The WTO Dispute Settlement as Seen by a Proceduralist

Yasuhei Taniguchi

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cilj/vol42/iss1/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
The WTO Dispute Settlement as Seen by a Proceduralist†
Yasuhei Taniguchi††

Introduction

Studying at Cornell forty-five years ago towards a J.S.D. degree under the mentorship of the great comparativist, the late Professor Rudolf Schlesinger, greatly enhanced my interest in comparative studies of the civil justice system. I am also indebted to the late Professor Harry Henn, a corporate law expert and the successor to Dean Stevens for whom this lecture series is dedicated. While studying at Cornell, I wrote a thesis on shareholders' judicial remedies in which I compared American and Japanese law. In it, I explored some fundamental differences between the two legal systems, with one belonging to common law and the other to civil law. My analysis of the subject gave me a good foundation for my career. In fact, during my seven and a half years on the Appellate Body of the World Trade Organization (WTO), I encountered many thought-provoking questions that echoed in my mind as a comparativist in procedure.

In 1995, the WTO instituted the present system of dispute settlement. One of the great innovations was the creation of the Appellate Body.

† This essay is a modified version of the Stevens Lecture that the author delivered on April 4, 2008 at Cornell Law School on the occasion of the 2008 Berger/Cornell International Law Journal Symposium. The author thanks Professor Yuka Fukunaga of Waseda University, LL.M., 2000, U.C. Berkeley School of Law, for her valuable suggestions and cooperation in collecting materials cited in the footnotes.
†† Professor of Law, Senshu University Law School, Tokyo; Professor Emeritus, Kyoto University; LL.B., 1957, Kyoto University; LL.M., 1963, U.C. Berkeley School of Law; J.S.D., 1964, Cornell Law School; Member of the Appellate Body of the World Trade Organization 2000-2007.

42 CORNELL INT'L L.J. 1 (2009)
Although the new system is not free from criticism, the international community and academic observers have generally regarded the Appellate Body as the best functioning part of the WTO.\(^1\) I had the privilege of serving as one of the Appellate Body's seven members from June 1, 2000 until December 10, 2007. When I was appointed to the position, I had only the slightest knowledge of the WTO and its dispute settlement system. Public international law in general, and international trade law in particular, were quite foreign to my teaching and research interest in civil procedure and insolvency law.

The WTO dispute settlement process starts with a consultation between the disputing states, then proceeds to an adversarial procedure before the panel, and may end up with appellate proceedings before the Appellate Body.\(^2\) It is no wonder, then, that many procedural issues arising in WTO disputes are similar to those occurring in state court litigation. As in any national legal system, the WTO legal system consists of substantive law rules and procedural (court organization) rules. Substantive law rules for conduct in international trade are contained in various multilateral treaties, such as the so-called "Anti-Dumping Agreement,\(^3\) "Subsidy Agreement,\(^4\) and "SPS Agreement.\(^5\) Procedural and organizational rules are embodied in a treaty called the Dispute Settlement Understanding (DSU).\(^6\) All are collectively referred to as the WTO agreements, or the "covered agreements."\(^7\) In this short article, I would like to reflect on the WTO dispute settlement system in comparison with national counterparts under municipal law.

I. The WTO "Village" and Dispute Settlement

Our task in the Appellate Body was to review the points of law in appealed panel reports. I had to deal with WTO law in Geneva while at the

---

2. See discussion infra Part I.
7. See generally id.
same time teaching Japanese civil procedure in Tokyo. These two things may appear very different and remote from each other, but I did not have to become schizophrenic. The procedural aspects of the WTO dispute settlement fascinated me. Several months after I joined the Appellate Body, I came to conclude that the WTO was like an ancient Greek village in which there was a primitive form of democracy with no central political power like that of a modern state. Members of some 150 households inhabit this little village. There are large families as well as small families, rich families as well as poor families. But each household is treated equally under the village law. Every affair of the village is managed by an assembly attended by the heads of all households who represent the interests of their family members. Under the principles of autonomy and direct democracy, there is no separation of powers in the political system of this village.

If there is a dispute between the member families, the head of the household concerned can file a complaint with the assembly. Such a complaint is filed if there is an alleged violation of the rules laid down by the founders of the village. The assembly, busy and lacking the necessary expertise, then organizes a body of experts, called the panel, to hear the complaint. The panel hears both parties, examines evidence, and makes a report to the assembly about what the assembly should do. If the assembly adopts the recommendation, it becomes a binding decision. If the losing head of a household does not want to accept the decision, he can appeal. For that purpose, the assembly permanently retains a group of seven experts called the Appellate Body.

At this juncture, let me explain the way the Appellate Body works in the village. The Appellate Body functions with a division of three out of the seven experts and a secret system of rotation. One of the three members presides over each division by election. The election customarily results, however, in such a way that every member has an equal opportunity to serve as the presiding member. Although a division is responsible for hearing and deciding the assigned appeal, the other four members are also consulted in a session of all seven members called an Exchange of Views, which normally lasts for two or three days. A division must decide the appeal within ninety days from the filing of the appeal. Of those ninety days, exchanges of written submissions by the parties and third-party participants take thirty days or more. The translation of our final draft from English into the two other official languages of the WTO—French and Spanish—takes two more weeks. This leaves fewer than forty-five days

