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The Role of Lawyers in the World Trade Organization

Peter D. Ehrenhaft*

The World Trade Organization is a marvelously ambitious effort of now 140 countries to bring the rule of law to international trade. The WTO is a logical extension of the inspired ideas of the draftsmen of the General Agreement on Tariffs and Trade (GATT), who recognized at the end of World War II that the seeds of that conflagration were sown, in part, by the chaotic condition of international trade following World War I.

During that inter-war period, the United States adopted its Antidumping Act of 1921 and its Smoot-Hawley Tariff Act of 1930. Both survive to this day. By 1934, however, the Roosevelt Administration proposed reciprocal trade agreements intended to soften the impact of the barriers to our markets those laws created. The GATT was a logical extension of that concept, essentially enshrining as the two keystones of freer trade “national treatment” and “most-favored nation” commitments. Indeed, the GATT is sometimes characterized as two paragraphs—with two thousand pages of exceptions. The WTO Agreements now cover twenty-seven thousand pages.

From the beginning, the GATT addressed the settlement of disputes between trading nations. Disputes were recognized as inevitable. The GATT dispute resolution procedure was part mediation and part arbitration. It depended on the good offices of experienced representatives of unaffected members to help the disputing parties find common ground to settle their differences. Increasingly, however, particularly representatives of the United States sought a more rigorous procedure leading to a judgment that one party was right and the other one was wrong—and the latter had

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either to correct its ways or provide compensation to the aggrieved complainant.

Increased American attachment to this rule of law model through the 1980s prompted U.S. negotiators of the WTO agreements to seek a greatly strengthened Dispute Settlement Body (DSB). This Body maintained the previous system of panels to hear—and settle—trade disputes. In addition, an Appellate Body was to be created with semi-permanent judges to review the legal issues raised in panel reports. Moreover, and critically, the judgment of a panel was to be implemented by the affected parties unless a consensus of all the WTO's members decided it need not be adopted.

Paradoxically, although these results of the WTO negotiations appeared to be a triumph of the rule of law, the United States, in particular, was quite diffident about the notion that private lawyers should have a role in the system. The concern of the United States about including private lawyers as participants in the dispute resolution procedures of the WTO sprang from a number of factors. They included, first, a fear that such lawyers might be excessively aggressive and unable or unwilling to recognize the possible advantages of compromise and only partial victory. Concern was also expressed about such lawyers' possible conflicts of interest and their inability to keep confidential the information to which they might be given access in the course of such proceedings. In negotiating the NAFTA before the conclusion of the Uruguay Round creating the WTO, both Canadian and U.S. negotiators were reluctant to give private counsel the right to appear on behalf of specific industries or economic interests in their countries before NAFTA dispute settlement bodies—other than under Chapter 19 that created special panels in lieu of court review of antidumping and countervailing duty orders. Neither government wanted the lawyers for U.S. Steel to argue independently for their client's views in other NAFTA—or, later, WTO—forums, lest it lessen the governments' ultimate control of their trade policy.

This perspective, arguably proper in the NAFTA context, lacked an appreciation of the problem of many members of the WTO. Small and often new states in the organization rarely employ experienced WTO specialists in their governments. They often lack any lawyers versed in WTO procedures, able to represent their positions in WTO dispute settlement proceedings. If their rights are to be protected or vindicated, they need access to advocates, likely to come from the private bars of the U.S. or U.K. Eventually, the Appellate Body agreed and the practice appears to have evolved to the point that private counsel employed by a government participant can now appear in both appellate and panel proceedings on behalf of a government. From that narrow prospective, the private bar has won its battle for access.
Attached as Appendix A is a document from the American Bar Association. It includes the recommendation of its Section of International Law and Practice, adopted by the Association's House of Delegates in 1998, urging the WTO to take formal action to permit private counsel to appear in dispute settlement procedures. The recommendation was accompanied by a report that provides a historical perspective of the issue and attaches a proposed “Code of Conduct” that the Committee preparing the report thought would be useful to address some of the concerns of the U.S. government with regard to this development. The Author chaired the Committee that prepared this report.

Private counsel do now appear in WTO dispute settlement proceedings, but no “Code of Conduct” has been adopted. Perhaps it is unnecessary. Nevertheless, it provides an interesting focus for further discussion.

Quite apart from the narrow question of counsel in dispute settlement proceedings is the far larger question of the role of lawyers and “hard law” in a body such as the World Trade Organization. Is the WTO the type of organization that can and should be viewed as bound by the law existing at its creation, as expressed in the agreement signed at the time and then ratified by the members? Or is it capable of making new laws that are not subject to unanimous consent or ratification? If it has a rule making function, is it accountable to its members in terms of such values as democracy and transparency?

These are the much more interesting and pervasive problems than the simple issue of private lawyer participation in WTO dispute resolution proceedings. They impact our vision of the proper role of the WTO in a fast-changing world of diverse states that are at different stages of development and with often competing values.

Lawyers, particularly those trained in the United States, are concerned about accountability and transparency in the law. The citizens of other countries may mock the extent to which U.S. lawyers take to court issues that they would never present for adjudication. They decry the volume of our litigation. At the same time, few, if any, other countries have developed our keen appreciation for the need for imposing accountability by all who can exercise control over others. Be they presidents or teachers, CEOs or shop stewards, or even parents and social workers, everyone must be ready to explain their behavior to a judge and abide by core principles in exercising their authority. Some of our ideas, such as class actions, punitive damages, and freedom of information, to cite but three relatively unique elements of the U.S. legal system, are instrumental in achieving that accountability. It is a necessary part of our concept of legitimate government.

