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The Participation of NGOs in the WTO Dispute Settlement System

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Wintersemester 2003

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I. Introduction

“We are making progress toward improving our information exchange and consultation with civil society. These measures are the first step in our enhanced co-operation and represent the start of an on-going collaboration with partner NGOs, which we fully expect will offer important benefits for all parties concerned.”¹

“I’ve repeatedly said I thought the WTO process was too closed; if I can’t persuade more of my colleagues that, if they don’t want people like the protestors outside of every trade meeting `til the end of time, they’re going to have to open the process [...], we’re going to continue to have problems.”²

Traditionally, sovereign states have been the sole legitimate actors in the field of international relations.³ However, in an increasingly globalized society, the traditional concept of international law of the “law of nations” no longer reflects the reality of international society. Especially non – state actors are increasingly demanding a voice in international organizations and processes. Non – governmental organizations (NGOs) are among the most influential groups of non – state actors in the international legal field; but just how far their influence reaches within the WTO system in general and especially in WTO Dispute Settlement proceedings shall be the focus of this paper.

1) What are NGOs?

NGOs are “private organizations (associations, federations, unions, institutes, groups) not established by a government or by intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights. The members of an NGO may be individuals or corporate bodies [...].”⁴

“If civil society were an iceberg, then NGOs would be among the more noticeable of the peaks above the waterline [...].”⁵

¹ Former World Trade Organization Director General Renato Ruggiero in a statement on July 17th, 1998; available under http://www.wto.org/english/news_e/pres98_e/pr107_e.htm.

² Former U.S. President Bill Clinton speaking at the 3rd WTO Ministerial Conference in Seattle on December 1st, 1999; available under <http://www-hoover.stanford.edu/publications/epp/105/105b.html>.

³ Alfred Verdross called this “zivilistisch – bilateralistische Struktur des Völkerrechts”; see Alfred Verdross /Bruno Simma, “Universelles Völkerrecht – Theorie und Praxis“, 3. Auflage, Berlin (1984), p. 40.

⁴ Hermann H.-K. Rechenberg, NGOs, in : R. Bernhardt (ed.), Encyclopedia of Public International Law, Volume 9, North – Holland (1986), pp. 276f. See also Steve Charnovitz, “Opening the WTO to Non – Governmental Interests”, p. 2: “NGOs are voluntary organizations of individuals who come together to achieve common purposes.”

⁵ Michael Edwards, “NGO Rights and Responsibilities – A New Deal for Global Governance”, The Foreign Policy Centre (2000).

NGOs come in all shapes and sizes, representing all sorts of special interests; as used in the context of this paper, the term “NGOs” covers all non – state actors including legal or natural persons.

Since the end of the Cold War, there has been an enormous growth in the number, size and reach of transnational NGOs. Contacts with global regimes and multilateral institutions became more frequent towards the 1980s.⁶ The creation of the WTO has increased calls by NGOs to participate in decisions about trade policy, including in WTO dispute settlement as *amici curiae*⁷. Many NGOs have claimed that the rights and interests of citizens are inadequately reflected in WTO decisions; their scepticism has been nurtured by the confidentiality of the GATT / WTO dispute settlement mechanism, which gives rise to speculation about “what happens behind closed doors”.

But many governments, especially in developing countries, accuse NGOs of being unrepresentative and radical, thereby distorting the democratic process, undermining the authority of elected officials, and fostering urban, middle – class minorities.⁸

However, both practically and politically, it is virtually impossible to retreat from the trend of greater NGO engagement. The Marrakesh Agreement establishing the World Trade Organization of 1994 in fact explicitly acknowledges involvement by NGOs in the WTO, stipulating that “[T]he General Council may make appropriate arrangements for consultation and cooperation with non – governmental organizations concerned with matters related to those of the WTO.”⁹ In 1996, the General Council of the WTO elaborated formal guidelines for increased relations with NGOs.¹⁰

Still, it must not be overlooked that in practice, NGOs have been kept away from the most important forums – for example, though NGOs may attend WTO ministerial conferences, they are excluded from the “green room” where the “real negotiations” take place.

The same goes for dispute settlement in the WTO, since it’s the broadly held view that the WTO as an intergovernmental institution does not bring about direct involvement of NGOs.¹¹ If and how a direct or at least a more efficient indirect

⁶ Examples are the formation of the NGO Working Group on the World Bank in 1984, as well as the consolidation of NGO consultative bodies for the UN specialized agencies.

⁷ The term *amicus curiae* literally means “friend of the court”; in the U.S. Supreme Court, for example, it denotes a person who is not a party to a case, but has a strong interest in the subject matter, and may therefore ask the court for permission to file a brief. In the context of WTO dispute settlement, the term *amicus brief* means letters and other information submitted by non – parties in the course of dispute settlement proceedings.

⁸ A UN study made public in 2000 went so far as to characterize the WTO as a “nightmare for developing countries”. (ECOSOC, Sub – Committee on the Promotion and Protection of Human Rights, “The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the Full Enjoyment of Human Rights”, E/CN.4/Sub.2/2000/13; June 15th, 2000). This study came under strong attack from the WTO Secretariat, which released a study arguing that free trade helps reduce poverty. (WTO Secretariat: “Trade, Income Disparity and Poverty”, June 2000).

⁹ Art. 5 (2) of the Marrakesh Agreement Establishing the World Trade Organization.

¹⁰ See especially Par. IV of the Guidelines for Arrangements on Relations with Non – Governmental Organizations, adopted on July 18th, 1996 : “The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. [...]”

¹¹ See the Guidelines for Arrangements on Relations with Non – Governmental Organizations, para 6 : “Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As

participation of NGOs in WTO dispute settlement can be achieved shall be discussed later on...

2) What is the WTO?

The WTO is the only global “intergovernmental organization regulating trade between nations”¹², set up, inter alia, to supervise national trade policies. It came into being in 1995, as a result of the Uruguay Round (1986 to 1994) initiated in order to address a crisis of the GATT and thereby to modify the “old” order of international trade.¹³

The WTO has legal personality, and Members are required to accord to the WTO such legal capacity, privileges and immunities as may be necessary for it to carry out its functions.¹⁴

The preamble of the Marrakesh Agreement Establishing the World Trade Organization¹⁵ summarizes its intention to [...] *develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.*”

The WTO is “integrated” in that it provides for the so – called “single undertaking approach”, meaning that all rules are to be uniformly applied to all of the WTO agreements. On the basis of this approach, all members are required to accept all agreements.¹⁶ Members may not make any reservations in respect of their membership of the WTO.¹⁷ By Art. XVI (4) of the Marrakesh Agreement, members commit themselves to alter their laws, regulations and administrative procedures to conform with the supra - state trade regime. Alleged violations of WTO rules are considered by a panel of experts whose decisions are binding unless every WTO member votes to overturn the advice. The WTO as an international organization is a consensus – based¹⁸ institution driven by the members¹⁹ themselves.

a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.”

¹² See *August Reinisch/Christina Irgel*, “The participation of non – governmental organizations (NGOs) in the WTO dispute settlement system”, Kluwer Law International (2001), p.127.

¹³For details, see *Jeffrey S. Thomas/Michael A. Meyer*, “The New Rules of Global Trade – A Guide to the World Trade Organization”, Carswell (1997).