---

8. I do not know if such a village really existed in ancient Greece. This is just an imaginary village in my fantasy.
10. See id. Rule (7)(1).
12. DSU art. 17.5.
for a division to do its work. The work of a division includes, firstly, a preliminary deliberation; secondly, an oral hearing (normally lasting one or two days in which the division asks the parties questions requiring immediate answers); thirdly, the Exchange of Views; and lastly, further deliberation and drafting of a report for submission to the assembly of all the member states—the Dispute Settlement Body (DSB).15

The schedule imposes a significant constraint on time, especially when two or more appeals occur simultaneously. I occasionally had to concurrently participate as a member of two divisions (possibly presiding in one of them) and in the Exchange of Views of a third. During my time in the Appellate Body, I dealt with fifty-three appeals. Out of these fifty-three, I was a member of twenty-two divisions, seven of which I presided over. This shows a roughly equal distribution of work among the seven members. The rate of appeal is high but varies from year to year. In the Appellate Body's early years, the rate of appeal was 100% but has recently dipped to 70% or so.16 When a large number of appeals were filed, I had to sleep in Geneva for about 180 days of the year—divided into several stays.

WTO appellate review is limited to legal points in a matter similar to the review of the highest national courts. It does not extend to a review of fact-finding by the panel below unless an error of fact is so egregious that it constitutes a legal error.17 The assembly of all member states must also adopt the Appellate Body's recommendation for the recommendation to become conclusive and binding.18 In this village, there are two assemblies consisting of the same membership, one for general affairs called the General Council, and the other specializing in dispute settlement called the Dispute Settlement Body (DSB).19 It is customary for the Appellate Body members to have lunch or dinner with the newly appointed chairperson of the DSB, who is the ambassador of a member state, after the annual election.

II. WTO Dispute Settlement as Judicial Function

The dispute settlement system in the WTO village I just described looks very different from the judicial function of modern democratic
The original decisionmakers (the panel and Appellate Body) do not, in form, decide cases independently from the DSB assembly because the latter reserves the right to reject a recommendation submitted to it. In fact, according to the procedural rules laid down by the founder of the village, called the Dispute Settlement Understanding (DSU), there is a theoretical possibility of rejecting a panel or Appellate Body's report.\textsuperscript{20} The practical likelihood of rejection, however, is extremely slight because of the famous "negative consensus rule" embodied in articles 16.4 and 17.14 of the DSU.\textsuperscript{21} Unless DSB members form a consensus against the adoption of a report, the DSU must adopt the report.\textsuperscript{22} Such a negative consensus is difficult to form in practice because the winning state can easily prevent such a consensus from forming. Since 1995—when this system started functioning—through the end of 2007, no report has been rejected and, as of August 1, 2008, 115 panel reports and 87 Appellate Body reports have been adopted.\textsuperscript{23} Thus, the panel and Appellate Body, which in their form look like mere subcontractors subordinated to the Assembly (DSB), in practice appear to be independent decisionmakers similar to national courts in modern states.

The WTO's dispute settlement system also resembles a national judiciary because of its compulsory jurisdiction. In national court systems, one can sue someone else and a defendant has no choice but to respond or suffer a default judgment. The power of a national court to decide does not depend on the defendant's consent to submit to jurisdiction. The same rule applies in the WTO system. The WTO forms a panel that starts working without the consent or agreement of the respondent state.\textsuperscript{24} This is different from the jurisdiction of the International Court of Justice where a binding judgment can be rendered only if there is an agreement of the party-states to submit a dispute to the Court.\textsuperscript{25}

One must remember, however, that there is an advance agreement to jurisdiction, which was given at the time of accession to the WTO. Accession to the WTO must be a "single undertaking," that is, the member states have no choice but to accept all the WTO agreements as a whole.\textsuperscript{26} All member states must therefore agree to subject themselves to the rules laid down by the DSU, which provides for compulsory DSB jurisdiction.\textsuperscript{27} This

\textsuperscript{20} See DSU art. 17.14.
\textsuperscript{21} See id. arts. 16.4, 17.14.
\textsuperscript{25} See id. at 796.
\textsuperscript{27} See DSU art. 23.
is a blanket agreement without specification of any particular dispute that has arisen. In this respect, the WTO dispute settlement system also has a close affinity to arbitration, as further discussed later.28

Related to this is the obligation of the decisionmaker to decide. One of the features of the modern judiciary is that the court is obligated to decide a case once the case is properly brought before the court. This is because people have the right of access to justice. Traditionally, in France the prohibition of deni de justice expressed this principle.29 Under this principle, the court must somehow give a final judgment even if the facts are not clear or the applicable law is not known.30 The same principle admittedly applies in the WTO dispute settlement system, although the theoretical possibility of a decision of non-liquet has been suggested.31 Therefore, in practice, once a complaint (a request for the establishment of a panel) is properly brought to DSB, the DSB must give a final resolution to the dispute. The DSB's obligation is actually carried out by its subcontractors, the panels and the Appellate Body.32

The burden of proof then becomes an indispensable doctrinal apparatus for the panels and the Appellate Body because it enables a decisionmaker to reach a conclusion. Thus, in WTO disputes, as in any dispute in a municipal system, the allocation of the burden of proof and the required degree of proof to satisfy the burden often play a crucial role.33

There are additional similarities. Just to mention one, the judges in modern states are bound by the rules of substantive law in reaching a decision. The founder of the WTO village also laid down substantive rules of conduct for the member households, that is, member states. These rules are themselves contained in a series of international treaties and collectively called—as mentioned previously—the "covered agreements."34 The rules bind the DSB and therefore serve as the rules for the panel and Appellate Body to apply in making a recommendation for the settlement of disputes. The aforementioned procedural rules are called the DSU, which is

