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DEFINING THE EXTENT OF NGO'S PARTICIPATION IN THE WTO

Rimantas Daujotas

Abstract

Although there are a lot of arguments for and against of NGO's participation in the WTO, it can be argued that NGO's already play an important role in the process and work of the WTO. Notwithstanding the lack of detailed provisions in WTO law towards NGO's participation in activities of WTO, NGO's can, and do influence the decisions made in WTO. The extent of all these activities available to NGO's in WTO will be addressed thereafter. Examples will illustrate how NGO's can participate in the activities of WTO's legislative, executive and judicial braches.

Key words

NGO's; WTO; *amicus curiae* briefs; participation in WTO; transparency; non-state actors in WTO; influence; cooperation;

I. Introduction

One of the results of globalization and growth of the importance of international trade to the global society is the increase of influence possessed by non-governmental organisations (NGO's). Commonly, in the context of international trade, NGO's are treated as the neutral and non-profit bodies which work towards fair and socially responsible trading system. As world trade becomes the decisive aspect of every country's well being, participation of NGO's in the activities of the World Trade Organisation (WTO) is of great

importance to the majority of NGO's. Although there are a lot of arguments for and against of NGO's participation in WTO, it can be argued that NGO's already play an important role in the process and work of WTO. In addition, the 1947 General Agreement on Tariffs and Trade (GATT) does not consist of any provisions towards cooperation with NGO's and The Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) only consists of a broad provision in Article V:2 of the WTO Agreement which states that:

„The General Council may make appropriate arrangements for consultations and cooperation with non-governmental organizations concerned with matters related to those of the WTO.“

Notwithstanding the lack of detailed provisions in WTO law towards NGO's participation in activities of WTO, NGO's can, and do influence the decisions made in WTO. The involvement of NGO's could be divided into three main parts – firstly, formal participation in WTO's legislative and executive processes and access to information. Secondly, informal participation in WTO's legislative and executive processes and thirdly, participation in WTO's judicial branch and the *amicus curiae* briefs. The extent of all these activities available to NGO's in WTO will be addressed thereafter.

II. Formal participation in WTO's legislative and executive processes and access to information

Legal background

As stated above, current provisions of WTO law set only broad regulation towards NGO's participation in WTO activities. Under the Article V:2 of the WTO Agreement, the General Council of the WTO adopted the Guidelines for Arrangements on Relations with Non-Governmental

Organizations (the 1996 Guidelines¹). However, it can be observed that these guidelines are also broad in character and do not set any clear or concise grounds of NGO's rights for participation in WTO. On the other hand, broad character of such guidelines gives the opportunity for broader interpretation as well, and, consequently, assists NGO's when pursuing their objectives in WTO.

Firstly, the 1996 Guidelines “*recognize the role NGO's can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGO's*”². Improvement of transparency was the main argument towards the rights of NGO's to participate in WTO, however, at the end of 1996 Guidelines, the statement which states that – “*there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings*”³, sends a clear message to all non-state actors that WTO is member driven body only and NGO's can only assist WTO members in informal and non-binding relationship. Furthermore, the General Council opted in 1996 Guidelines to direct the main responsibility of NGO's for engaging with civil society to the national level⁴. As it will be stated later, NGO's constructive use of various informal activities and tools can make a substantive change and influence in the activities of WTO.

Moving towards transparency

In the past two decades WTO responded towards criticisms of poor NGO's participation in a number of ways.

¹ Guidelines for Arrangements on Relations with Non- Governmental Organizations, WT/L/162, 1996;

² Ibid, para II;

³ Ibid, para VI;

⁴ NGO Involvement in the WTO: A Comparative Perspective. Peter Van den Bossche, *Journal of International Economic Law* 11(4), 717–749, doi:10.1093/jiel/jgn032. 2008, p. 724;

Firstly, the WTO Secretariat sponsored and organised various symposia for NGO's to express their ideas and concerns towards global problems of trade and development, for example,- in 1999, the WTO symposia on environment and development and the WTO and the U.S. Government sponsored a pre-Ministerial symposium for NGO's in Seattle. The interchange between governments and NGOs proved mutually beneficial, however, academic society argued that the broad symposia could not be a substitute for real cooperation on specific issues⁵.