¹⁴ See Art. VIII of the Marrakesh Agreement.

¹⁵ See *Ernst – Ulrich Petersmann*, “The Dispute Settlement System of the WTO and the Evolution of the GATT Dispute Settlement System since 1948”, *Common Market Law Review*, Kluwer Academic Publishers (1994), p. 1160: “ The Agreement Establishing the WTO, adopted by 124 countries and the EC on 15 April 1994, is [...] the most important worldwide agreement since the UN Charter of 1945.”

¹⁶ With a few minor exceptions (“Plurilateral Agreements”), of which only two are of importance, namely the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement.

¹⁷ See Art. XVI (5) of the Marrakesh Agreement Establishing the World Trade Organization.

¹⁸See Art. IX of the Marrakesh Agreement; in cases where a decision cannot be reached, the matter shall be decided by voting unless explicitly excluded.

¹⁹ Formally, membership in the WTO is not limited to sovereign states – see Art. XII (1) WTO Agreement: “*Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO [...].*”

The main organs of the WTO are the Ministerial Conference, the General Council and the Secretariat. The Ministerial Conference as the highest organ of decision – making, in which all members are represented, convenes once every two years. In the intervals between Ministerial Conferences, the General Council, also composed of representatives of all members, conducts the functions of the Ministerial Conference. Furthermore, it can convene in the form of the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB). There is also an Appellate Body, which is established as a standing body by the DSB.

The WTO, with its delicate balance of rights and obligations that the Members have negotiated among each other, is a unique international organization. No other institution`s rules extend so deeply into domestic economies, and no other institution possesses a binding dispute settlement system, complete even with the possibility of legal retaliation.²⁰

3) A Quick Overview: The WTO Dispute Settlement System

Since the WTO Agreement came into effect in January of 1995, the number of dispute settlement cases has increased significantly as compared to experience under the GATT 1947.²¹ While GATT dispute settlement had evolved over time in case law from the meagre foundation provided by Articles XXII and XXIII of GATT 1947²², Article III of the WTO Agreement provides that one of its principal functions is the administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“The DSU”). Even though the DSU “judicializes”²³ the panel procedures, the “acquis” of past GATT dispute settlement practice remains relevant also for the WTO dispute settlement system.²⁴

The key stages in WTO dispute settlement proceedings are as follows:²⁵

First, the parties must attempt to resolve their differences through confidential consultations²⁶. Members may, throughout the proceedings and on a voluntary basis, use good offices, conciliation or mediation as alternate means²⁷. Assuming that consultations or the other alternatives have failed to settle the dispute, the

²⁰ See Art. 22 DSU.

²¹ For details, see http://www.wto.org/english/news_e/pres03_e/pr353_e.htm.

²² This lack of dispute settlement procedures is due primarily to the intended temporary nature of the GATT, which was to remain in force only until the Havana Charter and the ITO came into effect. The Havana Charter, however, never entered into force, since the necessary amount of ratifications, especially that of the U.S., could not be attained. U.S. President Truman could not overcome the resistance of the Republican – dominated Senate. See thereto *Peter Fischer*, “Internationales Wirtschaftsrecht – ein Grundriss” (2003), p. 67.

²³ Petersmann, 1211.

²⁴ See Art. 3 (1) of the DSU.

²⁵ The following paragraph is based on *Jackson/Davey/Sykes*, “Legal Problems of International Economic Relations – Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations”, American Casebook Series, West Publishing Co. (1995), p. 340ff.

²⁶ See Art. 4 DSU.

²⁷ See Art. 5 DSU.

complaining Member may request the establishment of a panel²⁸. The DSB must establish a panel unless it decides, by consensus, not to establish the panel.²⁹ All meetings of the panel are to be held in closed session, and deliberations of the panel as well as documents submitted to it are to be kept confidential.³⁰ The panel hears the disputing and interested third parties and drafts an interim report, which is circulated to the disputing Members for review and comments.

If the parties fail to reach a mutual settlement following this interim stage, the panel will issue its final report to the DSB. In adopting a panel decision³¹, the DSB renders it binding upon the parties. Any of the disputing Members who considers that the panel has made a legal error may appeal to the WTO's Appellate Body (AB).³² The AB may uphold, modify or reverse the legal findings and conclusions of the panel. Its report will be adopted by the DSB³³ and must be unconditionally accepted by the disputing Members.

There are tight time schedules for both the panel and the appellate stage, according to which the panel process may not last longer than six months, and the appeals process may not take longer than 60 days.³⁴ After a report is adopted, the DSB will monitor whether or not its recommendations are implemented.³⁵ If a party does not abide by the recommendations, the prevailing party may be entitled to seek, as temporary measures, compensation or the authority to suspend concessions previously made to the opponent.³⁶

²⁸ Panels normally comprise three well – qualified, independent persons who may not be citizens of the parties to the disputes (Art. 8 DSU). They are established ad hoc by the DSU; their task is to assist the DSB in issuing a final binding ruling on the matter (Art. 11 DSU).

²⁹ This “reverse consensus” requirement has been adopted to overcome the consensus rule under GATT dispute settlement, where a party to the dispute could thus easily prevent the establishment of a panel.

³⁰ Art. 14 (1) DSU: “Panel deliberations shall be confidential.”

³¹ Here, again, the negative consensus – rule is applicable: The DSB may decide by consensus that the report will not be adopted.

³² See Art. 17 DSU. Third parties may not appeal a panel decision, but may participate in an appeal issued by a disputing party. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body review is held in closed session; submissions to the Body are confidential.

³³ Unless the DSB decides by consensus not to adopt the AB's report.

³⁴ In exceptional circumstances, these time frames may be extended up to nine months in the panel proceedings and 90 days in the appeals process. See Arts. 12 (8) and (9), Art. 17 (5), Art. 20, and Art. 21 of the DSU.

³⁵ See Art. 21 DSU.

³⁶ See Art. 22 DSU.

II. Opportunities for NGO Participation in the WTO

By and large, since the establishment of the WTO, NGOs have always shown interest in the new multilateral organization and wanted to participate in its negotiations and proceedings. In terms of their general approach to the WTO, there are, of course, differences among NGOs: some broadly endorse the existing aims and activities of the WTO, while others accept the need for a global trade regime, but want to change the WTO's policies; yet another group seeks to reduce the WTO's competences or even to abolish the institution altogether – like the *Peoples' Global Action Against "Free" Trade and the World Trade Organization* (PGA), which has called openly for "the disappearance of the WTO".³⁷

1) NGOs and the Original International Trade Regime³⁸

In view of the current limited role of NGOs at the WTO, it should be mentioned that NGOs played a substantive role in the UN Conference at Havana, and that NGOs were in fact expected to play an important part in the International Trade Organization (ITO) that was to be created.

The Draft of a Proposed Report of the Interim Commission to the First Conference of the ITO of 1949 states that "[t]he organization shall take full advantage of the knowledge and experience of non – governmental organizations engaged in work within its purview. To this end, arrangements shall be made for including appropriate non – governmental organizations in a list of consultants to the Organization [...]"