---

28. See discussion infra Part IV.
34. See generally Marrakesh Agreement Establishing the World Trade Organization.
itself one of the covered agreements. The DSU specifically provides that, "the DSB cannot add to or diminish the rights and obligations provided in [these rules]."\textsuperscript{35} Panels and the Appellate Body, being under the DSB, are of course subject to this restriction. This language is reminiscent of Montesquieu's classical eighteenth-century theory about the role of ideal judges—namely, that judges are "the mouthpieces of the law."\textsuperscript{36} If such a strict adherence to the rules is a signature of the modern judiciary, the DSB, panel, and Appellate Body are also acting "judicially." But the truth is that today's judiciary enjoys greater freedom in the statutory interpretation of new substantive rules. Therefore, the overly strict language of the DSU sounds a bit anachronistic. Nevertheless, this characteristic of the WTO dispute settlement does bespeak its "judicial" nature.\textsuperscript{37}

\section*{III. Weak Enforcement?}

The previously mentioned features make the WTO dispute settlement process resemble the judicial process in a modern state. There is, however, one fundamental difference: the enforcement of an adopted report. As mentioned before, all member households in the WTO village are equal. Although each head of household has power over those in his house, he does not, whether alone or as part of a group, have authority over the other residents of the village. In short, there is no king of the village. Therefore, enforcement of an adopted Panel Report or Appellate Body Report is not possible in the same way as a judgment of a state court. The WTO's agreed methods of enforcement are rather modest and are not strong enough to cope with recalcitrant non-compliance. This decisive shortcoming, however, must be accepted as the ultimate limitation of today's international society.

Even mild, indirect coercion permitted under the DSU is regarded as a remarkable innovation in public international law.\textsuperscript{38} Probably the most effective measure of enforcement is a retaliatory action under DSU Article 22. This can be viewed as an authorized form of self-help. Article 22, however, requires a cumbersome procedure, is not always effective, and can even be detrimental to the enforcing state itself.\textsuperscript{39} Issues of compliance

\begin{thebibliography}{9}
\bibitem{35} DSU art. 3.2.
\end{thebibliography}
always prolong a dispute. If a losing state claims that it has already complied and the winning state does not agree, the original panel, now called the compliance panel, must decide whether compliance has really taken place.\textsuperscript{40} This process may be repeated many times.\textsuperscript{41} As of March 2008 there have been 22 Compliance Panel Reports out of a total 111 Panel Reports.\textsuperscript{42} The so-called sequencing issue, caused by the WTO agreements' ambiguous treatment of who determines whether a country has failed to comply and when a party has the right to retaliate for non-compliance, further complicates the process.\textsuperscript{43}

The overall rate of compliance, however, is not bad. Even though most losing states have complied with DSB recommendations, there are several \textit{cas célébres} in which compliance has not yet been obtained.\textsuperscript{44} Ironically, the more democratic a country, the more difficult it may be to obtain compliance.\textsuperscript{45} The United States has a few cases in which federal law has yet to be brought into consistency with a WTO agreement.\textsuperscript{46} Congress must act in order for the United States to comply, but political conditions have made compliance difficult for years.\textsuperscript{47} Japan also had problems complying in a timely manner with adopted Panel and Appellate Body Reports calling for amendments to Japan's alcohol tax law in the famous \textit{Shōchū} case.\textsuperscript{48} It is encouraging, however, that no losing member state has openly declared that it would not comply. Instead, they promise to comply, but insist that

\begin{itemize}
\item \textsuperscript{40} See Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, \textit{The World Trade Organization: Law, Practice, and Policy} 160 (2d ed. 2006).
\item \textsuperscript{41} See id. at 165.
\item \textsuperscript{42} See AB Annual Report, supra note 16, Annex 4.
\item \textsuperscript{44} See Gary Horlick & Judith Coleman, \textit{A Comment on Compliance with WTO Dispute Settlement Decisions}, in \textit{The WTO: Governance, Dispute Settlement & Developing Countries}, supra note 33, at 771, 774-76 (setting out specific disputes in chart form); Bruce Wilson, \textit{Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date}, 10 J. Int'l Econ. L. 397, 397, 400-01 (2007) (stating that states comply in most cases, but highlighting some cases in which they did not).
\item \textsuperscript{46} See Bruce Wilson, \textit{Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings}, in \textit{The WTO: Governance, Dispute Settlement & Developing Countries}, supra note 33, at 777, 779-80.
\item \textsuperscript{47} See generally Sharyn O'Halloran, \textit{US Implementation of WTO Decisions}, in \textit{The WTO: Governance, Dispute Settlement & Developing Countries}, supra note 33, at 945.
\end{itemize}
Despite a decisive difference in the enforcement aspect, the WTO dispute settlement process is remarkably similar to that of civil litigation. Both types of process involve adversarial proceedings between the complaining party and the defending party, with a neutral decisionmaker presiding. The complaining party must present a case with supporting legal arguments and evidence, and the defending party has a full opportunity to rebut the allegations. The panel has the right to seek necessary information. If the panel actively uses this power, the proceedings may become inquisitorial. In practice and by necessity, the panels exercise this power only to supplement the information set forth by the party-states’ complaints and rebuttals.

