Status of non-governmental entities and dispute settlement mechanism of the WTO: An analysis with special reference to *amicus* brief controversy

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ABSTRACT

A central feature of the World Trade Organization (WTO) is its Dispute Settlement Mechanism (DSM). Access to the DSM is presently limited to member governments; other entities such as NGOs are not eligible to be WTO Members and, consequently, are denied formal participation in the dispute settlement process. However, non-governmental entities have been afforded a limited opportunity to express their views through the submission of *amicus* briefs in dispute settlement proceedings. There are concerns, in particular on the part of Developing Countries, over the Appellate Body's authority to confer such a role to these entities. This paper aims to analyze the issues surrounding the status of non-governmental entities at the WTO level with respect to the DSM, how its Appellate Body is interpreting the law of the WTO, and how far the criticism of Developing Countries towards the Appellate Body's interpretation of WTO law is justified.

RÉSUMÉ

Un caractère central de l'Organisation Mondiale du Commerce (l'OMC) est son Mécanisme de Règlement des Différends (MRD). Accès au MRD estpresentement limité au gouvernements qui en sont membres. D'autres organisations ne sont pas eligibles d'être membres de l'OMC et ainsi sont exclus de participation formelle dans la procédure de règlement des différends. Toutefois, les organisations non gouvernementales peuvent exprimer (de maniere limitées) leurs opinions via la soumission des "amicus briefs". Il reste des questions, particulièrement parmi les pays en développement, concernant l'autorité de l'Organe d'appel de conférer un tel rôle a ces organisations. Cette thèse a pour but d'examiner les matières entourants le statut des organisations non gouvernementales au niveau de l'OMC selon le MRD, la façon dont l'Organe d'appel interprète le droit de l'OMC, et les critiques des pays en développement à propos de ladite interpretation.

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INTRODUCTION

> We must build a trading system for the 21st century that honours our values as it expands opportunity[1][...] We must do more to ensure that spirited economic competition among nations never becomes a race to the bottom. We should be leveling environmental protections up, not down [...] Sustainable development is a stated objective and mission of the WTO. Achieving this goal will require greater inclusiveness and transparency in WTO proceedings to win the confidence of people around the world.[2]

> The most fundamental change that is required to make globalization work in the way that it should is a change in governance. This entails [...] *that it is not just the voices of trade ministers that are heard in the WTO.*[3]

A. Initial Remarks

The World Trade Organization (WTO)[4] has a central place in the structure of the world trading system. A central feature of the WTO is its Dispute Settlement Mechanism (DSM). Indeed, it is one such achievement on which the family of

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[1] Statement of H.E. Mr. William J. Clinton, President of the United States of America at the WTO Ministerial Meeting, Geneva, 18 May 1998,
online: WTO< http://www.wto.org/english/thewto_e/minist_e/min98_e/anniv_e/clinton_e.htm > (date accessed: 20 February 2003) ; cited by Frank Loy, "Public participation in the World Trade Organization", at 113, online:<http://www.unu.edu/news/wto/ch06.pdf>(date accessed: 20 February 2003) [Loy].

[2] Statement of H.E. Mr. William J. Clinton, President of the United States of America at High Level Symposium on Trade and Environment, Geneva, 15 March 1999,
online: WTO< http://www.wto.org/english/tratop_e/envir_e/dg_clin.htm> (date accessed:20 February 2003) ; see also Loy, *ibid.*

[3] Joseph E. Stiglitz, "*Globalization and its Discontents*", (New York: W.W. Norton & Co., 2002) at 226 (Emphasis in original).

[4] World Trade Organization in this papers means *Marrakech Agreement* Establishing the World Trade Organization, Art.. XV: 2, Annex 1A (Apr. 15, 1994), *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226 (1994)[the WTO Agreement].

nations can feel considerable pride.[5] The DSM has had an enormous impact on the world trade system and trade diplomacy. The WTO's *Dispute Settlement Understanding*[6] (DSU) has its own evolutionary history[7]and is regarded as the anchor of the rule-based trading system envisaged under the WTO. The creation of the WTO contemplates the unfinished business of establishing an institutional structure for the international trading system.[8]The establishment of such an organisation has removed the right of contracting parties to block the adoption of a Panel's report.[9] Effective legislation and adjudication are the most essential tools for the success of a legal system. The success of the rule-based system envisaged under the WTO depends upon the effectiveness of its DSM. Although the rule-based system of the WTO is facing daunting challenges from various corners, which are issues of concern[10], to me, deficiencies in DSU need immediate attention from the Member States.

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[5] Dispute Settlement Body (DSB) of the WTO is considered as its 'center piece'. See John H. Jackson,"*The World Trade Organization – Constitution and Jurisprudence*" (London: Chatham House Papers-The Royal Institute of International Affairs, 1998) at 59[Jackson].

[6] *Agreement Establishing the World Trade Organization*, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, April 15, 1994, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226,1227(1994) [DSU].

[7] See Michael J.Trebilcock & Robert Howse, " *The Regulation of International Trade*", 2nd ed (London & New York: Routeledge, 2001) c. 3 at 51-94 for greater insight on the dispute settlement system of the GATT [Trebilcock & Howse].

[8] See John. R. Johnson,"*International Trade Law*"(Ontario: Irwin Law,1998) at 12.

[9] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can.T.S. 1947 No. 27 (entered into force 1 January 1948) updated as *General Agreement On Tariff and Trade 1994 Agreement Establishing the World Trade Organization,* Annex 1A (Apr. 15, 1994), *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226 (1994) [GATT]. Under prior GATT rules, decisions of Dispute settlement were adopted only by consensus of all parties including the loosing party to a dispute. This gave loosing party a right to block adoption of panel report. Under the WTO DSU, negative consensus is required to block adoption of panel report, which virtually assures that report will be adopted.

[10] Other issues of concerns that are considered as daunting challenges to the WTO system are growing resort by states to regionalism, problem of *Agreement on Trade Related aspect of Intellectual Property* to deal with cheap generic drugs in poor countries, putting labour standards on the WTO agenda etc.

In international arena, different organizations have different sets of rules relating to non-governmental entities such as Non-Governmental Organizations (NGOs), individuals and other private economic actors. This difference in approach raises many issues. These issues attract greater intensity when it comes to the WTO, as it is an organization whose expansive reach so greatly impacts the socio-economic well being of the entire world; perhaps more so than any other international organization.[11]There has been considerable criticism of the WTO's DSM *e.g.*, it lacks transparency, and non-governmental entities have no say before the Panels and the Appellate Body (AB).[12]This criticism highlights shortcomings of the DSU.

As already observed, because of the impact of its rules and policies on the world population, greater public participation is required at the WTO level, particularly in the DSM. The WTO's DSM does not provide direct access to non-governmental entities. The overall success of the WTO's DSM implemented as a result of the Uruguay Round cannot be concluded with certainty. There is an ongoing debate on reforms of the DSU in different spheres, including the idea of allowing non-governmental entities to participate in the proceedings before the Panels and the AB of the WTO. There is no doubt that such an allowance to private individuals and NGOs will further enhance the effectiveness and democratic attributes of the WTO.

Hostile attitude of the WTO Members towards these non-governmental entities seems to be reformed by the AB when it allowed NGOs to submit *amicus*

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[11] See *e.g.* Jackson, *supra* note 5 at 51.

[12] See *e.g.* Richard H. Steinberg, "Judicial Law-Making, Internal Transparency, and External Transparency: Recent Institutional Developments at the WTO", at 14, online: <http://www.law.berkeley.edu/cenpro/ils/papers/steinbergwtO17.pdf> (date accessed: 12 February 2003)[Steinberg]. The article is forthcoming in volume 37(1) of "The International Lawyer", 2003.

briefs in proceedings before the Panel and itself.[13]On the one hand, this interpretation of the existing provisions of the DSU by the AB to confer upon itself the authority to accept *amicus* briefs brought some satisfaction to the NGOs; these entities are now demanding a more defined and direct role in the law-making and adjudicatory process. On the other hand, this and subsequent decisions of the AB, as well as the calls for a more direct role for NGOs and other non–governmental entities to participate directly in the WTO rule-making and adjudicatory processes, have raised profound questions about the basic idea of having a multilateral trading regime. There are concerns, in particular on part of the Developing Countries, over both the authority of the AB to confer such a role upon itself and further demands by non-governmental entities to have a more defined and direct role. Besides the concerns shown by the Developing Countries, there are many interesting issues that surround the AB's decisions to accept *amicus* briefs. How is the discretionary power of the Panel and the AB to accept or reject such briefs is to be governed? The impact of such submissions on expedient resolution of disputes.

This is now one of the debated issues in international trade circles. At Doha, Members agreed to *Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding*, which implicitly includes issues related to the status of non-governmental entities.[14] The deadline set for concluding these negotiations was

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[13] *United States – Import Prohibition of Certain Shrimp and Shrimp Products, (Complaint by India et al.)* (1998), WTO doc. WT/DS58/AB/R (Appellate Body Report), online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 12 February 2003) [*Shrimp Turtle* case-AB Report].This case will be discussed in detail in Chapter 2, below at 31-37.

[14] Ministerial Declaration, (adopted on 14 November 2001) WTO Doc. WT/MIN(01)/DEC/W/1, at para 30, online:WTO<http://docsonline.wto.org/gen_search.asp>(date accssed 12 February 2003) [Doha Ministerial Declaration]. It states, "We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by members, and aim to agree on improvements and

31 May 2003, which the Member States failed to meet. This indicates that the matter of *Clarification and Improvement of the Dispute Settlement Understanding* is not only important but also complicated. It has been observed that "Doha marks cultivation of an environment conducive to the growth of civil society groups; it offered an excellent example of the power of these groups in making the plight of the poor and weak heard."[15]

B. Scheme of the Paper

This paper aims to analyze: 1) the issues surrounding the existing provisions of the law of the WTO governing the status of non- governmental entities at the WTO level in relations to the DSM and how it is interpreted by its AB; 2) Whether there is a proper logical and legal basis for the interpretation given by the AB to the existing provisions of the DSU in conferring upon itself and the Panel a right to accept *amicus* briefs from non-governmental entities; and 3) To what extent the criticism forwarded by the Developing Countries is true?

This paper is divided into four chapters followed by the conclusion. Chapter One will focus on analyzing the need to have a reformed role for non-governmental entities in light of existing provisions of the law of the WTO. Chapter Two will examine the judicial response by the AB to attempts made by non-governmental entities to raise their voice at the level of the DSM. Within the same vein, I will also analyze the legal basis of the authority that has been conferred by the AB upon itself

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clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter." This paper will examine the proposals forwarded by the states till 31 May 2003.

[15] Arvind Panagariya, "Developing Countries at Doha: A Political Economy Analysis", at 44, online:< http://www.bsos.umd.edu/econ/panagariya/apecon/Policy%20Papers/Doha-WE-2.pdf > (date accessed: 12 February 2003) [Panagariya].

and the Panels to accept unsolicited briefs from non-governmental entities. Chapter Three will focus on analysis of the concerns shown by the Developing Countries over the decision of the AB. This chapter will examine the extent to which the Developing Countries are right in showing this hostility towards the decisions rendered by the AB and whether there is a genuine argument against existing (role as *amicus curiae*) or a more defined role for non-governmental entities? The purpose of Chapter Four shall be to evaluate the current state of affairs under the law of the WTO by pointing out various open issues that surround this debate and will present some proposals in this regard.

This will be followed by a conclusion that will provide a discussion in support of the AB's interpretation of the existing provisions of the law of the WTO, allowing non-governmental entities to participate in DSM by submitting *amicus* briefs. There are a few open issues, of which the most important is to determine how far we can go from this point. Broadly speaking, this open question is to be answered by the Member States as well as the AB. Creating a balance between the interests of the WTO Members, particularly those of the Developing Countries and non-governmental entities seems to be the answer; such a balance can be achieved by having more explicit rules through negotiation in order to avoid ambiguity.

CHAPTER 1

NON-GOVERNMENTAL ENTITIES, THE WTO AND THE DISPUTE SETTLEMENT MECHANISM: NEED FOR A ROLE

International organizations in general and trade, and investment treaties in particular, have different approaches to the *locus standi* of the non-governmental entities to use the DSM and the direct applicability of the treaty rights and obligations to such entities.[16] While promoting trade liberalization, these organizations sought to do so by leaving trade matters in the sphere of sovereign states and looking at the flow of goods occurring between states.[17] As a result, various rights and obligations set forth were referred to states only.[18] This disregarded the fact that the everyday flow of goods takes place by means of transactions entered by and between private parties.[19]

"The establishment of the WTO and the results of the Uruguay Round have somehow inherited this basic structure, but it has been much more responsive to the call for a certain rule-oriented approach in substitution for the power-oriented one

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[16] See Andrea Kepfur Schneider, "The Getting Along : The Evolution of Dispute Settlement Regimes in International Trade Organizations" (1999) 20 Mich. J. Int'l L 697[Schneider]; see also Linda.C.Reif, " NAFTA, The WTO and the FTA: Choice Of Forum in Interstate Disputes to Private Actor access to Dispute Settlement", at 19,
online:<http://www.bus.ualberta.ca/CIBS-WCER/WCER/NAFTAreif.pdf> (date accessed: 12 October 2002) [Reif].

[17] See Roberto Bruno, "Access of Private Parties to International Dispute Settlement: A Comparative Analysis ", Jean Monnet Working Paper 13/97, at part V,
online: <http://www.jeanmonnetprogram.org/papers//97/97-13.html> (date accessed: 21 March 2002)[Bruno].

[18] *Ibid.*

[19] *Ibid.*

that normally characterizes international relations."[20]In light of its allowance for a legalistic form of multilateral forum for trade policy and dispute settlement, the WTO reflects an excellent example of the shift from a power-oriented to a rule-oriented vision of international trade. Looking at the *WTO Agreement* and its covered Agreements[21], including the DSU, it can be seen that there are explicit as well as some vague references to non-governmental entities like NGOs and individuals. For example, the preamble[22] of the *WTO Agreement* states as follows:

> [R]elations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The preamble of the *WTO Agreement* and other provisions indicate that the Members of the WTO were aware of the concern about public participation at the time of its making. Yet, these non-governmental entities are not given any defined or direct role at the WTO level in general, and the DSM in particular, to voice their

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[20] *Ibid.*

[21] Covered Agreements indicate all Agreements that are attached to and included in the WTO Agreement.

[22] See "the WTO Agreement", *supra* note 4. First Recital of the Preamble. For detail of few other references to non-governmental entities under various covered Agreements see "Annexure A" at the end of this thesis at page 89-91. For a detail analysis of these rights see "The WTO and the Rights of the Individual ", at I,
online: <http://www.netamericas.net/Researchpapers/Documents/Charnovitz/Charnovitz2.doc > (date accessed: 23 May 2003) [The WTO and the Rights of the Individuals].

views on trade and other issues. This chapter will examine the need to confer some sort of defined role to these entities in light of these provisions.

1.1 It is Non –Governmental Entities that are Indirectly and Ultimately Affected by the Law of the WTO

The problem is that today's world is quite different from what it was fifty years ago.[23]The globalization process has produced a significant increase and affirmation of the role played by private parties in the international flow of goods and capital. It is non-governmental entities, including individuals, private economic actors and other members of civil society that are indirectly and ultimately affected by the law of the WTO. Therefore, it can be argued that it is not the states that are the real players in international trade; rather, the law of the WTO mostly affects the interests of private parties.

Ragosta[24] states that if the DSB is to be taken as a court, certain procedural protections, such as access for real parties in interest, are essential. He asserts that the right of the real party in interest to fully participate in dispute settlement is "the single most important missing element in the DSU and if the WTO is to play the role of a 'world court' for trade, it is essential that real parties have real access."[25] He further argues that it will not make sense to take a decision without the participation

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[23] See *e.g.* Bruno, *supra* note 17.

[24] John A. Ragosta "Unmasking the WTO: Access to the System: Unmasking the WTO--Access to the DSB System: Can the WTO DSB Live up to the Moniker 'World Trade Court'?" (2000) 31 Law & Pol'y Int'l Bus. 739 at 746, online:<http://www.law.georgetown.edu/journals/lpib/symp00/ragosta.pdf > (date accessed: 11 January 2002) [Ragosta].

[25] *Ibid.* He quotes Michael K. Young, "Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats" (1995) 29 Int'l Lawyer 389 at 406. Young states that, "If the goal is to depoliticize completely the dispute resolution process, then the advantages of recognizing complaints by nonstate actors must be seriously weighed."

of private economic actors who have an interest at stake and concludes that it is essential for the proper working of the WTO to provide an "opportunity for the real party in interest to participate *effectively*".[26]

Inability of individuals and private corporations to prevent financial losses to them is evident from the Anti-Dumping Law of the WTO.[27] Of the major trends in international trade today is the widespread use of Anti-Dumping laws by countries around the world.[28]Ironically, the main parties involved in anti-dumping cases, namely; exporters, importers and domestic producers of the products in question not only lack knowledge about what these actions involve, but also have no standing in the dispute settlement proceedings.[29]Private parties under domestic law of a country have some procedural rights as anti-dumping investigations are normally initiated upon a written application by, or on behalf of the domestic industry. Nevertheless, the authorities in an importing country competent to conduct anti-dumping investigations can also initiate the proceedings without receiving any such application.[30] In both cases, a necessary condition for the initiation is the existence of

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[26] Ragosta, *supra* note 24 at 747(Emphasis added).

[27] *Agreement on Implementation of Article VI of GATT,* 1994. All national legislations of the WTO members have to comply with this Agreement [Antidumping Agreement].

[28] See generally "Anti-Dumping Proceedings-Guidelines for Exporters and Importers", A technical paper presented in 1997 and updated in September 2002 by the International Trade Centre, UNCTAD/WTO, online: http://www.intracen.org/worldtradenet/docs/information/referencemat/anti_dumping_proceedings.pdf (date accessed: 04 June 2003) [Anti-Dumping Proceedings]. This paper relies on the statistics provided by the 'Committee on Anti-dumping Practices 2002' and states that there were 330 investigations initiated in 2001 as compare to 155 initiated in 1995 and asserts, "this trend has grown in part because of globalization, and in part because the WTO has succeeded to a large extent in eliminating secret quotas and other illegitimate trade barriers, leaving anti-dumping duties as one of the few WTO-legitimate ways for national industries to address import competition."