The ITO intended for NGOs to be able to attend Conference Sessions and to submit suggestions to the Conference for its consideration. Moreover, NGOs were to receive any documentation necessary for effective consultation, and documents submitted by NGOs to the Conference were to be made available through a list of all communications received.

The above – mentioned Proposed Report was never adopted, since the ITO did not come into being. Chapter IV of the Havana Charter, which came into force in 1948 as the GATT, contained no provisions for an NGO role in GATT activities.

When the GATT Ministerial Conference met in Brussels in December of 1990, a group of NGOs came to the conference site and denounced the ongoing round as a

³⁷ PGA press release, 18 May 1998; see the PGA website: <http://www.agp.org> : "[W]e say: enough! Shut down the WTO!"

³⁸ The following paragraph is based on *Steve Charnovitz and John Wickham*, "Non – Governmental Organizations and the Original International Trade Regime", in: *Journal of World Trade*, Vol. 29 (October 1995), Werner Publishing Company Ltd.

“GATTastrophe”.³⁹ Non – solicited briefs sent to the GATT Secretariat for consideration by panels were never considered, with the argument that it was a government – to – government system.

2) Participation of NGOs in the WTO System in general

Art. V (2) of the Marrakesh Agreement provides that “[t]he General Council may make appropriate arrangements for consultation and cooperation with non – governmental organizations concerned with matters related to those of the WTO.” In accordance with this mandate, the Secretariat was given the task by the General Council in the 1996 Guidelines For Arrangements on Relations With Non – Governmental Organizations⁴⁰ of playing “a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate [...]”⁴¹

Still, in practice, it is hard for NGOs to counter the prevailing opinion among WTO Members that the WTO was founded “by states and for states only”; the Guidelines even expressly refer to this view⁴², underlining the intergovernmental character of the WTO legal system.

Chances for “consultation and cooperation” with NGOs could arise in all three “branches” of the WTO: the legislative, the executive, and the judicial branch. Some of the most persistent efforts to reform the WTO have come from environmental NGOs, who maintain that a liberal trade regime tends to worsen ecological degradation. Thus, they have sought to institute restrictions on trade where it causes ecological damage.⁴³ Not only have NGOs tried to influence WTO policies, but they have also sought to change the operating procedures of the WTO, advocating a democratization of the organization by giving citizens increased access to and influence in its proceedings and decisions.

Some have argued that NGO representatives should participate directly in WTO policy deliberations and dispute settlement procedures; even the establishment of a WTO Parliament with an advisory role for NGOs has been proposed.⁴⁴

Although very little has been done to institutionalize relationships with NGOs or to involve them directly⁴⁵, the WTO has already taken some steps to implement Article V of the Marrakesh Agreement: Since 1994, the Secretariat has organized annual symposia with NGO representatives on trade and sustainable development

³⁹ Charnovitz, 2.

⁴⁰ Decision adopted by the General Council on 18 July 1996, WT/L/162 (July 23rd, 1996).

⁴¹ See Par. IV of the Guidelines For Arrangements on Relations with NGOs, WT/L/162 (23 July 1996).

⁴² See Par. VI of the Guidelines For Arrangements on Relations with NGOs.

⁴³ Leading reformist environmental NGOs in dialogue with the WTO include the International Center For Trade and Sustainable Development (ICTSD), the World Wide Fund for Nature (WWF), and the Center for International Environmental Law (CIEL).

⁴⁴ See <http://www.ictsd.org/html/special.htm>.

⁴⁵ See, for example, the NGO information page for the Fifth Ministerial Conference held at Cancun, available under http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_ngo_e.htm.

issues. In November of 1996, the Secretariat commenced informal sessions with NGOs.⁴⁶

The WTO has also responded to NGO demands for greater release of information concerning WTO policymaking, especially in constructing an elaborate website.⁴⁷

The reports of dispute panels are now made public as soon as they are adopted; still, some important documentation continues to be restricted. As one NGO representative described the situation, “The WTO has evolved from opaque to translucent.”⁴⁸

In 1996, the General Council took the important step of permitting NGOs to attend

(- note: merely to “attend” -) the WTO Ministerial Conference⁴⁹; at these Conferences, a practice has developed of providing NGOs that make an application to the WTO and meet certain criteria (- not very clearly articulated -) a kind of “accreditation”. This “earns NGOs the dubious privilege of attending several “plenary sessions” where delegations read set speeches, repeating generalities about their negotiating positions that could less tediously be gleaned from a regular reading of the Financial Times [...]. One exception to the exclusion of NGOs from formal participatory roles in the WTO relates to the dispute settlement process [...]”.⁵⁰

3) Participation of NGOs in the Dispute Settlement Procedure

“The DSU is an integral part of the WTO Agreement and thus has the legal status of a treaty. Therefore, the dispute settlement system has a precise, treaty – based framework.”⁵¹

Art. 3 (2) of the DSU reinforces the view of the WTO as an exclusively intergovernmental forum, stating that “[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to *preserve the rights and obligations of Members* under the covered agreements [...]” (emphasis added).

There are three main capacities in which NGOs might participate: as a party, as an “intervener”, or as an *amicus curiae*⁵². Whereas involvement as a party or as an intervener implies the granting of “standing”, when they are allowed to act as *amicus curiae*, by contrast, NGOs do not gain standing per se, but may participate at the discretion of the Tribunal. At present, NGOs are not allowed direct access to the

⁴⁶ Trade and Environment News Bulletin, TE/016 (November 28th, 1996). A key participant was the International Center for Trade and Sustainable Development (ICTSD), which had just been established to enhance interactions between the WTO and civil society.

⁴⁷ <http://www.wto.org>.

⁴⁸ See http://www.ictsd.org/html/review_2-3.7.htm, page 1.

⁴⁹ WTO Annual Report 1998, 135 – 136.

⁵⁰ Robert Howse, “Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy”, presented at the World Trade Forum in 2001; available at http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/Howse17.pdf.

⁵¹ Reinisch/Irgel, 133.

⁵² See Fn 7.

WTO dispute settlement system, meaning that they have no standing before the adjudicating bodies. Still, there is a possibility for indirect participation: The Appellate Body of the WTO has held that NGOs are permitted to file amicus curiae submissions to both panels and the Appellate Body.⁵³

The question of providing for the possibility of amicus curiae submissions in the WTO dispute settlement system was already considered during the Uruguay Round negotiations.⁵⁴ In November 1993, one delegation put forth a negotiating proposal to the effect that the panels may invite interested parties other than parties or third parties to the dispute to present their views in writing. Due to overwhelming opposition, the proposal was not incorporated into the DSU. After the establishment of the WTO, the issue of amicus curiae briefs first came up in the “Shrimp – Turtle” dispute, which shall be discussed in more detail under III.

The filing of amicus curiae briefs as such hardly constitutes a major role for NGOs, since it is within the discretion of a panel or the Appellate Body whether or not to accept the briefs. Still, it is a first step towards formal and direct participation in the real workings of the WTO, opening the door to challenging the “club” privileges within the WTO. Currently, therefore, the DSU as interpreted by the Appellate Body allows the submission of amicus curiae briefs only on a case – by – case basis. The U.S. have observed that “[i]n light of the experience to date [...], Members may wish to consider whether it would be helpful to propose guideline procedures for handling amicus curiae submissions [...].”