Due to the similarities between the WTO process and national litigation, one would naturally expect to find many procedural issues in the WTO process which also commonly arise in national litigation, such as the required degree of specificity in a complaint and issues relating to evidence—i.e., burden of proof, treatment of confidential information, and questions relating to fact and law. These familiar issues may or may not be amenable to the same treatment they receive in national courts.

The WTO dispute settlement process, however, utilizes other practices which are unknown or uncommon in national systems of litigation. For example, the WTO dispute system takes the form of pro se litigation in the sense that a case is prepared, presented, argued, and defended by a government without the assistance of outside counsel. Even if outside counsel is retained, that counsel acts as a member of the government. Thus, the distinction between the allegation and the evidence is unclear. In domestic litigation, a party’s attorney presents the allegation and the party may testify as a part of the evidence, separate from that allegation. Conversely, in WTO litigation, the government delegation (which may include outside counsel) presents both the factual and legal allegations as well as the evidence before the panel in an inseparable manner. This feature, which is somewhat reminiscent of a primitive justice system, tends to blur the distinction between allegation and evidence. This distinction is basic to the very structure of domestic litigation systems, and its absence seems to give the panel proceedings a color of informal diplomatic negotiation.

49. See DSU art. 21.3 (providing for arbitration to determine a reasonable time for compliance). But see Horlick & Coleman, supra note 44, at 771–72 (showing that countries do not always comply with WTO obligations).

50. DSU art. 13.

51. See PALMETER & MAVROIDIS, supra note 15, at 165 (noting that although “private attorneys [do] not present cases directly to the panels,” private attorneys “advise[ ], counsel[ ], draft[ ] submissions, and remain[ ] available during panel meetings”).

52. See Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, ¶ 10, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter EC—Bananas] (ruling “that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body”).
IV. WTO Dispute Settlement as Arbitration

Like arbitration, the WTO dispute settlement system is based on agreement. In fact, the WTO village is the product of an agreement, and the DSU even uses arbitration terminologies, such as "terms of reference," in Article 7 of the DSU. Interestingly, the DSU includes references to various "arbitrations" outside the mainstream dispute settlement proceedings, starting with a request for consultation and leading to the establishment of a panel. DSU Article 25 allows disputing WTO member states to agree to settle their dispute by arbitration, according to whatever procedure they agree upon. An award reached in such arbitration need not be "adopted" by the DSU, but can be enforced in the same manner as an adopted report resulting from the formal dispute settlement proceedings.

Although this type of arbitration has never been used, it represents an interesting double-decked structure of the WTO dispute settlement system which is also found in all national systems. There is a state judiciary in which a uniform procedure is followed as laid down by the legislature. The parties are free to avoid the state-imposed procedure by resorting to arbitration in which they can freely choose a judge (an arbitrator) and agree upon a procedure to follow. Other types of arbitration in the DSU, such as those set forth in Articles 21.3(c) and 22.6, are designed to be ancillary to the main dispute settlement proceedings, but they can also be used in the compliance stage of Article 25 arbitration. Thus, the panel and Appellate Body proceedings, Article 25 arbitration, and these types of ancillary arbitrations constitute the universe of the WTO dispute settlement system in the same way as the state judiciary and arbitration do in national systems.

Moreover, the WTO dispute settlement system is complete with a mediational method. DSU Article 5 provides for conciliation or mediation

---

53. *See* DSU art. 7.
54. *See* id. art. 25 (providing for arbitration to replace formal WTO dispute settlement proceedings); *see also* id. art. 21.3(c) (stating that arbitration will determine a reasonable period of time for compliance); *id.* art. 22.6 (requiring arbitration to grant authorization for and assess the level of retaliatory suspension of concessions if a member objects to the level of suspension proposed or claims certain procedures have not been followed).
55. *Id.* art. 25.2.
56. *See* id. art. 25.4.
57. In *United States—Section 110(5) of the US Copyright Act, Recourse to Arbitration Under Article 25 of the DSU*, WT/DS160/ARB25/1 (Nov. 9, 2001), the parties explicitly resorted to Article 25 in order to "enter into arbitration to determine the level of nullification or impairment of benefits" and agreed to accept the award of the arbitrator "as the level of nullification or impairment for purposes of any future proceedings under Article 22 of the DSU." *Id.* ¶ 1.6. Because the Article 25 arbitration is considered to take the place of an entire panel and Appellate Body proceeding, this arbitration is officially counted as one of the Article 22.6 arbitrations.
58. DSU art. 25.4.
by the Director-General.\textsuperscript{60} In fact, the DSU emphasizes amicable settlement of disputes between member states through several of its provisions.\textsuperscript{61} This is also true for many, if not all, municipal legal systems because the amicable settlement of a dispute is preferred in any society.\textsuperscript{62} The WTO village is built on the same principle.

Despite the structural similarity of the WTO system and the municipal system, a basic difference exists between the two. Effectiveness of the state system, whether it is judicial function or arbitration—or even amicable settlement—depends on the state's sovereign power.\textsuperscript{63} Although arbitration is conducted outside of the national judiciary, its effectiveness is backed by the state power, just as state power backs a state court judgment. Arbitral proceedings are largely autonomous, but this autonomy is within the limit that the state arbitration law imposes. The state law makes an arbitral award enforceable only on the condition that the arbitration satisfies certain state law requirements. Enforceability of a foreign award under the New York Convention of 1958\textsuperscript{64} also relies on the state power that is available by virtue of the Convention.\textsuperscript{65} The judicial process can also enforce an amicable settlement.