[29] *Ibid.*

[30] Antidumping Agreement", *supra* note 27 Art. 5.4. It states, "Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry." Domestic industry under Art. 4.1 has been explained in relations to domestic producers of a particular product.

sufficient evidence of dumping[31], of injury and of a causal link between the two. Publicizing of the application by the authorities is not allowed unless a decision is made to initiate an anti-dumping investigation. Under this procedure, exporters and importers of the allegedly dumped product do not have much of an opportunity to defend their interests before the initiation of the anti-dumping investigation, unless the complaints about the imports in question are made public after which the exporters are to be given at least 30 days time to reply to the questionnaires sent out by the authorities.[32]

Once injury as a result of dumping is found, anti-dumping measures are used, which remain in force as long as necessary to counteract any dumping subject to review by the relevant judicial, arbitral and administrative tribunals of an importing country upon its own initiative or upon request of any interested party, which must provide information substantiating the need for such a review.[33] According to the WTO rules, these tribunals and the procedures of such judicial reviews have to be independent of the authorities responsible for conducting the investigation proceedings. These judicial reviews may give opportunity to the importers and exporters and all other interested parties[34]to question whether the final affirmative or negative determinations and imposition of measures are supported by substantial evidence on the record and in accordance with the law, whether there has been any

[31] If the export price is less than the normal value, then the product is considered to be dumped.
[32] Antidumping Agreement, *supra* note 27 Art. 6.1.1.
[33] *Ibid.* Art. 13.1.
[34] *Ibid.* Art. 6.11; see also The WTO and the Rights of the Individuals, *supra* note 22.
Interested parties include both governments as well as non-governmental entities. The term includes: the government of the country of export; the foreign exporter or producer; the importer; a trade or business association whose members are producers, exporters, or importers of the product under investigation; the producer of the competing product in the country of importation; and an association whose members produce the like product in the country of importation.

arbitrary or erroneous decision or an abuse of discretion by the authorities, etc. This requirement provides the only means of formal appeal available to aggrieved exporters, importers or domestic industries within the overall context of the *Anti-Dumping Agreement* before the national tribunals of the importing country.

Formal appeals against or challenges of the outcome of an anti-dumping investigation in the WTO's DSB are also possible. This provides binding procedures to resolve disputes among the WTO Member countries as to whether measures imposing anti-dumping duties are consistent with the *Antidumping Agreement* or not. But such appellate review of the findings of any national tribunal can only be challenged before the WTO's DSB by the government concerned, and are often therefore subject to political considerations and broader economic factors .[35]

Member States are increasingly seeking appellate review of antidumping measures by the AB with the real actors i.e. exporters, importers and domestic producers virtually absent from the scene. The WTO's DSM only considers disputes between governments *inter se* while in reality "all such disputes reflect rivalry among private economic actors."[36] It has been argued, "Despite the centrality of private actors in trade disputes, these actors are not explicitly acknowledged in the WTO DSU."[37] Authors like Kessie[38] also made similar observations by stating that it is private parties that are ultimately affected by the inefficiencies in the trading

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[35] Antidumping Agreement, *supra* note 27 Art.17; see also Anti-Dumping Proceedings, *supra* note 28 at 19.

[36] See The WTO and the Rights of the Individuals, *supra* note 22 at part III. The author asserts that "a dispute that is exclusively between sovereign governments is imaginable -- for example, two state trading entities -- but no such cases have arisen in the WTO."

[37] *Ibid.*

[38] See Edwini Kessie, "Enhancing Security and Predictability For Private Business Operators under the Dispute Settlement System of the WTO", (2000) 34 (6) J. World Trade. 1 at 17[Kessie].

system envisaged under the WTO and, therefore, it will be totally unjustified and illogical to deny a proper role to them within the DSM.

In my view, there is a large gap between state and private interests; survival of the system mandates that the interest of all of the actors concerned must be accommodated.

1.2 Greater Transparency and Democratic Character is Required

Transparency of procedural justice is the key for success of any DSM. This can be assured if the process is open to all those who are directly and indirectly concerned. Allowing public participation[39] is important as it ensures transparency, particularly when it comes to the settlement of disputes. Transparency in dispute settlement has been an issue of concern in international trade negotiation for some time.[40] For example, under GATT, the 1979 *Understanding on Dispute Settlement* clearly stated an objective in international trade dispute proceedings of bringing "as much clarity and transparency as possible into the operation of the dispute settlement provisions of the General Agreement in order to make the provisions more predictable."[41]

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[39] See Steve Charnovitz, "Participation of Non-governmental Organizations in the World Trade Organization", (1996) 17 U. Pa.J.Int'l. Econ. L at 331-332 [Charnovitz, "Participation of Non-governmental Organizations"] ; see also Dierk Ulrich . "No Need for Secrecy? Public Participation in the Dispute Settlement System of the World Trade Organization" (2000) 34 U.B.C. L. Rev. 55 at 57. [Ulrich].Ulrich borrows the definition of the term 'public participation' from Charnovits. The term 'public participation' is defined by both these authors as all those means by which the public at large that is affected by the WTO trading system adopts towards the WTO activities in general and the dispute settlement system in particular for a more open, transparent and understandable system.

[40] Ministerial Declaration (adopted on 29 November 1982), GATT Doc. No. L/5424, reprinted in GATT, BISD 29th Supp., at 9-23, as cited by Ragosta, *supra* note 24 at 749-750. The 1982 Ministerial Declaration contained a resolution that the ministers, to liberalize trade, would seek to increase the transparency of dispute settlement proceedings.

[41] *Understanding on Dispute Settlement Understanding, 1979,* 2 THE GATT URUGUAY ROUND 2697, as cited by Ragosta, *ibid.*

The Seattle crisis is a good example of this lack of transparency. It is agitating the public opinion and gives legitimacy to the criticism that is forwarded against the WTO because it is non-transparent and secretive. As observed by Luis F. de la Calle, "Seattle brought into the daylight the implications and importance of trade agreements to everyday life."[42] It has also been argued, "it would be unfair to disregard such a loud public voice against an organization whose decisions are vital for the livelihood of vast populations around the world."[43] The secretive nature of the WTO proceedings is considered highly undemocratic.[44] Today, the general public would like to see the WTO more open and more accountable.[45] Ragosta observes:

> WTO's dispute settlement procedures evolved out of a diplomatic environment where compromise was encouraged and confidentiality, essential in diplomacy, could be justified. *[But]* a proceeding before the WTO dispute settlement panel is litigation, and not diplomacy..... *[While]* reliance on the reputation of panellists and country representatives to protect the integrity of the proceedings may have been fitting in the context of the former GATT "diplomatic" model, that rationale for holding all proceedings *in camera* and effectively withholding litigation documents is not appropriate under the adjudicative model of dispute resolution adopted with the advent of the WTO.[46]

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[42] Luis F. de la Calle, "The Functioning of the World Trade Organization", Paper presented at conference on the post-Doha work and the functioning of the WTO held in Geneva on 30 April 2000, at 12, online: WTO <http://www.wto.org/english/tratop_e/dda_e/paper_luis_de_la_calle.doc > (date accessed: 17 February 2003) [Luis F. de la Calle].

[43] Tamer Nagy Mahmoud, "The WTO Dispute Settlement Mechanism: An International Law perspective", at I, online:<http://www.sit-edu-geneva.ch/Tam.wto.htm> (date accessed: 18 February 2003) [Mahmoud].

[44] See *e.g.* Robert F. Housman, "Democratizing International Trade Decision-making" (1994) 27 Cornell Int'l L.J. 699 at 703 [Housman]. As defined by Housman, the element of democracy here means as 'the democratic right of citizens to have knowledge of and participate in decisions that will affect their interests'.

[45] H.E. Dr. Supachai Panitchpakdi, "Balancing competing interests: The future role of the WTO", 29 at 33, online:< http://www.unu.edu/news/wto/ch02.pdf >(date accessed: 18 February 2003) [Dr. Panitchpakdi].

[46] Ragosta, *supra* note 24 at 750-751(Emphasis added).

Authors like Wilson[47] endorse Ragosta and state that transformation of the dispute settlement process from a non-binding diplomatic exercise under the GATT into a binding judicial system under the DSU of the WTO is undermined by the fact that the latter lacks fundamental judicial protections and effective democratic controls. Wilson asserts that reforms are needed that can improve transparency and private participation.

1.3 Security and Predictability of the Multilateral Trading System

As pointed out earlier, effective legislative and judicial mechanisms can ensure the success of a legal system. The WTO recognizes this approach, as one of the objectives of the DSU is to provide security and predictability to the multilateral trading system envisaged under the auspices of the WTO.[48] This can only be achieved if the rights of all the entities directly and indirectly concerned with the fate of the organization are recognized and properly balanced.

Certainly, there cannot be room for total omission of one segment of society *e.g.,* individuals who, as already stated, are ultimately affected by the policy of the WTO. It has been argued that although the DSM has been improved from what it was under the GATT, as rules for dispute settlement have been tightened under the law of the WTO, the issue as to the effectiveness of the dispute settlement system in promoting security and predictability for all the concerned actors including individuals and other private business operators, is still there.[49]This has been also recognized by one of the Panels of the DSB:

> The lack of security and predictability affects mostly these individual operators. Trade is conducted most often and

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[47] See generally S. Bruce Wilson, " Can the WTO Dispute Settlement Body be a Judicial Tribunal Rather than a Diplomatic Club" (2000) 31 Law & Pol'y Int'l Bus. 779.

[48] DSU, *supra* note 6. Art. 3:2 states, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system"

[49] See Kessie, *supra* note 38 at 1-2; see also Raj Bhala, *" International Trade Law: Theory and Practice"* 2nd ed. (New York: Matthew Bender & Co., Inc., 2001) at 610.

> increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market-place and the activities of the individual within it. [50]

Given that indirect rights[51] are available to individuals and other non-governmental entities, one can argue that security and predictability of the world trading system at the WTO level is present. However, in my opinion, these rights are undermined by the fact that the WTO's DSU does not provide any substantive way for them to enforce their rights. They are left at the mercy of their government, as the decision whether or not to file a formal complaint remains under the purview of their respective governments, who have a formal voice as Members of the WTO. In filing a complaint, the concerned government will certainly keep in mind the overall general interest of the state; this overall interest may not be congruent with the interest of the concerned individual or a particular segment of society. This might be justified on grounds of public policy; the welfare of the people in general should be preferred over individual interest. However, in my opinion, this will put the predictability and security of the system at risk.

1.4 Reconciling Trade with Other Values

The secretive nature of the DSU is disconcerting because of the fact that the issues it has to deal with have now gone beyond what was intended under the

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[50] *United States- Section 301-310 of the Trade Act of 1974- Report of the Panel (Complaint by E.U.)* (1999), WTO doc. WT/DS152/R (1999) at para 7.76-7.77, online: WTO< http://docsonline.wto.org/gen_search.asp>(date accessed: 12 February 2003).
[51] See Annexure A, *supra* note 22.

original GATT law i.e. tariff reduction.[52] It is now concerned with issues such as environmental protection, labour standards, cultural concerns etc. The subject matter of the WTO has penetrated all areas of civil society and has consequential effects, not only on those individuals and corporations that are providing goods, services, and investments for international trade, but also on labour, environment, consumer choices, science, culture, and education.[53]This entails that the WTO is now concerned with overall global governance.

Authors like Atik[54] point out that the WTO has an uncaring attitude towards social values as it takes into account corporate interests at the expense of social values. He further asserts that the WTO is feared as a super-government, driven by the logic of free trade to override national preferences.[55]The consideration of environmental issues in the dispute settlement process is significant because resulting decisions are influential both in the specific case, and on a broader policy level. The DSM, both under the WTO and the GATT, has frequently involved environmental matters. The *Tuna/Dolphin*[56] case is a well-known illustration of the GATT Panel decisions involving issues of environmental policy. These cases were decided by a

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[52] See Housman, *supra* note 44 at 710-711. The author argues that though the dispute resolution has always been there under the GATT's portfolio but the focus of discussion under the GATT was mostly discussion on tariff reductions.
[53] See Ullrich, *supra* note 39 at 59.
[54] Jeffery Atik "Global Trade Issues In the New Millennium: Democratizing The WTO" (2001) 33 Geo. Wash. Int'l L. Rev. 451.
[55] *Ibid.*
[56] *United States - Restrictions on Imports of Tuna*, (on 3rd September 1991) GATT Doc. DS21/R, 30 ILM 1594, 1599 (unadopted) online:
< http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf > (date accessed 10-03-2003) [*Tuna/Dolphin- I*]; *United States - Restrictions on Imports of Tuna*, (on 16 June 1994) GATT Doc. DS29/R, 33 ILM 839 (unadopted),
online: <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf>(date accessed: 10 March 2003) [*Tuna/Dolphin- II*].These disputes questioned the GATT-legality of provisions in the *Marine Mammal Protection Act* of the United States that operated to ban tuna imports from countries that did not require their tuna fleets to practice "dolphin safe" tuna fishing methods.

Panel of trade experts operating in secret who shaped general policy on issues such as the legitimacy of regulating for environmental purposes with respect to the way products are harvested[57], the availability of alternative methods of environmental regulations[58] and the extent to which environmental regulation should reach beyond national boundaries.[59] These issues illustrate that by inquiring into the trade legality of environmental measures, the GATT/WTO DSMs directly address environmental policy. The *Tuna/Dolphin* cases are not isolated examples of the environmental policy overlap in the GATT/WTO.[60]These cases show that members of civil society must be allowed to participate in the working of the WTO in general, and the DSM in particular so that economic interests can be reconciled with environmental and other social values.

1.5 Practice of the Other International Organizations

Another justification that can be forwarded for conferring a role to non-governmental entities in the DSM is the rapidly growing practice of the other international organizations. Authors like Steve Charnovitz point out that the practices and experiences of the UN and other international bodies have provided NGOs with legal grounds for their interests and must be taken as precedent-setting.[61] This

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[57] *Tuna/Dolphin*- I , *ibid.* at para 5.14.
[58] *Ibid.* at para 5.28.
[59] *Ibid.* at para 5.26; see also *Tuna/Dolphin*- II, *supra* note 56 at para 5.1.
[60] *United States - Standards for Reformulated and Conventional Gasoline* (*Complaint by Brazil and Venezuela)*(1996) WTO Doc. WT/DS2/R (Panel Report); see also *United States -- Standards for Reformulated and Conventional Gasoline*,(1996) WTO Doc. WT/DS/AB/R, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 12 February 2003). The WTO dispute settlement mechanisms considered such issues as whether environmental protection measures were sufficiently related to conservation goals, and the similarity or likeness of products that have different effects on the environment.
[61] Charnovitz, "Participation of Non-governmental Organizations", *supra* note 39 at 335; but see *contra* Philip M. Nichols, "Extension of Standing in the World Trade Organization", (1996) 17

precedent may lead to greater transparency with respect to the WTO. He also quotes the UN's "*Agenda 21*"[62] program, which urges all intergovernmental organizations (this includes the WTO) to use NGOs for policymaking, program design, implementation, and evaluation. Moreover, it is not a new phenomenon that there should be a role for the members of civil society.

Frank Loy observes, "the NGO community clearly plays a role today as never before, but there is nothing new about non-governmental organizations attempting to influence government decision-making."[63] He further argues that the drafters of the International Trade Organization (ITO) included a role for NGOs in the structure of the organization. But, in the end, it failed to gather enough support and the weaker GATT became an interim solution. The ITO framers envisaged that commercial and public interest NGOs would maintain regular contact with the ITO Secretariat, receive unrestricted access to documents, propose agenda items, and participate as observers and occasional speakers at conferences. Ironically, the request for proper implementation of such a role that was proposed half century ago is still knocking at the doors of the WTO.[64] Charnovitz also points out the practice of the European Union (E.U).[65] In the E.U., individuals who are challenging the laws in national courts may seek to refer the case to the European Court of Justice (E.C.J) for a

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U.Pa.J.Int'l.Econ.L 295 at 304-305. The author rebuts theorists like Charnovitz and states that drawing a comparison of the WTO with other international organizations is undisciplined and cannot be basis of a role for the non-governmental entities.

[62] *Agenda 21*, Art. 27(9), U.N.Doc. A/UNF.151/26 (1993).

[63] See Loy, *supra* note 1 at 115. He states that it was as early as the 1800s, that such organizations actively promoted the human rights against abuses in English colonies and by the 1945, NGOs were largely responsible for inserting human rights language into the *United Nations Charter* and, since then, have placed almost every major human rights issue on the international agenda.

[64] *Ibid.* at 116.

[65] Charnovitz, "Participation of Non-governmental Organizations", *supra* note 39 at 349.

determination as to whether a national law is violative of the provision of the *Treaty of Rome* ensuring the free flow of goods.[66]

Ragosta argues that, both domestically and internationally, courts normally accept *amicus curiae* briefs by interested persons who are not parties to a dispute.[67] Covelli[68] quotes the example of the International Court of Justice (ICJ). He observes that the ICJ accepts *amicus curiae* briefs despite the fact that the provision of the *Statute of the International Court of Justice*,[69] analogous to 'article 13 of the DSU'[70] which authorizes the WTO's Panels to seek information from any source, is more restrictive. Peter Hendy[71]points to the trend in international investment agreements that include provisions for Investor-to-State dispute settlement in recognized *fora.*

The WTO is distinct among other international organization. Due to the fact that its DSM is more effective and its rules have a significant impact on the daily life of individuals and other segments of society, it is important that the WTO should give greater weight to public participation than other organizations.

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[66] See Art. 177, *Treaty Establishing the European Economic Community*, March 25th, 1957, 298 U.N.T.S. 11, 67-77, amended by *Treaty of Amsterdam*, 1997 O.J.L (C340) 173-308. See also Art. 173*(230)* which gives the ability of natural as well as legal persons to initiate proceedings in the ECJ to contest directly the legality of the actions of Community institutions under Community law. Article references in *italics* are to the corresponding article in the consolidated version of the treaty, incorporating the *Treaty of Amsterdam* Amendments. Online : < http://www.europa.eu.int >(date accessed : 12 March 2003).

[67] See Ragosta, *supra* note 24 at 754.

[68] See Nick Covelli, "Public International Law and Third Party Participation in WTO Panel Proceedings," (1999) 33 (2) J. World Trade. 125 at 139.

[69] Art. 50 of the Charter of ICJ states, "The court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with task of carry out an enquiry or giving an expert opinion."

[70] DSU, *supra* note 6 Art. 13. It states," Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."

