

## AMICUS CURIAE BRIEFS BEFORE WTO DISPUTE SETTLEMENT SYSTEM: WELCOME FRIENDS?

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*Non-governmental organizations have clearly expressed their desires for participating actively in the development of trade policy within the framework of the main institution, the World Trade Organization. This intention has included the submission of amicus curiae briefs in the WTO dispute settlement system. This matter – not expressly regulated in the Dispute Settlement Understanding – has been controversial for most WTO Members. This article explores the main political and legal implications that arise from the acceptance of that sort of unsolicited communications, from the point of view of transparency in the process. The article suggests the need for regulation on the issue, a task that belongs to WTO Members and that encompasses the recognition of the contribution that non-governmental organizations may do in terms of legitimacy of WTO dispute settlement system, commonly regarded as especially closed.*

Key Words: *WTO, dispute settlement system, NGOs, transparency, amicus curiae, public participation*

### 1. Introduction

Over the past years, non-governmental organizations have developed constant efforts in order to take part in international trade decisions. This increasingly empowered and influential attitude assumed by the civil society clashes with the traditional notion that understands that only sovereign states have the power to act and decide on the development of international trading regime. The creation of the World Trade Organization (WTO) has been seen as a valuable opportunity to realize such desires of influence, putting pressure on governments in order to open more active paths for participation.

This article focuses on the involvement of non-governmental organizations in the dispute settlement system established within the WTO by submitting *amicus curiae* briefs. As will be explained, this has been the most effective way – albeit controversial – by which civil society has expressed opinion on issues of public interest. After the introduction, the second part presents a general view on the main ideas and rules governing the WTO dispute settlement

mechanism. These distinctive features are crucial to properly understand the logic but especially the difficulties arising out of the submission of this sort of briefs. The third part is divided in five sections: the first one exposes the rationale behind the participation of non-governmental organizations in the WTO dispute settlement system, which is directly linked with transparency aspects. The legal basis for the admissibility of *amicus curiae* briefs by WTO dispute settlement bodies is discussed in the second section. The next ones deal with the view of WTO Members on the involvement of non-governmental organization in dispute settlement proceedings, as well as the review of others existing approaches in different international courts and tribunals on the same issue. The fifth section brings attention to arguments exposed in favour and against the submission of *amicus curiae* briefs by non WTO-Members. Finally, the article suggests some conclusions and proposes some alternatives for the further development of the subject.

### 2. An Overview: the WTO Dispute Settlement System<sup>1</sup>

As a result of the Uruguay Round (1986–1994), the WTO was formally concluded by the *Agreement Establishing the World Trade Organization* (1995).<sup>2</sup> It came to replace the old GATT system as a global intergovernmental organization providing for a clear institutional framework for the conduct of trade relations among its Members.<sup>3</sup> Its governance structure is led by a Ministerial Conference, responsible for carrying out its functions and with the authority to take decisions on all matters under

- 1 For a complete explanation of the WTO dispute settlement system, A WTO Secretariat Publication, A Handbook on the WTO Dispute Settlement System, Cambridge University Press, 2004.
- 2 Marrakesh Agreement Establishing the World Trade Organization (United Nations – Treaty Series, Vol. 1867, I-31874 / 1995).
- 3 Marrakesh Agreement Establishing the World Trade Organization (United Nations – Treaty Series, Vol. 1867, I-31874 / 1995), art. II. The single institutional framework of the WTO encompasses the GATT (modified by the Uruguay Round), all agreements concluded under its auspices and the complete results of the Uruguay Round (1986–1994).

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any of the agreements.<sup>4</sup> A General Council has general powers for monitoring the operation of the Agreement and for acting as a Dispute Settlement Body, in accordance with the Dispute Settlement Understanding.<sup>5</sup> In addition, three specific Councils were also established.<sup>6</sup> The WTO framework provides for the so-called “single undertaking approach”. This brings two significant consequences: all Members must accept all the agreements concluded during the Uruguay Round<sup>7</sup> and on the other hand, they are not entitled to make any reservations in respect to any provision of the Marrakesh Agreement unless specifically permitted.<sup>8</sup>

The system for settling disputes is a cornerstone of the WTO<sup>9</sup> and is based on the *Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereinafter DSU), which constitutes the Annex 2 of the WTO Agreement.<sup>10</sup> Regarding to the substantive scope of the mechanism (Article 1 DSU), it applies to all disputes falling within the WTO agreements listed in Appendix 1 of the DSU (referred to as “covered agreements”<sup>11</sup>), also including the

4 Marrakesh Agreement, art. IV para. 2.

5 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex II Marrakesh Agreement.

6 Council for Trade in Goods, Council for Trade in Services and Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS).

7 In other words, “all parties to the negotiation pledged to adopt all of the agreements as a package”. See C. VanGrasstek, P. Sauvé, “The consistency of WTO rules: can the single undertaking be squared with variable geometry?”, *Journal of International Economic Law*, 9 (4) / 2006, p. 837–864., p. 839. This rule is with the exception of the Agreements signed in Annex 4 WTO Agreement, which are known in the WTO context as “Plurilateral Agreements”. This term is opposed to “multilateral” because not all Members have ratified them, on the basis of its voluntary subscription.

8 This provision is in contrast with the Article 19 of the Vienna Convention on the Law of Treaties (1969), which allows reservations unless specified otherwise.

9 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system (DSU, art. 3 para. 2).

10 The term “Agreement” with no-specific reference incorporates all the agreements that have been concluded in the Uruguay Round, which includes the DSU.

11 It includes: (A) Agreement Establishing the World Trade Organization; (B) Multilateral Trade Agreements: Annex 1A Agreements on Trade in Goods, Annex 1B General Agreement on Trade in Services, Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights, and Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes; and (C) Plurilateral Trade Agreements contained in Annex 4 WTO Agreement, which are Agreement on Trade in Civil Aircraft, Agreement on Government Procurement,

Plurilateral Trade Agreements contained in Annex 4 of the WTO Agreement.<sup>12</sup> The DSU is applicable in a uniform manner to disputes under its scope, but there are some specific cases in which the system contains special and additional rules and procedures that shall prevail, included in some covered agreements listed in Appendix 2 of the DSU, and designed to deal with the particularities of disputes arising under these specific covered agreements.<sup>13</sup>

## 2.1. WTO Organs Involved in the Dispute Settlement

According with DSU, the responsibility for the dispute settlement process is in charge of the Dispute Settlement Body (hereinafter DSB<sup>14</sup>) which is a political organ composed of representatives of all WTO Members. This responsibility covers two main functions: the administration of the DSU and the supervision of the entire dispute settlement process.<sup>15</sup> In carrying out these tasks, the DSB has the authority establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements.<sup>16</sup>

The Director General and the WTO Secretariat also play a role in the dispute settlement process. The first one may offer his/her good offices, conciliation or mediation.<sup>17</sup> This power is especially relevant when a dispute involves a developing country: in this case, the Director General will – at the request of that least developed member – offer his/her good offices, conciliation or mediation before requesting the constitution of a panel.<sup>18</sup> The WTO Secretariat

International Dairy Agreement, and International Bovine Meat Agreement.