Even if the WTO dispute settlement system can be characterized as arbitral in nature, no state power or state mechanism can enforce an adopted Panel or Appellate Body Report or an arbitral award under Article 25 and other provisions. The WTO system is an autonomous mechanism detached from any national system. It constitutes its own universe comprised of its own judiciary (the regular dispute settlement mechanism involving panel and Appellate Body proceedings), its own arbitration (through Articles 25, 21.3, and 22.6 of the DSU), and amicable settlements reached autonomously or through a mediatory mechanism by virtue of Article 5 of the DSU.

In this unique universe, a dispute settlement mechanism works without any centralized enforcement power. From a strictly legal-positivist

\textsuperscript{60} DSU art. 5.6.

\textsuperscript{61} See id. arts. 3.7, 4.


point of view, it might not even qualify as a legal system. Today, however, the Austini an theory of the nineteenth century is no longer persuasive if the law and legal systems are more broadly defined.66 The WTO is a rule-oriented system in which a dispute settlement mechanism operates based on a set of predetermined substantive and procedural rules. The member states have agreed in advance to comply with a decision resulting from the dispute settlement process, although an actual act of compliance may not meet this declared intention. Even the national legal system tolerates a certain degree of irregularity. For example, the fact that a winning party may not be able to collect some money judgments because of the debtor's insolvency does not affect the nature of contract or tort law as the law.67

Whatever difference may exist between the basis of authority for the national judicial system and that for the WTO dispute settlement system, common features give legitimacy to both systems. An independent arbiter, while observing the requirement of due process, may give a binding decision according to pre-existing substantive rules on the basis of allegations and evidence presented by the disputing parties in accordance with a set of procedural rules. With this common core and a fundamental difference in mind,68 we can safely compare the WTO system with national civil justice systems in which arbitration is also a part. In the following section, I shall list some of the points of interest.

V. The WTO System vs. National Civil Justice Systems: Some Specific Topics

A. As-Such Claim

The WTO system allows a member state to attack a piece of legislation of another member state "as such"—without waiting for its application against the interest of the complaining state.69 The U.S. Constitution's "case and controversy" requirement definitely does not allow this practice.70 According to the Japanese Supreme Court, the same is true in Japan.71 In civil law countries, however, the issue of the constitutionality of a law or regulation "as such" can be brought to the constitutional court or other organ (such as the Conseil d'État in France) for a declaratory

66. See generally Raj Bhala & Lucienne Attard, Austin's Ghost and DSU Reform, 37 INT'L. LAW. 651 (2003) (considering whether the current DSU reform makes international trade law less "law").


68. See supra notes 63-65 and accompanying text.


70. U.S. CONST. art. III, § 2, cl. 1.

relief.\footnote{See, e.g., Alec Stone Sweet, Why Europe Rejected American Judicial Review—And Why It May Not Matter, 101 Mich. L. Rev. 2744, 2770 (2003).} In Germany, it is called “abstrakte Normenkontrolle” (abstract norm control).\footnote{Grundgesetz für die Bundesrepublik Deutschland (federal constitution) art. 93(1.2) (GG).} The European Court of Justice offers a similar possibility: an action for annulment.\footnote{Consolidated Version of the Treaty Establishing the European Community art. 230, Dec. 29, 2006, 2006 OJ. (C 321) E/146, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF.} For this type of claim, there is no requirement for a specific interest, except that only the legally designated person or organ has standing to bring a claim.\footnote{See id.}

It is a matter of some debate whether only a state which is actually threatened by an application of a particular statutory or regulatory provision can bring an as-such claim.\footnote{For one example of the Appellate Body hearing an “as-such” claim, see Appellate Body Report, United States—Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007).} If so, this requirement comes closer to the case and controversy requirement. The Appellate Body has held, in response to an argument that a complaining party must have a legal right or interest in the claim it is pursuing, that no provision of the DSU contains any such explicit requirement.\footnote{EC–Bananas, supra note 52, ¶ 132.} If this holding applies generally, an as-such claim should be permitted without any threat of application of the law or regulation in question.

Therefore, the as-such claim is comparable to the abstract norm control. There is, however, an important difference. In the national system (also in the European system), if a provision of law is declared unconstitutional (or against the EU Treaty), such provision becomes null and void automatically.\footnote{See, e.g., 16A Am. Jur. 2d Constitutional Law § 203 (2007).} Such a self-executing effect can be recognized because the constitutional court (or EU Court) and the legislature function within a single legal system. The WTO system and a national system (or EU system) belong to two different legal spheres. An adopted report condemning a member state’s provision of law as incompatible with a WTO agreement can only oblige the respondent state to repeal or amend the provision through its own legislative process.\footnote{Natalie McNelis, What Obligations Are Created by World Trade Organization Dispute Settlement Reports?, 37 J. World Trade 647, 651–52, 656–57 (2003).} This brings us back to the problem of enforcement of an adopted Panel or Appellate Body Report discussed previously.\footnote{For more information, see generally PAUWELYN, CONFLICT OF NORMS, supra note 31, at 52-88.} This also endorses the concept that any WTO member state has a vested general interest in a violation of the covered agreements by any other member state regardless of actual or threatened harm caused by the violation. In municipal systems, the standing necessary for starting a claim for an abstract norm control is limited to certain holders of the pub-
lic interest such as a political organ or its member.\textsuperscript{81} In the WTO village, in comparison, each member household has a legitimate interest in correcting a violation of the community norm by any other member.