[71] See Peter Hendy "Investment and the WTO: A Private Sector Perspective", at 14-15 , online <http://www.acci.asn.au/text_files/speeches_transcripts/PH_EuropeanUnion131202.pdf > (date accessed: 25 February 2003) [Handy]. The author mentions World Bank's International Centre for Settlement of Investment Disputes (ICSID), the *Arbitration Rules of the United Nations Commission on International Trade Law* (UNCITRAL), and the International Chamber of Commerce.

1.6 Ensuring that States Discharge their Responsibilities

As already observed, private persons are ultimately affected by any sort of negligence on behalf of the Members of the WTO and/or the WTO itself.[72] Therefore, they should be afforded an opportunity to raise their voice at the DSM. It has also been pointed out that "national governments do not adequately represent the interests of all of their constituencies"[73]and, therefore, the need to have some sort of check on state responsibility is highly desirable. The importance of affording a right of standing to private parties also lies in the fact that it affects the ability of the parties to enforce the trade agreements, as they are better able to practice the agreement.[74] It is further asserted that the advantage of private actor standing will enable the private citizens to better police their own government compliance with the trade agreement.[75]

Laidhold observes that even though some substantive rights are available to the individual under the WTO's DSM, "a lack of procedural access to the dispute settlement obviates the significance and effectiveness of those rights."[76] States owe obligations towards their citizens under the law of the WTO.[77]Therefore, it has been asserted that "the ability of private parties to receive both substantive and procedural

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[72] See Kessie, *supra* note 38 at 17.
[73] See "Charnovitz, Participation of Non-governmental Organizations", *supra* note 39 at 342.
[74] See Schneider, *supra* note 16 at 707-708.
[75] *Ibid.* The author contemplates that while states face political obstacles to bring cases against other states, private actors don't share this concern. Therefore more suits are apt to be brought which together with policing the governments compliance with trade agreement, can play an important role in development of an organization.
[76] See Michael Laidhold, "Private Party Access to the WTO: Do Recent Development in International Trade Dispute Resolution Really Give Private Organizations a Voice in (1999) 12 Transnat'l Law 427 at 429 [Laidhold].
[77] See the WTO Agreement, *supra* note 4; see also Annexure A, *supra* note 22.

rights in international trade dispute settlement is indispensable in ensuring state accountability for state actions in the arena of international trade."[78]

1.7 Duty of the Adjudicating Body to Ensure Justice

In my opinion, the primary duty of any adjudicating body, be it domestic or international, is to adjudicate upon a dispute, ensuring justice to all the parties. An effective procedural framework is one, which enables a judicial body to consider effectively the legal problems at issue in a dispute and to develop the law in a rational and appropriate manner. To achieve this end, the adjudicating body need not only know the law, but it must also explore all factual aspects of the case and apply the law to such facts. A judicial body can only explore all the facts if the system can assure such body, the access to the best available information in a dispute.

In the context of the WTO dispute settlement process, Housman states that *amicus* briefs filed by the private persons, such as interested citizens and NGOs would provide the Panel and the AB with "important supplementary information that may not, for political or other reasons, be reflected by the briefs of the parties to the disputes."[79]One can question the fairness of a judicial system, which fails to provide an opportunity to the "real parties" in interest to raise their voice. If the "real parties" cannot voice their views before an adjudicating body, I have doubts as to whether such a body can impart justice. Therefore, within the WTO framework, allowing a standing to non- governmental entities before the DSB conforms to the discharge of

[78] See Laidhold, *supra* note 76.
[79] Houseman, *supra* note 44 at 745.

the duty conferred by law on the Panels and the AB to do justice in a dispute brought before them.

1.8 Expertise and Scholarly Contribution by Civil Society is also Required

Supporters of increased public participation at the WTO level also state that the "contemporary NGOs, unlike their predecessors, are wellsprings of important scholarly efforts. Throughout the 1990s, members of the NGO community made significant intellectual contributions to the body of knowledge that underpins the field of trade and the environment."[80] Moreover, there are legitimate concerns of the members of civil society, like NGOs and private parties, which are to be considered.

Dr. Panitchpakdi observes:

> [W]e may have to take their legitimate concerns into consideration in our future deliberations. The NGOs could provide valuable inputs and share their thoughts and main concerns to improve the working of the WTO process [...] the strong dynamism of NGOs makes them increasingly influential in all areas and they should be given an appropriate role to play in the constructive formation of our New World Economic Order.[81]

I believe that the call for a more defined and direct role for members of civil society does not mean that their supporters are trying to equate their status with that of the Member States. Certainly, such an attempt will be baseless. What supporters of such standing want is an opportunity that will enable them to contribute to the

[80] See Loy, *supra* note 1 at 117. The author mentions the London-based Foundation for International Law and Development and the US-based Centre for International Environmental Law stating that these NGOs have grappled adroitly with the issues that fall at the intersection of environmental policy and trade law.
[81] Dr. Panitchpakdi, *supra* note 45 at 34.

sustainable development of the entire world. As John Audley and Ann M. Florini observed:

> No one is suggesting that NGOs should have a vote in either trade negotiations or dispute settlement. The final authority in all these institutions and forums rests firmly with governments. But *NGOs have proven their value as sources of ideas* and as educators of the public on a wide range of international issues. Now, it is urgent that the WTO devise an effective way to reap the benefits of NGO participation. The alternative is the status quo: a system incapable of making difficult policy decisions and facing increasing pressure from a flood of demands for public involvement. Ultimately, the threat to the global trading system is not just violence in the streets, but a backlash against the WTO and a much-reduced chance for further trade liberalization.[82]

1.9 Need for greater Liberalization and Extension of the WTO Operations Like Investment etc

One of the aspirations of the WTO is to gradually extend its legal framework into areas like investment and competition at multilateral level. Let us consider the example of investment, which is the "missing panel of the WTO's suite of trade and related agreements."[83] It is argued that "though investment is covered within the WTO, albeit in a fragmented way, the most effective regulation of investment will come through a single, discrete *General Agreement on Investment.*"[84] The *Doha Ministerial Declaration* issued on November 2001 appears to have taken another step forward, when it recognized "the case for a multilateral framework to

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[82] John Audley and Ann M. Florini, "Overhauling the WTO: Opportunity at Doha and Beyond", External Reforms, online: <http://www.ciaonet.org/pbei/ceip/auj01.html> (date accessed: 10 March 2003) (Emphasis added).
[83] Hendy, *supra* note 71 at 3.
[84] *Ibid.*

secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment that will contribute to the expansion of trade."[85]Such an *Agreement on Investment* must address the issue of possible direct access by private parties to dispute resolution and enforcement, be it through the WTO's DSM or a dispute settlement process outlined within the *Agreement on Investment.*[86]At present, the WTO's trade agreements are generally based on State-to-State dispute settlement, with no direct recourse for individual users or those affected by actions of the Member States who breach the WTO rules.[87]

It is contended:

> [T]he underlying concept of investor-to-State dispute settlement is fairly straightforward: the aggrieved investor has the capacity to take the host government to binding international arbitration or dispute settlement. The attraction for the investor is the capacity to manage their own corporate affairs, and defend their own economic interests without the need for political interventions by a home-government that may not have the company's best interests in mind.[88]

Some authors also argue that governments may engage in some "tacit collusion" by refraining from contesting a dispute, which may be due to a fear of a counter claim or serious consequences in non-trade areas like defense cooperation.[89] Therefore, there is legitimate demand from private economic actors to get access to the WTO's DSM.

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[85] Doha Ministerial Declaration, *supra* note 14 at para 20.
[86] Hendy, *supra* note 71 at 14.
[87] *Ibid.*
[88] *Ibid.*
[89] See *e.g.* Bernard M. Hoekman and Petros C. Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance", at 3, online : World Bank <http://www1.worldbank.org/wbiep/trade/papers_2000/dispute_settlement.pdf >(date accessed: 20 February 2003)[Hoekman & Mavridos].

Once the liberalization process is extended to areas like investment, it will be inevitable for private business operators to get access to the WTO's DSM; such a demand will definitely increase. Kessie observes that it is necessary for the WTO to try and accommodate aspirations of private economic actors within its legal framework.[90]He argues, "should private business operators lose confidence in the WTO, it would be difficult to extend the mandate of the WTO to cover new areas such as investment and competition policy."[91] For these reasons, I believe that commentators like Kessie have been correct in holding that "it is important for the WTO to streamline its dispute settlement process and make sure that the interests of private business operators are accommodated".[92]

1.10 Conclusion

In summary, the existing provisions of the WTO recognize the concerns of non-governmental entities. However, there exists a practical need for affording these entities a greater role within the DSM. Such a role also finds its basis in the fact that when greater liberalization of the WTO framework to areas like investment takes place, interest of private economic actors, be it individuals or corporations, will be directly at stake. Moreover, the reconciliation of trade with other social values also requires that some standing should be provided to these non-governmental stakeholders.

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[90] See Kessie, *supra* note 38 at 9.
[91] *Ibid.*
[92] *Ibid.* at 17.

CHAPTER 2

DECISION OF THE AB TO ACCOMMODATE NON-GOVERNMENTAL ENTITIES: ANALYSIS OF THE AB's DECISIONS TO ACCEPT *AMICUS* BRIEFS

Access to the DSM is presently limited to the WTO Member governments. Other entities or organizations are not eligible to be the WTO Members and are consequently denied formal participation in the dispute settlement process. However, these entities have been afforded a limited opportunity to express their views through the submission of *amicus* briefs. The AB's decisions to afford such opportunities to non-governmental entities have "monopolized the discussion with respect to the WTO dispute settlement proceedings."[93]

The objectives of this chapter are twofold. First, it will analyze the jurisprudence developed by the AB with respect to the conferring of right to submit *amicus* briefs to non-governmental entities. Second, it will examine the legal basis of the AB's decision to confer upon the Panel and itself the authority to accept unsolicited briefs so as to shed light on the AB's interpretation of existing law and its justifications thereof. Before delving into the abovementioned analysis, it is pertinent to note that there is neither any provision that expressly allow the AB or the Panel to exercise such power, nor is there any stipulation that prevents them from doing so.

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[93] Petros C. Mavroidis, "*Amicus Curiae* Briefs Before The WTO: Much Ado About Nothing"Jean Monnet Working Paper 2/01, at Act One,
online: <http://www.jeanmonnetprogram.org/papers/01/010201.html > (date accessed: 2 April 2003)[Mavroidis].

The allowance of submission of *amicus* briefs has been an evolutionary process and as such, hardly constitutes a "major role"[94] or a status for non-governmental entities. Since *amicus* briefs are the only means by which non-governmental entities can voice their views before the DSB, they hold an important place in the study of status of such entities in the functioning of the WTO in general and the DSM in particular.[95]

Prior to analyzing jurisprudential treatment afforded by the AB to *amicus* briefs and its legal basis, it is important to examine the concept of *amicus* briefs in general and in reference to international as well as domestic legal systems.

2.1 Concept of *Amicus* Briefs

Amicus Curiae has been defined as "friend of the court": a person with strong interest in or views on the subject matter of an action, but not a party to an action.[96] *Amici* are also termed as "bystanders" having no direct legal interest at stake.[97] It has also been stated that such *amici* are commonly filed in appeals that pertain to some matter of strong public interest.[98] *Amicus* briefs have a long history.[99] Presently,

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[94] Robert Howse, "Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy",
online: <http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/Howse17.pdf>
(date accessed: 2 April 2003) [Howse].

[95] *Ibid.* The author regards submission of *amicus* briefs as "the first step towards formal and direct participation for NGOs in the *real* workings of the WTO" and its development as "well worth studying."

[96] See Garner, "*Blacks Law Dictionary*", 7th ed, *s.v "amicus curiae"* [*Blacks Law Dictionary*].

[97] See Georg. C. Umbricht, "An 'Amicus Curiae Brief' on Amicus Curiae at the WTO" (2001) 4(1) Journal of Int'l. Eco. L. 773 at 778, online: Oxford University Press <http://www3.oup.co.uk/jielaw/hdb/Volume_04/Issue_04/pdf/040773.pdf >(date accessed: 10 April 2003)[Umbricht].

[98] See "*Blacks Law Dictionary*", *supra* note 96.

[99] See Gabrielle Marceau and Matthew Stilwell, "Practical Suggestion for the Amicus Curiae Briefs Before the WTO Adjudicating Bodies" (2001) 4 (1) J. Int'l Econ. L. 155 at 156, online: Oxford University Press <http://www3.oup.co.uk/jielaw/hdb/Volume_04/Issue_01/pdf/040155.pdf > (date

there are various legal systems both at an international as well as at a domestic level that are familiar with the concept of the *amicus* briefs. For Example, the *Rules of the Supreme Court of the United States* make mention of the *amicus* briefs and point to the importance of such briefs in deciding the cases.[100] These briefs can be either specifically invited by the courts from an individual or a group, or an interested person or group may apply for leave to allow submission of such briefs.[101]

Umbricht[102] summarises material[103] written on the concept of *amicus* briefs in the dispute settlement mechanisms of different international *fora*. Some organizations prohibit *amicus* submissions,[104]while a few explicitly provide an allowance for submissions of non-governmental entities.[105] Umbricht concludes that analyses on how other organizations are dealing with *amicus* submissions are appealing and politically interesting but not overly relevant to the question of whether *amicus* briefs should be allowed at the WTO, as "this question must be decided through an analysis and interpretation of the text of the law of the WTO itself."[106] He also observes that the concept of *amicus* submissions from non-

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accessed: 10 April 2003) [Marceau & Stilwell]. These authors state that the concept originally evolved under the Roman Law and developed in the English system after which it was exported to the United States where it flourished; see also Umbricht, *supra* note 97 at 779.

[100] See *Rules of the Supreme Court of the United States,* Rule 37, online: <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf>(date accessed: 17 May 2003).

[101] *Ibid.*

[102] See Umbricht", *supra* note 97 at 781.

[103] See Dina Shelton, "The Participation of Non-governmental organizations in International Judicial Proceedings", (1988) 4 A.J.I.L. 611-642; see also Marceau & Stilwell, *supra* note 99 at 165-176.

[104] See Umbricht, *supra* note 97 at 781. The author quotes example of MERCOSUR.

[105] *Ibid.* The author quotes Rule 61(3) of the European Court of Human rights that states, "In accordance with Article 36(2) of the Convention, the president if the chamber may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings, or *any person concerned who is not the applicant*, to submit written comments or, in exceptional cases, to take part in a hearing." (Emphasis in original)

[106] *Ibid.* The author criticizes commentators like Howse and argues that the statement made by the latter that an allowance by few organizations to submissions of non-governmental entities has lent added legitimacy to the law of the WTO which has recently allowed such submissions is an over emphasis of the institution of *amicus* briefs.

governmental entities has greater significance at an international level than at a national level as such entities are, in general, still very much an object of international law.[107] Lopez who asserts that *amicus* briefs can play an important role because "legal decisions in international disputes affect interests beyond the parties to the disputes" has made a similar observation.[108]

This discussion of the concept of *amicus* briefs indicates that the concept is not novel to a legal system and when it knocked at the doors of the WTO's DSM, the only issue that raised concerns was the absence of explicit provision of law on the subject. As article 13 of the DSU expressly allows the Panel to "seek" information from any source, I believe that there should be no controversy in a situation where the Panel itself requests a legal and/or natural person to submit a brief. Article 13 states:

> Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate...Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.[109]

There remain two issues on which the criticism that has been forwarded by the WTO Members seems to have some legitimacy. First, the interpretation of the term "seek" in article 13 of the DSU by the AB to allow the Panel to accept unsolicited briefs. Critics believe that article 13 only empowers the Panel to "seek" and not to "accept" the briefs submitted thereto when such briefs are not requested

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[107] *Ibid.* at 782-783.The author asserts that it would be wise to allow such submissions at the WTO level as this will not only allow greater public participation in a quasi-judicial working of the dispute settlement mechanism of the WTO but also enable the panels to have a complete picture of the facts of the case.

[108] Ernesto Hernandez. Lopez, " Recent Trends and Perspectives for Non-State Actor's Participation in World Trade Organization's Disputes"(2001) 35(3) J. World Trade. 469 at 485 [Lopez].

[109] DSU, *supra* note 6 Art. 13.

by the Panel itself. The second issue that has been subject of criticism is the decision of the AB to accept unsolicited briefs or requesting information through such submissions at the appellate level, as article 13 only applies to the panel proceedings and not to appellate review. The second issue will be addressed more specifically in the latter part of this chapter as I undertake to examine the extent to which the AB is correct in accepting *amicus* briefs at the appellate level.

2.2 Analysis of AB's Case Law on *Amicus* Briefs

2.2.1 *Shrimp Turtle* Case[110]

This case is the jurisprudential cornerstone in which the AB for the first time allowed the members of civil society to participate in the dispute settlement proceedings through submission of *amicus* briefs and "private party voices were officially given an ear at the level of the WTO."[111] As the facts of this case are not important with respect to *amicus* brief controversy, they can be briefly stated. Several Asian countries challenged a trade embargo by the U.S. pursuant to a domestic scheme under the *U.S. Marine Mammal Protection Act*, which aimed at preventing shrimp fishing techniques that produce high mortality rates of sea turtles. The AB of the WTO upheld the decision of the Panel that such measures are not in compliance with the law of the GATT. At the Panel stage, number of NGOs attempted to submit *amicus* briefs. The Panel refused to accept them, stating that the initiative to seek information and to determine the source of information under article

[110] *Shrimp Turtle* case-AB Report, *supra* note 13.
[111] Laidhold, *supra* note 76 at 440.

13 of the DSU rests with the Panel.[112] The Panel held that accepting unsolicited *amicus* briefs would be incompatible with the provision of the DSU.[113]

The Panel ruled against the U.S. and on appeal the concerned NGOs again made an attempt to submit the *amicus* briefs, this time as an attachment to the U.S. submissions.[114] Certainly it was a blessing in disguise for the NGOs that the case at the Panel level was decided against the U.S. and the proceedings at the appellate level proved to be an avenue for NGOs to influence the legal review of their status.[115] The AB also admitted an *amicus* brief, which was directly submitted to it by an NGO[116] and reversed the ruling of the Panel on the point that the Panel lacked authority to consider unsolicited briefs from NGOs.