Can we fit the WTO into that model? Its members designate representatives pursuant to their constitutional government
organization. But they may also delegate to the WTO decision-making and law-creating rights and obligations that are beyond practical accountability. Is the United States prepared to cede some elements of its sovereignty to such an organization? If so, must it assure access to the organization’s decision-making bodies by ordinary citizens and non-governmental organizations? The civil society representatives claim that their access is necessary to render the Organization’s decisions legitimate. But most NGOs are self-selected, self-funded and often no more representative of democratic values than any industry, company, labor union, or other interest group. Moreover, the unequal funding of NGOs and their concentration in but a few countries provides an added base for questioning their claims that their participation is indispensable to legitimate rule making.

It is in this area of legitimization of the WTO in which our concerns about the rule of law should be most pointed. Hopefully the commentaries and presentations at this symposium will help us to focus on these transcendent issues.

Obviously this issue is much larger and deserving of much more time than my brief comments permit. But I will venture a few points.

First, lawyers could be welcomed at all levels of the DSB. As this has been achieved, there is not much more that need be said other than that a Code of Conduct may be a useful adjunct to this practice.

Second, it is not the proper role of the Secretariat to provide counsel to members involved in dispute settlement procedures. As a way to obtain advice “on the cheap,” some of the less developed countries have relied on advice given by current or former GATT officials or lawyers who are also paid by the organization. This type of legal aid to governments by the body that is deciding cases is inappropriate and inadequate. A separate body—external to the WTO and funded outside the WTO budget—could usefully provide expert legal services to countries lacking human and monetary resources independently to pursue their rights and obligations. Moreover, I do not doubt that highly expert lawyers in a number of countries—including the United States—would be willing to appear on a pro bono or reduced fee basis in the WTO for states that cannot afford U.S. billing rates. But observing the entertainment budgets of many missions to Geneva also makes me skeptical of the claims that funds are lacking to retain counsel for disputes important enough to pursue.

Third, U.S. requests for transparency in dispute settlement procedures, no less than in other rulemaking functions of the WTO, are proper and should be pressed. DSB procedures could partake of mediation or arbitration in which confidential communication is often essential to achieving a successful outcome. In fact, however, most panel procedures begin only after negotiation and mediation have failed. They become adjudicatory procedures in which the positions of
the parties ought to be available and decisions made public as soon as they are released to the parties. Similarly, formal proposals to the other organs of the WTO ought to be available to all when filed. Such procedures do not prevent private negotiations; they do not compel the advance disclosure of all negotiating positions. But they allow the public to know what issues are on the table. That, alone, helps assure both accountability and opportunity for comment.

Fourth, unlimited access by NGOs to DSB procedures or other WTO functions is not necessary or desirable. NGOs may have knowledge and views that may be useful for decision-makers. The right of NGOs to file briefs and to request invitations to appear ought to regularized. But, as the Appellate Body has done, while accepting amicus briefs, the tribunal need not accord the briefs any weight nor discuss their contentions in decisions. As noted, NGOs are too self-directed and unequally funded to be accorded greater appearance rights. Their funding sources and “real parties at interest” are often undisclosed. On the other hand, a rigorous policy of exclusion will deny the WTO tribunals useful and unique information possibly not otherwise available, and may undermine public confidence in the institutions of the WTO and their decisions.

Fifth, periodic oversight review of WTO participation should be encouraged in all member states. Democratic values require periodic opportunities for the public to review the results of their governing institutions. Governments conduct periodic elections for that purpose. The WTO—and most other international organizations—provide no such reviews by other than the governments who are represented within their membership. But this is a relatively closed group. Some form of a review in which citizens and NGOs are assured an opportunity to comment and to see and hear the decision-makers is desirable if the rulemaking functions of the organization continue to expand.
AMERICAN BAR ASSOCIATION*

SECTION OF INTERNATIONAL LAW AND PRACTICE
RECOMMENDATION

RESOLVED, that the American Bar Association:

1. Supports the further development of the dispute settlement procedures in international trade matters created under the Uruguay Round Agreements establishing the World Trade Organization (WTO);

2. Endorses procedures to assure all parties the right to be represented by counsel of their selection, including non-government personnel duly accredited by the government using such assistance, in all phases of the dispute settlement process from the request for consultation to the implementation of panel and WTO Appellate Body decisions, including the gathering of relevant facts, the preparation of written submissions to panels and the WTO Appellate Body, attendance at hearings, the presentation of oral argument to those presiding over the proceedings and participation in settlement negotiations; and

3. Urges that, in the context of the scheduled 1998 review of the WTO's Dispute Settlement Understanding (DSU), the United States supports appropriate policies, rules and procedures to enable any party in a dispute subject to the DSU to seek, employ and use counsel of such party's selection for participation on behalf of such party at all phases of the proceedings.

REPORT

Private Counsel in WTO Dispute Settlement Proceedings

Overview

Through this Recommendation, the American Bar Association (ABA) expresses support for the right of Member countries of the World Trade Organization (WTO) to retain legal counsel of their choice to represent their interests in all phases of WTO disputes settlement procedures.

The dispute settlement process of the WTO is one the United States has long championed. It is critical to a viable rule-oriented international trading system. The ability of all countries to obtain competent legal advice bears directly on the credibility and effectiveness of the system.

This Recommendation builds upon and is fully consistent with the resolution adopted by the ABA at its Annual Meeting in 1993 supporting the creation of the WTO and its strengthened multilateral dispute resolution procedures.