If a statute is being applied to the detriment of the complaining state, both the statutory provision as such and its application can be challenged. If a statutory provision is not applied, there is no immediate actual harm. Some scholars suggest, however, that an as-such complaint in this situation is allowed on the theory that there is already a chilling effect on the trade.\textsuperscript{82} In my view, such justification is not necessary. Others argue that a mandatory application of the provision in question under the national law is necessary to permit an as-such claim.\textsuperscript{83} It seems that this line of argument is overly influenced by the "case and controversy" requirement or a similar doctrine in the national system which limits access to the court. Even after actual application has occurred, any member state, even if unaffected by the application, should be able to initiate an as-such claim.

The legal residents of the WTO village are only about 150 states which are closely united by the WTO agreements. Each of them has a "systemic" interest in a violation of the agreements by any other member whether or not there is a current and pressing trade interest in it. Similar systemic interest has been considered sufficient justification for third-party participation.\textsuperscript{84} Such a liberal interpretation would not increase the number of cases because no state would be willing to bear the burden of pursuing a case unless there was a good, pecuniary reason for doing so.

B. Real Party in Interest

In all civil justice systems, whether common or civil law, a plaintiff and a defendant in a lawsuit must be real parties in interest, except for some special situations where, for example, a trustee can litigate on behalf of the beneficiary. In the WTO process, only a member state can become a party.\textsuperscript{85} Private entities (rather than states) normally conduct trade and thus suffer directly from the nullification of a benefit by WTO-inconsistent behavior. A private trading entity, however, has no standing for initiating a WTO process and must depend on the state in which it operates.\textsuperscript{86} As a first step, a state makes its own decision about whether to file a request for consultation and how to proceed in the subsequent dispute settlement pro-

\textsuperscript{81} In the German system, standing is limited to the federal and state government and a certain number of federal legislators. See Grundgesetz für die Bundesrepublik Deutschland (federal constitution) art. 93(1.2) (GG).

\textsuperscript{82} See, e.g., Frieder Roessler, The Concept of Nullification and Impairment in the Legal System of the World Trade Organization, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM, supra note 65, at 125, 125-30.

\textsuperscript{83} See JACKSON, SOVEREIGNTY, supra note 31, at 132-33.

\textsuperscript{84} See Yuji Iwasawa, WTO Dispute Settlement as Judicial Supervision, 5 J. INT'L ECON. L. 287, 297 (2002).


Diplomatic considerations also affect a government's filing decision. Although it is true that the state has its own interest in trade, the private sector has a large incentive to impress upon the state the importance of the issue in question, considering the measure taken by the foreign state would directly affect the private entity.

Domestic systems vary from country to country in the nature and degree that private influence has on a governmental decision to initiate a WTO dispute. In some countries, like the United States, the government seems to be more responsive to the interests of the private sector than elsewhere. In Japan, for example, the government seems to be developing a better channel with the private sector. Improvement must be desired in many member states so that the real party in interest—the private entity—can better benefit from the WTO system.

C. Role of Lawyers

In all national systems, the role of lawyers is divided into two fields: activities outside of the court and those in the court. This division is true also in connection with WTO law. Lawyers can serve private companies and a government by advising them generally on WTO law. They may be instrumental, as in the United States, to convey the needs of a private sector to the relevant government agency through formal and informal channels. The sound development of a group of specialist lawyers will be an important infrastructure of the WTO system. Members of such a trade bar may participate in the WTO dispute settlement in a variety of ways.

In national litigation, a party has the right to be represented by a lawyer. In WTO disputes, there is no explicit provision for such right. It seems to be assumed that the governments of member states represent themselves before a panel or the Appellate Body. Presumably, such expectation of pro se representation springs from the idea that the dispute settlement process is simply a continuation of diplomatic negotiation. The issue of whether an outside lawyer can represent a government in the WTO dispute settlement proceedings arose before I joined the Appellate Body and was solved by a compromise that allowed a lawyer to participate.

87. See DSU art. 3.7.
88. See Shell, supra note 86, at 901-02.
90. See IIDA, supra note 48, at 25-45.
91. See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); Shaffer, US and EU Experience, supra note 89.
92. See supra note 51 and accompanying text.
in the proceedings as a member of the state delegation. Thus, it is common to see a lawyer from a big American law firm arguing a case before the panel and Appellate Body on behalf of a non-American government. Many countries are apparently consulting those expert lawyers in the process of preparing and drafting necessary documents, even though the lawyers may not appear at the hearing. This involvement of attorneys makes the WTO dispute settlement process resemble litigation in any national court.

At first sight, the participation of attorneys must be applauded because expert legal service is now available to the member states involved in the dispute settlement. Their presence is also a sign of advancement in the highly specialized area of WTO law. However, a dark side of these sophisticated advancements is that poor countries may be unable to afford representation from these expensive and specialized lawyers. In response to this problem, the Dutch government created the Advisory Centre on WTO Law (ACWL), modeling a public interest law firm, in 2001. The Centre is very active in receiving consultations and appears often before panels and the Appellate Body representing developing countries.