In *Shrimp Turtle,* the AB reversed the finding of the Panel below it. The Panel held that it did not have the authority to accept *amicus briefs* from non-governmental entities. The Panel considered that since it had a right to "seek information from any person" pursuant to article 13 of the DSU, it was thereby prohibited from considering non-requested information. The AB stated:

> [W]e do not believe that the word 'seek' must necessarily be read, as apparently the panel read it, in too literal a manner. 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

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[112] *United States-Import Prohibition of Certain Shrimp and Shrimp Products, (Complaint by India et al.)* (1998), WTO doc. WT/DS58/R at para 7.8. (Panel Report), online:
< http://www.sice.oas.org/DISPUTE/wto/58r00/shrus31e.asp#sec7> (date accessed: 12 February 2003).
[113] *Ibid.*
[114] *Shrimp Turtle* case-AB Report, *supra* note 13.
[115] See Steve Charnovitz "Opening the WTO To Non-governmental Interests" (2000) 24 Fordham Int'l L.J. 173 at 184 *(6)*, online:<http://www.worldtradelaw.net/articles/charnovitzngos.pdf>(date accessed: 24 May 2003). The page number in *italic* (in brackets) refers to the page number at Internet.
[116] *Shrimp Turtle* case- AB Report, *supra* note 13 at para 83.The NGO was Center for International Environmental Law. The AB held that it will consider the arguments contained in this brief in so far as they are pertinent.

> 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.[117]

The argument against *amicus* briefs at the Panel stage does not appear to be consistent with the adjudicatory function of the Panels. Article 11 of the DSU states that "a panel should 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".[118]Moreover, article 13 of the DSU appears to be an open-ended provision. Together with article 12 of the DSU, the provisions stipulate various means that the Panel can adopt to effectively discharge its obligation to make "an objective assessment" of the facts.

The importance of objective assessment of the facts in a dispute lies at the heart of the DSU and can only be made if a Panel informs itself of all the facts. In my view, justice in a case cannot be done if the adjudicator who has to apply the legal norms to such facts does not know or possess a complete and clear picture of all the facts. Therefore, commentators like Umbricht have observed that if the large amount of information and views are taken into account by a decision-making body, it increases the chances of reaching a just outcome.[119]He further asserts that the "quality of the final outcome would be increased if as many persons and entities as

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[117] *Ibid.* at para 107.
[118] DSU, *supra* note 6 Art. 11.
[119] See Umbricht, *supra* note 97 at 774.

possible whose legitimate interests are at stake by the decision of a particular case are allowed to explain their perspective."[120]

To enable the panellists to discharge such an important duty, the provisions of the DSU allow sufficient flexibility that was rightly identified and interpreted by the AB. In *Shrimp Turtle,* the AB held that the Panel has duty to make an objective assessment of the facts and has the authority to depart from the *Working Procedures* set forth in Appendix 3 of the DSU by virtue of article 12.1 of the DSU.[121] The AB stated that such an authority is *indispensable* for enabling the Panel to discharge its duty of objectively assessing the facts under article 11 of the DSU.[122] Commentators like Howse observed:

> [I]t is important to note that the AB did *not* base the authority to accept *amicus* briefs on the right to "seek" information from any individual or body in Art. 13—it reversed an interpretation of the panel that the word "seek" in Art. 13 implies a *prohibition* on the acceptance of such briefs. Instead, the AB held that the breadth of Art.12 (which allows a panel to create its own procedures, deviating from the default procedures in Annex 3 of the DSU) and Art.13, enable in particular ways the panel to discharge its duty "to make an objective assessment" of the matter before it.[123]

While analyzing the decisions of the AB in *Shrimp Turtle* and subsequent cases, Mavroidis asserts that *amicus* submissions "represent an opportunity for any given court: to be exposed to an opinion and to see, through the submitted briefs, its

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[120] *Ibid.*
[121] *Shrimp Turtle* case- AB Report, *supra* note 13 at para 105.
[122] *Ibid.* at para 106.
[123] Howse, *supra* note 94. The author asserts that in the absence of any explicit limitation in the DSU, the real scope of the panel's authority is defined by what is 'indispensably necessary' to perform its functions under Art. XI to make an objective assessment. He states, "This is good sense, for—even taken together with the working procedures in Annex 3—the Provisions of the DSU hardly amount to a comprehensive *code* of civil procedure or evidence."

role in the society within which it operates."[124] Mavroidis further argues that the duty of a court is to look for truth, and for this matter, the pleadings of the dispute should not be understood as the frontier of the truth.[125] "This is precisely why Art. 13 DSU exists: its function is to guarantee that panels will have the authority to look for answers beyond what has been pleaded [....] Art. 13 DSU is one avenue for WTO panels to honour their mandate."[126] Reading article 13 in light of articles 11 and 12 of the DSU, the AB found that these provisions accord the Panel with " ample and extensive authority to undertake and to control the process by which it informs itself of the relevant facts of the dispute and of the legal norms and principles applicable to such facts."[127]

The analysis of the *Shrimp Turtle* ruling indicates that the decision of the AB seems to be logical; in making an "objective assessment" of the matter, the Panels are conferred a wide authority to utilize whatever information is available under their mandate to "seek information" from any source. Commenting on the *Shrimp Turtle* ruling, authors like Steinberg have asserted that "permanent judicial bodies such as the AB of the WTO that face a shadow of the future, are more likely to think in terms of incremental development of law", rather than solving merely the case at hand.[128] Therefore, the DSU's silence on many procedural questions including that of *amicus* submissions can be seen as an invitation to the AB to make procedural rules; the AB

[124] Mavroidis, *supra* note 93 at Act Three.
[125] *Ibid.*
[126] *Ibid.*
[127] *Shrimp Turtle* case- AB Report, *supra* note 13 at para 106.
[128] See Steinberg, *supra* note 12 at 35.

has accepted such an invitation in *Shrimp Turtle* and has efficiently filled procedural gaps in the DSU.[129]

At appellate level, the briefs were submitted in two different ways: as attachments to U.S. submissions and directly with the AB. As to the former mode of submission, on objection by the respondent states, the AB held that any material that is submitted with the AB becomes an integral part of a participant's submission, no matter how or where such material may have originated.[130]The AB further stated that a participant, by filing a submission is properly regarded as assuming responsibility for the contents of such material, including any annexure or attachment and therefore, the briefs attached to the U.S. submissions were considered as part of its entire submission.[131]

However, the importance of the ruling also stemmed from what the AB did not state. The AB failed to give reasoning on its authority to accept *amicus* briefs submitted directly to it.[132]Although, the AB in its preliminary ruling promised that it would hand over the reasons for accepting unsolicited briefs that were directly submitted at the level of appellate review.[133] This left open the question of whether

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[129] *Ibid.* at 28. The author observes that the AB's interpretation of article 13 was made in the context of several years of North-South deadlock on the question of whether to permit *amicus* briefs; the AB chose to interpret the DSU as supporting it.

[130] *Shrimp Turtle* case- AB Report, *supra* note 13 at para 89.

[131] *Ibid.* at para 91.

[132] *Shrimp Turtle* case- AB Report, *supra* note 13 at para 83; see also Chakravarthi Raghavan, "Trade: Appellate Body assailed for usurping its jurisdiction", online: <http://www.sunsonline.org/trade/process/followup/1998/11100198.htm> (date accessed: 12 June 2003)[Raghavan].

[133] Raghavan, *ibid.* The author observes, "But this promise was never fulfilled. No actual mention of this brief was made in its final decision, despite the fact that three Ambassadors wrote a letter to the AB, copied to all participants, complaining about this preliminary ruling. The letter was entirely ignored by the AB."

the AB could accept briefs when directly filed.[134]Unlike Panels, which are specifically provided the power to "seek" information from any source, the AB has no such express authority. The decision of the AB in this case not to explain the legal basis for accepting unsolicited briefs submitted directly at appellate level, brought into doubt its authority to accept such briefs.[135] The AB in fact addressed this issue in a subsequent case.[136]

2.2.2 *Australian Solomon* Case

Australian Solomon case[137] is another instance involving *amicus* brief controversy. During the proceedings of this case, the Panel received a letter from "Concerned Fishermen and Processors" in South Australia. The Panel considered the information submitted in the letter as relevant to its procedures and accepted it as part of the record. Here the Panel accepted the briefs as relevant information relying on its powers under article 13 of the DSU and the decision of the AB in *Shrimp Turtle,* which stated that a Panel had the right but not the obligation to consider information submitted to it, whether requested by the Panel or not.[138]The Panel stated that information contained in the brief was useful in deciding the case and that it was influenced by these submissions.[139]

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[134] See e.g. Arthur E. Appelton, " Shrimp Turtle; Untangling the Nets" (1998) 2(3) J. of Int'l Econ. L. 477 at 485-486, online: Oxford University Press <http://www3.oup.co.uk/jielaw/hdb/Volume_02/Issue_03/pdf/020477.pdf>(date accessed : 11 June 2003)

[135] *Ibid.* at 487.

[136] *Carbon Steel* Case, *infra* note 142.

[137] *Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada*, (on 18 February 2000) WT/DS18/RW, online:< http://www.sice.oas.org/DISPUTE/wto/ds18/ds18r9e.asp#vii>(date accessed: 18 February 2003).

[138] *Ibid,* at para 7.8,7.9.

[139] *Ibid.*

The result in this case was significant as article 13 of the DSU and the *Shrimp Turtle* ruling was found to constitute an authority for a Panel to consider and incorporate unsolicited information.[140]Moreover, it was for the first time that information contained in an unsolicited brief from a non-governmental entity was found as relevant.[141]

2.2.3 *Carbon Steel* Case

Discussion on the submission of *amicus* briefs again caught the attention of trade experts for the third time in the *Carbon Steel* Case[142] where the U.S. levied countervailing duties against certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom; the duties were challenged by the European Communities. The Panel held that these duties were illegal and constituted a violation of obligations under the *Subsidies and Countervailing Measures Agreement.*[143]While adjudicating the dispute, the Panel rejected an *amicus* brief filed by an industry group[144], on the ground that it was submitted after the deadline

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[140] Arthur E. Appelton, "*Amicus Curiae* Submission in Carbon Steel Case: Another Rabbit From the Appellate Body's Hat" (2000) 3 (4) J. Int'l Econ. L. 691 at 693-694. Also online: <http://www3.oup.co.uk/jielaw/hdb/Volume_03/Issue_04/pdf/030691.pdf >(date accessed: 11 June 2003)[Appelton].

[141] *Ibid.*

[142] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, (Complaint by EC)* (2000), WTO doc. WT/DS138/AB/R (Appellate Body Report),
online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> (date accessed: 1 June 2003) [*Carbon Steel* Case-AB Report].

[143] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, (Complaint by E.C)* (1999) WTO doc. WT/DS138/R (Panel Report),online: WTO < http://docsonline.wto.org/gen_search.asp >(date accessed: 12 February 2003)[*Carbon Steel* Case- Panel Report].

[144] The group was American Iron and Steel Institute ('AISI') and the *amicus* brief is available online: <http://www.steel.org/policy/trade/amicus_brief.html> (date accessed: 29 May 2003).

prescribed for submissions.[145] This rejection indicates that the Panel recognized its discretion under articles 12 and 13 of the DSU, as interpreted in *Shrimp Turtle,* to accept or reject unsolicited briefs from non-governmental entities.[146] The U.S. appealed the decision of the Panel to the AB where the decision of the Panel was upheld. At appellate level, the industry group again made an attempt to submit *amicus* briefs, which were rejected by the AB on the ground that they were not pertinent for reaching a decision on the matter in hand.

At the appellate level in this case, many of the same arguments made in *Shrimp Turtle* were repeated.[147] In particular, the controversy was that since article 13 of the DSU applies only to the Panels, the AB has no power to invite or accept unsolicited briefs.[148]The AB for the first time addressed the question of whether it could accept and consider unsolicited *amicus* briefs submitted directly to it. The AB held that article 17.9[149] of the DSU provides that the *Working Procedures* are to be drawn up by the AB, which makes it clear that the AB had broad authority to adopt procedural rules.[150] However, it must be noted that article 17.9 of the DSU requires two things; first, *Working Procedures* can be adopted by the AB in consultation with the Chairman of the DSB, and the Director General; second, after such procedure is adopted it must be communicated to the Members. By virtue of the power under

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[145] *Carbon Steel* Case- Panel Report, *supra* note 143 at para 6.3.
[146] See Appelton, *supra* note 140 at 694.
[147] *Ibid.*
[148] *Ibid.* see also *Carbon Steel* Case-AB Report, *supra* note 142 para 36. E.C and other appellees also argued that article 13 of the DSU only applies to factual and technical information/advice and does not include legal arguments and interpretation, appellate proceedings are confined to participants and third participant under article 17.4 of the DSU, etc.
[149] DSU, *supra* note 6 Art. 17.9. It states, "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."
[150] *Carbon Steel* Case-AB Report, *supra* note 142 at para 39. But such rules must not conflict with any rules and procedures in the DSU or the covered agreements.

article 17.9 of the DSU, the AB promulgated " the *Working Procedures*", which, however, make no mention of *amicus* briefs.[151]

It has been argued that pursuant to Rule 16 (1) of the *Working Procedures,*[152]the AB had the legal authority to adopt and issue the additional procedure in a situation where a procedural question arises that is not covered by these Rules, and, therefore it can solicit as well as accept unsolicited briefs.[153] The AB itself held that by reason of Rule 16(1) of the *Working Procedures*, it could develop an appropriate procedure in an appeal where a procedural question is not covered by the existing rules.[154]

Since Rule 16(1) of the *Working Procedures* contemplate that whenever a procedure is adopted in an appeal pursuant to Rule 16(1), participants and third participant must be notified, critics argue that it cannot be ascertained from the AB's decision in *Carbon Steel* that the AB in fact followed this procedure.[155] On the other hand, the possibility that the AB did inform the participants and third participants in this case about the application of Rule 16(1) cannot be ruled out.[156]The AB also clarified that it is not under a duty to accept a brief submitted by non-governmental

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[151] *Working Procedures for Appellate Review*, (15 February 1996) WTO Doc.WT/AB/WP/1, online: WTO < http://docsonline.wto.org/gen_search.asp> (date accessed: 29 May 2003)

[152] *Ibid.* Rule 16(1) states, "In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the *DSU*, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body."

[153] See *e.g.* Geert A. Zonnekyn, " The Appellate Body's Communication on *Amicus Curaie* Briefs in Asbestos Case - An Echternach Procession", (2001) 35(3) J. World Trade. 553 at 557 [Zonnekyn].

[154] *Carbon Steel* Case-AB Report, *supra* note142 at para 39.

[155] See *e.g.* Appelton, *supra* note 140 at 697.

[156] *Ibid.* The author observes that this is possible in a private communication by the AB with the participants and third participants.

entities. It was emphasized that individuals and other organizations have no legal right to file *amicus* briefs:

> We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages participation in panel or the Appellate Body proceedings, as matter of legal right, only by parties and third parties to a dispute. And, under the DSU, only Members of the WTO have a right to participate as parties or third parties in a particular dispute[....]Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO.[157]

Given that there is neither any provision in the DSU or the *Working Procedures* that allows the AB to accept the *amicus* briefs nor any that prohibits the AB from doing so, it was held that acceptance or rejection of *amicus* is a discretionary matter;[158] the AB will only accept such *amicus* submission when pertinent and useful in deciding a case in hand.[159] An analysis of the *Carbon Steel* decision shows that the decision in this case established the authority to accept *amicus* briefs at both the panel and the appellate level. The decision in this case seems to be an appropriate if not perfect interpretation of the legal text of the DSU and *Working Procedures,* enabling the AB to fill the gaps in situations where there is neither express prohibition nor express grant of the authority to administer justice.

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[157] *Carbon Steel* Case- AB Report, *supra* note 142 at para 40,41.
[158] *Ibid.* at para 42.
[159] *Ibid.*

Nevertheless, this case also left certain unanswered issues regarding due process.[160] In view of the short time that is allocated to the AB to complete process of appellate review,[161] it has been observed that the discretion to accept *amicus* brief submissions could undermine the due process rights of the parties to a dispute, if use of such discretion is not properly structured. For example, the decision failed to clarify the issue of how much time the parties and third parties can avail to respond to any such brief that the AB decides to accept.[162] Further, the AB failed to give any mechanism to check the risk of a serious abuse of due process in a situation where parties and/or third parties have influence over NGOs through funding or other means; such influence could be used to advance the arguments that otherwise such parties and/or third parties are not able to make.[163]The AB did adopt a special procedure to address these issues subsequently in *Asbestos* case.[164]

2.2.4 *Asbestos* Case

In *Asbestos*, Canada challenged a French ban on the sale and use of both domestic and imported asbestos grounded in concerns over the effects the asbestos fibers have over people's health. *Asbestos* raised issues concerning the

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[160] See Howse, *supra* note 94.

[161] DSU, *supra* note 6 Art. 17.5. It states, " As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

[162] Howse, *supra* note 94.

[163] *Ibid.* But the author observes, "One should not be too critical of the AB in that regard, since courts often develop practices such as this in a case-by-case manner, in response to concerns that are raised by the parties in each particular case." These issues are still open to debate and will be discussed in detail in chapter 4 of this paper, below at 70-74.

[164] *European Community – Measures Affecting Asbestos and Asbestos – Containing Products, (Complaint by Canada)* (2000), WTO doc. WT/DS135/AB/R (Appellate Body Report), online: WTO < http://docsonline.wto.org/gen_search.asp >(date accessed: 4 June 2003)[*Asbestos* case- AB Report].

relationship of trade and social values such as the protection of human life and health; the public interest in this case was obvious and resulted in submission of *amicus* briefs by special interest groups. The Panel held that the French ban was a justified exception to the WTO rules; Canada appealed the decision.[165]

Asbestos marked a significant development with respect to *amicus* brief submissions, as for the first time the AB laid down and implemented a specific procedure for considering unsolicited briefs by NGOs, which reflects a departure from its earlier practice of accepting *amicus* briefs only when they were either attached to the parties' submissions or were unsolicited.[166] Specified time was given to non-governmental entities, which were interested in making submissions to file both an application and the brief. The procedure required that a private party wishing to submit an *amicus* brief must fill out an application for leave to file the brief. This application contained various questions concerning the origin of the brief, its funding and objectives. The application also required a detailed statement of the contribution that was to be made through the briefs and the nature of the interest an applicant had in this appeal. The brief was not to exceed twenty pages in the length. Howse argues that all these measures indicate that the AB's approach in *Asbestos* was very

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[165] *European Community – Measures Affecting Asbestos and Asbestos – Containing Products, (Complaint by Canada)* (2000), WTO doc. WT/DS135/R (Panel Report), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> (date accessed: 1 November 2002)

[166] See *WTO Appellate Body Communication. Additional Procedure* adopted Under Rule 16(1) of the *Working Procedures for Appellate Review* in *European Community – Measures Affecting Asbestos and Asbestos – Containing Products*, (on 8 November 2000) WTO doc. WT/DS135/9, online: WTO< http://www.wto.org/english/news_e/news00_e/ds135_9.doc> (date accessed: 5 April 2003)[Additional Procedure]; see also *Asbestos* case- AB Report, *supra* note 164 at para 52.

sensible, as the additional procedure provided a way of addressing the due process and transparency issues surrounding the acceptance of *amicus* briefs.[167]

One can argue that in *Asbestos*, the AB recognized the possibility that a large number of NGOs would attempt to submit the briefs. Therefore, it was appropriate for an effective, fair and orderly conduct of the case that an additional procedure pursuant to Rule 16(1) of the *Working Procedures* is adapted to deal with these briefs. However, the Member States acted in a hostile manner by calling a special session of the General Council Meeting against the AB's decision to have additional procedure for the submission of *amicus* briefs.[168] The Chair at that meeting concluded, "the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed."[169]The AB subsequently rejected all of the requests for leave to file *amicus* briefs stating that these briefs failed to "comply sufficiently with all the requirements" set out in the AB's procedures.[170]A commentator summarizing the proceedings of the General Council Meeting made the following observations:

> Although the WTO General Council recognized that the Appellate Body does have certain procedural powers in conducting proceedings, the prevailing view appears to be that laying down rules for NGO participation in the proceedings is not one of them. According to the WTO General Council, they, not the Appellate Body, would determine the relationship between the WTO and

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[167] See Howse, *supra* note 94.