I. Background

The Agreements creating the World Trade Organization (WTO), most of which entered into force in 1995, included an important Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the "Dispute Settlement Understanding" (DSU). The DSU was actively supported by the United States. In his Statement of Administrative Action (SAA) sending the WTO Agreements to the Congress for implementation, the President stated:

"The [DSU] responds to long-held U.S. concerns regarding international trade disputes. As the country that has used the GATT dispute settlement mechanism more than any other country, the United States has a strong interest in having an effective process to enforce U.S. rights under the Uruguay Round agreement."

Inherent in the DSU is the recognition by the WTO Members that the GATT 1994 and other Uruguay Round Agreements contain an expanded set of legal rights and obligations among all member countries for the conduct of international trade. As such, the DSU is an indispensable element of the effort to promote the rule of law among nations. As discussed below, the GATT 1994 and other

Uruguay Round Agreements, to the extent they represent a move to a more rule-oriented trading system, raise an important question regarding the use by nations of private counsel in proceedings in which one or more sovereign countries seek to enforce their legal rights and obligations.2

From an historical perspective, access to private counsel for purposes of resolving trade disputes under the pre-Uruguay Round regime was less of an issue, given the nature of the dispute resolution process. However, the current structure of the GATT and CVTO depend upon a more formal dispute resolution system. The need to maintain the integrity of the dispute resolution process as a critical element of this structure, and the right of sovereign countries to defend their rights in this new structure, argue against restrictions on access to and use of legal experts of any nation's choice.

A. The Historical Context

The draft charter for an International Trade Organization drafted immediately after World War II (but which never came into effect) included a major chapter on dispute settlement, with some recourse to the International Court of Justice (after completing elaborate ITO procedures). The General Agreement on Tariffs and Trade, (GATT), prepared at the same time, included only sketchy provisions on dispute settlement. The original intent of the negotiators in 1947 and 1948 was that the ITO would be the institution, and the GATT merely a treaty of tariff concessions to be implemented under the ITO umbrella.

The GATT includes brief references to disputes (Articles XXII and XXIII) but they focus on the concept of “nullification or impairment,” rather than strict breach of treaty obligations. Even though the language empowered the GATT Contracting Parties to make “rulings,” diplomatic habits of many participants led some to argue that the GATT dispute resolution procedures were not to be too “legalistic” or “juridical,” but rather were designed only to facilitate negotiation of settlements.

Over the years, GATT practice began to cause dispute settlement procedures to focus more precisely on treaty obligations and their interpretation. In the late 1950's, the GATT shifted from the context of “working parties” (with government representatives), to “panels” consisting of several independent experts not acting as government representatives. In 1962, a major case brought by Uruguay against many industrial country trade practices caused a panel to create the

2. The term “private counsel” is used broadly to include any attorney or legal adviser who is not a full-time or permanent employee of the government of a member nation.
concept of "prima facie nullification or impairment" whenever a breach of obligations could be established. This would shift the burden to the defending country to show the absence of nullification or impairment. The essential effect of these developments was to make the process much more focused on the law and its application. This practice was affirmed and embodied in an "Understanding" adopted by the GATT at the end of the Tokyo Round negotiations in 1979.

These trends continued as many more cases were brought and reports took on more of a legal flavor. In the 1980's, a legal division was created in the GATT and the practice developed of assigning a lawyer of the GATT Secretariat to work with each panel, so that by the late 1980's the panel reports were much more rigorously worded (and much longer). Proceedings became more like administrative hearings, with published findings and recommended corrective action rather than efforts to reach a compromise settlement. Increasing the dispute settlement function developed into a more rule-oriented system declaring parties' rights and obligations. It was in fact admiration of these developments that partly led various trade interests to urge the GATT to embrace new subjects, such as services and intellectual property. In addition, other bilateral or regional treaties established dispute settlement procedures which emulated the GATT practice as it evolved.

B. The Present Perspective

With the Uruguay Round Agreements, panels are expected to deal with a greatly enlarged set of issues, reflecting the expansion of WTO membership and the inclusion under WTO auspices of agreements affecting services (professional, tourism and telecommunications), intellectual property rights and foreign direct investment. In fact, the use of the panels has exceeded expectations to date. As of October 1997 cases numbered more than 100 (in less than three years). See Exhibit 1. The DSU seems to push the dispute process further towards an "adjudication model" although there are still references in the DSU that suggest the importance of the earlier idea of assisting settlements. For example, the DSU provides:

"3.2 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members of the [WTO] recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law...."

However other clauses may be seen to refer back to notions of conciliation and negotiated settlement. For example:
"3.4 Recommendations or rulings made by [panels] shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

But further language can be read as confirming the "rule orientation" rather than negotiation emphasis, even with a view that satisfactory settlements are important. For example:

"3.5 All solutions to matters formally raised under the consultation and dispute settlement rules and procedures of the covered agreements, including arbitration awards, shall be consistent with those 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.

"3.6 Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the [WTO] and the relevant councils and committees, where any Member may raise any point relating thereto."

Practice regarding procedures under the DSU is still evolving, influenced by the experience under GATT as modified by the new treaty language, including the requirement that the newly created Appellate Body expressly review the legal issues raised before the panel whose report is being appealed. At this time:

-- Panelists are selected from many countries and often are not lawyers, much less lawyers with a background in serving as judges.

-- Governments appear before panels to defend government interests under international agreements and to protect their sovereignty. Of course, these interests can - and often do - coincide with interests of private parties in their own countries.

-- Governments claim a greater interest in preserving "the system" than prevailing in a particular matter.