12 See supra note 7.

13 These covered agreements and the specific procedural rules that apply are listed in Appendix 2 of the DSU (Special or Additional Rules and Procedures Contained in the Covered Agreements), and include, for instance, Agreement on the Application of Sanitary and Phytosanitary Measures, whose especial rule of procedure is contained in its art. 11 para. 2.

14 WTO Agreement, art. IV, para. 3.

15 DSU, art. 2 para. 1.

16 Thus, the DSB plays a critical role during the dispute settlement process, because it has the exclusive responsibility for referring a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing “retaliation” when a member does not comply with the ruling (DSU, art. 2 para. 1).

17 DSU, art. 5 para. 6.

18 DSU, art. 24 para. 2.

support members during the process and provide additional legal advice and assistance in respect of dispute settlement to developing country Members.<sup>19</sup>

Key figures in the system are the panels. They are quasi-judicial bodies established at the request of the complaining party, by the DSB.<sup>20</sup> They are composed of three (or five, exceptionally) experts selected on an *ad-hoc* basis.<sup>21</sup> The panels are in charge of adjudicating disputes in the first instance (where the dispute is not settled through consultations). To do so, a panel must make an objective assessment of the matter before it (which is the specific dispute), including an evaluation of the facts of the case and the applicability of and conformity with the relevant covered agreements.<sup>22</sup> As a result of its function, the panel may consider that a Member has violated the obligations established by the WTO regime, in which case it makes a recommendation for implementation by the respondent (report).<sup>23</sup>

One of the mayor innovations of the Uruguay Round in the dispute settlement context was the creation of the Appellate Body, highlighting the concept of appellate review.<sup>24</sup> This is a permanent body (unlike panels) composed by seven members, whose main task is to review the legal aspects of the reports issued by panels.<sup>25</sup> The Appellate Body may uphold, reverse or modify the panel's finding.<sup>26</sup>

Additionally, the DSU gives the possibility to resort to arbitration, by mutual agreement of the parties.<sup>27</sup> Arbitration is conceived as an alternative to dispute resolution by panels and the Appellate Body, but WTO Members have rarely utilized it.<sup>28</sup>

19 DSU, art. 27 para. 2.

20 DSU, art. 6 para. 1.

21 DSU, Article 8. This implies that there are no permanent panels: they are constituted on a case-by-case basis.

22 DSU, Article 11.

23 DSU, Articles 11 and 19.

24 DSU, Article 17.

25 It is important to mention that only parties to the dispute (and not third parties) may appeal a panel report (DSU, art. 17 para. 4), and this appellation must be limited to issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 DSU). This constitutes the second and final stage in the adjudicatory part of the dispute settlement system.

26 DSU, art. 17 para. 13.

27 DSU, art. 25 para. 1 and DSU, art. 25 para. 2.

28 While this procedure gives more flexibility to the parties (they are free to agree on the rules and procedures they deem appropriate for the arbitration), a possible explanation for the low use is that "the arbitration provisions of the DSU are too vague and uncertain to serve as a useful guidance. For example, the DSU states

In contrast, members have utilized much more frequently other forms of arbitration included in the DSU for specific situations and aspects, especially within the implementation process of a panel or Appellate Body decision.<sup>29</sup>

Lastly, experts may also take part in the dispute settlement process. The DSU grants the panels the "right to seek information and technical advance" from experts.<sup>30</sup> This "right" has been critical in the development of the *amicus curiae* briefs before WTO panels and Appellate body, as will be discussed below.

## 2.2. A Typical WTO Dispute Settlement Proceeding

But how do these bodies interact throughout the dispute settlement process? Generally speaking, a dispute arises among WTO Members when one of them adopts a trade policy measure that one or more Members consider to be inconsistent with the obligations provided in the WTO Agreement. Just in case where the parties cannot resolve a controversy informally, the formal process of WTO dispute settlement system takes place. In that case, a Member may request for consultations, where the parties to the dispute have the opportunity to reach an agreement on their own.<sup>31</sup> This is consistent with the idea that a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred to resorting

that arbitration can be used to settle "certain disputes" which concern issues which are "clearly defined". However, it is unclear what types of disputes should be forwarded for arbitration and what are the issues that are clearly defined by the parties". See B. H. Malkawi, "Arbitration and the World Trade Organization, The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding", *Journal of International Arbitration*, 24 (2) / 2007, 173–188, p. 183–184. In fact, the only one example of arbitration under Article 25 DSU until date is United States – Section 110(5) of US Copyright Act. The procedure was not used as an alternative to the panel and Appellate Body procedure, but at the stage of implementation (after the panel was adopted).

29 These specific situations are two: (a) cases where the losing party considers as impracticable to comply immediately with the recommendations and rulings of panels or Appellate Body, an arbitration process may take place in order to determine the reasonable period of time for complying with the decision (Article 21 para 3 point. c DSU); (b) a party subject to retaliation may also request arbitration if reject the level or the nature of the suspension of obligations proposed (Article 22 para. 6 DSU).

30 DSU, Article 14.

31 DSU, Article 4. Formally, a request for consultations must be submitted in writing and must include the reasons for the request, the identification of the measures at issue and an indication of the legal basis for the complaint (Article 4.4 DSU).

to litigation.<sup>32</sup> If an agreement is reached, the DSB must be notified in order to ensure that it does not violate any provisions of the WTO Agreement.<sup>33</sup> Only if the controversy has not been resolved by the parties after mandatory consultation (within a period of 60 days<sup>34</sup>), the complainant may request for adjudication by a panel.<sup>35</sup> The DSB will establish the panel at the next meeting following the request unless it determines by consensus not to establish a panel.<sup>36</sup>