4) PROs and CONs of NGO Participation

It might be useful to illustrate, free of any value judgments, the possible advantages and disadvantages arising in the context of the participation of NGOs in the WTO’s proceedings. What can be gained by the WTO, what does it stand to lose?

The following positive aspects of NGO participation can be identified:

- An international legal process that fails to allow nonstate actors – and therefore a wide array of interests – full participation inevitably faces difficulties developing economic and social norms that are fully responsive to the international community.
- The WTO can gain information and expertise from NGOs, which leads to better – quality judgments.
- Moreover, NGOs can promote compliance with WTO rules and help educate the public about the WTO and trade.
- NGOs can provide the WTO with research, which is often time – and money – consuming and therefore less easy to conduct at the WTO level.

⁵³ Especially the U.S. has always demanded that non – parties be permitted to file such amicus briefs; in a speech held at the 1998 Fifty Years Celebration of the GATT, former U.S. President Bill Clinton proposed that “[...] the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file amicus briefs, to help inform the panels in their deliberations.” Available at http://www.wro.org/english/thewto_e/minist_e/min98_e/english/anniv_e/clinton.htm.

⁵⁴ The Uruguay Round negotiations leading to the establishment of the WTO took place from 1986 to 1993.

- An increase of NGO participation would give minority viewpoints a chance to be heard, relieving the WTO of the common perception that the public opinion is excluded from its proceedings and negotiations.
 - Critical voices which have not been “governmentally filtered” can help WTO panels in their law - and fact – finding tasks.
 - NGOs can stimulate debate about WTO policies by offering alternative perspectives, challenging the WTO to clarify, explain and perhaps even rethink its positions. With NGO input, officials can better assess the political viability of proposed measures.
 - NGO involvement can contribute to efficient project implementation and a lower rate of failure; it also leads to a higher level of public support. It could also positively influence the respect accorded to WTO views and the ratification of WTO – sponsored trade agreements.
 - The WTO could become more effective in achieving the goals set out in the Preamble of the Marrakesh Agreement to “develop an integrated, more viable and durable multilateral trading system [...]”

Possible shortfalls, and thus detrimental effects on policy and democracy in the global trade regime, might be the following:

- NGO participation might endanger the delicate balance of rights and obligations that resulted from numerous trade negotiations between the WTO Members.
 - NGOs lobby and compete in the politics of individual WTO Member states; it’s the failure to achieve their goals in the national arena that impels them to again lobby at the WTO itself. Giving NGOs the opportunity to do so would be giving them “two bites of the apple” which might actually undermine democracy. The idea is that it is anti - democratic if countries do not speak with one voice.⁵⁵
 - The practical questions of deciding just which – and how many – NGOs should be granted direct participation in the DSU might prove to be insurmountable.
 - Since the loss of an important WTO case can cost hundreds of millions of dollars in compensation or from retaliation, attempts to shift the balance of power by introducing new actors into the DSU are likely to trigger a battle among WTO Members.
 - Moreover, timing and scheduling might pose a problem when involving NGOs in the process, since the panel process is normally limited to six months and the appeals process to sixty days.⁵⁶
 - Those NGOs with the greatest legal and political resources would probably benefit most from an expansion of participation; a large imbalance exists between northern and southern NGOs. Especially developing country Members view an increased openness as favouring the positions of western, developed country NGOs. NGO contacts could thereby produce and enlarge inequalities.
 - In many cases, NGO leaders are not accountable directly to their members; NGO operations usually lack safeguards for accountability and transparency.
 - A potential danger lies in “low – quality involvement”, in that NGO experts might be inexperienced and unacquainted with WTO law.

⁵⁵ See also par. 6 of the Guidelines for Arrangements on Relations with NGOs: “Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy – making.” (WT/L/162, 23 July 1996).

⁵⁶ See Fn 34.

- There has been a tendency of “campaign NGOs” to exaggerate issues in order to attract media attention and funding.

III. Selected Disputes⁵⁷

The “Shrimp – Turtle” dispute⁵⁸

WTO Members have been at odds over NGO participation in trade disputes ever since the ruling of the Appellate Body in the “Shrimp – Turtle” case. It is probably one of the most well known environment – related cases as well as the first case where the Appellate Body dealt with the issue of amicus curiae briefs in the context of acceptance of a role for NGOs. The dispute centres on a ban imposed by the U.S. on the importation of shrimp and shrimp products for the protection of endangered sea turtles.⁵⁹ The panel found the import ban to be inconsistent with WTO rules, and not justifiable under Art. XX of the GATT, arguing that the U.S. ban was unjustifiable discrimination between countries. This argumentation of the panel was appealed against by the U.S., as well as the panel’s finding that the acceptance of non – requested amicus submissions from non – governmental sources would be incompatible with the DSU.

In the course of the proceedings before the panel, it received briefs from three NGOs.⁶⁰ The complaining parties (- India, Malaysia, Thailand, and Pakistan -) requested the panel not to consider the contents of the briefs, while the U.S. urged the panel to avail itself of the contained information.

The panel reacted as follows: “We had not requested such information as was contained in the above – mentioned documents. We note that, pursuant to Art. 13 of the DSU⁶¹, the initiative to seek information and to select the source of information rests with 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. We therefore informed the parties that we did not intend to take these documents into consideration [...].”

So, in the panel’s view, non – requested information was to be disregarded, precisely because it was unrequested. The verb “to seek” which figures in Art. 13 DSU was seen as reflecting the idea that panels only may take the initiative to request information. Nevertheless, the panel allowed any party to the dispute to

⁵⁷ Summaries published in *Pierre Pescatore*, “Handbook of WTO/GATT Dispute Settlement”, Volumes 1 and 2, Kluwer Law International (2003). For the full texts, see <http://www.sice.oas.org/DISPUTE/wto/58r00> or <http://www.wto.org/disputes>.

⁵⁸ “US – Import Prohibition of Certain Shrimp and Shrimp Products”; WT/DS58/R, WT/DS58/AB/R (1998).

⁵⁹ A 1989 U.S. law (- Section 609 of the Endangered Species Act -) required the U.S. government to certify that all shrimp imported to the U.S. are caught with methods that reduce the number of turtles caught in shrimp nets, such as the use of “turtle excluder devices” (TEDs). India, Pakistan, Malaysia and Thailand lodged complaints at the WTO in early 1997, claiming that Section 609 violated Arts. I, XI, XIII of GATT 1994 as well as the principle of National Treatment.

⁶⁰ The Center for Marine Conservation (CMC), the Center for International Environmental Law (CIEL) and the World Wide Fund for Nature (WWF) submitted amicus briefs.

⁶¹ Art. 13 of the DSU, entitled “Right to Seek Information”, reads: “1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate [...]. 2. Panels may seek information from any relevant source and may consult experts [...].”

attach amicus briefs to its own submissions: “[I]f any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the panel, they are free to do so.”

The Appellate Body disagreed with the panel’s opinion on non – requested information; however, it started out by stating that “[i]t 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. [...] 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.” (emphases not added).

The Appellate Body went on to examine what exactly a panel is authorized to do under the DSU; it interpreted Art. 13 of the DSU as “a grant of discretionary authority: a panel is not duty – bound to seek information [...].”

