

THE CHANGING ROLE OF *AMICUS-CURIAE* IN THE RELATIONS BETWEEN NON- GOVERNMENT ORGANIZATION AND THE WORLD TRADE ORGANIZATION

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Abstract— this paper attempts to analyze the changing role of *amicus-curiae* in the WTO dispute settlement system where the Appellate Body was developing and implementing a judicial policy. Although it was a radical step for Appellate Body to engage *amici curiae*, it has given an indication that this body has opened the possibility for deepening and strengthening the relations between the non-government organization and WTO in order to provide the possibility for a non-government organization to engage in WTO actively.

Keywords—*Amicus-Curiae*, *WTO*, *Non-Government Organisation*.

I. INTRODUCTION

In the first few years of the World Trade Organization (WTO) (between 1995-1999) when the tension rose between the organization and civil society. The WTO had come into existence making bold claims and glowing promises in the preamble of its founding charter. Developing countries and especially the least-developed among them felt a sense of betrayal by the organization and the main Members driving it. Non-Government Organizations (NGOs) with interest in human rights, the environment and development realized the power of the organization and the effects of its rules and policies. These two developments led to a re-assessment of the organization in the public discourse and gave oxygen to a dynamic civil society movement comprising both of traditional established NGOs and to the grassroots movement against the WTO. Contrary to the traditional methods of established international NGOs, the movement included a broad range of small, more extreme movements with a penchant for violence and destructive behavior. There was then an effort from NGO to put itself in WTO. This paper attempts to analyze the changing of the role of *amicus curiae* the

WTO dispute settlement system where the NGO and WTO have its legal relationship.

II. NON-GOVERNMENT ORGANIZATIONS IN GENERAL AGREEMENTS ON TARIFFS AND TRADE'S ERA

The creation of the General Agreement on Tariffs and Trade (GATT) was a historical accident more than a carefully considered and crafted trade treaty. The treaty regime was supposed to have been created was the regime of the International Trade Organization (ITO). The ITO Charter was an encompassing legal regime that linked into the broader objectives of the United Nations Organization (UNO) and was planned as a specialized organization of the UNO.

The ITO Charter was drafted by the United Nations Conference on Trade and Employment, the conference title giving away that its mission was broader than trade liberalization and aimed to jumpstart trade after the war to achieve the wider objectives of achieving full employment, identified as the best guarantee to ensure all people could benefit from the economic growth achieved by the liberalization of international trade. The broader objective also brought civil society into play in the form of organized labor. Trade Unions would immediately have been interested and engaged in the operation of the International Trade Organization. However, it was not to be.

For reasons that are too complex to go into in this context, the treaty was not acceptable to the U.S. Senate. The negotiators, being hopeful that the problem would be temporary, drafted a stopgap treat with the sole aim to facilitate the resumption of international trade. This treaty was poorly drafted and limited in its scope and expected duration. However, it became the main treaty regulating international trade for the next forty years. The General Agreement on Tariffs and Trade was technical treaty that represents bad law; it was unclear

and ambiguous and left most issues to be dealt with ad hoc whenever problems arose. This contributed to a culture of diplomatic dealing that was not law-based and took place behind closed doors. It offered little attraction to civil society and functioned in such a way as to make their participation effectively impossible.

III. NON-GOVERNMENT ORGANIZATIONS AND THE WORLD TRADE ORGANIZATION

The World Trade Organization is a new organization with a new mission that purports to be relevant for the world community and sensitive to the broader issues of world governance, including the human rights, the environment and development. In these areas, well established international and local NGOs were already operating. They quickly took notice of the WTO as it established itself as an organization playing a major role in international governance and seemingly aiming to impact on the broader agenda drawing into the WTO sphere debates on labor standards, climate change, public health, social and economic human rights, the protection of endangered species, and biodiversity. However, the WTO was not prepared for the interaction with NGOs as this had never happened in the GATT days. Much has been written about the inheritance by the WTO of GATT culture and this also applies to the relationship with NGOs.