-- Submissions to panels by governments are regarded by some governments to be confidential diplomatic exchanges, although the rules allow governments to make their own submittals public within certain constraints.

GATT and WTO practice has not been uniform regarding the use by governments of private counsel of their selection outside the panel hearings. No DSU language addresses this question, and general international practice (discussed below) quite clearly leaves such decision to the government concerned. The GATT 1995 Analytical Index on Article XXIII dispute settlement cases has nothing reported on this question. It has been reported that when a government objected, private counsel were not permitted in the hearing rooms of the panels, although private counsel did attend in cases in which no objection was voiced and often worked with governments outside the hearing room in the preparation of cases and written submissions. Both prior to and since the creation of the WTO, it has been the United States government that has most often voiced the view that
private counsel should be excluded from hearings, although other governments have also taken that position.

In the GATT era, the exclusion of private counsel was not based on a conscious decision of the Contracting Parties. Rather, it was based of a view that panels were essentially diplomatic conferences between government representatives designed to resolve intergovernmental dispute. Nevertheless, private counsel were not infrequently "in the corridors." Affected private interests sought to press their views on government representatives and governments saw their interests as similar (if not identical) to such private interests, and benefited from the factual and legal expertise of lawyers representing private parties. Governments often welcomed or retained counsel sewing on bases ranging from fully paid to limited honoraria to pro bono, in writing submissions, gathering evidence and preparing government spokespersons who actually "appeared."

In the recent WTO panel proceeding regarding claims by several countries, including the United States, that EC regulations concerning banana imports violated the GATT, an objection was raised to the presence in the proceeding of private counsel utilized by a smaller country which did not have access to in-house governmental expertise on WTO dispute proceedings and its private attorneys was excluded. The panel stated in its report:

"It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to panel meetings if any party objected to their presence and in this case the Complainants did so object.

"In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at panel meetings.

"The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.

"Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality. "There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became common practice, would be in the interest of smaller Members as it could entail disproportionately large financial burdens for them.

"Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of the WTO dispute settlement proceedings.

"We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of panel proceedings, nor to receive legal
Panel Report (US) at 275-276.

Certain questions may be raised about the accuracy of this panel report and whether, even if accurate, this limited practice can be considered influential under general principles of international law. More importantly, the Bananas panel refers to a special agreement for the procedures in that case which may control it. The Panel Report was then appealed to the Appellate Body and the issue was again raised. The WTO Appellate Body did not review the issue of counsel before the Panel because that issue was not appealed. However, when the Complaining Parties, including the United States, objected to the presence of private counsel for other parties before the Appellate Body as well, the Appellate Body rejected the objection, noting that if found “nothing in the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings.” Having considered the full panoply of concerns with private counsel participation in WTO dispute resolution proceedings, as articulated by the U.S. and other governments the Appellate Body ruled 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.”

While the Appellate Body specifically noted that the issue of private counsel participation in the underlying panel process was not formally appealed, and that its decision was limited to participation in the Appellate Body hearing, a number of observations regarding access to private counsel appear to be applicable across the board to any form of dispute proceeding within the WTO context. For example, the Appellate Body specifically remarked that “it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings.”

Despite this recent ruling of the Appellate Body, no rules or guidelines have been adopted by the WTO regarding the ways in

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3. European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/G3R at 5 (Sep.9, 1997).
which countries may work with or retain outside counsel. No information is available at the WTO as to whether a government has retained or is working with outside counsel, whom counsel actually represents, what, if any, conflict-of-interests check has been made by the government, what confidentiality obligations a Member country has imposed on outside counsel or who is paying for the counsel retained. At the same time, we note that other international agencies and fora also impose no such requirements for submitting information about persons representing the participating governments. The WTO has not decided whether outside counsel may be properly “accredited” by a country as a member of that country’s delegation to the WTO for a DSB proceeding. The WTO Secretariat only determines whether an individual has been named to a Member’s delegation, allowing any delegation to decide for itself who may serve that Contracting Party. No other WTO standard exists for reviewing the credentials or qualifications of delegates.

The GATT, and now the WTO, does provide assistance to developing and least developed country members who request such assistance. See Procedures Under Article XXIII, Decision of April, 1966 [“1966 Decision”]. This involves both ability to request the good offices of the Director-General “with a view to facilitating a solution” [1966 Decision, para. 1], the provision of technical assistance from the WTO Secretariat to developing countries involved in a dispute [DSU Art. 27.21, the conduct of “special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members’ experts to be better informed in this regard” [DSU Art. 27.21, and special procedures for least-developed country members including a requirement of “due restraint” by other countries in challenging conduct of such countries [DSU Art. 24.1]. The “qualified legal expert from the WTO technical cooperation services” provided to developing countries upon request pursuant to DSU Art. 27.2 have often been individuals with long experience in GATT and now WTO matters. Thus, developing countries, regardless of financial resources, have access to legal experts on WTO issues if involved in a dispute. However, such experts do not appear at panel hearings as counsel to participating governments.

II. The Issues Now

There appears to be no solid legal basis for a rule under GATT or the WTO to limit a sovereign nation’s right to choose for itself what representation it will utilize in the proceedings of the organization. Even if there were some element of constraint under GATT, it can be argued that the WTO, as a new organization, with new treaty language, could find reason to depart from such constraint.
A number of interests support the right of governments to decide their representation including the use of private counsel, unless or until there is concrete treaty or treaty-based decisional language to the contrary:

-- Fundamental concepts of due process suggest that parties to a dispute should be permitted to seek the assistance of advisers and advocates.