It came to the conclusion that a panel does indeed have the authority to accept amicus briefs, based on “Articles 12 and 13, taken together [...]. That authority [...] is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements [...].”⁶²

The Appellate Body disagreed with the panel in that “we do not believe that the word ‘seek’ must necessarily be read, as apparently the panel read it, in too literal a manner.” The panel’s understanding of the word ‘seek’ was seen as being “unnecessarily formal”. So, through an interpretation of the term “to seek”, the Appellate Body managed to introduce the amicus curiae briefs issue to the WTO:

“In the present context, 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. [...] [A] panel will not be deluged, as it were, with non – requested material, unless that panel allows itself to be so deluged [...].”

The Appellate Body’s final conclusion reads, “We find, and so hold, that the Panel erred in its legal interpretation that accepting non – requested information from non – governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non – governmental organizations, or any portion thereof, to its own submissions.”

The Appellate Body accepted three amicus curiae briefs appended to the U.S. submissions, and one that had come directly to the Appellate Body.⁶³

⁶² Some authors mention in this context the ICJ decision “Reparation for Injuries Suffered in the Service of the United Nations” (ICJ 1949), in which the ICJ held that an international organization should be considered to possess those powers not explicitly granted in its constitutive treaty that are necessary for the performance of its duties.” See *Robert Howse*, “Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy”, presented at the World Trade Forum in 2001, p.10. Available under http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/Howse17.pdf.

⁶³ This directly submitted brief came from CIEL. The Appellate Body was harshly criticized for saying in the preliminary ruling taking the amicus brief into account that it would give its reasons for accepting the brief in its final ruling, but never doing so. See *Chakravarthi Raghavan*, “Appellate Body Asserts Right to Receive Amicus Curiae Briefs”, available at <http://www.twinside.org.sg/title/amicus.htm>.

CIEL commented on the acceptance of its brief by the Appellate Body as follows: “The decision yielded a victory for civil society participation in the WTO. The Appellate Body accepted the CIEL brief and overturned the Panel’s ruling that submissions by civil society could not be considered. The decision thus marks a significant step forward in increasing openness and transparency at the WTO.”⁶⁴

Some WTO Members started protesting, since they held that it was for the Membership to decide the extent to which NGOs could participate in the WTO, and accused the Appellate Body of having exceeded its mandate.⁶⁵

“Carbon Steel”⁶⁶

The controversy deepened with the Appellate Body’s decision in the “Carbon Steel” case, also called “British Steel” case, where it explicitly ruled that unsolicited amicus curiae briefs are admissible in Appellate Body proceedings.

The European Communities claimed that the U.S. had not taken all “necessary steps” to ensure that countervailing duties on certain leaded bars from the UK were imposed. The U.S. appealed the panel report which decided that the U.S. imposition of countervailing duties on hot – rolled lead and bismuth carbon steel products from the UK was inconsistent with the “SCM Agreement”.⁶⁷ The parties to the dispute contested whether the Appellate Body had the authority to accept the briefs directly, rather than as attachments to a government’s brief. As a preliminary matter, the Appellate Body considered whether or not it could accept two amicus curiae briefs it had received directly from the interested U.S. steel industry associations.⁶⁸

While the European Communities and Mexico⁶⁹ argued that the Appellate Body was barred from considering such briefs⁷⁰, the U.S. argued that these briefs should be accepted by the Appellate Body since Art. 17 (9) DSU⁷¹ authorizes the Appellate Body to draw up its own Working Procedures.

The Appellate Body held: “In considering this matter, we first note that nothing in the DSU or the Working Procedures specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in the appeal. On the other hand, neither the DSU

⁶⁴ See <http://ciel.org/Tae/shrimpturtle.html>.

⁶⁵ See the Minutes of the DSB Meeting in November of 1998, available at <http://www.worldtradelaw.net/dsbminutes/m51.pdf>.

⁶⁶ “US – Imposition of Countervailing Duties on Certain Hot – Rolled Lead and Bismuth Carbon Steel Products Originating in the UK”; WT/DS138/R, WT/DS138/AB/R (2000).

⁶⁷ For the full text of this “Agreement on Subsidies and Countervailing Measures”, see <http://www.worldtradelaw.net/uragreements/scmagreement.pdf>.

⁶⁸ Those briefs were submitted by the “American Iron and Steel Institute” and the “Specialty Steel Industry of North America”.

⁶⁹ Mexico and Brazil took part in the proceedings as third participants.

⁷⁰ They based their argument on Art. 17 (4) DSU, which reads: “only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

They also invoked Rules 21, 22, and 28 of the Working Procedures for Appellate Review, which “confine participation in an appeal to participants and third participants”, as well as Art. 17 (10) DSU, which states that “[t]he proceedings of the Appellate Body shall be confidential.”

⁷¹ Art. 17 (9) DSU reads: “Working Procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director – General, and communicated to the Members for their information.”

nor the Working Procedures explicitly prohibit acceptance or consideration of such briefs. However, [...] Art. 17 (9) of the DSU [...] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU [...].” In a footnote, the Appellate Body referred to Art. 16 (1) of the Working Procedures, which allows for the Appellate Body to develop an appropriate procedure where a procedural question is not covered by existing rules of procedure. “Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is *pertinent and useful* in an appeal.” (emphasis added).

In its conclusion, the Appellate Body acknowledged that the dispute settlement system only recognizes participation in appellate proceedings as a matter of legal right by parties and third parties to a dispute. NGOs therefore have no legal right to make submissions or to be heard by the Appellate Body.

In the appeal at issue, the AB found it unnecessary to consider the submitted amicus briefs in rendering a decision, and therefore did not take them into account. Still, the AB’s view on the reception of amicus curiae briefs was criticized by a large number of Members at a DSB Meeting held on June 7th, 2000.⁷² India, for example, protested that the WTO dispute settlement system was meant to be exclusively for governments. Officials from several countries pointed out that the AB did not provide sufficient guidance for governments as to when briefs would be considered “pertinent and useful”.

3) The “Asbestos case”⁷³

The controversy over the participation of NGOs in trade disputes reached a climax in this dispute. Canada challenged measures of the European Communities prohibiting asbestos and products containing asbestos; it later appealed the panel ruling that France’s ban on the sale and use of asbestos was justified on public health grounds.

The panel had received four amicus briefs⁷⁴, two of which it had taken into account, since the EC included these two briefs in its own submissions. Without giving a reason, it had decided not to take into consideration the two other briefs.

Following the panel proceedings, the Appellate Body decided – for the first time – to publicly invite briefs from all interested sources. It derived the legal authority to do so from Art. 16 (1) of the Working Procedures for Appellate Review.⁷⁵

To recap what the AB has ruled so far on the amicus curiae issue:

- Panels can accept unrequested briefs; however, they are under no legal duty to take the content of the briefs into consideration for their findings. Art. 13 (1) DSU,

⁷² WT/DSB/M/83.

⁷³ “European Communities – Measures Affecting Asbestos and Asbestos – Containing Products“; WT/DS135/R, WT/DS135/AB/R (2001).

⁷⁴ The briefs were submitted by the following NGOs: Collegium Rammazzini (May 1999), Ban Asbestos Network (July 1999), Instituto Mexicano de Fibro – Industrias A.C. (July 1999), Congress of Industrial Organizations (July 1999).