[168] See WTO, General Council , *Minutes of the Meeting* (held on 22-11-2000), WTO doc. WT/GC/M/60, online: WTO < http://docsonline.wto.org/gen_search.asp>(date accessed: 29 May 2003)[Minutes of General Council Meeting in *Asbestos* case].This meeting was the result of a special session called by Egypt that turned out to be a hostile complaint forum on the submission of unsolicited briefs by NGOs. The objections raised in this meeting and various other concerns shown by the Developing Countries over submission of *amicus* briefs will be discussed in detail in chapter 3 of this thesis paper.

[169] *Ibid.* at para 120.

[170] See *Asbestos* case-AB Report, *supra* note 164 at 56.

> NGOs, and that in the meantime, the Appellate Body should exercise extreme caution. One cannot know definitively if this message motivated the *Asbestos* Appellate Body to reject all of the *amicus* briefs submitted to it, but it would not seem to be a far-fetched assumption.[171]

Few commentators have argued that the AB should have accepted at least one brief in *Asbestos*. "By doing otherwise, it appeared to be caving to political pressure, thereby risking the appearance of judicial independence, and making effective an attack on its institutional legitimacy."[172] In my view, the conclusion of the General Council's Meeting recognized the power of the AB to accept such briefs until the time there can be formulation of rules by the Member States. The only thing that is required is the careful exercise of discretion by the AB in rendering its decisions in such matters.

2.2.4 Analysis of the AB's Jurisprudence after *Asbestos*: *E.C-Sardines* Case

The situation after *Asbestos* has been described as a kind of "stand off" between the AB of the WTO and the opponents of *amicus* briefs submissions.[173]In subsequent cases, the AB has not attempted to reproduce the special procedure as it laid out in *Asbestos* but it has also been argued that "the AB has not backed off from its view that it has discretion to accept *amicus* briefs."[174]

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[171] See Duncan B. Hollis, "Private Actors in International Law: Amicus Curiae and the Case for the Retention of State Sovereignty", at IV,
online: < http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/25_2/04_TXT.htm#T*>(date accessed: 22 March 2003) [Hollis].
[172] Howse, *supra* note 94.
[173] *Ibid.* The author states that, "the AB has become subtle in dealing with *amicus* issues."
[174] *Ibid.* The author has referred to his attempt to file an *amicus* brief in a dispute concerning the implementation of the original ruling in *Shrimp Turtle*, where in its judgment the AB noted that it was not necessary to consider the brief in order to decide the appeal. The author asserts, "[A] decision not

Recently in *E.C-Sardines*[175], the AB was again confronted with the question of whether it could accept and consider *amicus* briefs submitted by non-governmental entities. While referring to its case law on the point that it had authority to accept or reject the *amicus* briefs submitted by private parties, the AB rejected the briefs on the ground that they were of no assistance in deciding the appeal.[176]*E.C-Sardines* also raised a novel issue, as one of the two briefs filed was by Morocco; a WTO Member, who did not exercise its third party rights under the DSU.[177]

This was the first time that a WTO Member submitted such a brief in any dispute settlement proceeding.[178]Peru objected to Morocco's submission arguing that, as Morocco did not notify its interest to the DSB in accordance with articles 10.2 and 17.4 of the DSU, it couldn't be given an opportunity to be heard by the AB. The AB rejected Peru's objection and accepted the brief referring to its earlier decision in *Carbon Steel* and affirmed that it had the authority to accept or reject such briefs.[179]

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to accept a brief because it is not necessary for the disposition of the appeal is an *affirmation* of the discretion to accept or reject such briefs, as it appears appropriate to the AB" (Emphasis in original); see also *E.C Sardines* case, *infra* 175.

[175] *EUROPEAN COMMUNITIES - TRADE DESCRIPTION OF SARDINES* (2002), WTO Doc. WT/DS231/AB/R (Appellate Body Report), online: WTO < http://docsonline.wto.org/gen_search.asp> (date accessed: 22 May 2003) [*E.C Sardines* case].

[176] *Ibid.* at para 160.

[177] DSU, *supra* note 6 Art. 10.2. It contemplates that "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report." Article 17.4 of the DSU states, "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 pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body."

[178] *E.C Sardines* case, *supra* note 175 at para 161.

[179] *Ibid,* at para 162; see also WTO Annual Report 2003, at 93, online: WTO <http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep03_e.pdf> (date accessed: 10 July 2003). The report states that "the Appellate Body confirmed that it could accept and consider amicus curiae

The AB observed:

> It is true that, unlike private individuals or organizations, WTO Members are given an explicit right, under Articles 10.2 and 17.4 of the DSU, to participate in dispute settlement proceedings as third parties. Thus, the question arises whether the existence of this explicit right, which is not accorded to non-Members, justifies treating WTO Members differently from non-WTO Members in the exercise of our authority to receive *amicus curiae* briefs. We do not believe that it does [...] We have been urged by the parties to this dispute not to treat Members less favourably than non-Members with regard to participation as *amicus curiae*. We agree. We have not. And we will not. [...] We have examined Articles 10.2 and 17.4, and we do not share Peru's view. Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an amicus curiae is prohibited.[180]

In my view, the decision in *E.C-Sardines* has answered the concerns shown by the Member States that accepting briefs from non-governmental entities would give them more rights than the WTO Members that were not party to the dispute, as such Members could not submit *amicus* briefs. After *E.C-Sardines*, it is clear that in addition to non-governmental entities, Member States may also participate as *amicus curiae*. Moreover, aforementioned observation by the AB in *E.C-Sardines* seems to suggest that the presence of specific provisions in the DSU governing participation of Member States as third parties does not lead to a conclusion that these provisions are exclusive in nature. However, the AB emphasized that in accepting the brief filed by Morocco in *E.C-Sardines,* it was not suggesting that each time a Member State

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briefs submitted by private individuals and found, for the first time, that it could accept and consider amicus curiae briefs submitted by WTO Members that were not parties to the dispute."

[180] *Ibid,* at para 163-165.

files such a brief, the former is required to accept and consider such brief.[181] The AB held that acceptance of any *amicus* brief is a matter of discretion, which will be exercised on a case-by-case basis.[182]

A careful examination of *E.C-Sardines* indicates that the AB did in fact stipulated a check on its discretion by stating that it will exercise such discretion and could reject a brief filed by a Member State if acceptance of such brief would interfere with the "fair, prompt and effective resolution of trade disputes".[183] In light of the analysis of the jurisprudence on *amicus* brief submissions following *Asbestos*, the observation made by Howse seems to be correct; The AB has not backed off from asserting its discretion to accept and consider the briefs.

2.3 An Implicit Basis of Allowing *Amicus* Submissions Especially at Appellate Level

2.3.1 Duty to Clarify the Law

In order to ensure the security and predictability of the system, the DSU confers on the dispute settlement organs the broader role of clarifying the law.[184] The basic purpose of dispute settlement is to settle cases to the satisfaction of parties and perhaps of third parties with legal interests in a particular case. Howse states that the dispute settlement organs, including the AB, must take into account both the objective of satisfactory settlement of inter party disputes, as well as the

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[181] *Ibid.* at para 167.
[182] *Ibid.*
[183] *Ibid.* The AB held that this could arise where, "a WTO Member were to seek to submit an *amicus curiae* brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden over other participants."
[184] DSU, *supra* note 6 Art. 3.2.

objective of clarification of the law, which is of particular importance in appellate review.[185] He observes:

> [T]he parties to a dispute may have many strategic reasons for making legal arguments in a particular way or avoiding other legal arguments altogether—complete party control over the scope of appellate legal interpretation may not serve the interests of clarification of the law. [*therefore*]...the discretion to accept *amicus* briefs is related to the AB' broader institutional role in clarifying the law.[186]

With reference to submission of *amicus* briefs at the level of appellate review under the DSU, the analysis by authors like Mavrodis reveals that article 17 of the DSU, on its face, makes no allowance for *amicus* brief submissions but argues that it is wrong to consider that the AB is bound only by what is explicitly stated in the DSU.[187] He asserts:

> If this were indeed the case, one could end up with rather perverse outcomes: for example, nowhere the DSU mentions that the Appellate Body must make an objective assessment of the matter before it. The matter comprises of course not only the facts, but also the law, as the unambiguous wording of Art. 11 DSU makes it plain. Such an obligation is imposed only on panels (Art. 11 DSU). Does the fact that such an obligation is not explicitly imposed on the Appellate Body mean that, following a *contrario* interpretation, the Appellate Body should not make an objective assessment of the matter before it? Of course not. The Appellate Body cannot preach objective assessment and practice subjective superficial browsing.[188]

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[185] Howse, *supra* note 94.
[186] *Ibid.* (Emphasis added)
[187] See *e.g.* Mavroidis, *supra* note 93 at Final Act; see also Trebilcock & Howse, *supra* note 7 at 67. The authors argue, "Perhaps the AB quite reasonably considered the ability to accept such material as implicit in the very notion of appellate jurisdiction, which would be consistent with general appellate court practice."
[188] See Mavroidis, *ibid.*

The importance of the duty to clarify law cannot be overlooked. Despite the fact that the WTO is a "member driven organization", it is the mission of the AB, as that of any judicial branch to interpret the law of the WTO independently.[189] The AB observed in one of its reports that "the procedural rules of WTO dispute settlement are designed to promote the fair, prompt and effective resolution of trade disputes."[190] Effective resolution of trade disputes requires flexibility in procedural rules. It has been argued that the context of the DSU gives the AB more control over its procedure than to the Panels, and therefore if the DSU mandates sufficient flexibility so as to ensure high quality panel reports, the concern for high-quality appellate reports cannot be less.[191]

For this matter, even if there is no explicit provision in DSU that grants power to seek information to the AB, the AB has inherent power to do so if it judges that such information is useful.[192]Moreover, it has been argued that the legislative wing of the WTO is so slow and culminates so infrequently in new rules that "the judicial branch must engage in law-making if gaps and ambiguities are to be addressed and if the system is to respond in a timely manner to environmental change." [193]

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[189] See Umbricht, *supra* note 97 at 777.
[190] *E.C. Sardines* case, *supra* note 175 at para 167.
[191] Issues of Amicus Submissions: Note by the Editors (2000) 3(4) J. Int'l Econ. L. 701 at 706, online: Oxford University Press <http://www3.oup.co.uk/jielaw/hdb/Volume_03/Issue_04/pdf/030701.pdf>(date accessed: 11 June 2003).
[192] *Ibid.*
[193] Steinberg, *supra* note 12 at 40.

2.3.2 Appellate Body's Lack of Authority to Remand

The introduction of an institution like the AB shows that the dispute settlement process in international trade has been judicialized.[194] As with jurisdiction of an appellate tribunal under the domestic systems,[195] which has been confined to "issues of law", the drafters of the DSU have adopted a similar approach with respect to the jurisdiction of the AB. Its jurisdiction has been confined to "issues of law" covered in the panel reports and legal interpretation developed by the Panel.[196] While under the domestic legal system where jurisdiction of a domestic appellate tribunal is confined to "issues of law", alternatively, such tribunal is conferred with an "authority to remand" the case in situations where it feels that the subordinate court has not discharged its duty of fact finding.[197]

This is not the case with the WTO's AB. Under the law it can only "uphold, reverse or modify a decision of the Panel."[198] In a case where the Panel fails to discharge its duty to make an objective assessment of the facts, the AB cannot send the case back to the Panel for proper discharge of such a duty. Clearly this amounts to an oversight on part of the drafters of the WTO, leaving such an important institution with considerable ambiguity. What can a judicial tribunal in

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[194] See *e.g.* Merit E. Janow, "The Role of the Secretariat in Dispute Settlement", Working Draft: Prepared for the World Trade Forum, August 2002, University of Berne, Forthcoming in The World Trade Forum, Volume 4, University of Michigan Press 2003, at 1, online :<http://www.columbia.edu/~mj60/PDF/berne%20paper.pdf> (date accessed: 8 June 2003) [Janow].

[195] See *e.g. Code of Civil Procedure, 1908* of Pakistan [*Code of Civil Procedure 1908*]. Appellate jurisdiction of the High Courts in each of the four provinces of Pakistan is governed by section 96 and 100 of the Code. It states that appeal will be on question of law.

[196] DSU, *supra* note 6 Art. 17.6. It states, "An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel."

[197] See *e.g.* "*Code of Civil Procedure 1908*", *supra* note 195. Order XLI Rule 23-25. These orders contemplate that the Appellate Court can send the case back to the trial court at its discretion where it feels *inter alia* that the trial court has failed to make a proper factual analysis.

[198] DSU, *supra* note 6 Art. 17.13.

such a situation do? It cannot leave the case undecided, nor can it remand the case on the ground that the Panel has not objectively assessed the facts. The AB is under duty to proceed with the case. Without being fully informed about the facts of the case, I have doubts as to whether any judicial forum can impart justice and reach an equitable and fair decision.[199] Completing the factual analysis appears to be the solution, but if the AB is provided with incomplete factual information, it cannot reasonably be expected to decide the case on its merits. Therefore, the AB cannot discharge its duty to ensure security and predictability of the multilateral trading system without seeking information from any source.

Given the large gap in the rules of the DSU, to ensure the ultimate objective of this more "legalistic" DSM, it is important that the AB exercises its implied power while proceeding with the case; in doing so it must inform itself of the relevant facts either by soliciting or accepting unsolicited *amicus* briefs. It has been argued:

> [T]he international trade regime, including the dispute settlement system, is dynamic and dynamic systems evolve. Because there are few rules governing appellate proceedings, many gaps have had to be filled by the Appellate Body, either through its Working Procedures, or through its decision-making.[200]

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[199] PREPARATIONS FOR THE 1999 MINISTRIAL CONFERENCE- Communications from Pakistan, (on 1 April 1999) WTO Doc. WT/GC/W/162 at para 5,online: WTO < http://docsonline.wto.org/gen_search.asp> (date accessed: 20 May 2003)[Communication from Pakistan].Pakistan while critically referring to the *Shrimp Turtle* case argued that AB has wrongfully interpreted the provisions of the DSU to confer upon itself and the panels to accept unsolicited briefs but at the same time highlighted the importance of conferring remand authority to the AB to send the case back to Panel and stated that such lack of authority has "resulted in AB examining *de novo* facts of the case and/or making a finding on issues of law not addressed by the Panel."

[200] See "Thematic File: Post-Doha Agenda The Doha Work Programme: The WTO Dispute Settlement Understanding", at IV, online:<http://www.acici.org/aitic/documents/notes/note21_eng.html>(date accessed: 18 February 2003).

The criticism of the AB's decision to accept *amicus* briefs at the appellate level seems to be baseless as the jurisdiction of the AB has been confined to issues of law without conferring authority to remand in situations where the Panel failed to discharge its duty to make objective assessment of the facts.[201]With reference to soliciting or accepting unsolicited *amicus* briefs at the appellate level, had there been authority conferred upon the AB to remand the case in a situation where the Panel fails to objectively assess the facts, the situation would have been different and there could have been room for criticizing the approach adopted by the AB in the above-mentioned cases. But since it is not the prevailing law of the WTO, in my opinion, the AB is correct in conferring upon itself the authority to accept and consider the *amicus* briefs.

2.4 Conclusion

Although there have been no explicit rules regarding the status of non-governmental entities that can allow them to raise their voice before the Panels and the AB in disputes; outcome of which inevitably affects them. But there has been an important and revolutionary development in this regard through the interpretation of existing provisions of the DSU by the AB of the WTO.

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[201]See JORDAN'S CONTRIBUTIONS TOWARDS THE IMPROVEMENT AND CLARIFICATION OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING-Communication from Jordan (on 28 January 2003), WTO Doc TN/DS/W/43, at para 27-29, online : WTO <http://docsonline.wto.org/gen_search.asp> (date accessed: 12 June 2003) [Communication from Jordan].It has been proposed by Jordan that it is necessary for the efficacy of the two tier WTO's DSM to grant remand authority to the its AB; see also CONTRIBUTION OF THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES TO THE IMPROVEMENT AND CLARIFICATION OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING-Communication from the European Communities (on 23 January 2003) WTO Doc. TN/DS/W/38, at V:B, online : WTO < http://docsonline.wto.org/gen_search.asp> (date accessed: 12 June 2003) [Communication from European Communication-I].