-- Governments without the internal resources to defend their interests, either as respondents in proceedings or complainants, may need private counsel from their own or other countries, to serve as their advisors and spokespersons to enable them to participate in the DSB in a meaningful way.

-- Governments may wish to have private counsel serve as their representatives, because those governments may view their national interest in a dispute identical to the interests otherwise represented by private counsel.

The principal objections to use of private counsel appear to be:

-- A fear that private lawyers may introduce an adversarial, excessively litigious style of representation that is alien to the system and would undermine its effectiveness to assist in the settlement of disputes.

-- Private lawyers would be subject to no effective discipline for misconduct or breach of obligations of confidentiality or conflicts of interest. There is no “WTO bar,” and the lawyers’ home bars may be either unable or unwilling to exercise effective discipline.

-- Private lawyers, retained on a case-by-case basis, may not convey the perspective of governments that have a commitment to an enduring set of rules and institutions under the WTO.

-- Participation of private counsel complicates issues of confidentiality -- both as to the business confidential data produced in a proceeding and as to the very conduct of the proceedings, such as the settlement postures of some participating countries and the panelists’ reactions to them.

-- Some countries cannot afford to retain private counsel and would be disadvantaged by being unrepresented. Other countries lack the internal resources to match the efforts opposing private counsel might bring to bear for Members.

-- Panelists are insufficiently experienced to deal with skilled lawyers, particularly lawyers who may advocate different -- even opposing -- views in different cases. -- The number of lawyers available for this work is limited, and the practice could become excessively concentrated in the hands of a few U.S. and E.U. firms or individuals.

-- The use of private counsel creates risks of conflicts of interest and other ethical concerns which the WTO is not equipped to address.
III. International Law and the Experience of Other International Dispute Resolution Agencies

A. General Principles of International Law

One of the general principles of public international law is that sovereign states are free to choose who represent them before international organizations, absent specific rules to the contrary in the charter of the organization. The DSU contains no rules limiting the right of a Member State of the WTO to be represented by counsel or experts of its choice. In Bananas the WTO Appellate Body has recognized that right in its proceedings. It has also noted that the WTO Agreements are “not to be read in clinical isolation from public international law.” (United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R at 18 (Apr. 29, 1996).

The customary international law principle of “sovereign equality of States” includes the freedom of States to choose representation of their choice, whether before international adjudicatory bodies or subsidiary organs of international organizations. As stated by a leading commentator on the International Court of Justice:

“No attempt is made in the Statute [of the ICJ] to regulate the manner by which the parties shall be represented before the Court and this is a matter which is largely the outcome of the practice of States in international arbitration... The texts governing the working of the Court are silent concerning the qualifications of counsel and advocates. This is a domestic matter for the litigating State to settle for itself with due regard for the status of the Court.”

S. Rosenne, The Law and Practice of the International Court, 1965, at 214-16

The United Nations International Law Commission (ILC) addressed the principle of sovereign equality during the drafting of a Convention on the Representation of States in Their Relations with International Organizations of a Universal Character. In that context, the ILC Special Rapporteur explained the background to the ILC’s approach on selection of advisers on delegations:

“The Special Rapporteur is of the opinion that the sending State should have a wider freedom of choice with respect to the members of its delegation to organs of international organizations and to conferences convened by such organizations [as compared with members of permanent missions]. One of the salient features of present-day international relations is the increasing number of subsidiary organs set up by international organizations to deal with very specialized matters of highly technical character which require the enlisting of the services of experts possessing the necessary training and experience.... For these reasons it is highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to such organs and conferences.”
B. Practice of Other International Dispute Resolution Tribunals

Of all major international dispute settlement tribunals, only NAFTA limits in any way a member country's choice of counsel or the degree of involvement by counsel in a proceeding.

1. NAFTA - Rule 25(b) of the "Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement," negotiated by the NAFTA Parties pursuant to NAFTA Article 2012: 1 and applicable to disputes other than reviews of anti-dumping and countervailing duty proceedings, permits advisers to be present during hearings, provided they have no financial or personal interest in the dispute. However, the rule expressly states that they may not address the panel. This is the only discovered instance in which the signatories of the rules of an international dispute resolution tribunal have chosen to limit the role of private counsel. Rule 25(b) also limits "representatives" of the participating Governments to "employees" of those governments (without defining that term).

The NAFTA Rules were adopted in July 1995, after the NAFTA entered into force, and are probably not widely known. They are curiously aimed solely at the oral presentation by "advisers" in hearings before panels and impose a conflict-of-interest standard only if the adviser does (or his client Party wishes the adviser to) attend the hearing. The Rules contain no limits on Parties using "advisers" for other purposes, such as preparing written submissions. Moreover the conflict of interest portion of the Rule is difficult to understand. It is written in the present tense and thus suggests that only "advisers" with currently active "interests" in the matter before the panel are barred. But "interests" are not defined and might be interpreted (as some U.S. government personnel do) to be the lawyer's representation of a different client in a different industry but with a common issue of law that may both matters. However, as is discussed below, this is usually not viewed as a "conflict" under local bar rules of ethics. Rule 25(b) also does not prevent a government from accepting an "adviser" on secondment as a "special employee" (as the U.S. Government does from time to time in other contexts), and thus evading entirely the restrictions on "advisers."

