global economy.

What, then, is the appropriate role of lawyers in the WTO?

I would submit that, ultimately, the rule of law is inseparable from having a role for lawyers, and the early experience of these creative days in the WTO would support that statement.

I am not free to take positions on issues that are pending before the Members of the WTO. I am not free to explain further what I have already explained, along with my colleagues, in decisions we have made in Geneva. I am bound by the WTO Rules of Conduct. So, I am not free to tell you what I think the Members of the WTO ought to do. That is up to the Members of the WTO. I say it again: That is up to the Members of the WTO.

But let me tell you what has already been done with respect to the role of lawyers in the WTO, all of which is a matter of public record. I was the presiding member in the appeal in what is commonly called "The Banana Case." There were forty-two countries involved in that appeal as parties or third parties. As you may recall, it went on for a while. One of the procedural issues that was raised on appeal was whether members of the WTO—specifically, a group of the developing countries in that appeal—could have private counsel in WTO appellate proceedings.

Basically, we concluded that it was not for us to second-guess a member of the WTO on who that member wanted to include in its delegation in an Appellate Body proceeding. So we let in the lawyer. As best as I can tell, this was the first time in the fifty years of experience under the GATT, and then the WTO, in which a country had been represented by private counsel.

That was all we ruled. Peter can explain some of the consequences a little later, because he has been much involved in the follow up of these rulings. I will simply say that, several years later, it is now commonplace for countries to be represented by outside private counsel as members of their delegations, not only in Appellate Body proceedings in the WTO, but also in the initial panel proceedings that are the WTO tribunals of first instance, and are the WTO equivalent of a trial court. And, nowadays, there are more and more lawyers who are participating in developing what is clearly perceived and portrayed as a WTO practice.

What would you like to know about the consequences of all this? What can I say to help you as you consider your own legal career?

Perhaps simply this: you cannot escape me. What we have already done in the WTO and what we will be doing in the next few years and in the next few decades will increasingly shape what is done domestically and internationally in virtually every area of the practice of law. The responsibilities of the WTO are already considerable.

The "covered agreements," as we call them, already "cover" more than ninety percent of the world's commerce. When China comes into the system, we will add a few more percent. Every country in the world is either a member of the WTO or wants to be. In addition to the 140 members countries we have now, there are more than two dozen countries that have applied for membership in the process we call accession. That's the legal jargon for waiting in line and trying to meet the admission requirements. Moreover, the various agreements that comprise the overall WTO treaty are not only voluminous, but also vast in their scope. They cover goods, services, and intellectual property. They range far, wide, and deep, as the commentators have noted. And, already, the member countries, in their wisdom, are beginning to contemplate still another multilateral trade negotiating round in which they will, no doubt, extend and expand the concessions and the coverage of the current agreements and in which they may also consider adding still more areas of possible responsibility for the WTO.

And, as the Members of the WTO have stressed, the WTO dispute settlement system is central and critical to the success of the WTO. For what is the purpose in having rules if they are not going to be enforced fairly and effectively?

Professor Levinson spoke of the "lore of the law." In our day-to-day work in Geneva, we are dealing now with the reality of trying to reconcile all different kinds of views about what the role of a lawyer is, in a forum in which 140 different countries with different forms of jurisprudence and different "lores of the law" work together.

This is a challenge. It is also, to me, the most exciting part of the system.

There are seven of us, as I said, who serve on the Appellate Body. By far, the best part of the experience of the past six years for me has been in working with brilliant, international jurists from all over the world on the body. The membership is changing, as Professor Charney and I were discussing. There were seven of us who were originally chosen. Two have since retired. One, Christopher Beeby of New Zealand, passed away a year ago. That was a great loss; he was a dear friend. There are three new members who have replaced them. And there are four of us who remain from the original seven.

The other three will complete their terms in December. I am, thus, in an unusual position. I have, from the beginning, been the youngest member, by far, of the Appellate Body, and I still am. My son calls me "old man," but at fifty-one now, I am still, by fifteen years, the youngest member of the seven. Our senior member, Julio Lacarte-Muro, of Uruguay, is nearly eight-three. He helped write the GATT in Havana before I was born. I was in Montevideo last November at his request, speaking in his home country of Uruguay. He introduced me. He said: "I have worked with Jim Bacchus for five years. He is a very young man, but he has potential." Coming from Julio, that's a very high compliment indeed.

So, I have found something where I am still young, even at fifty-one. But, come December, I will be the only one left from the original seven. I will be the senior member then in length of service. And I am scheduled also to become Chairman of the Appellate Body at that time.