The panel proceeding consists of writing submissions and oral hearings, giving the possibility to the parties to support and develop their legal and factual arguments.<sup>37</sup> After that, and applying WTO law, the panel issues its report (including the ruling) within a period of six months after the initiation of the panel process.<sup>38</sup> The report will only become binding after its adoption by the DSB.<sup>39</sup> There are two exceptions: (a) if any of the parties to the dispute notifies the DSB of its decision to appeal, in which case the report will be presented by its adoption after the appellation process; or (b) in case that the DSB decides by consensus not to adopt the report.<sup>40</sup> If neither party appeals, the DSB will adopt the panel report, unless there is a consensus against the adoption.<sup>41</sup> In case of appellation, the mandate of the Appellate Body<sup>42</sup> is strictly

limited to legal issues and panel interpretations that have been appealed.<sup>43</sup> The Appellate Body issues a report (within a period of 90 days<sup>44</sup>) that will be presented to the DSB for its adoption. The DSB must adopt the report unless it decides by consensus not to do so.<sup>45</sup> It is also the organ in charge of supervising the implementation of the Appellate Body report.<sup>46</sup> At this stage, the losing Member will have a “reasonable period of time” to implement the recommendations and ruling of the DSB.<sup>47</sup> In case of non-compliance within the reasonable period of time the complainant can request authorization to adopt countermeasures (suspension of obligations).<sup>48</sup> There is also a possibility of partial compliance with the recommendation and ruling of the DSB, where the Member takes some actions but they are considered unsatisfactory by the complainant. In that case, such dispute shall be decided through recourse to the original panel in order to rule on the effectiveness of the implementation.<sup>49</sup>

### 2.3. Some Distinctive Features of the WTO Dispute Settlement System

Having explained briefly the main aspects of the dispute settlement system provided in the DSU, it is necessary to highlight some general features of the system, whose consideration will be useful when analyzing the way in which panels and the Appellate Body have dealt with the submission of *amicus curiae* briefs by non-disputing parties.

#### 2.3.1. SELF-CONTAINED NATURE OF THE WTO DISPUTE SETTLEMENT SYSTEM

Although the true existence of pure self-contained regimes has been in detail analyzed in doctrine<sup>50</sup>, there is no doubt that the WTO dispute settlement system is a self-contained regime in the sense that article 23 of the Dispute Settlement Understanding (DSU) excludes unilateral determinations of breach or countermeasures

32 DSU, art. 3 para. 7.

33 DSU, art. 3 para 5.

34 However, the parties may skip the consultation stage if they resort to arbitration as an alternative means of dispute settlement (Article 25 para. 2. DSU).

35 DSU, art. 4 para. 7. There are some formal requirements for the requesting for the establishing of a panel: it must be made in writing, indicating whether consultations were held, and must identify the specific measures at issue, providing a brief summary of the legal basis of the complaint (Article 6 para. 2. DSU).

36 DSU, art. 6. para 1. This rule is known as “rule of negative (or reverse) consensus”, and it means that the only possibility for not establish a panel is by consensus of the DSB. In practice, it is a guarantee for the complainant, because it implies that all Members – including itself – must vote against establishing a panel.

37 DSU, article 12.

38 DSU, art. 12 para. 8.

39 DSU, art. 14 para. 4. This is because the function of a panel is to assist the DSB in discharging of its responsibilities under DSU and covered agreements (Article 11 DSU).

40 DSU, art. 16 para. 4.

41 This is the second manifestation of the “rule of negative (reverse) consensus”. Thus, the losing party cannot prevent the adoption of the report, since this decision requires consensus within the DSB.

42 The DSU does not devote many articles to address the appellation process. The specific rules are contained in Articles 16 para. 4 and 17 DSU. But according with Article 17 para. 9 DSU, the Appellate Body has adopted its own

Working Procedures for Appellate Review, included in Appendix 3 to the DSU.

43 DSU, art. 17 para. 6. and DSU, art. 17 para. 12.

44 DSU, art. 17 para. 5.

45 DSU, art. 17 para. 14. This is the third application of the “rule of negative (reverse) consensus”.

46 DSU, Article 2.

47 DSU, art. 21 para. This reasonable period of time cannot exceed fifteen months.

48 DSU, art. 22 para. 2.

49 DSU, art. 21 para. 5.

50 For a complete explanation of international systems and self-contained regimes, see Y. Shany, *The Competing Jurisdiction of International Courts and Tribunals*, Oxford University Press, 2004, p. 101 et seq.

outside the “specific subsystem” of the WTO-regime.<sup>51</sup> Thus, the WTO establishes its autonomous rules ranging from the dispute resolution process to enforcement of countermeasures.<sup>52</sup> However, and this is relevant for the purposes of this paper, in many cases panels and the Appellate body have also applied rules and principles of general international law, such as burden of proof, treatment of municipal law, *lex specialis*, judicial economy, and acceptability of *amicus curiae* briefs, among others.<sup>53</sup>

### 2.3.2. COMPULSORY JURISDICTION

According to the DSU, WTO dispute settlement system has been established as compulsory.<sup>54</sup> This means that when a party becomes a Member of the WTO (and therefore accepts all agreements) it automatically consents to the jurisdiction of its dispute settlement system in relation with a dispute arising under the covered agreements,<sup>55</sup> without requiring a separate declaration.

Two are the direct consequences of this compulsory nature: if a dispute arises, the respective Member is obliged to bring the controversy to the WTO dispute settlement system; and on the other hand, the other Member can not challenge this jurisdiction.<sup>56</sup>

51 UN General Assembly, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by M. Koskenniemi, A/CN.4/L682 (2006), p. 71., para. 134. Shany agrees: “It is a complex arrangement that has regarded itself for some time as a self-contained”, Y. Shany, *Ibid.*, p. 100. A contrary view is expressed by Anja Lindroos and Michael Mehling: “In fact, few would nowadays claim that the World Trade Organization (WTO) – being a prime example for such “special regimes” – is entirely self-contained, existing in isolation from international law. It is likely understood more aptly as a set of rules and institutions similar to other international regimes, such as human rights law, space law, and environmental law”. A. Lindroos, M. Mehling, “Dispelling the Chimera of “Self-Contained Regimes” International Law and the WTO”, *The European Journal of International Law*, 16 (5) / 2006, 857–877, p. 858.

52 P. Delimatsis, “The Fragmentation of International Trade Law”, *Journal of World Trade*, 45 (1) / 2011, 87–116, p. 98.

53 A. Lindroos, M. Mehling, *op. cit.*, p. 876. One of the examples cited by the authors is contained in ‘Coconut’/‘Coconut’ case, Brazil – Measures Affecting Desiccated Coconut, Report of the Appellate Body, WT/DS22/AB/R, 21 January 1997, p. 15. In its report, the Appellate Body made express mention to the application of principle of non-retroactivity of treaties (included in Article 28 of the Vienna Convention) to that particular WTO case.

54 DSU, art. 23 para. 1.

55 This is a consequence of the single undertaking approach. The only exception is referred to WTO Agreement Annex 4, which includes the so-called Plurilateral agreements (voluntarily accepted or not by the Members).

56 P. Van den Bossche, *The Law and Policy of the World Trade Organization. Text, Cases and Materials*, Cambridge University Press, 2005, p. 189.