⁷⁵ Art. 16(1) states: “In the interest of fairness and orderly procedure in the conduct of appeal, where a procedural question arises that is not covered by these Rules, a Division may adopt an appropriate procedure for the purpose of that appeal only provided that it is not inconsistent with the DSU, the other covered agreements and these Rules.”

which grants panels the right to seek information and technical advice from any individual or body, was, together with Art. 12, the main ground for authorizing the acceptance of non – requested amicus submissions at the panel level.

- The Appellate Body, on the other hand, has the legal authority under Art. 16 (1) of its Working Procedures to accept briefs; such briefs can be requested, if the AB exercises its authority under Art. 16 (1) to formally invite briefs. For the purpose of appellate proceedings, Art. 13 DSU cannot be invoked, since it talks of the right of panels only to seek information.

So, in November 2000, the AB, pursuant to Art. 16 (1) of the Working Procedures, adopted a case – specific “Additional Procedure”⁷⁶ for appeals purposes only, in order to provide an orderly process for non –party submissions as well as the submission of amicus briefs.⁷⁷ Under this Procedure, such entities could – within a strict time frame and if certain formal requirements were met – apply for leave to submit a brief to the Appellate Body.⁷⁸ Pursuant to the Additional Procedure, the AB received numerous applications requesting leave to file a written brief.

The majority of WTO Members reacted with heavy protests, claiming that the AB overstepped its powers in inviting NGOs to present their opinions. Egypt called an extraordinary meeting of the WTO General Council⁷⁹, where massive criticism was voiced.

Brazil, for example, was concerned that “the dispute settlement mechanism could soon be contaminated by political issues that do not belong to the WTO, much less to its dispute settlement mechanism.”⁸⁰ The head of the Uruguayan delegation stated that Uruguay believed that the practical effect had been to grant individuals and institutions outside of the WTO a right that Members themselves did not possess; he further said that the initiative taken by the AB represented “a change in the balance of functions of each body involved” in the WTO.⁸¹ Egypt held that the AB’s decision “went far beyond the Appellate Body’s mandate and powers.”⁸²

India stated that “[i]t was totally unjustified by the Appellate Body to proceed on the basis that soliciting amicus curiae briefs was not a substantive matter and that they could deal with it under Rule 16 (1).”⁸³ Only the U.S. believed that the Appellate Body had “acted appropriately”.⁸⁴

⁷⁶ Available at http://www.wto.org/english/news_e/news00_e/ds135_9.doc.

⁷⁷ The Additional Procedure was communicated to the parties and third parties to the appeal, and the Chairman of the AB informed the Chairman of the DSB of the adopted Procedure in a letter which was also circulated to the WTO Members. See Communication of the AB of November 8th, 2000; WT/DS135/9.

⁷⁸ An application for leave to file an amicus curiae brief had to a) be made in writing, be dated and signed by the applicant, and include the address and other contact details, b) be no longer than three pages, c) contain a description of the applicant as well as of the nature of its activities, d) specify the nature of the interest the applicant has in the appeal, e) name the legal interpretations contained in the panel report that are subject of the appeal, and which the applicant intends to address in its brief, f) explain how the submission would help the AB in deciding the case, g) contain a statement as to whether the applicant has any direct or indirect relationship with any party or third party to the dispute, and whether it received any assistance, financial or otherwise, from a party or a third party to the dispute.

⁷⁹ WT/GC/M/60.

⁸⁰ § 46 of the Minutes.

⁸¹ See § 7 of the Minutes.

⁸² § 12 of the Minutes.

⁸³ § 32 of the Minutes.

⁸⁴ § 74 of the Minutes.

Following these protests, none of the requests to submit briefs were granted by the AB, which told the submitting parties that they had failed to comply with the procedural requirements. When some of the applicants asked the AB to specify the reasons for rejecting the applications, the AB refused to do so. A press release issued by a coalition of NGOs that had submitted an amicus brief request expressed disappointment at the AB's refusal to explain: "What the WTO gave with one hand, it took with the other. We were encouraged by the WTO's invitation as a sign that it might have finally got the message about the importance of civil society participation. To then be summarily refused without reasons shows gross indifference to the interests of our constituencies and lack of due process".⁸⁵

To quote a Greenpeace spokesman: "Once again, the WTO has arbitrarily dismissed the input of civil society, fuelling concerns about the secretive way in which it makes decisions that impact on human lives and the environment."⁸⁶

IV. Arguments in favour of / against NGO Participation in the WTO

In the following, I would like to discuss some of the opinions and views that have been "put out there", especially in light of the cases that were presented in the preceding Chapter.

Keeping the WTO closed vs. Opening up the WTO

Should the WTO remain closed to greater participation of NGOs? I will try to compile the most important arguments in that vein⁸⁷ and refute them, where possible.

An important argument of opponents to NGO participation is that the WTO only has those capacities the Member governments attribute to it; so an NGO cannot demand the same opportunities for participation at the WTO level as it enjoys at the national level.

In 1999, a communiqué of the G – 15 countries argued that because the WTO is a government – to – government organization, the consideration of amicus curiae briefs would "prejudice an objective and legal examination of issues."⁸⁸ The argument thus comes down to this: Non – governmental interests have no place in an intergovernmental organization; the WTO is all about rights and obligations between state parties. This is also expressed in the "two bites of the apple" – theory, according to which "two – bite" participation of NGOs (- globally and nationally -) would undermine democracy. The idea is that it is anti – democratic if countries do not

⁸⁵ See <http://www.ciel.org/asbstospr.html>. (Statement of Aimee Gonzales, WWF Int. Senior Policy Advisor).

⁸⁶ See <http://www.ciel.org/Announce/asbstospr.html>. (Statement of Remi Parmentier, Greenpeace spokesman).

⁸⁷ Charnovitz calls this point of view the "Statist" perspective. See *Steve Charnovitz*, "Opening the WTO to Non – Governmental interests", 24 *Fordham Int'l L.J.* 173 (2000); available at <http://www.worldtradelaw.net/articles/charnovitzngos.pdf>, p. 13.

⁸⁸ <http://www.ictsd.org/ministerial/seattle/G-15.pdf>.

speak with one voice because interests are allowed to get in the way of popularly elected governments. But: Many authors have argued, and I tend to agree, that, since WTO policies are determined both nationally and internationally, it is logical for a transnational NGO to operate simultaneously at both levels. This is not “taking two bites of the apple”, but rather “biting into two different apples” – a national and a global one. Also, what is totally neglected in this theory is that there has always been active NGO involvement with various international organizations, like the UN, the World Bank, or the ICC. Those who do take this aspect into account often argue that these practices should not be followed in the WTO, since the WTO is different from other international organizations in that it comprises running negotiations and enforcement of contractual obligations. This argument could in turn come into conflict with another argument that the WTO does not directly affect the individual, but only governments. But from what can be derived from the contents of the WTO website⁸⁹, not even the WTO itself purports not to affect individuals.

Another argument is that NGOs might be more concerned with pursuing their interests than with working for the common good. In *Shrimp - Turtle*⁹⁰, when the Appellate Body reversed the panel ruling which stated that the panel did not have the authority to consider unrequested amicus briefs, the responding governments contended that the panel was right not to accept such amicus submissions, since they could be “strongly biased”. But, in my view, amicus submissions and the information contained in them may in fact counter the danger that an adjudicating body develops unconscious biases.