At the outset, there was an interesting contradiction between the physical accessibility of the WTO and the lack of transparency in its decision-making processes. The WTO is based in the Centre William Rappard, the former headquarters of the International Labor Office (now International Labor Organization. The building is located at the end of the public park that stretches along Lake Geneva from the city center to the Centre William Rappard. The building had a cafeteria with an outside seating area accessible through a row of French doors. These doors made the building easily accessible to anybody who wanted to wander in for a coffee, a chat with officials, and the library. Nobody worried who walked in or out or why. This made access to officials easy and any outside interest in their work and the activities of the WTO was largely welcomed as a positive development). Access to documents, on the contrary, was strictly controlled with restrictive access or full confidentiality being the default position for all documents generated by the WTO and its Members.

Quickly, it became clear that the old GATT ways were untenable and changes had to be made to accommodate NGOs who are used to a level of recognition and access to information in their dealings

with the United Nations Regional Headquarters in Geneva, a few minutes' walk away from the WTO Headquarters.

IV. NON-GOVERNMENT ORGANIZATION IN WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT

A. *Amicus-curiae* brief

WTO dispute settlement system provides Article 13 of DSU for WTO Panel and appellate body to seek and accept the 'solicited' *amicus curiae* brief from non-government organizations. However in some cases, unsolicited *amicus curiae* brief become controversy such as in *the US – Shrimp case* [1], when some NGOs submitted unsolicited *amicus curiae* briefs to both Panel and Appellate Body. The Panel rejected all of the unsolicited NGO submission, stating that "accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied." The Panel interpreted the word "seek" in Article 13 to mean only those submissions that were explicitly solicited or requested. However, the U.S. argued on appeal that the Panel in this case had erred in finding the interpretation of Article 13 of DSU by concluding that it only applied to solicit or requested submissions. The Appellate Body therefore agreed with the U.S. and reversed the Panel's decision on this issue. The Appellate Body stated that "under the DSU, only Members who are parties to the dispute, or who have notified their interests become 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." In other words, Appellate body suggested that under Article 13 of DSU, a Panel has the discretion to look at or ignore any information, including submissions by NGOs, irrespective of whether such information was requested [2].

B. *A Changing Relationship*

The Appellate Body has taken a broad view of its role in developing the procedure and has asserted its independence from political bodies of the WTO when doing so. It has also asserted its role within the system by taking a supervisory role in the development of procedural rules. This role is explicit for the development of procedural rules at the appellate level. An Appellate Body Division can adopt an appropriate

procedure to deal with a procedural question not dealt with in the Dispute Settlement Understanding (DSU), the other covered agreements or the Appellate Working Procedures [3]. If such an additional procedure is adopted, the Division has to notify the other Members of the Appellate Body immediately. The Appellate Body has also assumed a supervisory role in the development of procedural rule by the panels. Strictly speaking, panels cannot develop their working procedures as they can only adopt new or additional rules for a specific panel. However, the developments in working procedures influence future panels. In the absence of a standing panel body, the Appellate Body has expressed concern over this piecemeal development and modification of the working procedures by the panels as this may undermine the general applicability of the pre-established rules of the DSU or general principles of due process [4]. To deal with this, the Appellate Body has repeatedly called for more detailed working procedures for panels [5]. According to Bacchus, panels need ‘comprehensive standard working procedures that would apply to all of the procedural aspects of WTO panel proceedings — akin to the standard “Working Procedures for Appellate Review”’ [6]. Recognizing the inherent discretion of the panels to develop their own working procedure, the Appellate Body stated that it is important that panels use this discretion to ensure equality of treatment, due process and maintenance of the rights of the parties and third parties throughout [7]. The Appellate Body has taken it upon itself to safeguard the integrity and consistency of the procedure of WTO dispute settlement even for panel procedures despite the fact that panels are independent of the Appellate Body and have control over their own working procedures.

The development of procedural rules, as well as the supervisory role of the Appellate Body, is limited by the rules that are binding on panels and the Appellate Body; these include DSU and other covered agreements. The Appellate Body has the power to interpret the DSU according to the customary rules of interpretation of the public international law, but it does not possess the power to alter these rules. The Appellate Body acknowledged this in the US – Certain Products that “to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with the customary rules of interpretation of public international law.” (Emphasis added) Determining what the rules and procedures of the DSU ought to be is not our responsibility not the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO [8].