### 2.3.3. EXCLUSIVE JURISDICTION

Conceived as a compulsory system, Members shall thus have recourse to the WTO dispute settlement system to the exclusion of any other system<sup>57</sup> (Article 23.1 DSU). An important panel decision was clear on that sense.<sup>58</sup> Nevertheless, there are some provisions that in the opinion of some scholars mitigate this idea, allowing the Members some flexibility.<sup>59</sup>

### 2.3.4. PARTICIPATION OF THIRD PARTIES

Only WTO Members have access to the dispute settlement system.<sup>60</sup> This means that only they can take part in the proceedings either as parties (complainant and respondent) or as third parties.<sup>61</sup> Private entities do not have direct access to the dispute settlement system. Following the same logic, non-governmental organizations (hereinafter NGOs) are not entitled to initiate proceedings, and its direct participation during any WTO adjudicative process is excluded.

57 *Ibid.*, p. 190.

58 “Section 301 Trade Act/Act” case, US – Sections 301 – 310 of the Trade Act of 1974, Panel Report, WT/DS152/R, 22 December 1999, para. 7.43. “Article 23.1 of the DSU imposes on all Members to “have recourse to” the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call ‘exclusive dispute resolution clause’, is an important new element of Members rights and obligations under the DSU”.

59 Shany is clear: “It should be realized that DSU permits parties to agree to settle their dispute by way of arbitration, i.e. outside the ordinary structure of WTO dispute-settlement institutions (but still subject to control by the DSB). Hence, the DSU itself allows for some measure of flexibility in forum selection”. Y. Shany, *op. cit.*, p. 184.

60 A clear statement of this was issued by the Appellate Body in ‘Shrimp’/‘Shrimp’ case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 101: “It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental”.

61 Before panels, WTO Members have the opportunity to be heard and to make written submissions, but they are required to demonstrate a substantial interest in the matter (DSU, art. 10 para. 2). In the Appellate Body instance, third parties are prevented to appeal. Nevertheless, third parties that have acted also as third parties during the panel stage may make written submissions and be heard by the Appellate Body (DSU, art. 17 para. 4).

This impediment does not prevent the exercise of influence and pressure on governments, not only in cases when a particular Member is involved in a controversy.

This idea of disallowing – at least formally – the participation of non-Members is critical in analyzing the submission of *amicus curiae* briefs within WTO dispute settlement procedures.

### 3. Public Participation in the WTO Dispute Settlement System

#### 3.1. The Rationale Behind the Participation of non-Members: a Question of Transparency

There are many ways in which the issue of transparency in the WTO can be addressed. This article will deal from the perspective of the dispute settlement system since it has been within this mechanism where *amicus curiae* briefs have been submitted and the issue has emerged. The starting point is that decisions taken by DSB often affect directly legitimate interests of different individuals or groups. However, as it has been mentioned that only WTO Members have the right to bring disputes before the dispute settlement mechanism. It is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members. Therefore, individuals or civil society do not have direct access to panels and Appellate Body, and the same applies in case of NGOs with general interest in matters brought before the system.

Nowadays, many NGOs have claimed that the rights and interests of citizens and civil society are inadequately reflected in WTO decisions.<sup>62</sup> For them, WTO decisions inescapably raise questions about loss of sovereignty and lack of democracy because of the nature of the system that they perceive as closed.<sup>63</sup>

In general terms, the participation of NGOs by means of *amicus curiae* briefs within dispute settlement system may serve at least for the next functions: (a) providing legal analysis and interpretation, including arguments not necessarily mentioned by the parties; (b) providing factual analysis and evidence; and (c) placing the dispute into a broader political and social context<sup>64</sup>.

62 G. Marceau, M. Stilwell, "Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies", *Journal of International Economic Law*, 4 (1) / 2001, 155–187, p. 156.

63 D. Esty, "Linkages and Governance: NGO's at the World Trade Organization", *Journal of International Economic Law*, 19 (3) / 1998, 709–730, p. 717.

64 P. Van den Bossche, op. cit., p.739.

#### 3.2. Legal Basis and Admissibility of *Amicus Curiae* Briefs in the WTO Dispute Settlement System

As it has been suggested, the only way through which NGOs have achieved to express their own views before WTO dispute settlement bodies has been by submission of *amicus curiae* briefs. This Latin term – which literally means "friends of the court" – has its origin in Roman law and was subsequently integrated into English and American common law.<sup>65</sup>

The submission of *amicus curiae* briefs has a relatively long practice in trade disputes. Under the old GATT system, unsolicited briefs from non-Members were not accepted by panels. The reason was clear: the dispute was strictly between governments and thus the panelist could only address the claims and arguments that were submitted by the parties to the controversy.<sup>66</sup> These kinds of briefs were only taken into account if they had been adopted by one of the parties of the dispute.<sup>67</sup>

But the establishment of the WTO in 1995 brought important changes especially in the dispute settlement system. In particular, the panels and the Appellate Body have not followed the GATT view on the issue of unsolicited briefs submitted by non-members, and this has opened the door for the participation of NGOs and individuals in trade disputes. But the road has not been simple and this is what we will discuss hereinafter.

In order to achieve a better understanding on the process of acceptance of *amicus curiae* briefs before WTO dispute settlement bodies, and the specific legal basis for doing so, it is necessary to make a distinction between the practice within panels and the Appellate Body, because they have had different approaches in the development of the issue.

##### 3.2.1. AMICUS CURIAE BRIEFS FILED IN PANEL PROCEEDINGS

By virtue of Article 3(2) DSU access to the WTO adjudicating bodies is limited to

65 B. A. Garner, *Black's Law Dictionary*, West Group, St. Paul, Minn. 1999, p. 83. *Amicus curiae* is defined as "a person who is not a party in a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that persona has a strong interest in the subject matter".

66 P. Ala'i, "Judicial Lobbying at the WTO: the Debate over the Use of Amicus Curiae Briefs and the U.S. Experience", *Fordham International Law Journal*, 24 (1) / 2000, 62–94, p. 67.

67 For example, in 'Semi Conductors' case, Japan – Trade in Semi Conductors, Panel Report, BISD 35S/1164, 24 March 1988; 'Users Fees' case, US – Customs Users Fees, Panel Report, BISD 35S/245, 27 November 1987.

WTO Members. Moreover, the possibility for submitting *amicus curiae* briefs by NGOs or individuals is not mentioned in any provision of the DSU. Notwithstanding, different groups and associations have expressed strong interest in the development of global trade, since decisions could also affect non-trade issues.

The very first disputes in which unsolicited *amicus curiae* briefs were filed for consideration of WTO panels were *US – Gasoline*<sup>68</sup> and *EC – Hormones*<sup>69</sup>, two highly controversial cases. Both cases were related to environmental and health domestic regulations that potentially conflict with their WTO obligations. Following the GATT past practice, these briefs were not considered by the panels, without further explanation. In other words, panels ignored the NGOs submissions.