I feel, increasingly, the considerable burden of that responsibility in a system which was created to assure consistency in the interpretation of the covered agreements.

We are still very much present at the creation of the WTO dispute settlement system. Yet, by the time I leave the Appellate Body in another three years, we will have, no doubt, at the current pace, rendered perhaps one hundred decisions. In addition, there are already a dozen decisions in what are called Article 21.3 proceeding—arbitrations on the "a reasonable period of time" to be permitted for implementation of our rulings.

There is an abundance of opportunity for further innovations in the WTO system. Peter has said previously, and I hope he will say again today, that it is possible to develop different ways of proceeding in addition to the one that has generally been chosen during the past five years. Mediation and individual arbitration are both available under the current rules in the Dispute Settlement Understanding, which is part of the WTO treaty. They have not yet been used. It is up to the members whether they wish to use them, but they can be used. In this and other ways, there is still much that can be done as innovations in the WTO.

And that is certainly so with respect to the role of lawyers. Although lawyers are commonplace now, in terms of working on dispute settlement, the truth of the matter is that the system has not yet figured out just how to deal with lawyers. This is part and parcel of the fact that the system itself has been evolving over half a century from what began as a purely diplomatic undertaking to what is increasingly a juridical understanding. It is up to the members to choose how, where, and when they want to draw that line. But establishing the precise role of the lawyers and determining whether there might need to be a special WTO code of conduct for lawyers or whether there might need to be other kinds of prerequisites to

participation in the system, is an issue the members will undoubtedly, at some time, address. Meantime, improvisationally, we proceed to develop procedures to make the system work for the sake of the members and for the sake of the common good of the world.

A final point I would make to students who are here today and about to go out into the legal world would be this: I have noticed that what I do is a bit controversial in some places. Why is that so?

It is because the world is changing and because, understandably, people have apprehensions about change. It is also because there is very little understanding of what it is that we are doing in Geneva. Consciously, and intentionally, I have spent my first years on the Appellate Body in silence. Vanderbilt is one of the few places where I have spoken. It has been important for all of us who are Members of the Appellate Body to focus on establishing our institution, to speak with one voice, and to submerge our own identities into the system itself. I have tried very hard to do that. But, meanwhile, the world has continued to turn, and with its turning we have watched the growing apprehension around the world about what has come to be called "globalization." Not only in the United States, but in every country of the world, there is apprehension about the challenges globalization poses, and about what it will mean for individual human beings in our daily lives, and in our future together. This is understandable.

In considering this, I would simply ask those who are apprehensive about globalization to remember our old friend Thucydides. The WTO is the result, not the cause, of globalization. The choice we face is not between globalization and no globalization. Rather, the choice we face is between an increasingly "globalized" world in which we will be ruled by the arbitrary exercise of economic and political power, or one in which we will have the rule of law.

My own view is that we need more international law, not less. We need the rule of law. And we need the WTO.

Our previous speaker showed us how difficult what we are hoping to accomplish can be. We saw, in some detail, his elaboration of how difficult it has been and remains for the fifteen members of the European Communities to try and find some way to fulfill a goal they have established for movement of natural persons in just one profession in just one sector of the economy, that of the practice of law.

In terms of seeing the dimensions of our challenge in the WTO, I want you to think of this. Take his example of that one profession and those fifteen states. Add another 125 states, or more. In terms of services, take not just that one profession, but add a few hundred more, or a few thousand. That is what the service negotiations are going to do over the next generation.

And services is only one area of negotiation. There is always the issue of goods. So add in negotiation on a few thousand goods, tens of thousands of goods. Throw in as many forms of jurisprudence and as many ways of looking at the world as there are countries in the world participating in the world economy.

Now, you begin to see the dimensions of the challenge we face.

And services and goods, too, are but a part of it. Add into the mix also all the other supposedly peripheral issues, that are not really peripheral at all, but are central to considering the human dimensions of the changed world economy: the environment; the labor issues; human rights; health and safety issues of all kind; competition and anti-trust policy issues; electronic commerce; and on and on and on.

The task is imposing. Yet, unlike Thucydides, I am not a pessimist. True to my Vanderbilt education, I am an optimist. And I believe we can succeed.

We still are present at the creation. But the task of creation will be truly exciting. And, as you begin your careers in the law, I envy you for the part you can play in fulfilling it. It is always a pleasure to be at Vanderbilt University, and I want you to know that I will try my best to return any and every time that I can. Thank you very much.

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