Nevertheless, it is widely believed that, under the guise of interpretation, the Appellate Body has given a new meaning to article 13 DSU that provides that a panel has the right to seek information and technical advice from any individual or body which it deems appropriate. In *Shrimp-Turtle*, the panel had rejected *amicus curiae* briefs from non-governmental organizations arguing that the right to seek information does not include the right to entertain views and opinions that have not been requested. The verb ‘to seek’ in the view of the panel requires an action on the part of the panel to obtain such information and the mere reception of information does not suffice to fulfil this condition. The Appellate Body rejected the panel’s interpretation of article 13 DSU by stating:

That the Panel's reading of the word 'seek' is unnecessarily formal and technical in nature becomes clear should an 'individual or body' first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of sound discretion in a particular case, a panel concludes *inter alia* that it could do so without 'unduly delaying the panel process', it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between 'requested' and 'non-requested' information vanishes [9].

The Appellate Body continued by defining the panel’s authority:

The comprehensive nature of the authority of a panel to ‘seek’ information and technical advice from ‘any individual or body’ it may consider appropriate, or from ‘any relevant source’, should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel’s authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to

determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevance* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received [10].

The Appellate Body thus ‘struck back’ at the restrictive interpretation of the panel by carving out a procedural discretion for panels to accept *amicus curiae* briefs from an interpretation of the verb ‘to seek’ as ‘to seek or to accept’; including the so-called passive seeking [11]. It, moreover, suggested a new procedural rule that could/should be added to the working procedures of the panels: if a panel considers accepting *amicus curiae* briefs, it could/should consult over this issue with the parties. This new rule could be an attempt to reconcile the practice of WTO Members to annex *amicus curiae* briefs to their submission or to integrate the information in *amicus curiae* briefs in their submission and the new rule that panels can accept *amicus curiae* briefs. The consultation can serve as an opportunity to integrate *amicus curiae* briefs into the parties’ submission in default of which the panel can decide to accept the *amicus curiae* brief. However, such a consultation is not part of article 13 DSU but refers to article 12(1) DSU. The latter article allows panels to deviate from the working procedures after consulting with the parties. The Appellate Body’s interpretation and its suggested new rule for the panel’s working procedure have been described as an artistic legal expression and as acrobatic legal interpretation [12].

The legal basis for the Appellate Body to accept *amicus curiae* briefs is not as problematic as article 13 DSU applies only to panels. In the absence of conflicting rules from the DSU or other covered agreements, the Appellate Body asserts an extensive authority to adopt procedural rules. It stated in Lead and Bismuth: “We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so” [13].

The reasoning of the Appellate Body is based on its inherent power to develop its procedure as long as it does not conflict with the DSU and its power to adopt appropriate procedures in specific cases, expressed in rule 16(1) Appellate Working Procedures. At the DSB meeting where the report was adopted, WTO Members voiced their opposition to the acceptance of *amicus curiae* briefs by the Appellate Body without the

agreement of WTO Members or without consulting WTO Members. On the basis of rule 16(1) Appellate Working Procedures, the Division on the EC – Asbestos went a step further by instituting an additional procedure for that case that, as was emphasized, was not a new working procedure pursuant to article 17(9) DSU [14]. The new procedure instituted requirements that should be met to be granted leave to submit an *amicus curiae* brief. The circulation of this communication caused uproar in the WTO, and a special meeting of the General Council was convened to discuss the issue [15]. Only the US supported *amicus curiae* briefs with the EU expressing understanding for judicial innovations in the absence of a negotiated review of the DSU [16].

Other WTO Members accused the Appellate Body of going beyond its power and mandate, of risking contamination of the dispute settlement process with political issues, of opening the floodgates and of blurring judicial and legislative functions. The issue of *amicus curiae* briefs was qualified as a substantive rather than a procedural issue and thus beyond the power of the Appellate Body and only suitable for development through negotiations. However, direct intervention in the procedure of the Appellate Body would have undermined its legitimacy and authority. The consequence of the meeting was that the Appellate Body Division rejected all *amicus curiae* briefs and the final report gave no indication as to what the future policy on *amicus curiae* briefs would be.