Another improvement made towards transparency and openness of WTO was the earlier derestriction of WTO documents. Such improvements included the new decision of the General Council on "Procedures for the Circulation and De-restriction of WTO Documents"⁶ which resulted in the great major of documents being made available to the public in 6-12 weeks, as compared with the average time of 8-9 months which was required before. Although the majority of the academic society and NGO's welcomed such measures and commended the WTO for the extent to which it had managed to increase the availability of documents to the public, others argued that that derestriction procedures had significant shortcomings due to the delay in derestriction⁷. In addition, WTO launched the specialised website for NGO's to exchange information and to express their views in NGO's Position Papers which relate to WTO issues or activities.

Notwithstanding the increase of openness and interaction with NGO's in recent years, one can assume that

⁵ Opening the WTO to Non-Governmental Interests. Steve Charnovitz, 2000 24 Fordham Int'l L.J. 173 p.10;

⁶ "Procedures for the Circulation and De-restriction of WTO Documents", WT/L/452, 2002;

⁷ Public participation in the World Trade Organization. Frank Loy. The Role of the World Trade Organization in Global Governance, Gary P. Sampson, Bookwell, 2002; p. 126;

such improvements like access to information and informal forums or symposiums are far not adequate for NGO's to influence the work and decisions made in WTO. NGO's requested not only the openness of the WTO, but also they are in demand of the direct involvement in the WTO legislative, executive and in the judicial braches as well. Albeit it was argued that WTO clearly states that it is the member driven organisation, NGO's can pursue and reach their objectives in other methods.

Attendance at Ministerial Conferences

As mentioned above, in recent years WTO made conscious efforts to make WTO activities more open and transparent. Participation and in WTO bodies and meetings, where important decisions and deliberations take place, are also of great importance to NGO's. However, in contrast to most other international organizations, the WTO does not allow NGO's to participate in its decision-making processes⁸. Since 1996 arrangements for NGOs have essentially focused on attendance at Ministerial Conferences, participation in issue-specific symposia, and the day-to-day contact between the WTO Secretariat and NGOs⁹. For NGO's to attend at Ministerial Conferences, it was decided that (i) NGOs would be allowed to attend the only Plenary Sessions of the Conference and (ii) NGO applications to register would be accepted by the WTO Secretariat on the basis of Article V:2, i.e. NGOs had to demonstrate that their activities were "concerned with matters related to those of the WTO"¹⁰. Although attendance at Ministerial Conferences seemed as a further step and a great opportunity for NGO's to influence WTO policies, though,

⁸ Global social justice at the WTO? The role of NGOs in constructing global social contracts. Baogang He and Hannah Murphy. *International Affairs* 83: 4 707–727, 2007;

⁹ WTO annual report 1998, p. 135;

¹⁰ *Ibid* p. 136;

later NGO's and many academics argued that such attendance was worthless and that such "accreditation earns NGO's the dubious privilege of attending several "plenary sessions" where delegations read set speeches, repeating generalities about their negotiating positions that could less tediously be gleaned from a regular reading of the *Financial Times*"¹¹. In addition, NGOs are not allowed to make any statements, whether orally or in writing, to the Ministerial Conferences.

III. Informal participation in WTO's legislative and executive processes

As it was observed above, NGO's are not granted any formal power to influence decisions and policies of WTO. However, there are number of examples which show that NGO's can and do influence matters dealt in WTO trough other means, such as assisting developing countries, assisting governments of member states and making pressure to WTO trough global cooperation, communication and lobbying. Thereinafter are the examples which will illustrate how NGO's can reach their objectives, notwithstanding the lack of formal power granted to them by WTO.

The WTO's TRIPS agreement and pharmaceutical industry

The WTO's TRIPS agreement has been followed by a huge controversy and a clash of interests of developed states such as US with the European Communities and developing nations, in the context of pharmaceutical industry. The field of biomedical research necessitated by participation of financially powerful corporate bodies and, consequently, in order to make pharmaceutical business profitable, one of the

¹¹ Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy. Robert Howse. *European Law Journal* Volume 9, Issue 4, 2003;

means of effectively achieving profits, is to obtain patents over such products or processes. The WTO's TRIPS agreement states that WTO members have to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the chemical ingredients for a medicine), while allowing certain exceptions¹².