The process has started in 1998 when the WTO's AB opened the way for *amicus* submission by NGOs by holding that both the Panel and the AB have the right to right to accept such unsolicited briefs. The discussion throughout this chapter indicates that the AB rightly interpreted the existing provisions of the DSU in order to discharge its obligation of ensuring the security and predictability of the multilateral trading system. Such a form of participation by private sectors and NGOs is considered a welcomed development.[202] In sum, under the AB's holdings, the Panel and the AB retains the right to disregard or reject an *amicus* brief filed by a private organization. However, the brief cannot be disregard solely on the grounds that a Member did not submit it.[203] The AB in *Shrimp-Turtles* also held that private parties may submit *amicus* briefs directly to a Panel or AB.[204] Information, in the form of *amicus* briefs from a private party, may also be submitted to a Panel or AB as an appendix to a Member's submission. If an *amicus* brief is expressly adopted by a Member State to be part of that its submission, however, a Panel would be under an obligation to consider its arguments. [205]

[202] See Dr. Panitchpakdi, *supra* note 45 at 34.
[203] See *e.g.* Laidhold, *Supra* note 76 at 441.
[204] *Ibid.*
[205] *Ibid.*

CHAPTER 3

THE CONCERNS OF DEVELOPING COUNTRIES OVER PUBLIC PARTICIPATION WITH SPECIAL REFERENCE TO SUBMISSION OF *AMICUS CURIAE* BRIEFS

It has been argued in Chapter One that allowing public participation in the process of dispute settlement has various advantages, such as providing important information to the DSB, it will increase transparency and democratic character of the WTO etc. But the analysis done so far indicates that non-governmental entities such as NGOs and private economic actors have no right to initiate proceedings at the WTO level. The only role conferred to these entities by the AB is that of submitting unsolicited *amicus* briefs; the acceptance of such briefs nonetheless remains within the discretionary powers of the Panels and the AB.[206] Moreover, such a role for non-governmental entities has not been warmly received by the WTO Members, particularly the Developing and Least Developed Countries.

On the one hand, there is a voice for developing a more defined and direct role for non-governmental entities, while, on the other hand, governments representing the WTO Members, particularly the Developing and the Least Developed Countries, individually, as well as collectively, forwarded their proposals urging the AB to overturn its decision to accept *amicus* briefs from such entities.[207] The opposition to *amicus* brief submissions from these countries is based on both legal and policy grounds.

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[206] See *e.g.* Reif, *supra* note 16 at 19-20.
[207] See Minutes of General Council Meeting in *Asbestos* case, *supra* note 168.

This chapter will examine the concerns and objections regarding public participation in general and *amicus* brief submissions in particular to see the extent to which such criticism is justified.

3.1 It is Right of Member States to Decide Limits of Discretionary Powers of the DSB

The Decision of the AB to accept unsolicited briefs, as well as to invite submissions from sources other than the governments of the Member States has been considered as a serious matter.[208] It has been argued that the "AB's action is not procedural, rather, it is a substantial issue not mandated by the membership of the WTO."[209] Developing Countries strongly protested against the AB's interpretation of the DSU, particularly article 13, on the basis of which acceptance of unsolicited briefs by the Panel has been permitted.[210] In a meeting of the DSB held after publication of the AB's report in the *Shrimp Turtle* case, Thailand and Pakistan asserted that Member States should decide the manner in which NGOs can be involved the dispute settlement process and not the AB.[211] These states argued that the AB has only a judicial function to perform and not that of a creator or negotiator of the WTO rights.[212] They further argued that since the law of the WTO did not include the right to file *amicus* briefs, the AB, by allowing such submissions had

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[208] See Sumitra Chishti, "Dispute Settlement System under World Trade Organisation", at 32, online:<http://www.iift.edu/publications/paper19.pdf>(date accessed: 24 May 2003) [Chishti]. The author asserts that the matter is serious as it is concerned with the most *sensitive dispute settlement mechanism* of the WTO. Since the compliance of decisions has to be done by the governments, this uninvited information would create problems(Emphasis added).

[209] *Ibid.*

[210] See Lopez, *supra* note 108 at 492.

[211] *Ibid.* See also WTO Dispute Settlement Body, *Minutes of Meeting*, (on 14 December, 1998).WTO Doc. WT/DSB/M/50, online : WTO < http://docsonline.wto.org/gen_search.asp> (date accessed: 12 June 2003)

[212] *Ibid.*

diminished the rights of the Members.[213] According to these countries, *amicus* brief submissions violated article 19.2 of the DSU, which prohibits the Panels from creating or diminishing rights in the *WTO Agreement*.[214] Lopez observes that there have been strong legal arguments against permitting the *amicus* submissions and the strongest revolves around creation of new rights.[215]It has also been argued that under article V: 2 of the *WTO Agreement*, it is within the authority of the General Council to consult and co-operate with NGOs.[216]

In their contribution towards *Improvements and Clarifications of the Dispute Settlement Understanding*, Developing Countries have forwarded criticism on the AB's interpretation of the term "seek'. On behalf of Cuba, Honduras, Egypt, Malaysia, Jamaica and the Dominican Republic, India has submitted a proposal in which it states that article 13 of the DSU must include a footnote precluding the Panels from accepting unsolicited briefs.[217] This proposal can be referred back to India's earlier proposal, which covers a wide range of issues including *amicus* briefs.[218] *Inter alia*, the proposal states that there is no need for making any provision

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[213] *Ibid.*

[214] *Ibid.* See also DSU, *supra* note 6 Art. 19.2 contemplates, "...the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[215] Lopez, *supra* note 108 at 493. But the author asserts, "It is unclear whether such permission in fact creates new rights and nullifies rights of the members to solely participate in the disputes."

[216] See Zonnekeyn, *supra* note 153. The author criticizes this approach and asserts that the authority of the General Council to consult and co-operate is not exclusive and there fore Panels and the AB have power to consider and solicit submissions and information from non-parties including NGOs.

[217] See Dispute Settlement Understandings Proposals: Legal Text- Communication from India on Behalf of Cuba, Dominican Republic, Egypt, Honduras, Jamaica and Malaysia, (on 11February 2003) WTO Doc. TN/DS/W/47 at para 6, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [Communication from India-I]; see also TEXT FOR THE AFRICAN GROUP PROPOSALS ON DISPUTE SETTLEMENT UNDERSTANDING NEGOTIATIONS- Communication from Kenya, (on 24 January 2003) WTO Doc. TN/DS/W/42, at para V, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003).

[218] Negotiations on the Dispute Settlement Understanding- Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, (on 7 October 2002) WTO Doc.

for accepting *amicus* briefs.[219] So as to clear the uncertainty and controversy surrounding this issue, the proposal has mentioned the need for addressing the matter of *amicus* brief submissions by way of better defining the word "seek" in article 13 of the DSU.[220]

Moreover, it has been argued that even from historical perspective, there is no room for such an allowance to non-governmental entities.[221] During the Uruguay Round negotiations, the question of providing for the possibility of *amicus* submission in the dispute settlement system of the WTO was considered in the Informal Group on Institutional Issues, but as there was overwhelming opposition to the proposal, the proposal was not incorporated in the DSU.[222]

It has been observed that once the issue of *amicus* brief submissions surfaced in *Shrimp Turtle*, the AB dealt with it without giving any "convincing reasons".[223] The proposal further asserts that the mandate of the Panels and the AB is to clarify the provisions of the WTO covered agreements "in accordance with customary rules of interpretation of public international law" under article 3.2 of the DSU.[224] It has been argued that the AB has ignored these customary rules of interpretation and

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TN/DS/W/18, at III online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [Communication from India-II].

[219] *Ibid.*

[220] *Ibid.* India did suggested in this as well as a subsequent proposal that the term "seek" must be clarified to preclude a panel from accepting unsolicited briefs ; see also Communication from India-I, *supra* note 217.

[221] Communication from India-II, *ibid.*

[222] *Ibid.*

[223] *Ibid.*

[224] *Ibid.* It has been contended by the proposal that the AB in many disputes has itself asserted that articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) contain these customary rules of interpretation. While article 32 contains supplementary rules of interpretation, Article 31 of the VCLT states that provisions of an international treaty/agreement should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

while deciding *Shrimp Turtle*, the AB did not refer to any "textual or dictionary meaning" to clarify the word "seek".[225] Rather, it referred to the "thrust" and "context" of articles 11 and 12 of the DSU to state that the word "seek" in article 13 of the DSU could be construed as incorporating "the acceptance of unsolicited *amicus* briefs" by the Panels.[226] The AB's approach in subsequent cases[227] to confer upon itself the authority to accept unsolicited briefs and invite such briefs from non-governmental entities has been widely criticized by the WTO Members.[228] However, the AB did not take into consideration Members views on this substantive issue and has assumed legal authority to accept and invite *amicus* briefs on the basis of article 17.9 of the DSU read with Rule 16(1) of the *Working Procedures*, which in AB's view gave it "broad authority" to draw up procedural rules.[229] Developing Countries do not share the same view on the interpretation of the aforementioned provisions of the DSU and the *Working Procedures*. It has been contended:

> Rule 16(1) is of residual nature that provides for adoption of procedures to fill the gaps in the working procedures to meet unforeseen situations that might arise in an appeal. This could not form an appropriate legal base for issuance of procedures on such a substantive and controversial issue [...] it is clear that the UR negotiators had clearly rejected the idea of acceptance of unsolicited *amicus curiae* briefs; that neither Article 13 of the DSU, nor absence of "explicit prohibition" in the DSU or working procedures, nor Rule 16(1) could provide proper legal basis for admission and acceptance of *amicus curiae* briefs in the dispute settlement process.[230]

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[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.* The proposal refers to *Carbon Steel* Case and *Asbestos* Case.
[228] *Ibid.*
[229] *Ibid.*
[230] *Ibid.*

While criticizing the AB's decision in *Shrimp Turtle*, Pakistan, another Developing Country, has argued at the Ministerial Conference in 1999, that the AB has usurped the functions of the WTO Members regarding clarifications and modifications of the DSU under the "guise of interpreting law on the basis of contemporary developments."[231] Pakistan went on to state, "It would be necessary to clarify that the provisions of Article 13.2 would not permit panels or the Appellate Body to take into account unsolicited information including *amicus curiae* briefs from private parties."[232]

3.2 Inter-Governmental Nature of the WTO, Weak Economies of Developing Countries and the Possibility of Erosion of State Sovereignty

The WTO is an inter-governmental organization with membership open to states only. Like the WTO, its DSB is also of inter-governmental character; therefore, by allowing non-members to participate and submit *amicus* briefs, the AB has undermine this character.[233] While questioning European Communities and their Member States[234] on their proposal regarding the submission and consideration of *amicus* briefs, India stated:

> [U]ltimate compliance is to be done by Governments, not by others. Furthermore, Governmental position in disputes is arrived at after consultations with all domestic stakeholders. If Governments know that their non-governmental agencies have a further chance to influence the dispute settlement mechanism,

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[231] See Communication from Pakistan, *supra* note 199 at para 9.
[232] *Ibid* at para 11.
[233] See Communications from India II, *supra* note 218.
[234] See CONTRIBUTION OF THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES TO THE IMPROVEMENT OF THE WTO DISPUTE SETTLEMENT UNDERSTANDING-Communication from the European Communities, (on 13 March 2002) WTO Doc. TN/DS/W/1, at IV, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [Communication from European Communities-II].

> then they would pay less attention to finalizing their positions and even worse, there may be implications for compliance by the Governments themselves.[235]

The relative economic weakness of the Developing Countries makes them more dependent on foreign trading partners, and there is a need for governments to monitor trade relationships and private industries' complaints in a manner that is more beneficial for the whole nation than to an individual company. Consequently, it is felt that bringing private claims may endanger their economies and even have detrimental consequences in non-trade areas.[236] There are scholars such as Levy and Srinivasan[237] who are of the opinion that the governmental filter is beneficial on the whole and that the privatisation of the WTO's DSM would endanger the national welfare of the Developing Countries because of their weak economic position. Member Governments are representatives of the people in a state and disputes are brought and defended by these governments at the WTO "after consulting all the domestic stakeholders and taking overall interests of the state they represent."[238]

For these reasons, even commentators from the Developed Countries have argued that only "elected government can be properly responsible for the making of law, domestically and internationally."[239]Ostry has made a similar argument, "it is

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[235] See INDIA'S QUESTIONS TO THE EUROPEAN COMMUNITIES AND ITS MEMBER STATES ON THEIR PROPOSAL RELATING TO IMPROVEMENTS OF THE DSU - Communication from India, (on 7 May 2002), WTO Doc. TN/DS/W/5, at IV:32, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [India's Questions to European Communities].

[236] See Hoekman & Mavroidis, *supra* note 89.

[237] *Ibid.* The authors cite Levy, P. and Srinivasan T.N, " Regionalism and the (Dis)advantages of the Dispute Settlement Access" American Economic Review (1996).

[238] *Ibid.* See also Communications from India II, *supra* note 218.

[239] Martin Wolf, "Uncivil Society", *The Financial Time* (London) (1 September 1999) 14 [Wolf].

the role of government to make policy; transparency and participation are not a replacement for governmental responsibility."[240]

With reference to *amicus* submissions, one may argue that this institution can also be misused to the detriment of the Developing Countries who have limited financial resources to address these *amici* in a dispute.[241]The requirement of responding to such submissions within a prescribed time frame would particularly be burdensome to a Developing Country Member.[242] Also, Developing Countries would have to assume the added burden of defending themselves against any arguments, which such submissions might contain.[243]

Any role afforded to these non-governmental entities, whereby they are allowed to participate in disputes, is "a course not without risks."[244] Numerous potential difficulties can arise; some stakeholders, simply by being engaged in the process, may develop unrealistic expectations about outcomes and become frustrated when all their demands are not met; one lobby group may be more powerful than another and media may take advantage of the rift between these lobbying groups.[245] Moreover, the interests of specific civil society groups and private actors may not always coincide with the country's national interest.[246] It has been asserted:

> Non-governmental entities would seek to represent and advance their own sectoral interests. If such non-governmental entities

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[240] Sylvia Ostry, "External Transparency: The Policy Process at the National Level of the Two Level Game", at III, online:< http://www.utoronto.ca/cis/WTO_Transparency.doc > (date accessed: 8 June 2003) [Ostry].
[241] Communication from Jordan, *supra* note 201 at para 37. It states, "[T]his privilege may be misused in certain circumstances should there not be a clear framework for its application especially when a dispute involves a developing country Member, taking into consideration the financial burdens that may face them in addressing such submissions."
[242] India's Questions to European Communities, *supra* note 235 at IV: 31.
[243] *Ibid.*
[244] Panagariya, *supra* note 15 at 45.
[245] See Ostry, *supra* note 240.
[246] See *e.g.* Panagariya, *supra* note 15 at 45.

> were allowed to influence the process and outcome of disputes, it would severely erode the Member governments' authority and ability to participate effectively in the dispute settlement process. Further if the Member governments are required to respond to the submissions of the amicus curiae briefs, it would add to their obligations, beyond what was negotiated.[247]

3.3 Balance Envisaged under the Multilateral Trading Regime will be Disturbed

The law of the WTO is result of continuous, intensive and vigorous rounds of negotiation. These negotiations span over half a century and reflect a delicate balance of rights and obligations between the Member States. The attainment of this balance was not an easy task; rather, it was achieved as a result of compromise between the states. Any attempt to import non-governmental entities with a direct role particularly at the level of the DSB will disturb this balance. It can be argued that the WTO shall not confer an authority to non-members, which can change the terms of the complex compromises reached in successive trade rounds on the basis of following the precedent set by the other organizations.[248]Allowing for the submission of unsolicited briefs also raises concerns over the possibility of such an imbalance with respect to the way the DSU has been drafted. It has been asserted by India that at least one party must respond to arguments emanating from *amicus* brief and hence would be required to assume additional obligations not presently provided for in the DSU.[249]

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[247] See Communications from India II, *supra* note 218.

[248] See *e.g.* Philip M. Nichols, "Realism, Liberalism, Values, and the World Trade Organization", (1996) 17 U. Pa. J.Int'l Eco. Law 851 at 859–860 [Nichols, "Realism"]. He also criticized the fact that there should be any role for NGOs on the ground that other International organizations have the similar practice. He attacks these comparisons saying that that "comparative analysis cannot be reduced to a simple 'me, too' argument."

[249] India's Questions to European Communities, *supra* note 235 at IV:29.

3.4 Diversity and Imbalance in the NGOs: Grouping and Lobbying Issues

The considerable differences; be they with respect to geographic focus, aims, funding, etc., among NGOs present a valid argument against conferring a role upon them. Developing Countries already take the existing WTO trading system as biased against them, and the right to submit *amicus* briefs has been strongly opposed by southern governments and their NGOs. The concerns of the Developing Counties in this regard is adequately pointed out by Chishti, who refers to the opposing reaction of India and other Developing Countries.[250] Any role for NGOS will put Developing Countries at a disadvantage, as their NGOs are not financially and otherwise as equipped as those of the Developed Countries to influence the course of action of the WTO.[251]Commentators like Panagariya argue that since the NGOs of the Developing World are relatively new to the game and also short of financial resources, it is likely that such "developing country groups may also be captured by developed country groups."[252]

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[250] Chishti , *supra* note 208.

[251] *Ibid.* See also India's Questions to European Communities, *supra* note 235 at IV:31. India asserts that "if *amicus* briefs are permitted by the law of the WTO then the present disadvantages suffered by Developing-Country members in international trade would get further accentuated as very few entities in Developing Countries would be in a position to make *amicus* submissions."; but see *contra* Nitya Nanda, "Amicus Curiae Brief: Should the WTO Remain Friendless?", Briefing paper, at 6, online: CUTS<http://cuts.org/Amicus%20Curiae.pdf> (date accessed: 29 June 2003) [Nanda]. Nanda argues that argument from Developing Countries on the basis of financial imbalance between NGOs of North and South is not persuasive as many Southern NGOs have already made their presence known in Geneva, either directly or through their networks. The author points out to the *amicus briefs* submitted in *Shrimp Turtle*, which was result of coalitions of three NGOs from both Developed and Developing Countries. The brief referred by Nanda was submitted by the Centre for International Environmental Law (CIEL) jointly with the Centre for Marine Conservation (CMC) from the US, Red Nacional de Accion Ecologia (RENACE) from Chile, the Environmental Foundation Ltd. from Sri Lanka, and the Philippine Ecological Network.

[252] See Panagariya, *supra* note 15 at 45.

The Developing Countries also fear the aim of NGOs and their western supporters for a standing in the DSB. It has been observed that there is deep suspicion over the motives behind northern demands for greater transparency, as this will merely allow "northern NGOs, defending northern interests, to better exploit the media to pressure state delegates, the WTO Secretariat, and the WTO dispute settlement panellists to take their views into account and thereby advance northern ends."[253] It has been cautioned that transparency can be more beneficial for those who have the ability and "wherewithal to participate in the proceeding"; opening the hearings to the public or allowing *amicus* briefs will only increase the capabilities of large companies and richly endowed NGOs to influence the process, while the Developing World will be left behind.[254]

One may argue, "given that there is no legislative check—as yet—on dispute settlement body activism, we should be very wary of the political pressures for the DSB to legislate: this would be quite undemocratic."[255]I believe that as these NGOs and large companies mostly belong to the Developed Countries like the U.S., etc. This is a kind of "switching in role"; the influence of the Developed Countries over the Developing Countries will be replaced by that of large NGOs and companies from the Developed World.