But the issue was effectively first discussed in the famous *US – Shrimp*<sup>70</sup>, a dispute involving a ban imposed by the United States on the importation of shrimp and shrimp products for the protection of endangered sea turtles. The affected parties regarded this action as a measure restricting the free trade of products into the United States domestic market. The panel received two *amicus curiae* briefs from different environmental NGOs.<sup>71</sup> They argued that the acceptance and consideration of these briefs was permitted under Article 13 of the DSU. This Article – whose title is “Right to Seek Information” – allows panels to seek information from any relevant source and give the possibility to consult experts to obtain their opinion on certain aspects of the dispute. The position of NGOs was supported by the United States, but India, Malaysia, Pakistan and Thailand (complaining parties) requested that the panel does not accept the communications. The panel rejected the *amicus curiae* briefs, and decided not to accept them on the basis that these briefs were never requested as required in Article 13 DSU. In its opinion, accepting non-requested information from NGO-sources was

incompatible with the provisions of the DSU.<sup>72</sup> In addition, the panel also ruled that if any of the parties wanted to use the arguments made by NGOs they should be included as part of their own submissions. Obviously, this interpretation of Article 13 of the DSU was not satisfactory for the participation of NGOs as *amicus curiae* during panel proceedings.

After the adoption of the Panel Report, the dispute was brought for consideration of the Appellate Body. On appeal, the United States argued that the panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to this position, there is nothing in the DSU that prohibits panels from considering information based on the fact that the information was unsolicited. Moreover, the United States stated that when a NGO makes a submission, Article 13 of the DSU authorizes the panel to “seek” such information.<sup>73</sup> The Appellate Body agreed with this interpretation, and reversed the panel’s decision ruling that “(...) the authority to seek information is not properly equated with a prohibition on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.”<sup>74</sup> Notwithstanding, the Appellate Body also established that the discretion to receive unsolicited information from non-Members did not include an obligation to give due consideration to the information received, since only WTO Members have a legal right to have their submissions considered.<sup>75</sup>

68 ‘Gasoline’/‘Gasoline’ case, US – Standards for Reformulated and Conventional Gasoline, Panel Report, WT/DS2/R, 29 January 1996.

69 ‘Hormones’ case, EC – Measures Concerning Meat and Meat Product Products, Panel Report, WT/DS/DS26/R/USA & WT/DS48/R/CAN, 18 August 1997.

70 ‘Shrimp’/‘Shrimp’ case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998.

71 One brief was submitted jointly by the Center for International Environmental Law and Center for Marine Conservation. The second one was submitted by World Wide Fund for Nature. See ‘Shrimp’ case, US – Import Prohibition of Certain Shrimp and Shrimp Products, Panel Report, WT/DS58/R, 15 May 1998, para. 3.129.

72 In para. 7.8, the Panel Report stated: “We had not requested such information as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests in the panel (...). Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied (...).”

73 ‘Shrimp’ case US – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 9.

74 Ibid., para. 108.10.

75 Ibid., para. 101: “It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before a panel” may become third parties in the proceedings before that

This decision meant a significant step forward in increasing openness and transparency at the WTO. Moreover, since this case *amicus curiae* briefs have been submitted to the panels in several proceedings. In *Australia – Salmon dispute*,<sup>76</sup> Canada requested consultations with Australia in respect of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation. Canada alleged that the prohibition is inconsistent with WTO regulations. The Panel noted that according to Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement), "In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative."<sup>77</sup> But the reasoning of the Panel for considering information from non-Members had some particularities. First, the Panel invited the parties to submit names of experts in the subject matter. Then, the parties had the possibility to make comments on the names selected by the Panel. After that, the Panel selected four definitive individuals. Finally, the experts were invited to meet with the Panel and the parties to discuss their written responses to the questions and to provide further information.<sup>78</sup> For most of the WTO Members this is the context in which Article 13 DSU authorizes the submission of *amicus curiae* briefs before panels.<sup>79</sup> But in addition, in the Implementation Panel proceeding established pursuant to Article 25.1 of the DSU, the Panel received an unsolicited *amicus curiae* brief from "Concerned Fishermen and Processors in South Australia".<sup>80</sup> The Panel considered the information

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panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel. Correlatively, a panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is authorized to do under the DSU.

76 "Salmon" case, Australia – Measures Affecting Importation of Salmon, Panel Report, WT/DS18/R, 12 June 1998.

77 *Ibid.*, para. 6.1.

78 *Ibid.* at para. 6.2–6.5.

79 P. Ala'í, *op. cit.*, p. 74.

80 'Salmon' case, Australia – Measures Affecting Importation of Salmon, Implementation Panel, WT/DS18/RW, 18 February 2000.

submitted in the brief as relevant to its procedures and had accepted this information as part of the record. It did so pursuant to the authority granted under Article 13.1 of the DSU.<sup>81</sup>

In *US – British Steel*, the Panel received two briefs from industrial NGOs ("American Iron and Steel Institute" and the "Specially Steel Industry of North America"), but refused to take them into account on the basis that they were untimely.<sup>82</sup>

Another significant dispute for analyzing *amicus curiae* briefs before panel proceedings was *EC – Asbestos*.<sup>83</sup> The Panel received unsolicited briefs from four non-governmental organizations ("Collegium Ramazzini", "Ban Asbestos Network", "Instituto Mexicano de Fibro-Industrias AC", and "American Federation of Labor and Congress of Industrial Organizations"). The European Communities incorporated into its submission two of these briefs ("Collegium Ramazzini" and "American Federation of Labor and Congress of Industrial Organizations"), and Canada requested the Panel reject all of them. A few months later, a fifth brief was submitted by another NGO ("Only Nature Endures"), but it was dismissed for having been submitted too late. The Panel rejected the *amicus curiae* briefs submitted by the "Ban Asbestos Network" and by "Instituto Mexicano de Fibro-Industrias AC" without explanation, and decided to take into account only those submissions that the EC had incorporated in their own submission.<sup>84</sup>

More recently, in *US – Tuna II*, the Panel received an unsolicited *amicus curiae* brief from "Humane Society International" and "American University's Washington College of Law". The United States requested the Panel to review and consider the submission in its deliberations, in light of the relevant and useful information it contained which it believed could assist the Panel in understanding the issues in this dispute.<sup>85</sup> The Panel ruled taking into account the determinations of the Appellate Body made in *US – Shrimp*, considering that it had the discretionary authority either to accept and consider or to reject information and advice

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81 *Ibid.*, para. 7.8.

82 "Carbon Steel" case, US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Panel Report, WT/DS138/R, 23 December 1999, para. 6.3.

83 'Asbestos' case, EC – Measures Affecting Asbestos and Asbestos – Containing Products, Panel Report, WT/DS135/R, 18 September 2000.

84 *Ibid.*, para. 8.12 and 8.13.