NGO's were concerned that the provisions of the WTO's TRIPS agreement would limit the developing countries an affordable access to medicines for life-threatening diseases such as HIV/AIDS, malaria, and tuberculosis. In addition, developed countries started to pressure developing countries to comply with TRIPS provisions, mainly driven by large pharmaceutical corporations. The major debate over TRIPS revolved around the circumstances under which developing members may invoke the TRIPS safeguards to override pharmaceutical patents and provide citizens with access to low-cost generic versions of patented medicines¹³.

The main objective of NGO's and developing states was the amendment of the WTO's TRIPS agreement which could provide the grounds for exceptions to TRIPS agreement in order to secure the right and access to affordable medicine for citizens of developing countries. NGO's played a substantial role in promoting such amendment. Médecins Sans Frontières (MSF), Health Action International (HAI), Consumer Project on Technology (CPTech) and Oxfam International, in conjunction with local NGOs from developing nations launched an international campaign which consisted of a number of meetings, conferences, public statements, workshops and media campaigns. The NGOs also lobbied

¹² WTO OMC Fact sheet 2006;

¹³ The Making of International Trade Policy: NGOs, Agenda-setting and the WTO. Hannah Murphy. 2011;

international organizations such as the World Health Organization (WHO), the World Bank and the United Nations Development Programme (UNDP) and also actively participated and involved in formulating policy positions, offering guidance and actively helped developing countries in pursuing their interests¹⁴.

After constant pressure from NGO's and developing countries, at the Doha WTO Ministerial Conference in 2001, the WTO Members adopted a special declaration on issues related to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and Public Health¹⁵. Declaration stated that:

“the TRIPS Agreement does not and should not prevent members from taking measures to protect public health¹⁶”;

“Each member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics¹⁷”;

consequently,

“We also agree that the least-developed country members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016¹⁸”

Doha declaration was a huge success for the developing countries and a great example of the influence that

¹⁴ The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO. Frederick M. Abbott. J Int Economic Law (2002) 5(2): 469-505 doi:10.1093/jiel/5.2.46;

¹⁵ “Doha Ministerial Declaration on the TRIPS Agreement and Public Health”, WT/MIN(01)/DEC/W/2,2001;

¹⁶ Ibid para 4;

¹⁷ Ibid para 5c;

¹⁸ Ibid para 7;

NGO's can reach in WTO. In addition, NGO's had made an invaluable assistance to developing states which made the adoption of a declaration on Public Health and TRIPS the result of a carefully elaborated strategy by developing countries¹⁹.

WTO foreign investment agreement

Another similar example of NGO's influence in WTO's legislative and executive activities can be made through the example of blocking of WTO foreign investment agreement. NGO's argued that for more than a decade, the European Union (EU) has been pressing for the creation of an international investment agreement aimed at placing controls on the ability of governments to regulate foreign direct investment, and that proposed agreement was a 'corporate bill of rights' giving multinational companies sweeping rights to invest in countries and challenge government regulations²⁰.

Prior to the Cancún ministerial conference in 2003, NGO's strongly opposed the initiative made by EU and Japan to start negotiations on WTO foreign investment agreement. The main argument against such investment agreement was that it would emphasize protection of multinational corporations without at the same time taking into account environmental degradation and the human rights abuses of which it is capable²¹. As in the case of amendment of the WTO's TRIPS agreement, NGO's were strongly assisting the developing nations in their negotiations and provided their own research and analysis which was heavily relied by

¹⁹ Implications of the Doha Declaration on the TRIPS Agreement and Public Health. C.M. Correa. World Health Organization, WHO/EDM/PAR2002.3, 2002;

²⁰ Investment and the WTO – Busting the Myths. Friends of the Earth England Wales & N. Ireland and the World Development Movement, 2003; <http://www.citizen.org/documents/invandwtomyths.pdf>

²¹ The International Law on Foreign Investment. 3 Ed. M. Sornarajah. 2010, p. 67-68;

developing countries. In addition, NGO's organised and facilitated a number of international meetings, conferences, workshops, published reports and declarations.