In its communication as contribution towards the *Improvements and Clarifications of the Dispute Settlement Understanding*, Jordan states that the WTO

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[253] Gregory Shaffer, "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters"(2001) 25 Harv. Envt'l L. Rev. 99.

[254] See *e.g.* Luis F. de la Calle, *supra* note 42 at 14. It has been observed that this "will also increase the political pressures on panellists to decide matters on concerns not necessarily technical but political."

[255] *Ibid.*

system has reached a stage in its development where it makes sense that non-governmental interests be recognized.[256]Jordan observes that this can be done through institution of *amicus* briefs, but contends that it should always be taken into consideration that "the unsolicited *amicus* briefs will only be used to evaluate arguments made by the parties to the dispute *and not to make the case for the complainant or the respondent.*"[257]

It is suggested that allowing for new actors to participate in the settlement of trade disputes will jeopardize judicial process at the WTO level in two ways. First, there is fear that private organizations may turn their energies towards lobbying other WTO Members to join in a trade dispute as a third-party participant because as a third-party participant, a Member could effectively represent the legal arguments of an organization and decisions like *Shrimp-Turtle* could accelerate the lobbying process.[258] Second, "there is also danger of excessive lobbying not to member governments, but to the WTO Panels themselves, as various decisions of the AB permits the direct submission of *amicus* briefs by an individual or organization to a WTO Panel."[259] It has been observed that even though the Panel has the discretion to disregard arguments forwarded in such briefs, the chances do exist that the WTO panellists could be under undue influence by these lobbying efforts.[260] Therefore,

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[256] Communication from Jordan, *supra* note 201at para 33.
[257] *Ibid.* at para 35(Emphasis added). But see also John Ragosta, Navin Joneja and Mikhail Zeldovich, "WTO Dispute Settlement System: The System is Flawed and Must be Fixed", at 71, online:< http://www.dbtrade.com/publications/wto_dispute_settlement_is_flawed.pdf>(date accessed: 12 July 2003).It has been argued by Ragosta and others that "NGOs from developed nations frequently take positions opposite to that of their own governments and have less incentive to participate in dispute settlement proceedings if their views were already accounted for."
[258] Laidhold, *supra* note 76 at 443-444.
[259] *Ibid.*
[260] *Ibid.*

there is strong possibility that these entities could influence both the Panels as well as the AB to accept their arguments.[261]

3.5 NGOs Themselves are Not True Reflections of Public Opinion

Various national governments around the world particularly where there is lack of democracy, are being criticized for not being the true representatives of the common people but there is a strong argument questioning the representative capacity of the NGOs as well. As observed by Martin Wolf, "if the NGOs were indeed representative of the wishes and desires of the electorate, those who embrace their ideas would be in power. Self-evidently they are not."[262]

Providing NGOs a role on the ground that the operations of the WTO lack democratic attributes is baseless given that these NGOs cannot be taken as symbol of democracy because they themselves often lack measures for accountability to their members.[263] The whole idea of allowing these NGOs to participate in the adjudicatory process at the WTO level therefore becomes doubtful as it is not certain whether or not these entities do represent and will be able to safeguard public interest.

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[261] *Ibid.* The author quotes commentators like J.Cameron and observes, "Although WTO panellists are otherwise shielded from lobbying efforts and are strictly prohibited from ex-parte communications, experience in Washington, D.C. suggests ... that creative and powerful NGOs and other interest groups could pressure panellists or party and non-party WTO Members by using a variety of tactics, such as public relations campaigns. "

[262] Wolf, *supra* note 239.

[263] See Nichols "Realism", *supra* note 248 at 870-871; see also Peter J. Spiro, "New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace," (1996) 18 Cardozo Law Rev. 957 at 962–963. Both these authors have separately argued that the leadership NGOs is neither independent nor it is elected in a democratic manner.

3.6 Conclusion

At first sight it appears to a be a simple question of how non-governmental entities including NGOs can be given a role to participate in the WTO activities particularly in the process of adjudication before the DSM. But in light of the criticism forwarded by the WTO Members, it appears that the issue is for more important and complicated than originally thought. In particular, Developing Countries have heavily criticized the introduction of *amicus* briefs. This criticism has some merits particularly with reference to the fact that there is lack of clear rules on the subject.

Ostry's observations best reflects the entire situation:

> While there are undoubtedly benefits accruing from a more participatory policy process there are also costs, which is certainly one reason many countries are wary of the project. There are costs for governments in terms of time, expertise, and financial resources and there are significant differences in resources among the stakeholders.[264]

[264] Ostry, *supra* note 240.

CHAPTER 4

OPEN ISSUES, THE NEED FOR MORE EXPLICIT RULES AND SOME PROPOSALS

Rulings by the AB have provided non-governmental entities a limited right to submit briefs in various cases. This move by the AB indicates that the WTO Panels and the AB are realizing the efficacy of private interests in international trade matters.[265] Thus far, this paper has examined the strong arguments advanced by trade lawyers and NGOs in favor of these rulings; the hope is that this initiative will ultimately lead to a private right of action and standing before the WTO Panels and the AB. On the other hand, Developing Countries have expressed a strong opposition to both the granting of a direct role for non-governmental entities and the allowance given by the AB to such entities to submit *amicus* briefs. The controversy has been considered as "thorniest issue" facing the WTO with regard to its DSM.[266]

The rift between the aforementioned two positions raises various issues, which need to be resolved to ensure the stability of the rule based trading system envisaged under the auspices of the WTO. Pursuant to paragraph 30 of the *Doha Ministerial Declaration*, a Trade Negotiation Committee (TNC) was established in order to carry out negotiations on *Improvements and Clarifications to the Dispute Settlement Understanding.* There were proposals forwarded by the Member States;

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[265] See *e.g.* Laidhold, *supra* note 76 at 449.

[266] See Thomas J. Schoenbaum, " WTO Dispute Settlement: Praise and Suggestions for Reform", (1998) 47 I.C.L.Q. 647.

both in favor as well as in opposition of allowing participation of non-governmental entities as *amicus curiae* that shows presence of the rift, and as a result the Member States failed to meet the deadline set for an *Undertaking on Improvement and Clarification of the Dispute Settlement Understanding*.[267] The Chair of the TNC presented a consolidated version of the proposals on a number of substantial issues; it did not include clarification on the matter of *amicus* brief submissions due to "absence of a sufficiently high level of support."[268] In my view, this indicates that the entire issue, at present, is in a sort of "no-man's land".

This chapter has twofold objectives; first, it will examine open issues both in accordance with the present state of affairs at international trade scenario and in light of the above-mentioned discussion; second, it will suggest some modest proposals to regulate status of non-governmental entities in the WTO's DSM, *inter alia*, as *amicus curiae*.

4.1 Open Issues

4.1.1 Fate of the *amicus* briefs and Limitations on Such Submissions: Procedural Issues

The initiative to include the submissions of NGOs and other private actors is being considered as a "step towards the right direction",[269] however, there is

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[267] SPECIAL SESSION OF THE DISPUTE SETTLEMENT BODY- Report by the Chairman, Ambassador Péter Balás,(on 28 May, 2003) WTO Doc. TN/DS/9, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [Report by the Chairman]. This report sets the agenda for further negotiations on clarification and improvements of the WTO.

[268] *Ibid.* at para 4, 6, 10. The initial consolidated draft was issued on 18 May 16 2003 but during the discussion on this draft on 20 May 20 2003 the Member States indicated the shortcomings of the said draft, which includes issue of *amicus* briefs controversy. A revision was made on 28 May, 2003 but issue of *amicus* briefs is again missing. The revised version too has not been agreed upon by the Member States.

[269] Mahmood, *supra* note 43 at VI.

great uncertainty surrounding both the process by which *amicus* briefs are to be submitted and the ultimate fate of such briefs. For example, the AB in *Carbon Steel* rejected the briefs on ground that it was not necessary to consider them. In analyzing this approach, "it is unclear whether the Appellate Body accepted the briefs, read them, and decided not to use them, or whether the Appellate Body chose not to accept them after underlining its authority to do so."[270] There are several other procedural issues with the rulings on *amicus* submissions.[271] Carmody observes that lack of transparency in the process makes it difficult to determine when a case is actually before a Panel and therefore, it is hard to know when a submission should be prepared.[272] Further, the WTO does not publish a list of Panel Chairs and therefore, one cannot know with certainty to whom one has to send a request to submit a brief.[273]

The AB has repeatedly asserted that both the Panels and itself have the authority to accept *amicus* briefs only when it is in their opinion necessary. Outside this discretionary power of both the Panels and the AB, non-governmental entities have no legal right to submit *amicus* briefs. They are only bound to accept the briefs if explicitly adopted by the Member States in their submissions.[274] What are appropriate grounds for the acceptance of *amicus* brief submissions? The AB does not provide any guidance to the WTO Members on this question.[275]If appropriate is to mean that a brief discloses important information or it raises important factual

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[270] See online::< http://www.geocities.com/charnovitz/amicus.htm>(date accessed : 12 June 2003)
[271] See *e.g.* Chi Carmody, Beyond the Proposals: Public Participation in International Economic Law,(2000) 15 Am. U. Int'l L. Rev. 1321at 1341[Carmody].
[272] *Ibid.*
[273] *Ibid.*
[274] See Laidhold, *supra* note 76 at 443.
[275] See *e.g.* Chakarvarti Raghvan, "Ruleless Appellate Body and Powerless DSB", online:<http://www.twnside.org.sg/title/power.htm> (date accessed: 12 June 2003).

questions or points of law, then what will be the situation if, for example, a Panel accepts a brief due to its relevancy to a case and then ignores the questions and or points raised therein? Can the entity submitting the brief take (in appeal) this matter to the AB? The answer is certainly 'No', as under the current WTO rules, right of appeal is only available to the WTO Members.[276] There is a further problem if the Panel fails to rule on issues raised in the *amicus* submissions and the parties involved do not appeal the decision. Effectively, this means that the case is not decided on merit, as not all of the facts and issues are ruled upon. In situation where the briefs are submitted as part of a Member's submission, would the situation be different if the Panel or the AB fails to rule upon the issues raised in the briefs? Similar observations has been made by India:

> If in an amicus curiae brief a claim is raised which was not raised in the submission of the complaining party/third country Member, would such a claim be addressed by the panel/Appellate Body? Would the panel/Appellate Body address new arguments made in an amicus curiae submission, which was not otherwise made by any of the party to the dispute?[277]

The above scenario will be further complicated when such a decision is by the AB, which is the highest tribunal under the auspices of the WTO, from which there can be no further recourse. Can the AB and the Panels, at present, be left with such a wide discretionary power to decide the circumstances warranting approval of and the parties eligible for the submission of *amicus* briefs?

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[276] See DSU, *supra* note 6 Art. 17.4.
[277] India's Questions to European Communities, *supra* note 235 at IV:34.

Allowing NGOs and other non-governmental entities to have standing before the DSB, or at least submit to *amicus* briefs, is not as complex a matter as the establishment of a criterion to decide the parties eligible to submit briefs and the manner in which they are to proceed. Before allowing a particular entity to submit an *amicus* brief, it must be determined whether the entity making an *amicus* submission has a direct interest in the factual or legal issues raised in the dispute.[278] India has asserted that there are no clear parameters that can be used to determine whether the entity has demonstrated such a direct interest in the factual or legal issues raised in the dispute.[279] The issues surrounding this juxtaposition goes on and a further question arises: "Can any of the parties or a third party to a dispute adduce evidence and object to the fact that *[such an]* entity has not demonstrated such a direct interest?"[280]

Beside other private actors, there are hundreds of NGOs with a large variety of objectives, from environmentalists to human and wild life preservation groups. Can all of them be allowed to participate as *amicus curiae* before the Panels and the AB? If the answer to this question is affirmative, it will drastically affect the time frame for settlement of the disputes under the DSU. Furthermore, if for example, either the Panel or the AB will, at its discretion, accept *amicus* briefs from some of these actors and not from the others, serious question will be raised as to impartiality of the Panels and the AB. This will most certainly lead to a new plethora of

[278] *Ibid.* at IV:37.
[279] *Ibid.*
[280] *Ibid.*(Italics added)

criticisms and go against the fundamental objective for allowing such submissions i.e., transparency and democracy.[281]

4.1.2 How to Determine Impartiality of the Non-governmental Entities Submitting *Amicus* Briefs

As evidenced in the preceding chapter, there is concern that non-governmental entities may make a case for either complainants or the respondents through *amicus curiae* submissions. This raises issues of impartiality of such entities. It has been suggested that an application for leave to file an *amicus* submission shall contain certain information including details regarding the funding of the entity and whether it has any relationship with any party or third party to the dispute;[282] this proposal has been subject to criticism as it remains ambiguous on certain points. For example, India states that it is not clear as to who would verify the correctness of information submitted.[283] Leaving this within the ambit of the Panel or the AB can be one solution; this will likely overburden these bodies and will make them controversial organs of the WTO, which is not desirable for the progress of the rule-based multilateral trading system envisaged under the WTO.

4.1.3 Impact on Expediency of the Dispute Settlement Process

Another important factor to weigh on the matter of *amicus* brief submissions is procedural expediency. The grant of such right would certainly create

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[281] Argument in favor conferring some role to non-governmental entities has been made in chapter 1 of this paper, which includes need for transparency and democracy at the level of WTO's DSM. See above, 1.2 at 13-15.
[282] Communication from European Communities-II, *supra* note 234 at IV. It should be noted that such an approach was adopted by the AB in *Asbestose*, see *e.g.* Additional Procedure, *supra* note 166.
[283] India's Questions to European Communities, *supra* note 235 at IV:33.

a considerable amount of extra work for the Panel and the AB. Various WTO Members have proposed that there should be permanent panellists to help expedite panel proceedings.[284] Allowing *amicus* submissions and putting the Panel under extra time-consuming job cannot be reconciled with motivation to propose permanent panellists to have expedient judicial proceedings.[285]If the same time frame remains there the net result can be somewhat undesirable. It is likely that either it will result in diminishing of the quality of the Panel or the AB reports or tight deadlines imposed by the DSU will be routinely missed.[286] Certainly such a result would "undermine the confidence that the relevant actors have in the Dispute Settlement System."[287]

4.1.4 Conflict Between Private Economic Interests, Environmental Values and the Ability of Governments to Legislate: Possibility of a Complex Structure

There can be situations where interest of *amici* is likely to be in conflict with each other. For example, environmental NGOs competing with an industry group. Any role to non-governmental entities, be it right to initiate the

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[284] Communication from European Communities-II, *supra* note 234 at I:B; see also Communication from European Communities-I, *supra* note 201 at V:D.

[285] India's Questions to European Communities, *supra* note 235 at IV:28; but see THE EUROPEAN COMMUNITIES' REPLIES TO INDIA'S QUESTIONS-Communication from the European Communities, (on 30 May 2002), WTO. Doc. TN/DS/W/7, at Regulation of amicus curiae briefs, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003) [European Communities Replies].The EC asserts that the "acceptance of *amicus* curiae submissions should not slow down the proceedings. This can be achieved by retaining the present two-stage approach, i.e. an application for leave and an effective submission" with the authority to decide whether *amicus* submissions are relevant or not to be with the Panel/AB.

[286] See Kessie, *supra* 38 at 11; but see *contra,* Housman, *supra* note 44 at 746. Housman argues that inclusion of *amicus* curiae briefs will not affect the working of the WTO's DSB. The author refers to U.S. Supreme Court and argues that it hears far more cases than the WTO's DSB in a year, receives countless *amicus* briefs but this does not detract in any way, the Court's ability to give proper consideration to the arguments of the parties and information provided in the briefs.

[287] Kessie, *ibid.*

claims or submission of *amicus* briefs, will likely bring about an environment where competing interests jockey for position; such an environment may prove highly detrimental to the world trading system envisaged under the WTO.

Addressing such concerns is not an easy task. It has been observed that whenever a trade agreement provides standing for private entities in dispute settlement proceedings, "such entities will maximize the opportunity and often such exercise results in interpretations of the agreement that are unexpected, at least to the State Parties."[288]Chapter 11 of NAFTA[289] is a case in point. Chapter 11 allows private economic actors to safeguard their investments by providing them a direct means of initiating proceedings before the NAFTA tribunal.[290] It has been observed that the recent investor-state awards and pending claims illustrate the current tension that exists within the NAFTA, between the sovereign right of a government to achieve its environmental objectives and the right of a foreign company to secure its investments.[291]It has been forcefully argued within the context of NAFTA that multinational corporations have used its DSM as an instrument "to ride roughshod over labour and environmental rights in secrecy-shrouded procedures against host governments."[292]Reif argues that "the aggressive use of the chapter 11 arbital process has been controversial and worrisome for both the NAFTA governments and a wide

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[288] Reif, *supra* note 16 at 21.
[289] *North American Free Trade Agreement Between the Government of Canada, the Government Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No.2 in 32 I.L.M. 289 (entered into force on 1 January 1994) [NAFTA].
[290] *Ibid.* c. 11.
[291] See "NAFTA's Powerful Little Secret," *The New York Times*, 11 March 2001, and "Sovereign Corporations," *The Nation*, 30 April 2001, cited by Antonio Ortiz Mena L.N, "Dispute Settlement Under NAFTA: The Challenges Ahead",
online: <http://www.bus.ualberta.ca/CIBS-WCER/WCER/NAFTAOrtiz.pdf> (dated accessed: 12 October 2002)[Antonio]; see also Reif, *supra* note 16 at 22.
[292] See Antonio, *ibid.* at 7.

section of NGOs and civil society."[293]In light of these issues authors like Kessie observe, "the challenge therefore is to re-design the system in such a way that it should strike a balance between the interests of all the relevant actors."[294]

4.2 Proposals

Negotiations on Improvements to and Clarification of the Dispute Settlement Understanding remains on going. The status of non-governmental entities, particularly a right for *amicus* brief submissions continues to be contentious and short of broad support from the Member States. Those supporting such a right to non-governmental entities are still pressing the importance of such submissions; these entities play an important role in global affairs and therefore should play the role of *amici* in the development of the WTO in general and its DSM in particular.