85 "Tuna II" case, US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Panel Report, WT/DS381/R, 15 September 2011, para. 7.3.



submitted to it. The brief was thus accepted for consideration.<sup>86</sup>

### 3.2.2. *AMICUS CURIAE* BRIEFS SUBMITTED WITHIN APPELLATE BODY PROCEEDINGS

The same issue described above on the acceptance of *amicus curiae* briefs has been controversial in Appellate Body proceedings. In *US – Shrimp*, the Appellate Body seems to have made an important distinction between *amicus curiae* briefs that are attached to a party submission and those that are unattached.<sup>87</sup> In a subsequent decision, the Appellate Body gave some relevant signals especially regarding the treatment of unattached *amicus* briefs. In *US – British Steel* the Appellate Body received two unsolicited briefs from the same NGOs that submitted briefs at Panel stage, where they were rejected because they were considered untimely. As Article 13 of the DSU (“Right to Seek Information”) does not apply in Appellate Body proceedings, the question arose whether unsolicited *amicus curiae* briefs were admissible in these proceedings. The Appellate Body accepted the briefs concluding that it was authorized to do so because Article 17.9 of the DSU (Working Procedures) makes it clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. It is also stated that Article 16.1 of the Working Procedures allows the Appellate Body to develop an appropriate procedure where a procedural question arises that is not covered by the Working Procedures.<sup>88</sup> The Appellate Body also ruled that “Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO Members which are parties or third parties in a particular dispute.”<sup>89</sup>

The situation within the Appellate Body had its climax in *EC – Asbestos*. In this case, the Appellate

Body was beyond creating an *Additional Procedure* in order to address submission from groups other than a party or a third party to the dispute, relied on Article 16.1 of the Working Procedures.<sup>90</sup> The Appellate Body decided for the first time formally to invite briefs from all interested sources “for the purposes of this appeal only”. The Additional Procedure provided some important rules for dealing with *amicus curiae* briefs.<sup>91</sup> First, it established a deadline for the submission of briefs. Second, it mentioned several formal requirements that must be satisfied by all non WTO Members interested to submit a brief (for example, length of the letter, specific nature of the interest, and issues of law covered). Third, it provided that the Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave. Finally, the Additional Procedure mentioned that the parties and the third parties to the dispute would have a full and adequate opportunity to comment and respond to any written brief filed in the case. As a result, the Appellate Body received 17 applications requesting leave. Six were denied (untimely). The others were also rejected on the basis that the Appellate Body found none of them sufficiently compliant with the formal requirements established in the Additional Procedure.<sup>92</sup>

Another interesting case where different issues concerning *amicus curiae* briefs were discussed was *EC – Sardines*.<sup>93</sup> During the proceedings, two briefs were submitted: one of them by Robert Howse (a professor of international economic law), and the other by Morocco, a WTO Member that did not exercise the right for acting as third party at panel stage. This was the first case in which a WTO Member submitted a brief. Peru – the defending country – rejected the brief submitted by Robert Howse because in its opinion “the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body.”<sup>94</sup> Regarding the submission made by Morocco, Peru also requested the Appellate Body do not consider it would imply a violation of the DSU, which clearly establishes conditions under which WTO Members can participate as third parties in dispute settlement proceedings. In its ruling, the Appellate Body

86 *Ibid.*, para. 7.9.

87 “We admit therefore, the briefs attached to the appellants submission of the United States as part of that appellants submission (...) ‘Shrimp’ case *US – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, para. 91.

88 G. Marceau, M. Stilwell, *op. cit.*, p. 162–163.

89 “Carbon Steel” case, *US – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R, 10 May 2000, para. 41.

90 Working Procedures for Appellate Review, WT/AB/WP/6 (last version 16 August 2010).

91 “Asbestos” case, *EC – Measures Affecting Asbestos and Asbestos – Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, para. 52.

92 *Ibid.*, para. 57.

93 “Sardines” case, *EC – Trade Description of Sardines*, Report of the Appellate Body, WT/DS231/AB/R, 26 September 2002.

94 *Ibid.*, para. 154.

stated that Article 17.9 of the DSU entitled it for accepting and considering the *amicus curiae* brief submitted by Morocco and by private individuals, but at the same time considered that both briefs were not useful for the Appellate Body and thus were not be taken into account.

### 3.3. General View of WTO Members on *Amicus Curiae* Briefs

The acceptance of *amicus curiae* briefs especially by the Appellate Body has not been exempt of controversy and WTO Members have expressed a variety of views about the current practice of the adjudication bodies on the issue. After the creation of the Additional Procedure in *EC – Asbestos*, most WTO Members expressed displeasure and concern. They felt that non-institutional players could end up having more rights than WTO Members, altering the government-to-government nature of the dispute settlement system.<sup>95</sup>

In an extraordinary meeting of the WTO General Council held in November 2000<sup>96</sup>, most Members expressed the opinion that since there was no specific provision in WTO law allowing for the acceptance and consideration of *amicus curiae* briefs, such briefs should not be accepted and considered.<sup>97</sup> Uruguay “viewed with great concern the appearance and mass circulation outside the WTO of the Appellate Body communication establishing the additional procedure for the submission of written briefs from persons or institutions that were neither parties nor third parties in a particular dispute at the appeal stage”. Uruguay also “believed that the practical effect had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess”.<sup>98</sup> Egypt, on behalf of the Informal Group of Developing Countries stated that “the actions of the WTO Appellate Body and the Secretariat needed serious consideration by the whole WTO membership and at the level of the General Council, as the highest legislative and policy authority in the organization in the intervals between Ministerial Conferences, in order that such actions be rectified”, and also noted that “the Appellate Body decision went far beyond the Appellate Body’s mandate and power”.<sup>99</sup> And finally, Brazil “was also concerned with the notion that panels and the Appellate Body would be deciding who had a right to file written briefs on the basis of the

applicant’s membership, legal status, objectives, interests, nature of activities, sources of financing, or relationship with parties or third-parties to the dispute. If jurisprudence advanced in this direction, the dispute settlement mechanism could soon be contaminated by political issues that did not belong to the WTO, much less to its dispute settlement mechanism”.<sup>100</sup>

On the other hand, only the United States was strongly supporting the Appellate Body’s view on the issue. The representative of this country stated that “Appellate Body had acted appropriately in adopting its additional procedure in the asbestos appeal” because “the Appellate Body had the authority under Rule 16(1) of its *Working Procedures* to adopt the additional procedure regarding the acceptance and consideration of *amicus* briefs in that case”.<sup>101</sup>

As may be noted, the position of WTO Members regarding the acceptance of *amicus curiae* briefs – with the sole exception of the United States – is not favorable. Virtually all of them have emphasized that acceptance and consideration of briefs raises some important practical issues, mainly because panels and Appellate Body have considered briefs without providing criteria on the circumstances under which WTO dispute settlement bodies may take into account this sort of additional information. To ensure certainty and predictability, Members need guidance as to the legal value that the panels and the Appellate Body may attach to such unsolicited briefs.<sup>102</sup>

### 3.4. *Amicus Curiae* Briefs in other International Fora

The issue of the participation of NGOs in proceedings conducted before international courts and tribunals has been also controversial, and there are also different rules governing the subject matter. In some international courts and tribunals, NGOs have a clear right to participate in disputes; in others, the chances are minimal or inexistent. Three good examples are useful to illustrate these practices and rules.