Consequently, developing nations opposed the negotiations on WTO foreign investment agreement, followed by globally coordinated opposition from NGO's which resulted in the removing of the investment issue from Doha agenda. Disagreement between WTO members among investment in the Doha Round is seen as a major factor in the breakdown of the Doha negotiations²².

Examples of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and Public Health and WTO's foreign investment agreement showed that, notwithstanding the lack of provisions which would regulate and enable NGO's to participate in the legislative and executive activities of WTO, non-state bodies can and do influence decisions made in member driven WTO. However, it can be argued that NGO's can play even more important and direct part in the judicial part of WTO. A number of examples will be made to illustrate how NGO's can participate in WTO dispute settlement activities.

IV. Participation in WTO's judicial activities and litigation

Current provisions

A right to participate in WTO's dispute settlement mechanism can be found and interpreted in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which gives the panels of the DSB the right to "*seek information and technical advice from any source which it*

²² Law and practice of investment treaties: standards of treatment. Andrew Newcombe, Lluís Paradell. 2009, p. 56;

deems appropriate”²³. Such provision gives the panels a broad discretion and powers to accept information from various sources, including and NGO’s. However, other provisions of DSU also state that “*The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements*”²⁴. This provision explicitly states that WTO’s dispute settlement mechanism serves for members only and does not include any other parties, like NGO’s or other non-state bodies. Thus, not only the issue of the acceptance of *amicus curiae* submissions by NGO’s arises, but also a question of the right to initiate the dispute settlement in WTO, because referring to the DSU, the extent of NGO’s rightful participation is unclear and can only be illustrated by certain cases where those questions were taken into consideration.

Non-state actors in Kodak – Fuji dispute

To start with, and taking into account that only member states can initiate dispute settlement mechanism in WTO, the Kodak – Fuji dispute can be a great example of how non-state actors can pursue their objectives in WTO’s dispute settlement body (DSB).

The Kodak – Fuji dispute, or officially, “Japan - Measures Affecting Consumer Photographic Film and Paper“ is often considered as the dispute between two large corporations which was dealt with in WTO’s DSB. The dispute with Japan started in 1995, when the Kodak Company filed a request to the Office of the U.S. Trade Representative (USTR) arguing that provisions of Japan’s national legislation denied access to the market for photographic film and paper. USTR initiated an

²³ DSU, Article 13 (1);

²⁴ DSU, Article 3 (3);

investigation to determine whether those infringed the Trade Act of 1974 and requested consultations with Japanese government. However, consultations were unsuccessful and a dispute was brought to DSB in WTO.

What is important is this dispute, especially in the context of participation of non-state bodies in WTO, is that the real parties in interest were Kodak and Fuji, rather than sovereign nations of Japan and USA, because despite the rules that would preclude private party participation in WTO, Kodak and Fuji played a critical role in the initiation and planning of WTO action, in the development of the legal theories presented, in promoting its political salience and in conceiving and implementing the “post – WTO” aspect of this dispute²⁵. For example, both companies lobbied their governments to pursue a claim in WTO and assembled their own teams of lawyers which worked closely and helped government officials to negotiate and draft submissions. In addition, Kodak and its lawyers were the principal source of information on which the USTR relied to pursue the case. It was a collaborative effort and it can be observed how WTO cases may reflect deliberate corporate initiatives²⁶. Furthermore, some authors even argue that this case illustrates how foreign enterprises used “the strength of their superior power”²⁷.

***Amicus curiae* in Shrimp – Turtle dispute**

The Shrimp – Turtle dispute²⁸ dealt with national U.S. legislation which required a certification that all shrimp

²⁵ The misguided debate over NGO participation at the WTO. JL Dunoff. J Int Economic Law (1998) 1 (3): 433-456. doi: 10.1093/jiel/1.3.433, p. 442;

²⁶ “Snapshot: Kodak v Fuji” in “Case Studies on U.S. Trade Negotiations, Volume 2: Resolving Disputes”. Charan Deveraux, Robert Lawrence, and Michael Watkins, 2006, p. 176;

²⁷ Promoting competition in global markets: a multi-national approach. Peter John Lloyd, Kerrin M. Vautier. 1999, p. 177;