Another serious problem created by the increased use of outside lawyers is that they appear to create an increase in the number of issues and length of submissions. This increase may sometimes unnecessarily burden the WTO dispute settlement mechanism, which must dispose of each case within a limited period of time. It is hard to imagine how an appeal from a Panel Report of more than 1000 pages involving hundreds of issues can be adequately disposed of within ninety days as required by the DSU. Something should be done to protect the panel and Appellate Body (as well as the respective secretariat) from being flooded by an onslaught of paper.

D. Transparency of Proceedings

Proceedings in a national court are open to the public, and the court records are also basically open. One benefit of arbitration versus litigation in court is that arbitral proceedings may be kept secret from all but the parties and the arbitrator with relative ease. The WTO dispute settle-

94. EC—Bananas, supra note 52, ¶ 7-12.
96. See id. at 476 & n.376.
99. See WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 381–82 (2006) ("Notwithstanding the public perception of arbitration's confidentiality, not all court decisions have sustained such a policy. Accordingly, the parties should make clear that materials submitted to arbitration are subject to limits on disclosure that protect confidentiality." (citation omitted)); see also Christopher J. Borgen, Transnational Tribunals and the Transmission of Norms: The Hegemony of Process, 39 GEO. WASH. INT'L L. REV. 685, 712 (2007).
The WTO Dispute Settlement process is intended to be private presumably because of its diplomatic overtone and its similarity to arbitration. Hearings are not open to the public, and submissions to the panel or the Appellate Body are treated as confidential unless the submitting party chooses to make them open, as does the United States.\(^{100}\) Recently, there has emerged a new trend towards openness. The United States and European Communities (EC) agreed in their hormones dispute to make their panel proceedings open to the public.\(^{101}\) The oral hearing before the Appellate Body was open to public observation as well.\(^{102}\)

There is a slight difference in the way the relevant written rule is phrased for the panel and the Appellate Body. For the panel, DSU Article 14 expressly provides that “Panel deliberations shall be confidential,”\(^{103}\) but the Working Procedures for the panel allow the parties to disclose statements of their own positions to the public.\(^{104}\) For the Appellate Body, DSU Article 17.10 simply states: “The proceedings of the Appellate Body shall be confidential.”\(^{105}\) The “proceedings” may well include the oral hearing itself.

The Appellate Body, by its Procedural Ruling of July 10, 2008, decided to hold an open hearing in the appeal of the previously mentioned hormones dispute with a closed circuit television system.\(^{106}\) The Appellate Body reasoned that the oral hearing is not required by the DSU but instituted by the Appellate Body itself through its Working Procedure.\(^{107}\) Therefore, it continued,

the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process.\(^{108}\)

Thus, the Appellate Body preserved the right to confidentiality for third-party participants who did not agree to the opening of the hearing.\(^{109}\)

---

100. See DSU art. 13.1 (submissions to a panel), 14.1 (panel deliberations), 17.10 (proceedings of the AB), 18.2 (submissions to the AB).
103. DSU art. 14.
104. Id. app. 3, para. 3.
105. Id. art. 17.10.
108. Id.
109. See id. (noting that in this case “authorizing the participants’ request to forego confidentiality, does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body”). In addition to the United States, EC, and Canada—who agreed as participants to open the proceedings—third-parties also agreed to open the proceedings.
Though limited in form, this decision marks a significant step toward greater transparency of the WTO dispute settlement process. Although this ruling happened after I retired from the Appellate Body, I fully support this development. One of the advantages of arbitration in the municipal system is confidentiality. Though the parties can avoid undesirable publicity of their dispute by resorting to arbitration rather than litigation, they are free to agree to make the arbitral proceedings public if they so wish. General confidentiality of the WTO dispute settlement proceedings derives from the diplomatic origin of the GATT-WTO system. That fact should not prevent particular parties from agreeing to open the proceedings to the public if they regard the publicity as beneficial. In a democratic and open society, the governmental action taken by a member state within the WTO should be known to the constituency as much as possible. This candor would, in turn, enhance the legitimacy of the WTO and its dispute settlement system.

Another related problem has been the admissibility of amicus curiae briefs in the WTO dispute settlement system. Most civil law courts are not familiar with this peculiarly American practice. Therefore, the WTO membership has strongly opposed accepting amicus curiae briefs. The admissibility of amicus curiae briefs was a big issue when the Appellate Body was addressing the famous asbestos case in 2001. See generally Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EC—Asbestos]. A great number of the member states joined to oppose the Appellate Body’s decision to lay down a set of rules for accepting amicus briefs, which were expected to be numerous. See generally Communication from the Appellate Body, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/9 (Nov. 8, 2000) (announcing a new working procedure allowing amicus curiae briefs for the EC—Asbestos case). Because of the strong opposition from the membership, the Appellate Body abandoned the idea, denying all applications for leave to file briefs.