4. The ILC draft Convention has not been implemented because of concern of some states (including the United States) regarding limits on their right to object IO diplomats proposed to be assigned to permanent missions. However, no objection has been publicly stated to the Special Rapporteur's view that "it is highly desirable, if not indispensable, that the sending State should enjoy the widest possible freedom in the choice of the members of its delegations to [international] organs and conferences."
It is difficult to understand the rationale for this Rule, and none has been published. Some speculate it was adopted by the U.S. and Canadian negotiators seeking a way to protect themselves from the requests of “advisers” representing industries in their own countries for a right to participate in panel proceedings. By preventing all advisers to speak, they had a “neutral principle” by which to decline proffered “help” from domestic interests (which help might be counterproductive to a settlement the country nevertheless sought). However, the domestic concerns of democratic governments regarding access by private interests in their own countries ought not to justify a rule denying third parties—many without internal legal resources comparable to those available to the U.S. or Canadian governments—the right to rely on advisers in all phases of WTO proceedings. Interestingly in Bananas, the Canadian Government supported the request of St. Lucia to be represented by private counsel before the Appellate Body.

It has also been suggested that the objection of the United States Government to the right of other governments to be represented by private counsel at hearings stems from a desire to keep the issue as a “bargaining chip,” to be traded for concessions the U.S. Government is seeking regarding, for example, what it sees as excessively strict rules regarding the confidentiality of the proceedings. However, the right of counsel seems so fundamental an aspect of WTO proceedings as they are developing that it should not be held hostage to other legitimate goals of U.S. trade policy.

2. Other adjudicatory fora. The Statute of the International Court of Justice (ICJ) expressly permits parties to engage counsel to represent them. According to the Court’s Registrar, Article 42 of the Statute makes clear that:

“There are no limitations on the choice of counsel... Any person retained by a State to appear on its behalf in proceedings to which it is a party may do so without further formality and without regard to nationality or qualifications.”

(Letter dated 7 March 1997 from Eduardo Valencia-Ospina, Registrar, to C. Christopher Parlin).

Thus, the countries party to the ICJ Statute chose to follow the customary international law standard and imposed no restrictions on the role of outside counsel in disputes before the ICJ.

In two other well-known international dispute resolution tribunals, the parties explicitly permitted disputing parties to be represented by outside counsel. Rule 18 of the Arbitration Rules and Rule 18 of the Conciliation Rules of the International Centre for the Settlement of Investment Disputes (ICSD) expressly permits parties to be represented by counsel of their choice. Article 4 of the Rules of the Iran-United States Claims Tribunal, which replicates Article 4 of
the UNCITRAL arbitration rules, also provides that parties may be represented or assisted by persons of their choice. For proceedings before the European Court of Human Rights, the Inter-American Court of Human Rights, the Permanent Court of Arbitration and the United Nations Compensation Commission (adjudicating claims against Iraq), there are no limitations on who may represent a Government party.

3. Other International Organizations. The practice of international organizations, although not directly relevant to analysis of the WTO’s limitation of the role of outside counsel in panel proceedings, confirms the almost universal adherence to the customary international law principle that sovereign states are free to choose who represents them. Definition No. 1005 in the Annex to the Constitution of the International Telecommunication Union (ITU) explicitly provides that “Each 10 Member shall be free to make up its delegation as it wishes.” No organ of the United Nations imposes any restriction on the composition of delegations, which may be comprised of technical experts, including lawyers, drawn from the private sector. The same is true with respect to the International Labour Office (ILO), the Organization of American States (OAS), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO), in all of which the member states are free to accredit whomever they wish as members of their delegations to meetings and conferences. Under the Multi Fibers Agreement, by which a Textile Surveillance Body was created, now succeeded by the Textile Monitoring Body under the WTO umbrella, in at least two cases private U.S. counsel for small countries (but not made a part of the countries’ delegations) were asked to withdraw from oral arguments at the request of the U.S. government representatives. They did so. However, no rules have been adopted by the new Body that either sanction or prevent a repetition of such an event.

IV. Issues of Concern

A number of proper concerns have been identified. However, each can be addressed without a blanket exclusion of all private counsel from the WTO dispute settlement process:

A. Confidentiality

This issue relates to two types of information: (i) confidential (including diplomatic) information developed in the panel proceeding itself, and (ii) confidential information (primarily business data) which may have been generated in the underlying matter or dispute which is the subject of the dispute settlement proceeding. For purposes of this discussion, the term confidential information, when
used in a general sense, includes all the information which may be considered confidential, ranging from business confidential commercial information developed in the underlying proceeding to diplomatic information provided by member states during the proceedings to the WTO panel. For a variety of legal as well as practical reasons, the possibility of the unauthorized disclosure of confidential information by private counsel should not preclude the participation of such counsel in WTO dispute settlement proceedings at all levels; it is merely a question of determining how to deal with such an occurrence.

Private counsel have participated in a significant number of dispute settlement proceedings conducted under the aegis of a variety of other international organizations without apparent problems relating to the disclosure of confidential information. Moreover, private counsel have formally represented and informally advised member states in a number of previous GATT and WTO proceedings without apparent instances of unauthorized disclosure of confidential information. Most of this representation involved preparation and review of written submissions, rather than participation in oral proceedings before the panels. However, the issue of disclosure of confidential information exists with respect to the written submission stages of a panel proceeding, whether or not counsel participates in any oral hearings. The history of past proceedings involving private counsel suggests that the unauthorized disclosure of confidential information has not been a problem.