²⁸ “United States — Import prohibition of certain shrimp and shrimp products” DS58/R, DS58/AB/R, DS58/AB/RW, DS58/RW

imported to U.S. was caught with methods that reduce the number of turtles caught in shrimp nets, also called as “turtle excluder devices”. India, Pakistan and other interested countries brought a claim to WTO, alleging that such U.S. legislation violated Arts. I, XI, XIII of GATT and the principle of National Treatment. The Shrimp – Turtle dispute is also called as one of the most important environmental cases in WTO where the debate was whether trade restrictions to protect the environment are permissible under the law of the GATT/WTO system²⁹. However, what is more important is the context of NGO’s participation, is that the Panel and the Appellate body have considered whether *amicus curiae* briefs submitted by NGOS’s are admissible and whether the Panel should consider such briefs. In practice, “the acceptance by panels and the Appellate Body of *amicus curiae* briefs, and, in particular, those that are submitted independently from parties or third parties, has been very controversial and criticized by most WTO Members”³⁰.

Firstly, the Panel received *amicus curiae* briefs from environmental NGO’s, however, the Panel rejected such briefs taking the view that it had not requested such information under Article 13 of the DSU and it did not intend to take these documents into consideration. The Panel also observed, however, that if any of the parties to the dispute wanted to put forwards these documents, or part of them, as part of their own submission to the Panel, they were free to do so³¹.

²⁹ The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate. Robert Howse. Columbia Journal of Environmental Law, 27 Colum. J. Envtl. L. 491, 2002, p. 1;

³⁰ NGO Involvement in the WTO: A Comparative Perspective. Peter Van den Bossche, Journal of International Economic Law 11(4), 717–749, doi:10.1093/jiel/jgn032. 2008, p. 739;

³¹ The report of the Panel on United States - Import prohibition of certain shrimp and shrimp products WT/DS58/R, 15 May 1998;

On the appeal, U.S. argued that that the panel erred in finding that it could not accept non-requested submissions from non-governmental organizations and that when a non-governmental organization makes a submission to a panel, Article 13.2 of the DSU authorizes the panel to "seek" such information³². Accordingly, India, Pakistan and Thailand as joint appellees argued that members that are not parties or third parties cannot avail themselves of the right to present written submissions. In addition they argued that it would be unreasonable, to interpret the DSU as granting the right to submit an unsolicited written submission to a non-Member, when many Members do not enjoy a similar right³³.

Consequently, the Appellate body found that that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU and that a panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not³⁴. Furthermore, the Appellate body accepted *amicus curiae* briefs from environmental NGO's.

Notwithstanding the success of NGO's and rather liberal approach taken by the Appellate body, many governments criticized this decision on the grounds that it was not in conformity with the WTO Agreement and the same argument of "member driven organisation" was emphasized. However, as for NGO's, this case had opened a way to have a direct impact in the judicial branch of WTO and ability to express their views in a more formal and, especially, in a way where their arguments almost equally stand besides governments' claims.

³² Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, para 9;

³³ Ibid, para 29;

³⁴ Ibid, paras 108-110;

***Amicus curiae* in Carbon Steel dispute**

It was mentioned above that the decision of the Appellate body in Shrimp – Turtle dispute was criticized because it did not state on what legal grounds the *amicus curiae* briefs should be accepted. In the Carbon Steel decision, the Appellate Body finally explains its legal authority to accept *amicus curiae* submissions³⁵.

In the Carbon Steel dispute³⁶ the *amicus curiae* briefs were also submitted to the Panel by the industrial NGO (American Iron and Steel Institute), however, it was rejected due to late submission. The same *amicus curiae* brief and also briefs from other NGO's (Steel Institute and the Specialty Steel Industry of North America) then were submitted to the Appellate body. The question arose whether the Appellate Body had the authority to accept the briefs directly, rather than as attachments to a government's briefs.

The European Communities (EC) claimed that that these *amicus curiae* briefs are "inadmissible" in appellate review proceedings, and stated that it did not intend to respond to the content of the briefs. In addition, EC claimed that that Article 13 of the DSU does not apply to the Appellate Body and that, in any case, that provision is limited to factual information and technical advice, and would not include legal arguments or legal interpretations received from non-Members³⁷.