It could also be argued that there is no explicit provision in the DSU that allows the AB to accept amicus briefs. But if the AB really couldn't do anything without explicit authorization in the DSU, it would be virtually paralyzed. Still, one could object that panels are explicitly granted authority to “seek information from any individual or body”.⁹¹ This argument, however, dissolves if we recall what has been said about the “Shrimp – Turtle” dispute, where the AB held that the authority to accept such information was based on Arts. 12 and 13 of the DSU taken together and read in light of the panel's duty to “make an objective assessment of the matter”.⁹²

An objection that was raised by the EC in “Carbon Steel”⁹³ is that the panel's authority to receive amicus submissions is based on its capacity to conduct fact – finding, whereas the AB is prohibited from fact – finding.⁹⁴ It could be held, though, that the AB, in observing that it had the legal authority to accept and consider amicus curiae briefs when it finds it “pertinent and useful” to do so, took into account all aspects (- fact and law -) of making an objective assessment of the matter. The AB has been seen as having a broad institutional role in clarifying the law. However, the AB itself held that its broad authority to adopt procedural rules was limited by the provision that such rules do not conflict with any rules and procedures in the DSU or the covered agreements.⁹⁵ Some authors therefore have held that the AB's

⁸⁹ <http://www.wto.org>.

⁹⁰ “US – Import Prohibition of Certain Shrimp and Shrimp Products”; WTDS58/R, WT/DS58/AB/R (1998).

⁹¹ See Art. 13 (1) DSU.

⁹² See Art. 11 DSU.

⁹³ “US – Imposition of Countervailing Duties on Certain Hot – Rolled Lead and Bismuth Carbon Steel Products Originating in the UK”; WT/DS138/R, WT/DS138/AB/R (2000).

⁹⁴ See Art. 17 (6) DSU.

⁹⁵ See Art. 16 (1) of the Working Procedures for Appellate Review.

discretion to accept amicus briefs should be confined to briefs which address legal issues.⁹⁶ Could this lead to an imbalance in favour of one of the parties to the dispute? I believe this can be easily avoided if the AB makes sure that the parties are given an adequate opportunity to react. What is more, the AB has stated that amicus briefs are to be used “to help it understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.”⁹⁷

Another objection raised by the EC in “Carbon Steel”⁹⁸ is that the DSU provision requiring confidentiality of AB proceedings⁹⁹ is incompatible with the acceptance of amicus submissions. Although I cannot refute this argument, I do not think a connection should be drawn between the requirement of confidentiality and the acceptance of amicus briefs.

A legitimate concern is that, due to the short time frames in dispute settlement proceedings, the discretion to accept amicus briefs could undermine due process.¹⁰⁰

The AB has not yet addressed this issue; in the long run, however, it will be necessary to develop rules in this area.

The major points of criticism of NGOs are a lack of transparency and accountability. The reproach that the amicus practice is systematically biased in favour of developed countries, however, is difficult to sustain. In the “Shrimp – Turtle” Implementation Dispute¹⁰¹, for example, an amicus brief submitted at the panel level was the collaboration of both developed and developing country NGOs. Nevertheless, arguments in terms of a lack of accountability do exhibit an existing problem: there is no single authority to which NGOs must report on their activities; also, there may be uncertainty about who is really speaking.

NGO positions are often criticized as being simplistic and driven by sensation rather than loyalty to the facts. Still, in my view, it would be too easy to write off NGOs as well – meaning people who do not know the way of the world. In fact, many NGOs have substantial research departments; the challenge therefore lies in improving the analytical capacity of NGOs.

Harsh criticism of the way the jurisprudence on accepting amicus curiae briefs was developing was voiced by several WTO Members at a DSB Meeting in 2000¹⁰², where India, for example, sharing concerns expressed by Hong Kong, stated, “It

⁹⁶ Reinisch/Irgel, 147.

⁹⁷ See “Japan – Measures Affecting Agricultural Products”; WT/DS76/AB/R (1999).

⁹⁸ See Fn. 89.

⁹⁹ Art. 17 (10) DSU.

¹⁰⁰ Although not explicitly mentioned in the DSU, panels and the Appellate Body in their rulings often refer to the term “due process”, meaning, inter alia, that the parties and third parties should have adequate time to respond to whatever is brought before the dispute settlement organs. Other examples for due process requirements in the DSU are Art. 12 (6), which requires each party to submit its written submission to the Secretariat for immediate transmission to the panel and to other parties in the dispute, as well as Art. 10 (2), which requires third – party submissions to be transmitted to the parties.

¹⁰¹ “US – Import Prohibition of Certain Shrimp and Shrimp Products”, Recourse by Malaysia; DS58/RW; Third Party Submission of Australia, available at http://dfat.gov.au/trade/negotiations/wto_disputes.html.

¹⁰² DSB Meeting of July 27th, 2000; WT/DSB/M/83.

appears to us that in the matter of proceedings before the panels and the Appellate Body, the Members are treated less favourably than the non – governmental organizations. [...] If a Member wants to be a third party before a panel, the Member concerned has to reserve its third party rights [...]. If this is not done within the time period stipulated, the Member loses its right to be a third party before a panel. [...] [N]o time limit of any kind seems to apply to NGOs submitting amicus curiae briefs to panels. It appears that NGOs can send their briefs to the panel any time [...].¹⁰³

The claim that NGOs have more rights than WTO Members is easily refuted: Since NGOs have no “right” to submit amicus briefs, their rights cannot be greater than those of Members. Under Art. 10 (1) DSU, any WTO Member has a right to intervene as a third party to a case if it has a “substantial interest” in the matter, a term which is, in practice, interpreted broadly.

One argument, however, which is hard to refute is that the dispute settlement mechanism limits rights of participation to parties and third parties. Although the AB is not limited to what is explicitly provided for in the DSU, it still has to act within the objectives of WTO dispute settlement. But it could be held that amicus submissions do not change the nature of the system.¹⁰⁴

V. Suggestions for Possible Future NGO Participation

At the moment, “it is probably too early to grant NGOs standing before the Dispute Settlement Body. However, the time to accord NGOs at least limited participation rights by way of amicus curiae briefs [...] is overdue [...]”.¹⁰⁵

The main problem is that WTO Members find themselves in complete uncertainty as to what practice to expect in future cases. Panels and the AB have accepted and considered amicus briefs without providing criteria concerning the circumstances under which they may accept briefs and use the information contained in them; neither have they explained in every case why they have chosen to reject a brief.

Another source of uncertainty already mentioned above is that briefs may arrive at any time. Therefore, to ensure that, through enhanced predictability, NGO participation does help to strengthen the integrity of the WTO dispute settlement system, Members need guidance as to the legal value that may be attached to the respective NGO submissions.

There are several possibilities to attain this goal:

- WTO Members could negotiate and agree on certain criteria and procedures regarding the acceptance and consideration of amicus briefs.

¹⁰³ Chakravarthi Raghavan, “NGOs have more rights now than WTO Members!”, Third World Network; available at <http://www.twinside.org.sg/title/members.htm>.