In view of the fact that the WTO is a young organization undergoing a process of growth, at present, conferring standing, as a plaintiff to such entities so as to invoke the jurisdiction of the WTO dispute settlement process may not be desirable. Charnovitz observes, "[N]o government of a major NGO argues that NGOs ought to have 'standing' as a plaintiff."[295] But participation by the entities as observers and *amicus* brief submissions certainly is a reasonable and an appropriate role. The role that the AB has conferred upon these entities to participate as *amicus*

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[293] Reif, *supra* note 16 at 21-22.The author points out to the experience under chapter 11 of the NAFTA. She quotes statistics from < www.worldbank.org.icsid > and states that the claims by investors that attacked domestic measures that were not against foreign investors and thereby produced unforeseen results and tension between chapter 11 of NAFTA, its side agreement on environment and the interests of the business and civil society thereby limiting the ability of the NAFTA governments to legislate.

[294] Kessie, *supra* note 38 at 9.

[295] Charnovitz, "Participation of Non-governmental Organizations in the World Trade Organization" *supra* note 39 at 348.

curiae seems to be in accordance with the provisions of the DSU. Changing course from here is difficult to justify given that it is in conformity with the principle of justice and the objectives of the WTO. All that is required is to reform and regulate such a role and possibility of a more defined role can be left to the exigencies of time. Important is to formulate the rules so that such type of participation can be helpful in strengthening the integrity of the WTO's DSM.[296]

There are a number of measures that can be taken, ideal will be the rules negotiated by the Member States.[297] In the absence of such rules, the AB can itself provide clarification on above-mentioned issues surrounding *amicus* briefs controversy.[298]A definite set of proposal is out of the scope of this paper. As concluding thoughts and in contribution to the ongoing debate surrounding the current process of negotiations concerning the DSU, I will present some proposals; both on regulating submissions of *amicus* briefs and the possibility of any further role that can be conferred upon non-governmental entities. I feel such proposals will be helpful in contributing to the future development of the rule based trading system envisaged under the WTO, particularly in relation to the DSM.

4.2.1 Clarification of Issues by the AB Itself

As of June 30th, 2003, the matter of *amicus* brief submissions has not received heavy support during the ongoing negotiations aimed at improving the DSU. Failure of the Member States over the years to regulate such an important procedural issue has resulted in pressure on the AB and the Panels to formulate their

[296] See Marceau & Stilwell, *supra* note 99 at 157.
[297] *Ibid.* at 176.
[298] *Ibid.* at 177-178.

own rules on this issue.[299] The law on such submissions seems to be based on a case-by-case basis. Therefore, until this matter is effectively resolved by the Member States through negotiations, it is important that the AB itself clarifies certain issues; namely, how and to whom these submissions will be made, who will read them before accepting or rejecting them, the responsibilities of the Panel in relation to issues of law and fact raised by such briefs, etc.

These clarifications are possible in two ways; first, in an appropriate case in future when the AB decides to accept a brief; second, by amending the *Working Procedures* after consultation with the Chairman of the DSB and the Director General.[300]One can argue that such an amendment in the *Working Procedures* will be a politically controversial matter; nevertheless, it will be advantageous to the institutional stability of the adjudicating bodies of the WTO, in particular, the AB itself.[301]

Such procedure may include requirement of a leave to file a brief followed by the actual filing; the approach that the AB adopted in *Asbestos*.[302] Until an independent entity is set up for granting the permission to file a submission, the Panels and the AB can perform this function.[303]The procedure adopted by the AB in *Asbestos* can be persuasive in the formation of guidelines for *amicus* brief

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[299] See *e.g.* Appellton, *supra* note 140 at 699.
[300] See *e.g.* Appelton, *supra* note 140 at 698-699.
[301] *Ibid.*
[302] See Additional Procedure, *supra* note 166; see also Communication from European Communities-II, *supra* note 235.
[303] See European Communities Replies, *supra* note 285. In my view, it is advisable that an independent entity must be set up so that discretion of the Panels and the AB to accept amicus from a particular non-governmental and reject from the other can be checked. For other advantages of such an entity, see below at 81-83.

submissions in the future.[304]A mechanism can be adopted to control participation of non-governmental entities in general and environmental and other NGOs in particular. For Example, interested NGOs can be required to have an organized approach.[305]Rules may require non- governmental entities particularly NGOs with similar positions to consolidated their briefs.[306]Moreover, it will be useful if the procedure requires the *amici* to directly notify the submission of brief to the parties and the third parties to a dispute, by simultaneously sending the brief to such parties.[307] Such a requirement will address the concerns that filing of *amicus* briefs will affect the speedy disposal of cases, which is salient feature of the WTO's DSM.

Indeed, such clarifications, in particular through formal amendment in the *Working Procedures* will make the process of *amicus* submissions more certain and transparent. This will also enhance the trust that the Member States and non-governmental entities have in the dispute settlement process of the WTO.

4.2.2 Public Attendance of Oral Proceedings: Observer Status

Allowing non-governmental entities to have direct access to the DSM and determining the extent and manner in which such access is to be given may take some time as Members negotiate, but at the minimum the dispute settlement proceedings should be open to the public at the earliest. The U.S., in its proposal in

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[304] See Nanda, *supra* note 251. The observations made by author that the procedure adopted in *Asbestos* can be persuasive seems to be justified as E.C in its communication on *Improvement and Clarifications of Dispute Settlement Understanding* has suggested the same course of action to be adopted by the Member States to resolve the controversy. See Communication from European Communities-II, *supra* note 235.

[305] See Charnovitz, "Participation of Non-governmental Organizations", *supra* note 39 at 356.

[306] *Ibid.* See also Housman, *supra* note 44 at 746. Housman states that practice of consolidating the briefs with similar position is present in U.S. Federal system and the WTO's DSM can get benefit by looking into this practice.

[307] See Marceau & Stilwell, *supra* note 99 at 182,185.

the course of ongoing negotiations regarding the DSU, has emphasized the need to make the Panel proceedings more open and transparent.[308] *Inter alia*, it urges that private parties *e.g.*, NGOs and real parties in interest (i.e., individuals and companies of the Member countries who will actually bear the consequences of a Panel's decision) be permitted to attend oral proceedings before the Panel and the AB.[309]

It has been argued that there is no harm in allowing the public to observe the proceedings of the Panels and the AB because as a practical matter, most of this information seems to find its way to the hands of press and increasingly becomes publicly available.[310] Therefore there is little reason not to formally open the Panel and the AB's proceedings; the closed-door nature of judicial proceedings at the level of the WTO must be re-considered.[311] Together with participation as *amicus curiae*, granting observer status to private actors will be effective in accommodating non-governmental interests in the dispute settlement proceedings at the level of the WTO.

4.2.3 Structural and Institutional Changes to Regulate *Amicus* Submissions

It has been argued that if private parties are to have a voice, there must be structural and institutional changes made to the DSM itself.[312] A permanent

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[308] CONTRIBUTION OF THE UNITED STATES TO THE IMPROVEMENT OF THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO RELATED TO TRANSPARENCY-Communication from the United States, WTO Doc. TN/DS/W/13, at I, online: WTO <http://docsonline.wto.org/gen_search.asp>(date accessed: 16 June 2003)[Communication from U.S]; see also Faryar Shirzad, "The WTO Dispute Settlement System: Prospects for Reform", (2000) 31 Law & Pol'y Int'l Bus 769-772[Shirzad].

[309] Communication from U.S., *ibid.*

[310] See Shirzad, *supra* note 308 at 771. The author asserts that there is little reason not to formalize the release of documents to the public and to open the panel and the proceedings.

[311] *Ibid.*

[312] See Laidhold, *supra* note 76 at 450.

and independent commission or body should be created so as to screen out *amicus* briefs before they can be allowed for submission. This will help in providing an institutional check on the discretion of the Panels and the AB to accept or reject *amicus* submissions. It will also protect the Panels and the AB against unnecessary criticism calling into question their impartiality. An independent commission can also play an effective role in regulating *amicus* brief submissions so that both the "Panel and the AB would not be inundated with an extra and unnecessary workload."[313]

There has been a proposal by few commentators that an institution independent of the WTO should be created to increase transparency at the WTO level.[314] It has been argued that such a "Transparency Body" could also be effectively used as a forum to address issue of public participation at the WTO level in general and in the dispute settlement process in particular.[315] The aforementioned proposal of an independent body, in my view, is impractical for two reasons; first, it will add the to the financial burden that states have to bear for funding an international body particularly on Developing and Least Developed Countries, second, it will increase the obligations of the states to participate in additional proceedings of such an entity. As there are already international commitments and the states are unable to meet the deadlines for reaching an agreement under such commitments, such additional obligation will be less beneficial.

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[313] See Housman, *supra* note 44 at 746.
[314] See Hoekman & Mavridos, *supra* note 89 at 15-16. The term "Transparency Body" has been used by the authors.
[315] *Ibid.*

Therefore, it would be advisable to have a structural or an institutional change within the WTO, rather than establishing an independent body. Certainly, such an institution can be created only with the consent of the Members. There can be objections on the basis of additional cost that such an institution needs to be run effectively. Alternatively, the WTO Secretariat can effectively carry out such function.[316] Carmody suggests that WTO Director General can designate a person as a contact point for filing *amicus* briefs.[317] In my view, such person can also act as screening authority for *amicus* submissions.

4.2.4 Giving Authority to Remand to the AB

There has been criticism over the AB's assertion that it can invite and accept *amicus* briefs at the appellate level. During the ongoing negotiations, there were few proposals[318] to confer upon the AB an authority to remand the case; the proposal has received some consensus and is part of the consolidated version of the proposals drafted by the Chairman of the TNC.[319]

The consolidated version states that if the AB considers that it cannot proceed with the case due to incomplete factual analysis by the Panel, an aggrieved party can request the DSB to remand the case to the Original Panel.[320]

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[316] The Secretariat has been already assigned certain functions in relations to the dispute settlement proceedings. See DSU, *supra* note 6 Art. 8.6. It contemplates, "The Secretariat shall propose nominations for the panel to the parties to the disputes." For various important functions that the WTO Secretariat performs or could perform in relation to dispute settlement proceedings, see Janow, *supra* note 194 at 2-11.

[317] Carmody, *supra* note 271 at 1341. The author suggests hat Director of external affairs can be an appropriate person in this behalf.

[318] See *e.g.* Communication from Jordan, *supra* note 201 at para 31.

[319] Report by the Chairman, *supra* note 267 at Para 5.

[320] *Ibid.* The annexure in this consolidated draft by the Chairman of the TNC contains the manner in which remand can be requested by the parties to a dispute under Art.17, para 12 of the DSU. It states, "Where, due to insufficient factual findings in the panel report or undisputed facts on the record of the

Certainly, such an authority will be useful if it is given to the AB, as this will address the controversial issue of introduction of *amicus* briefs at the appellate level. An important step in such situation will be to clearly state the duties of the AB in situation where the Panel fails to complete factual analysis or disregards a material fact. Such an authority to remand the case shall be both upon the request of the parties to a dispute as well as in discretion of the AB. Various proposals forwarded by the Member States also urged that the authority to remand be conferred to the AB and not to the DSB of the WTO.[321]

4.3 Conclusion

The status of non-governmental entities with respect to the WTO's DSB still remains an ill-defined issue within the arena of international trade. At the heart of the matter is the determination of what type of right/role such entities should be granted within the working of WTO's DSM. Ideally it is direct access. But at present, the only possible manner in which these entities can participate in trade disputes at the WTO level is through *amicus* submissions, which is a loose but useful form of direct access. Ironically, this too has been subject to controversy. Its controversial nature is reflected by the fact that Member States failed to reach a consensus on the issue in ongoing negotiation; nonetheless, Members remain optimistic about the outcome of

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panel proceedings, the Appellate Body is unable to fully address an issue, it shall indicate it in its report and explain in detail the specific insufficiencies in the factual findings and undisputed facts on the record. In such case, within 30 days from the adoption of the Appellate Body report by the DSB, *the complaining party may request the DSB to remand that issue to the original panel, pursuant to the provisions of Article 17bis.*"(Emphasis added)

[321] Communication from Jordan, *supra* note 201 at para 31. It states, "If the report of the panel or compliance panel does not, however, contain sufficient undisputed factual findings so as to enable the Appellate Body to perform its task, *the Appellate Body shall remand the case to the panel* or, where appropriate, the compliance panel, with necessary findings of law and/or directions so as to enable the panel to perform its tasks."(Emphasis added)

these negotiations[322] and a consensus on *amicus* submissions is not a far-fetched possibility.

As expressed throughout this chapter, allowing acceptance of *amicus* brief submissions would provide a useful development tool, provided that certain issues are resolved. It is imperative that the acceptance of such briefs should not be left to the discretion of the Panels and the AB, lest their authority be undermined through criticism of the case-by-case manner in which they presently proceed. In addition, allowing non-governmental entities a right to observe the dispute settlement proceedings will be useful to address the interests these entities have in the outcome of disputes.

[322] Report by the Chairman, *supra* note 267 at para 3.

CONCLUSION

The WTO's DSB is considered as the most "active venue for the settlement of international law disputes in existence" as it handles more cases annually than any other international tribunal.[323] It is beyond any doubt that the DSB plays a central role in providing security and predictability to the multilateral trading system as it ensures that the rules negotiated by the WTO members will be observed. Though, the WTO is an inter-governmental organization and its membership is limited to governments, with non-governmental entities virtually having no role to play at any level, it has been contended throughout this thesis that the operation of the dispute settlement system could be made more democratic, transparent and effective by granting some participatory rights to these non-governmental entities. There has been strong opposition to this idea, particularly on part of Developing and Least Developed Countries. These Countries have opposed the granting of such a right on the ground that such a right is incompatible with inter-governmental nature of the WTO.

This thesis paper concludes that such a change would have no negative impact on the inter-governmental nature of the WTO trading system. Arguably, a more direct and defined role for non-governmental entities may not be advisable at this stage of the development in the WTO, but allowing submissions of *amicus* briefs

[323] Janow, *supra* note 194.

is a welcome attempt. Such briefs can play a useful role as legal decisions in international trade disputes affect interests beyond the parties to the dispute.

As there are no explicit rules on the subject matter, the AB of the WTO has been right in interpreting the existing provisions of the DSU in such a manner so as to confer upon itself and the Panel a right to solicit and accept unsolicited briefs. The multilateral trading system under the WTO needs to accommodate these changes in order to shake the criticism alleging that its operations are undemocratic. In fact, such a change would be in the best interest of the system itself.

We are living in an era, which is regarded as an "*era of globalization.*" Globalization affects not just one particular country,[324]but the entire global community; it is not just a particular country or its government, but also non-governmental entities and, more importantly, individuals that are affected by globalization. The key element in this regard is that all "such developments must move in the direction of completing the rule-oriented reform initiated with the Uruguay Round" under which a total disregard of non-governmental interest is not advisable.[325]

"To ensure that faith in the rules-based multilateral trading system is maintained, Members need to work together to make it strong and equitable."[326] For an equitable and predictable world trading order, an efficient, speedy and impartial DSM is a *sine qua non*[327]. Member States, through negotiations must set out a road

[324] Dr. Panitchpakdi, *supra* note 45 at 35.
[325] Bruno, *supra* note 17.
[326] Dr. Panitchpakdi, *supra* note 45 at 35.
[327] Chishti , *supra* note 208 at 1.

map by which more explicit rules are adopted for regulating the access of non-governmental entities to the process of dispute settlement at the WTO level.

The adoption of such rules is inevitable, they will ensure stability and development of the trading system, as well as impose necessary disciplines on *amicus* brief submissions. These rules must strike a balance; an inter se balance between the Member States; balance between the Member States and the non-governmental entities; and, a balance amongst these non-governmental entities itself *e.g.*, NGOs versus private economic actors. Failing to achieve such a balance will result in a rift between various actors linked to international trade; this in turn can prove to be disastrous for the rule-based trading system of the WTO and its aim of promoting welfare of the people of the world. *Member States shall not let this happen.*

ANNEXURE A

Some of the Provisions of the Law of the WTO including *Agreement Establishing the WTO* and the Covered Agreements indicate that there are some direct and indirect rights to non-governmental entities under the law of the WTO.[1]

1. Agreement Establishing the WTO:[2]

1.1 First Recital of the Preamble of the Agreement establishing the WTO States:

> " Recognizing that there relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development"

2. GATT:[3]

2.1 Article X:3 (a):

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings.

2.2 Article X:3 (b):

> "The Members States are required to maintain: Judicial, arbitral or administrative tribunals or procedure for the purpose, *inter*

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[1] The purpose of this annexure is to illustrate that the law of the WTO is not totally silent with reference to non-governmental entities, as these provisions have directly and indirectly conferred some substantive rights upon such entities. Therefore this annexure is not an exhaustive list of such provisions.

[2] See Marrakech Agreement Establishing the World Trade Organization, Annex 1A (Apr. 15, 1994), *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226 (1994)

[3] See General Agreement on Tariff and Trade, 30 Oct 1947, (entered into force 1st January 1948) Updated as *General Agreement On Tariff and Trade 1994*, *Agreement Establishing the World Trade Organization*, Annex 1A (Apr. 15, 1994), *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226 (1994)

alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals lodged by importers."

2.3 Article X:1: Publication of Trade Regulations for Facilitating Governments and Traders to be fully aware of their existence:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, ...shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy ..... shall also be published."

3 GATS:[4]

3.1 Article VI:2 (a) :Maintenance of Appropriate Remedies for Prompt Review of Affected Service Provider:

"Each Member shall maintain, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

3.2 Article VII: Co-operation with other Non-Governmental Organizations:

"Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions."

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[4] See *General Agreement on Trade in Services, Agreement Establishing the World Trade Organization*, Annex 1B,April 15, 1994, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226(1994)

4. TRIPS:[5]

4.1 Article 41:1 General Obligations of States:

"Members shall ensure that enforcement procedures as specified in this part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

4.2 Fair and Equitable Procedures:

4.2.1 Article 41 : 2

"Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessary complicated or costly, or entail unreasonable time limits or unwarranted delays."

4.2.2 Article 42:

"Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notices .....parties shall be allowed to be represented by independent legal counsel,"

4.3 Article 63:1 Transparency:

Laws and regulations, and final judicial decisions and administrative rulings of general applications made effective by a member pertaining to the subject matter of this Agreement9 the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or .....made available, in national language, in such a manner as to enable governments and right holders to become aquainted with them." in order to permit rights holders[i] - and other Member States – to become acquainted with them.

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[5] See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Agreement Establishing the World Trade Organization, Annex 1C, April 15, 1994, *in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 33 I.L.M. 1226 (1994)

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