³⁵ *Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?* Arthur E. Appleton. *J Int Economic Law* (2000) 3 (4): 691-699. doi: 10.1093/jiel/3.4.691, 2000;

³⁶ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*

³⁷ Report of the Appellate Body in “United States Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom”, WT/DS138/AB/R, 2000, para 36;

However, the U.S. argued that the Appellate Body has the authority to accept *amicus curiae* briefs, and urged to accept the briefs submitted by the steel industry associations. They also stated that it is clear that the Appellate Body (referring to the in Shrimp – Turtle dispute) has such authority, given that Article 17.9 of the DSU authorizes the Appellate Body to draw up its own working procedures, and Rule 16(1) of the Working Procedures authorizes a division to create an appropriate procedure when a question arises that is not covered by the Working Procedures. The United States did not agree that acceptance of an unsolicited *amicus curiae* brief would give greater rights to a non-WTO Member than to WTO Members that are not participants or third participants in an appeal³⁸.

The Appellate body again agreed with U.S. on the issue of *amicus curiae* briefs. It stated that that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs³⁹. Furthermore, it stated that it has the legal authority to decide whether or not to accept and consider any information that it believe is pertinent and useful in an appeal and that 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, but have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which it finds it pertinent and useful to do so⁴⁰.

³⁸ Ibid, para 38;

³⁹ Ibid, para 39;

⁴⁰ Ibid, paras 39-42;

Although, consequently, the Appellate Body did not accept the *amicus curiae* briefs, this decision was an important step forward for broader rights of NGO's to submit their views in a form of *amicus curiae* briefs. However, as the Shrimp – Turtle dispute was criticised by a number of countries, the Carbon Steel dispute also did not avoid the rejections by a number of countries. A lot of authors and practitioners argued that the *amicus curiae* submissions at the Appellate Body level is a substantive question that can only be decided at the General Council or inter-governmental level⁴¹. Also it was argued that such decisions overlook the fact that the WTO provisions, even those covering third parties and outside experts, do not explicitly delegate such discretionary authority to the Appellate body⁴².

***Amicus curiae* in EC - Asbestos dispute**

Another important decision in the context of NGO's rights to participate in WTO's DSB was the EC – Asbestos dispute⁴³ where the controversy over the participation of NGO's in trade disputes reached its climax⁴⁴.

The dispute arose with respect to the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods by France and accordingly to EC. Canada alleged that such measures violated Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Articles III, XI and XIII of GATT 1994. Canada also alleged

⁴¹ “Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the US Experience” Padideh Ala'i. Fordham International Law Journal, Vol. 24, No. 1, 2000;

⁴² “False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hot-Rolled Lead/Asbestos Doctrine”. J Robbins. 44 Harvard International Law Journal 317, 2003;

⁴³ European Communities — Measures Affecting Asbestos and Products Containing Asbestos;

⁴⁴ “The Participation of NGOs in the WTO Dispute Settlement System”. Brandstetter, Patricia. Seminar aus Voelkerrecht (International Economic Law) ao. Univ. Prof. MMag. Dr. August Reinisch, 2003;

nullification and impairment of benefits accruing to it under the various agreements cited.

Panel received five *amicus curiae* briefs from NGO's (Collegium Ramazzini, Ban Asbestos Network, Instituto Mexicano de Fibro-Industrias A.C. and American Federation of Labour Congress of Industrial Organisations and later from Only Nature Endures). However, only two briefs were accepted together with EC's submissions and others rejected without any explanation.

What is different in EC – Asbestos dispute, as compared with Shrimp – Turtle or Carbon Steel dispute, is that the Appellate body decided to invite all interested NGO's and non-state bodies to submit their views and *amicus curiae* briefs. For this purpose the Appellate body adopted additional procedures under Rule 16 (1) of the *Working Procedures*. These rules stated that:

“Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body⁴⁵”

Rules also requested the interested bodies to disclose and submit a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant. Also it needed to contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it had, or would, receive any assistance, financial or otherwise, from a party or a third party to this dispute⁴⁶.