The question arises why the Appellate Body in Shrimp/Turtle, keenly aware of its obligation to interpret the DSU according to the customary rules of public international law, rendered a decision that rejects the basic rules of the Vienna Convention. The decision of the Appellate Body can only be understood as judicial policy. It is an expression of its role in WTO dispute settlement and of the role of the WTO in global governance. The Appellate Body has a view of itself, its procedure and its role in the WTO legal system and has set a course at strengthening its role and position in line with that view. The Appellate Body already referred to this when it issues its first working procedures by referring to the spirit of the WTO and its role in strengthening the multilateral trading system. For the Appellate Body, strengthening the multilateral trading system means interpreting the covered agreements - including the DSU - in their context of international law and international relations. The Appellate Body stressed in its very first ruling that WTO cannot exist in clinical isolation [17]. The criticism, aimed at WTO and its dispute settlement system, has attacked the

confidentiality of the process. Access to the decision-making procedures and a possibility to contribute to the facts, views and perspectives that inform the decision-making process is one of the demands of civil society. Civil society groups, as well as many academic commentators, regard increased transparency as an important condition for WTO legitimacy [18].

The International Law Association has, moreover, recommended the opening up of the WTO dispute settlement process for observers representing legitimate interests in the respective procedures, and promoting full transparency of WTO dispute settlement proceedings [19]. Former Member and Chairman of the Appellate Body, James Bacchus, express the view:

We must open the doors of the WTO, and let in the light of public scrutiny. We must let the five billion people in the world who are served by the WTO see the WTO. For, if we do not, the Members of the WTO will never secure the increased public support that will be needed worldwide to continue to maximize all the mutual gains made from trade through a rule-based world trading system [20].

Although, he recognizes the concerns of developing countries, he emphasizes that *amicus curiae* briefs do not open the door to the WTO for non-governmental organizations; they are not given ‘standing’. In his view, there should be window open to allow their views to reach the WTO.

Most WTO Members remain, however, opposed to the introduction of *amicus curiae* briefs. They view the involvement of non-state parties as alien to the intergovernmental nature of the WTO and especially object to the fact that the *amicus curiae* is not a neutral ‘friend of the court’ offering additional facts or clarifying legal issues in the search for the ‘truth’ but they are, in fact, advocating a specific position. They are defending a specific interest. Allowing them to intervene in the procedure means that a state actor, party to the dispute will have to defend itself from the additional information or reasoning imported into the proceedings by a non-state actor. The non-state actor, moreover, has rights that a WTO Member does not have. An *amicus curiae* brief can be filed for the first time at the Appellate stage, whereas a third party cannot intervene at the Appellate stage alone. As such, the issue of the *amici* becomes a matter of substantive rights and obligations and not a mere procedural issue. The Appellate Body countered the criticism by implicitly

accepting that allowing *amicus curiae* in the proceedings may give additional support to one of the parties but it interprets this not as an issue of a balance of substantive rights and obligations but as an issue of due process. The additional procedure for *amicus curiae* briefs requires an application for leave to submit an *amicus curiae* brief and the application has to be sent to all parties and third parties [21]. Allowing *amicus curiae* briefs at both the panel and Appellate stage of the proceedings opens up the dispute settlement system to all stakeholders with pertinent and useful information or views. The *amicus curiae* briefs at the panel stage are a vital part in this policy as it is the only stage where *amici* can bring factual material to the attention of the WTO dispute settlement system as the Appellate Body reviews only the legal aspects of the case.

V. CONCLUSION

In sum, the saga of the *amicus curiae* briefs reveals that the Appellate Body is developing and implementing a judicial policy that takes into account outside criticism and attempts to address this criticism even in the face of internal opposition and legal constraints. It opened the possibility of *amicus curiae* briefs at the panel level despite an express provision to the contrary in the DSU. Despite the resistance of WTO Members, it pursued its policy at the appellate level. First by stating its authority to do so and when this evoked even stronger opposition from WTO Members, it ‘tested the grounds’ by inviting *amicus curiae* briefs through an *ad hoc* procedure in a Division rather than by developing new working procedures. The strategy allowed for face-saving because it does not require consultation with WTO Members, the Director-General or the DSB Chairman. It was a step in an even radical direction, not merely allowing but actively engaging *amici curiae*. It was too radical for WTO Members and the Appellate Body backtracked by not accepting *amicus curiae* briefs *in casu*. It does not have to be seen as an Echternach procession because it was merely an *ad hoc* experiment of a Division and the Appellate Body has given no indication that it intends to exclude *amicus curiae* briefs in principle. It should only mean that active engagement of civil society is stretching their authority.

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