The International Center for the Settlement of Investment Disputes (ICSID) has made good efforts in order to submit their arbitration proceedings to public scrutiny. Before the revision of the arbitration rules (2006), there were two important moments in the practice of submission *amicus curiae* briefs. In *Aguas del Tunari vs. Plurinational State of Bolivia*<sup>103</sup> – a dispute involving a concession contract for

95 G. Marceau, M. Stilwell, op. cit., p. 162–163.

96 World Trade Organization, General Council, Minutes of Meeting, WT/GC/M/60, 22 November 2000, Geneva.

97 P. Van den Bossche, op. cit., p. 740.

98 Minutes of Meetings, op. cit., para. 6 and 7.

99 Ibid., para. 11.

100 Ibid., para. 46.

101 Ibid., para. 74.

102 G. Marceau, M. Stilwell, op. cit., p. 163.

103 *Aguas del Tunari S.A. vs. República de Bolivia*, Decision on Respondent’s Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005.

the provision of water and sewerage services to the city of Cochabamba – an organized group of individuals and environmental NGOs filed a joint petition requesting the right to participate in the proceedings as *amicus curiae*. The President of the ICSID arbitral tribunal constituted for conducting the case wrote a letter to the petitioners denying the submission of the brief. The arbitral tribunal ruled that the authority to accept briefs goes beyond the power conferred to the tribunal, given the consensual nature of investment arbitration. But in another case, an arbitral tribunal showed a different approach, more favorable for the participation of non-parties in investment proceedings. In *Sociedad General de Aguas Barcelona vs. The Argentine Republic*<sup>104</sup>, five non-governmental organizations filed a request to the arbitral tribunal for leave to submit an *amicus curiae* brief. The tribunal received observation from the two parties of the dispute. After doing so, the arbitral tribunal held that neither the *ICSID Convention* nor the *ICSID Arbitration Rules* authorize or prohibit the submission of briefs. The arbitral tribunal decided that Article 44 *ICSID Convention* is a grant of residual power to the arbitral tribunal to decide procedural questions not treated specifically in the Convention. Then, the arbitral tribunal established three conditions that should be taken into account in order to accept *amicus curiae* briefs: (a) the appropriateness of the subject matter of the case; (b) the suitability of a given non-party to act as *amicus curiae*; and (c) the procedure by which the *amicus curiae* brief is made and considered by the arbitral tribunal. These criteria have been followed by others arbitral tribunals conducting proceedings under the *ICSID Convention* and *ICSID Arbitration Rules*. Due to the increase in the number of briefs submitted, in 2006 the *ICSID Arbitration Rules* were amended. The new Article 37 expressly establishes that the arbitral tribunal may allow a person or entity that is not a party to the dispute to file a written submission regarding a matter within the scope of the dispute.

The International Tribunal for the Law of the Sea (ITLOS) – responsible for adjudicating dispute related to the application of the *United Nations Convention on the Law of the Sea* – has its own rules on the issue. Article 20 of the Statute stated that only States have standing before the ITLOS. In addition, Article 289 provides that a court or tribunal exercising jurisdiction under ITLOS may select no fewer than two scientific or technical experts, at the request of a party or *proprio motu*.

Finally, Article 37 of the Statute of the European Court of Justice (ECJ) provides that

any individual with legal interest in the results of any case submitted to the Court may intervene, with the exception of cases involving disputes between Member States and/or institutions of the Community. In practice, the possibility for submission of *amicus curiae* briefs is very restricted, just to cases where a person files an application against a Community Institution.

The main conclusion after this brief review is that in other international fora – unlike WTO practice – criteria of some sort are applied to precise the discretion of the tribunal to accept interventions by NGOs. Thus, when a court or tribunal accepts an *amicus curiae* brief, it is usually subject to criteria that are more general and most important, previously established.<sup>105</sup>

### 3.5. Some Arguments in Favour of and Against Acceptance of *Amicus Curiae* Briefs in WTO Dispute Settlement System

The idea of allowing the participation of individuals and NGOs as friends of the tribunal in the WTO has been supported on several grounds and from different points of view. The general framework is that NGOs have strongly criticized the lack of transparency and accountability in the WTO, especially within its dispute settlement system. They believe that governments often face disputes without considering the true effects that decisions have on society, which is most evident – for example – in controversies relating to the protection of the environment. The WTO dispute settlement bodies often lack ready access to the necessary expertise for making well-regarded and broadly accepted decisions.<sup>106</sup> This role may be played by experts, but also by some NGOs with a proven track record in the subject matter.

The experience within other international fora may also serve as an important precedent in this regard. In many of them, NGOs are entitled to participate submitting *amicus curiae* briefs, because the policy-makers are aware of the importance of the views of civil society, that generally contribute to the resolution of conflicts in which States take part. In the same sense, often the participation of *amicus curiae* is closely linked with the concept of public interest: organizations expressing views of the major sections of the population may help to confirm the legitimacy of the decisions rendered by the panels and the Appellate Body, because in many cases the

105 G. Marceau, M. Stilwell, op. cit., p. 175.

106 D. Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion", *Journal of International Economic Law*, 1 (1) / 1998, 123–148, p. 127.

104 *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. vs. The Argentine Republic*, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, ICSID Case No. ARB/03/19, 19 May 2005.

briefs that are submitted provide information on the broader implications of a decision on development, health, environmental, or others relevant aspect.<sup>107</sup>

On the other hand, the reasons given against the idea of allowing participation of non-governmental organizations are of a very different nature. Legally speaking, those supporting this position affirm that the WTO is an inter-governmental organization: NGOs acting as *amicus curiae* do not represent governments and therefore cannot participate in the WTO dispute settlement process. In addition, the acceptance of *amicus* briefs lacks legal basis, because the authority of the Panel to “seek” information under Article 13 of the DSU does not encompass the authority to “accept” information.<sup>108</sup> Thus, the acceptance of briefs is a substantive matter rather than procedural issue, and should be decided by Members and not for panels or Appellate Body.<sup>109</sup> However, this idea starts from the false premise that NGOs have effectively the right to participate in WTO panels and Appellate Body proceedings. The Appellate Body clarified the point in several decisions, ruling that only WTO Members may take part in proceedings and it is up to the panels and Appellate Body to decide whether to accept and consider *amicus curiae* briefs.<sup>110</sup>

But there are also political arguments. Those who reject the participation of non-WTO Members consider that it may bring some negative effects, mainly because of the general feeling that NGOs are opposed to free trade. Many trade experts consider that formal participation of NGOs would expand protectionist notions, and that this is easier to perceive in environmental groups and labour unions intervening in WTO proceedings. This idea is directly linked with a concern about the representativeness and accountability of the NGOs: critics on the participation of NGOs in WTO dispute settlement mechanism argue that often they are manipulated for small-minder interests, and thus that they not represent really general interests. It is true that is very difficult to assess how many people a particular group represents. But within the same trade field there are good experiences for example within the World Bank system for resolving investment disputes between a State and nationals of other States (ICSID). In this forum, NGOs are expressly entitled

to submit briefs, but subject to compliance with certain requirements, highlighting the proof of a significant interest in the proceeding. The representation and accountability of NGOs may be relevant to confirm their character and the interests that they are representing.