¹⁰⁴ Compare Art. 17 (3) DSU, according to which AB Members “shall stay abreast of dispute settlement activities” of the WTO.

¹⁰⁵ Reinisch/Irgel, 149. See also Edwards, 4ff, who postulates “a voice not a vote”, meaning that there should be greater NGO involvement in the informal political process.

- Alternatively, the General Council could agree on a decision under Art. IX (2) of the Marrakesh Agreement¹⁰⁶, interpreting Art. 13 DSU (- concerning panels -) and Art. 17 (3) DSU (- concerning the AB).
- Another possibility is that Members may amend the DSU pursuant to Art. X (8) of the Marrakesh Agreement.¹⁰⁷
- The same results could also be achieved through informal arrangements between Members which would be applied on an ad hoc basis.

So far, for lack of rules, only panels and the AB have developed certain procedures in practice; still, no coherence could be achieved, and, as we have seen, the acts of the WTO's adjudicating bodies have been subjected to vehement criticism from the side of Members. But one should not forget that Members do have the right to challenge the relevance of any given brief, since criteria developed by panels and the AB must "preserve the rights and obligations of Members", as required in Art. 3 (2) DSU. In spite of the need for rules and procedures concerning amicus briefs, panels and the AB should still have some degree of discretion in applying criteria on a case – by – case basis. Relevant factors to be weighed and balanced may be whether the brief adds a new perspective, whether an interest group is adequately represented by the parties' submissions in the dispute, the amount of relevant expertise contained in it, and the political sensitivity of the case.

A major source of criticism, namely that at present, briefs may be submitted at any time, could be diminished by the adoption of procedures, to the effect that briefs should be submitted as early as possible in order to allow the parties and the adjudicating body to decide how to approach the briefs.¹⁰⁸ One difficulty in ensuring that amicus briefs are submitted early, however, is that the timetables of both panels and the AB are confidential; it will be necessary, therefore, to make those timetables more easily available.

As to concrete methods of procedure that could be adopted, I concur with Marceau and Stillwell¹⁰⁹, who suggest that "the process of accepting and considering amicus briefs could be divided into two stages: first, the reception and preliminary acceptance of the amicus briefs [...]; and second, the consideration of the content of such briefs [...]." In stage one, after consultation with the parties to the dispute, a preliminary ruling could be issued concerning the prima facie admissibility or non – admissibility on the grounds of whether a brief has fulfilled the procedural requirements and appears to be relevant to the dispute. If a brief were to be rejected, i.e. because of lateness, the parties could still incorporate the brief into their own submissions. After having been admitted by the adjudicating body, a brief could be considered in view of the arguments and evidence contained in it.

A distinction has to be drawn in that panels may consider issues of fact and law, whereas the mandate of the AB is limited to considering questions of law.¹¹⁰ Amicus

¹⁰⁶ Art. IX (2) reads: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. [...]"

¹⁰⁷ Art. X (8) reads: "Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. [...]"

¹⁰⁸ Reinisch/Irgel, 147: "In order to avoid untenable delays of WTO dispute settlement proceedings it would be necessary to provide for a system whereby the actual acceptance of non – party submissions could be subject to a limited period, though this raises the issue of how to inform interested NGOs effectively that such proceedings and thus the period for submissions have begun."

¹⁰⁹ See *Gabrielle Marceau and Matthew Stillwell*, "Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies", *Journal of International Economic Law* (2001), p. 183.

¹¹⁰ Art. 17 (6) DSU.

briefs submitted to panels therefore may include both issues of fact and law, while those submitted to the AB should be limited to legal questions.¹¹¹

Opening the proceedings to NGOs is seen by many as a risk; but in fact, NGO participation in the form of amicus briefs does, in my view, in no way pose a danger to the outcome of dispute settlement proceedings. There are, admittedly, some practical hindrances to be overcome, but in general, the WTO can gain a lot through increased openness.

VI. Conclusions

All in all, I do not think that a resume of the role of NGOs in the WTO dispute settlement system has to be negative.¹¹² The way that NGOs have been able to bring about changes in the practices of the WTO is impressive: The DSU has no provision for the submission of amicus briefs, but NGOs went ahead and submitted briefs anyway.

However, it is necessary to establish uniform rules or to apply a uniform practice for the acceptance and consideration of amicus curiae briefs in WTO dispute settlement procedures. The case law of the AB shows that the legal framework, as interpreted by the AB, exists. Therefore, as mentioned above, the provisions of the DSU do not necessarily have to be changed; it is just a matter of applying the legal framework in a consistent way so that NGOs will be able to assess what their procedural rights are in the WTO dispute settlement system, and so that WTO Members no longer face unpredictability on the part of panels and the AB.

Still, although the adjudicating bodies will increasingly try to fill the void and develop procedures and criteria, it must not be forgotten that Members have the primary responsibility for adopting rules regarding amicus briefs. What is especially crucial in this context is to see to it that the overall effectiveness of the dispute settlement proceedings is not compromised; given the vast number of NGOs, ways to avoid delays in the system must be found.

Another issue to be grappled with is the fact that opening the doors to NGOs might also mean opening the doors to extensive lobbying.

However, exchanges between the WTO and NGOs are irrepressible; NGOs will have a voice in world affairs.¹¹³ Therefore, it is important – and it is worth it – to meet the challenge and to find a way of channelling that voice in more constructive ways.

¹¹¹ See Fn 101.

¹¹² Compare *Petros C. Mavroidis*, “Amicus Curiae Briefs Before the WTO: Much Ado About Nothing”, first published in *Festschrift für Claus – Dieter Ehlermann*, Kluwer (2002), available at <http://www.worldtradelaw.net/articles/mavroidisamicus.pdf>, p. 2: “To my view, the story of amicus curiae briefs is a perfect illustration of the limits that WTO institutions face: Contrary to the popular belief, the WTO remains an essentially Members – driven organization.”

¹¹³ Reinisch/Irgel, 149: “[T]he WTO is no longer a technical institution with a limited trade mandate. Rather, the WTO has to deal with the interface between trade and other global issues, including social and environmental policy issues which go to the heart of many NGOs. Therefore, there is a real need to make their voices, as organ of public opinion, heard both on the policy making and the dispute settlement stage.”

In my opinion, increasing involvement of NGOs has been a significant force for good, since, if conducted well, contacts between the WTO and NGOs can contribute to greater effectiveness in the global trade regime and improve the fairness of WTO judgments. If handled poorly, however, these relations can undermine democracy.

Taking care of these relations, however, is greatly important; to say it in the words of Walter Rathenau¹¹⁴: “Die Weltwirtschaft ist unser Schicksal”.¹¹⁵

So far, the WTO has not yet taken its contacts with NGOs very far beyond public relations exercises. NGOs, in turn, often did not provide the WTO with sufficient precisely formulated and carefully researched inputs. A major challenge lies ahead for both NGOs and WTO Members...

¹¹⁴ Walter Rathenau, German politician (1867 – 1922).

¹¹⁵ *Daniel Thürer/Stephan Kux*, “GATT 1994 und die Welthandelsorganisation – Herausforderung für Schweiz und Europa“, NOMOS Verlagsgesellschaft Baden – Baden (1996).

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