⁴⁵ Appellate Body Report in European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, Para 52(2) ;

⁴⁶ Ibid, para 52(3);

The objective of such additional procedures was to ensure and promote the “interests of fairness and orderly procedure⁴⁷”. In addition, it can be argued that another objective of such procedures was to avoid the interests of private parties and corporations which could pursue their intentions under the veil of non-profit NGO’s.

However, massive criticism was voiced by a number of WTO members. They argued that under Article 17 (9) of the DSU, the Appellate body could only adopt rules on procedural matters, but the issue of admissibility of *amicus curiae* submissions was a substantive issue that altered the intergovernmental nature of the WTO and affected the rights and obligations of the Members under WTO law⁴⁸.

To discuss this matter a meeting of WTO’s General council was held where countries argued that the approach of the Appellate Body to accept unsolicited briefs, as well as to invite submissions from any non-governmental source on the most sensitive of all issues in the WTO, namely disputes, certainly amounted to changing the intergovernmental character of the WTO. For one thing, ultimate compliance was to be done by governments, not by others⁴⁹. In addition, participants argued that nowhere in the "working procedures" outlined by the Members in the Appendix was there a hint that a panel could accept documents other than those submitted by parties or third parties, or that Members had left to the panels the discretion to set out procedures such as the "leave to file written briefs" adopted in the EC – asbestos case⁵⁰.

⁴⁷ Ibid, para 52(1);

⁴⁸ Civil society groups and administrative law: *amicus curiae* in WTO. Nirmalya Syam. Institute for International Law and Justice (IILJ) Global Administrative Law: South Asian Dialogue Series, 2007; para 7;

⁴⁹ General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60; para 38;

⁵⁰ Ibid, para 42;

Consequently, after such amount of rejection and criticism, the Appellate body rejected all requests to submit *amicus curiae* briefs. Although it stated that none of the bodies complied with the requirements of additional procedures adopted by the Appellate body, it can be argued that the real reason of rejection was the offensive reaction of the member states.

It can be argued that the decision of the Appellate body to invite the views of all interested parties in the dispute and adoption of additional procedures was the attempt to find the equilibrium between the demands of openness and transparency and fears of developing countries which argued that most NGO's are tools of large private interest groups. In order to reach such equilibrium, the Appellate body adopted the additional procedures which needed to act as a selection mechanism which could ensure that *amicus curiae* briefs of only "right" and non-profit NGO's would be accepted. However, a search for such equilibrium was not allowed and it can be agreed with the views of authors which argue that "considering the strength of international feeling and the WTO's desire to establish creditability in the eyes of civil society, it would seem difficult directly to oppose the movement initiated by the Appellate body"⁵¹.

V. Conclusion

The aforementioned examples illustrate how NGO's can participate in the activities of WTO's legislative, executive and judicial braches. However, there is a lack of provisions in WTO law on which NGO's could rely, state their views or pursue their objectives. The provisions that do exist are of a

⁵¹ The World Trade Organization: legal, economic and political analysis, Volume 1. Patrick F. J. Macrory, Arthur Edmond Appleton, Michael G. Plummer.2005, p. 1457;

very broad character does not any enable NGO's to fully define their place and legal standing in the bodies WTO.

In addition, NGO's can reach substantial effects on issues which are dealt within WTO only trough cooperation and global communication and it can be argued that for a small and, especially, small budget NGO's there is no or very little chance to influence decisions made in WTO.

Furthermore, the main and the most effective way for NGO's to participate in WTO's judicial activities is trough *amicus curiae* briefs. Although there are a lot of disagreement and criticisms towards *amicus curiae* briefs brought by NGO's in WTO's DSB, the trend of accepting such submissions can be observed which brings more confidence to NGO's in the context of openness and transparency of WTO. It can be argued that it is only a matter of time when WTO will be forced to bring more clear provisions which would regulate the extent of NGO's participation, because the situation now is not acceptable nor to NGO's, nor it brings concordance between WTO members which, in recent decade, is of great importance to WTO.