All these observations can be corrected by means of the necessary regulation that must be made by WTO Members.

#### 4. Conclusions

As pointed out, the acceptance of *amicus curiae* briefs in WTO dispute settlement system is a contentious topic among WTO Members, in both political and legal level. Despite the negative attitude assumed by most of governments, it is important to keep in mind that problems and differences of opinions arise mainly due to the fact that it is a matter that has not been regulated in the DSU. Many governments have identified the need for Members to discuss and establish clear rules addressing the issue whether *amicus curiae* should be allowed in WTO dispute settlement mechanism, and if so, under what circumstances. Criteria applying to *amicus curiae* briefs must promote due process and ensure that they contribute to the integrity and legitimacy of the decisions rendered by panels and the Appellate Body.<sup>111</sup> That is the starting point for discussions, and primarily a responsibility of the Members. Only they have the key for reaching an agreement establishing the necessary regulations. To do this, it is necessary to weigh duly the different interests that are at stake.

Some inputs to take into account:

- NGOs have legitimately tried to influence dispute outcomes, promoting more transparent and informed decisions. Improved responsiveness and representativeness on the part of the WTO and a better understanding of the international trading system on the part of the public would enhance the WTO’s legitimacy and strengthen its position as a central element of the emerging structure of international economic governance.<sup>112</sup>
- The problem faced by WTO Members is not exclusively of legal nature. The crucial decision is to determine on what level of formal participation within the dispute

<sup>107</sup> G. Marceau, M. Stilwell, Op. cit., p. 180.

<sup>108</sup> H. S. Gao, “Amicus Curiae in WTO Dispute Settlement: Theory and Practice”, China Rights Forum, 1 / 2006, 51–67, p. 56.

<sup>109</sup> Ibid., p. 55.

<sup>110</sup> Ibid.

<sup>111</sup> G. Marceau, M. Stilwell, op. cit., p. 178.

<sup>112</sup> D. Esty, (Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion), p. 123.

settlement system will have in the next future organizations representing other interests (often collectives). This is mainly a political issue.

- The notion of “closed” institution could contradict democratic principles that inspire it. NGOs play constructive roles in numerous international organizations. It would be useful to analyze the practice before other international fora, since other courts and tribunals have developed clear rules governing the issue, generally contained in its respective statutes.
- WTO Members should negotiate and agree on certain criteria and clear rules regarding the acceptance of *amicus curiae* briefs. It would be desirable to limit the discretion of the panels and the Appellate Body, establishing uniform rules and practices. Inconsistency in the practice of the panels and the Appellate Body is clearly visible in the instances of acceptance and rejection of briefs in various cases. This uncertainty must be avoided.
- Even though it was rejected by WTO Members, a good draft may be the Additional Procedure established “in interests of fairness and orderly procedure in the conduct of this appeal” by the Appellate Body in *EC – Asbestos*. This procedure was developed because of the existing gap in the regulation of *amicus curiae* briefs, and contains important provisions that may be taken into account by Members. Following this Additional Procedure, the desirable regulation may include two stages: during the first stage – applying for leave – the panels and the Appellate Body should confirm *prima facie* whether a brief satisfies procedural requirements such as length, compliance with the timetable, identification of applicants, and nature of the NGO’s interest in the dispute. A second stage – after the *prima facie* analysis and subsequent authorization – should include a revision on the merits of the briefs, the relevancy of the NGO’s interest, quality of the evidence submitted, the expertise on the subject matter of the non-governmental organization, and the specific needs for the panel or Appellate Body for considering the brief, depending on the circumstances of the specific case.
- The government-to-government nature of the WTO is not an impediment to deprive the participation of civil society in its proceedings. It is clear that only WTO Members have access to the dispute

settlement system as a “right”, but at the same time panels and the Appellate Body could enrich its decisions by receiving information from different sources (accepting briefs). The key point is to agree upon a framework in which this participation should be effective.

- Although rejection of WTO Members to the participation of NGOs has been widespread, it has been stronger in the case of developing countries. They have distrust towards NGOs, believing that often they are controlled by more powerful countries. Indeed, this may be true in some cases. This legitimate fear can be mitigated by promoting accountability and disclosure of relevant information, such as funding sources, and clarifying the specific interest that the respective NGO has in the dispute.
- The lack of legal clarity provides a valuable opportunity to discuss and reflect on new ways of participation of civil society. NGOs could extend the WTO look and enrich decision-making processes.

Allowing NGOs to make submissions to the panels and the Appellate Body would be constructive in the dispute settlement system. As noted, in many cases the dispute goes beyond that of merely trade law, and non-governmental points of view may be especially illuminating before rendering a compulsory decision.<sup>113</sup> *Amicus curiae* must be welcome friends.

**Carlos Bellei Tagle**

### **Amicus curiae podnesci u sistemu rešavanja sporova STO: Dragi prijatelji?**

*Nevladine organizacije su jasno izrazile želju da aktivno učestvuju u razvoju trgovinske politike unutar okvira glavne institucije, Svetske trgovinske organizacije. Ova namera uključuje podnošenje amicus curiae podnesaka u sistemu rešavanja sporova STO. Ovo pitanje, koje nije eksplicitno uređeno u Dogovoru za rešavanje sporova, kontraverzno je za većinu članica STO. Ovaj članak istražuje glavne političke i pravne posledice koje proizlaze iz prihatanja te vrste netražene komunikacije, sa stanovišta transparentnosti procesa. Članak sugerše potrebu da se ovo pitanje uredi, što je zadatak koji pripada članicama STO i koji obuhvata prepoznavanje doprinosa koji nevladine organizacije mogu imati u smislu legitimiteta sistema rešavanja sporova STO, koji se obično smatra veoma zatvorenim.*

Ključne reči: STO, sistem rešavanja sporova, NVO, transparentnost, amicus curiae, učešće javnosti

<sup>113</sup> Ibid., p. 145.