WTO panel reviews of government proceedings or activities involving business confidential information ("BCI") submitted by private parties has increased since the WTO was established and is likely to continue to do so. Dispute settlement proceedings under the DSU, such as the Kodak/Fuji Film proceeding initiated by the United States against Japan, will likely involve information concerning the activities of private companies of a business confidential nature. Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (The "Antidumping Code") and Article 4 of the Agreement on Subsidies and Countervailing Measures (The "Subsidies Code") provide for DSU dispute settlement proceedings involving the review of member state antidumping and countervailing duty determinations. The underlying antidumping and countervailing duty investigations necessarily involve BCI submitted by parties to such investigations. Disclosure of such BCI to private counsel unregulated by the submitting government agencies would be a matter of concern to government agencies soliciting such information as well as to the private parties submitting such information in the underlying investigations.

However, in most cases, WTO dispute settlement proceedings could be conducted without the need to disclose such BCI to private counsel. The majority of disputes made subject to WTO panel review
APPENDIX A TO COMMENTS

involve questions of "law" in which the fact analysis involves otherwise public information. Where review of BCI is involved, public summaries of such information can be provided in most cases without disclosing confidential information in a manner harmful to the private parties originally submitting such information. Furthermore, a commitment to maintaining the confidentiality of any BCI, similar but not necessarily identical to U.S. administrative protective orders, could be adopted.

Sovereign governments may well be unwilling to submit BCI in WTO dispute settlement proceedings whether or not private counsel represent parties to such proceedings. Submitting governments may view unauthorized disclosure by government officials of other parties involved in such proceedings just as, if not more, likely than disclosure by private counsel. In any case, the involvement of private counsel does not generate a concern which would not otherwise arise without their participation in such proceedings. It is also possible that BCI submitted in WTO dispute settlement proceedings could be reviewed only by the panel members and not the parties to the proceeding. In such a case, the involvement of private counsel would not create any issue related to the unauthorized disclosure of confidential information.

Finally, procedures for allowing private counsel to play a role should require all such lawyers to execute a statement binding him or her to adhere to a Code of Conduct developed by the WTO through the DSB Secretariat, which would prohibit unauthorized disclosure of confidential information. (A draft of such a Code is attached.) Sanctions for the violation of such commitment would include removal from the pending dispute proceeding, disbarment from future WTO proceedings, and referral of the violation to the appropriate bar or other professional association for appropriate sanctions. The prestige attached to the opportunity to participate in a WTO dispute settlement proceeding would, for practical purposes, serve as a strong incentive for private counsel to conduct themselves in a manner which would insure their continued participation in the on-going, as well as future proceedings.

B. Ethical Issues.

Another concern with the role of private counsel in WTO proceedings involves an ethical problem perceived by some in the possibility that private counsel in a particular matter might previously have argued or may thereafter argue a different or even opposite point of view. However, lawyers involved in international trade matters -- probably no less than in many other areas of the law -- may well and often do represent clients with different interests. On one day a trade lawyer may represent a U.S. company seeking the imposition of antidumping duties; on the following day that same
A lawyer may represent a foreign producer seeking to avoid such duties. Corporate lawyers represent both acquiring and target companies; patent lawyers represent both licensees and licensors; trial lawyers are seated at the plaintiff’s table in one case and appear for the defense in the next. The U.S. Government, itself, in trade matters as in many others, appears on both sides in disputes and urges a strict reading of the applicable rules in one case and a broader interpretation in another.

An examination of the rules of professional conduct applicable to lawyers in the United States (and in the District of Columbia in particular) does not support the view that the a private counsel appearing in one case cannot ethically argue a different view in a separate proceeding so long as the interests of neither client is adversely affected by such activity.

The ABA Model Rules of Professional Conduct (“ABA Rules”) and the D.C. Rules of Professional Conduct (“D.C. Rules”), suggest that, when no conflict of interest exists, a lawyer must be able to advocate a legal position on behalf of one client (client 2) in one matter (matter 2), even if it is inconsistent with the position that same lawyer has previously advocated before the same tribunal on behalf of a former client (client 1) in a different matter (matter 1).

The appropriate threshold legal question is not whether a lawyer may advocate an inconsistent interpretation of law, but under what circumstances a lawyer may advocate an inconsistent interpretation of law. The ABA and D.C. Rules devote great attention to conflicts of interest. Rule 1.7 prohibits representation of client 2 if such representation will be directly adverse to or materially limited by the lawyer’s representation of an existing client, client 1. See ABA Rule 1.7; D.C. Rule 1.7(b). Rule 1.9 prohibits representation of client 2 in the same matter or a substantially related matter if the representation is materially adverse to the interests of a former client, client 1. ABA Rule 1.9(a); D.C. Rule 1.9; see also, Brown v. D.C. Bd. Of Zoning Adjustment, 486 A.2d 37 (D.C. 1984) (en banc) (leading case defining “substantially related” matters in context of former government employment). There is nothing about the mere argument of different positions in different cases, perhaps because no problem is seen in such activity.

Provisions of the ABA and D.C. rules provide support for the proposition that a lawyer can, and indeed must, where warranted, advocate interpretations of the law that may not be entirely consistent.5 Principally, a lawyer is bound to diligently represent his client’s interests. ABA Rule 1.3; D.C. Rule 1.3(a). Diligently

5. Obviously, lawyers are prohibited from advancing arguments that are frivolous. ABA Rule 3.1; D.C. Rule 5 3.1. But arguing inconsistent legal interpretations does not necessarily mean that either argument is frivolous.
representing a client does not necessarily preclude arguing opposing positions of law. Indeed, to represent a client diligently a lawyer may need to advocate an inconsistent legal position from that taken in a prior matter on behalf of a prior client.