There have been no relevant official developments since. In practice, however, amicus briefs are accepted and reports mention the reality of their acceptance. See, e.g., Appellate Body Report, European Communities—Trade Description of Sardines, ¶¶153–170, WT/DS221/AB/R (Sept. 26, 2002) [hereinafter EC—Sardines]. The WTO has not reacted to this development recently. In any event, a great amount of amicus briefs are difficult to handle in view of the timeframe imposed, especially on the Appellate Body. See DSU art. 17.5 (giving the Appellate Body a maximum of ninety days to reach a conclusion from the filing of the appeal and the circulation of its report in three official languages). Panel reports, as well as parties’ and third participants’ submissions,
situation is an anomaly. I believe there should be clear and reasonable rules for this matter.\textsuperscript{116}

E. Lack of Remand Power and Completing Analysis

In all municipal systems in which the highest court reviews only legal points and has no fact-finding power, the highest court must remand a case if it finds an error in law in a lower court's decision, unless it can dispose of the case without additional fact-finding. This is because the court must give a final resolution to the dispute brought to it. Given the silence of the DSU with respect to the possibility of remand, it is understood that the Appellate Body has no such power.\textsuperscript{117} To give a final resolution to the disputes before it when reversing a panel's finding, the Appellate Body developed jurisprudence that allows it to "complete analysis" by relying, when possible, on the facts found by the panel and the facts not disputed by the parties.\textsuperscript{118}

If the Appellate Body finds that the panel erred in the application of law included in the covered agreements, the parties should be given a full opportunity to present arguments and evidence under the "correct" law that the Appellate Body will apply. "Undisputed facts" and "found facts" may exist in the panel records, but they are undisputed or found under the "wrong" law. The Appellate Body should be more sensitive about the due process rights of the parties. The adage \textit{jura novit curia} ("the court knows the law") is dangerous when applied without concern for due process. In municipal law, due process at the level of application of law is increasingly recognized as the applicable law becomes more complex. For example, the French Code of Civil Procedure now provides, in effect, that the judge cannot apply a law by her own motion without first giving an opportunity to the parties to comment on it.\textsuperscript{119} The same principle should govern WTO dispute settlement procedure. An unexpected "completion of analysis" by the Appellate Body can surprise a party in such a way as to raise justifiable concerns over due process.\textsuperscript{120} Member states should remedy the lack of


\textsuperscript{117} See \textit{Joost Pauwelyn}, \textit{Appeal Without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix It} 1 (2007).

\textsuperscript{118} Id. at 9-12.


remand power by a proper amendment to the DSU.

Conclusion

There are, of course, many other topics that I would like to discuss. My fellow panelists in this Symposium addressed some of these topics in turn. My conclusion is brief: There is still a certain contradiction between the original design of the WTO dispute settlement as an extension of diplomatic negotiation and today's reality of increasing "judicialization." Much has been discussed about the judicialization of the WTO dispute settlement process. Whatever its exact content, the WTO system has brought about a revolutionary change to world trade. Some unprecedented events have occurred under the WTO regime. For example, a small country like Antigua can now sue an economic and political giant like the United States and win. Peru has also won this type of victory against EC. This reminds us of instances in our municipal courts when a small consumer sues a large corporation (or the government itself) and actually wins. Prior to the WTO system, such occurrences rarely, if ever, happened in the international community. The relative power of nations determined justice. We may even venture to say that finally, the rule of law has been brought to the international community.

When Mr. Pascal Lamy, the Director-General of the WTO, recently spoke on the current issues facing the WTO, he used only one sentence to mention the dispute settlement system. He was talking about the Doha Development Round, which is only slowly progressing despite his passion and ardent effort to push it forward. But I wonder what the WTO would be like today if the dispute settlement system, which has been functioning since the establishment of the WTO in 1995, did not exist. From 1995 to January 2008, the DSB received 369 requests for consultation and circulated 115 panel reports. The DSB has also adopted 87 Appellate Body reports as of August 1, 2008, during which time there were no amendments or additions to the body of the WTO agreements.

121. See generally Ernst-Ulrich Petersmann, Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice, 10 J. INT'L ECON. L. 529, 531 & n.5 (2007) (discussing GATT's anti-legal and diplomatic traditions).
123. See generally EC—Sardines, supra note 114.
The dispute settlement mechanism has been actively working, despite a stalemate in the Doha Round. Mr. Lamy is perhaps too preoccupied with the stalemate, as he should be, to think about the current overall functioning of the organization. I ask myself how much centripetal force the WTO could enjoy today without its dispute settlement system working as soundly as it has. The Doha Round, if successfully concluded, will add some new agreements and amendments. But the current body of trade rules, which is allegedly being violated on a constant basis, gives rise to enough disputes to keep the WTO panels and Appellate Body busy. Many regard the dispute settlement system as the best working part of the WTO. It is the WTO's infrastructure that keeps the whole WTO system afloat and keeps its member states coherent with each other. The member states of the WTO need the organization for its well-functioning dispute settlement mechanism. Given the importance of the system, the WTO dispute settlement mechanism should be improved.

Thus far, a relatively small number of member states have utilized the WTO dispute settlement system. Out of about 150 states, approximately 40 have participated in the process as complainants. The United States and EC are the most frequent users of the system. I do not think that this is because the rest of the member states do not have grievances or complaints. Rather, most of them do not have the resources to recognize a problem and, if a problem is found, for making a case out of it before the panel. The WTO Secretariat regularly conducts a capacity-building program on WTO law in developing countries. As mentioned before, the Advisory Centre on WTO Law in Geneva has been doing a remarkable job. Additionally, some expert law firms have provided developing countries with pro bono legal service.

I dream of a time when all member states are able to initiate a WTO case, when necessary, as easily and ably as the United States and EC can today. As everyone knows, the same process of improved access to justice has taken place in the domestic scene of many countries. By the time my dream comes true on a global scale, the WTO's dispute settlement mechanism may have to be totally reorganized by making the panel and Appellate Body members full-time and by changing their titles to judges of the World Trade Court, which may become independent from the WTO village assembly even in form.

128. See supra note 1 and accompanying text.
129. See BROUDE, supra note 63, at 80.
131. See id.