Similarly, the comments to ABA Rule 1.9 explain that a lawyer must decline subsequent representations involving positions adverse to a former client arising in "substantially related matters." ABA Lawyers' Manual on Prof. Conduct (BNA) 01 : 123-6 (1996). "The underlying question [regarding whether a conflict of interest exists] is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as changing sides in the matter in question." - Id. at 01 : 124. Indeed, D.C. Bar Advisory Opinion No. 265 states explicitly that a "traditional notion in the law of legal ethics holds that there is nothing unseemly about a lawyer's taking directly opposing views in different cases so long as the lawyer does not do so simultaneously." Op. No. 265, supra, at 101.

C. Cost to Participants.

The Panel in the Bananas case suggested that allowing private counsel to represent countries might impose undue financial burdens on smaller countries. However, as the Appellate Body noted in Bananas, it is precisely the developing country Members that most need such aid. We think they may be able to obtain it on reduced fee or pro bono bases or by funding from interested third parties. If so, others should not object. The source of counsel's remuneration is not generally a subject of inquiry in courts or agencies. We do not suggest that the WTO establish a "legal aid" system, although the DSU, itself, contemplates the provision of legal assistance to those in need. However, this is a fairly modest undertaking and cannot be compared to the right of a country to seek private counsel on a paid or unpaid basis.

It is particularly inappropriate for countries with in-house legal resources, such as the U.S. or E.U., to object to efforts of others to retain outside legal advisors for assistance at hearings. The U.S. has a particularly rich history of permitting persons to be represented by counsel in all manner of proceedings and includes the right to counsel (in criminal cases, to be sure) in its Constitutional Bill of Rights. It is our tradition to encourage the use of counsel to help find the facts, and present them in an orderly manner to allow decision-makers to make more informed judgments. All of these considerations favor a change in present practice.

D. Behavior of Private Counsel

The Bananas case Panel also questioned its (and the WTO's) ability to maintain the "character of the proceeding" as intended to
settle disputes. However, counsel who fail to behave appropriately may be disqualified or barred by the WTO and disciplined by their country of admission to the bar. The WTO can adopt a simple Code of Conduct for lawyers that, essentially, binds them to the local ethical codes of the professional associations to which such counsel are admitted and contemplates a report to that association of breaches (as occurs when a lawyer appears in different country -- or even U.S. state -- from that in which he/she is admitted). Acknowledgment forms, covering also 14 confidentiality obligations, can readily be required of all counsel appearing.

More to the point, dispute settlement is as important a priority for modern lawyers as advocacy in disputes. Many private lawyers are now trained and expert in mediation and arbitration. The many lawyers who successfully help clients in transnational commercial transactions also use such skills. If properly instructed by their clients and the forum, there is no reason to presume U.S. -- or any other -- lawyers cannot or would not seek settlements as readily as government representatives if so requested by the parties that retained them.

E. Domestic Pressure

The unique provisions regarding private counsel appearing at panel hearings in the context of NAFTA Art. 20, dispute settlements may have been adopted because the NAFTA signatories were anxious to avoid pressure from private interests in their own countries from demanding a right (or even opportunity) to be heard or otherwise participate in dispute resolution proceedings affecting those interests. A uniform, "neutral principle" barring all private counsel was thought to assist the governments in resisting such demands. However, such a problem seems an inappropriate basis to deny the right of other parties to retain counsel of their choosing to assist them. If governments wish to bar private counsel from their own delegations, they may, of course, do so.

VI. The ABA's Position

The DSU was an important step in furthering the "rule of law" and is a key element in the Uruguay Round Agreements that the ABA has supported in the past. The agreements creating the WTO are crucial to a regime of fair and free trade and are best implemented through an effective dispute settlement regime.

The Uruguay Round Agreements introduced sufficient novelties to the prior GATT dispute resolution system and greatly enlarged its substantive scope, so that the issue of counsel should be reconsidered and conformed to generally accepted practices in other "rule based" systems. It is a point at least equal in importance to the issues of
transparency that the USTR is vigorously pursuing. Viewed from the perspective of a Member, it is hard to justify an institutional rule or, even more questionable, and ad hoc approach, denying a party the right to select whomever it wishes to assist it in its participation in WTO dispute settlement proceedings.
Attachment 1

Code of Conduct

1. Members may be represented in proceedings before WTO Dispute Settlement Bodies by “Private Counsel” who subscribe to this Code of Conduct.

2. “Private Counsel” shall mean an individual who is, and represents and warrants that as of this date he/she is:
   a. A member in good standing of a bar or other professional organization in a Member state, which organization conditions admission and continued good standing on (i) sufficient education, (ii) a review of qualifications by a government operated or sanctioned agency, and (iii) adherence to ethical obligations generally recognized as appropriate throughout the world; and
   b. Retained by a Member for the purposes of rendering professional advice in a proceeding governed by the Dispute Settlement Understanding;

3. Private Counsel expressly represents that he/she:
   a. Is familiar with the organization, history and operation of the World Trade Organization to the extent they may be applicable to the proceeding for which he/she has been retained, and is professionally qualified to provide advice regarding such proceeding;
   b. Understands, and will conduct himself/herself in accordance with such understanding, that only Members are the parties before the WTO Dispute Settlement Bodies and him/her representation in all respects will be consistent with the representation of a Member in a proceeding in which all other parties are also and exclusively Members or representatives of the WTO;
   c. Will accept instruction for him/her professional services solely from or with the informed consent of the Member by which he/she was retained; and
   d. Provides below him/her signature, reflecting agreement with, and consent to, this Code and the name and address of the: disciplinary body of the bar or other professional organization on which the representation in 2.a. above is based and to which any violation of this Code of Conduct may be reported by the WTO Secretariat.