Bibliography

Textbooks:

1. Public participation in the World Trade Organization. Frank Loy. *The Role of the World Trade Organization in Global Governance*, Gary P. Sampson, Bookwell, 2002;
2. *The International Law on Foreign Investment*. 3 Ed. M. Sornarajah. 2010;
3. *Law and practice of investment treaties: standards of treatment*. Andrew Newcombe, Lluís Paradell. 2009;
4. *Promoting competition in global markets: a multi-national approach*. Peter John Lloyd, Kerrin M. Vautier. 1999;
5. *The World Trade Organization: legal, economic and political analysis, Volume 1*. Patrick F. J. Macrory, Arthur Edmond Appleton, Michael G. Plummer. 2005;

Articles:

6. *NGO Involvement in the WTO: A Comparative Perspective*. Peter Van den Bossche, *Journal of International Economic Law* 11(4), 717–749, doi:10.1093/jiel/jgn032. 2008;
7. *Opening the WTO to Non-Governmental Interests*. Steve Charnovitz, 2000 24 *Fordham Int'l L.J.* 173;
8. *Global social justice at the WTO? The role of NGOs in constructing global social contracts*. Baogang He and Hannah Murphy. *International Affairs* 83: 4 707–727, 2007;

9. Membership and its Privileges: the WTO, Civil Society, and the Amicus Brief Controversy. Robert Howse. *European Law Journal* Volume 9, Issue 4, 2003;
10. The Making of International Trade Policy: NGOs, Agenda-setting and the WTO. Hannah Murphy. 2011;
11. The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO. Frederick M. Abbott. *J Int Economic Law* (2002) 5(2): 469-505 doi:10.1093/jiel/5.2.46;
12. Implications of the Doha Declaration on the TRIPS Agreement and Public Health. C.M. Correa. World Health Organization, WHO/EDM/PAR2002.3, 2002;
13. Investment and the WTO – Busting the Myths. Friends of the Earth England Wales & N. Ireland and the World Development Movement, 2003;
<http://www.citizen.org/documents/invandwtomyths.pdf>;
14. The misguided debate over NGO participation at the WTO. JL Dunoff. *J Int Economic Law* (1998) 1 (3): 433-456. doi: 10.1093/jiel/1.3.433;
15. “Snapshot: Kodak v Fuji” in “Case Studies on U.S. Trade Negotiations, Volume 2: Resolving Disputes”. Charan Deveraux, Robert Lawrence, and Michael Watkins, 2006;
16. The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate. Robert Howse. *Columbia Journal of Environmental Law*, 27 *Colum. J. Envtl. L.* 491, 2002;
17. NGO Involvement in the WTO: A Comparative Perspective. Peter Van den Bossche, *Journal of International Economic Law* 11(4), 717–749, doi:10.1093/jiel/jgn032. 2008;
18. Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat? Arthur

- E. Appleton. *J Int Economic Law* (2000) 3 (4): 691-699.
doi: 10.1093/jiel/3.4.691, 2000;
19. “Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the US Experience” Padideh Ala'i. *Fordham International Law Journal*, Vol. 24, No. 1, 2000;
20. “False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hot-Rolled Lead/Asbestos Doctrine”. J Robbins. 44 *Harvard International Law Journal* 317, 2003;
21. “The Participation of NGOs in the WTO Dispute Settlement System”. Brandstetter, Patricia. Seminar aus Voelkerrecht (International Economic Law) ao. Univ. Prof. MMag. Dr. August Reinisch, 2003;
22. Civil society groups and administrative law: amicus curiae in WTO. Nirmalya Syam. Institute for International Law and Justice (IILJ) Global Administrative Law: South Asian Dialogue Series, 2007;

Other:

23. Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, 1996;
24. “Procedures for the Circulation and De-restriction of WTO Documents”, WT/L/452, 2002;
25. WTO annual report 1998;
26. WTO OMC Fact sheet 2006;
27. “Doha Ministerial Declaration on the TRIPS Agreement and Public Health”, WT/MIN(01)/DEC/W/2,2001;
28. “United States — Import prohibition of certain shrimp and shrimp products“ DS58/R,DS58/AB/R, DS58/AB/RW, DS58/RW;

29. The report of the Panel on United States - Import prohibition of certain shrimp and shrimp products WT/DS58/R, 15 May 1998;
30. Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998;
31. Report of the Appellate Body in “United States Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom”, WT/DS138/AB/R, 2000;
32. Appellate Body Report in European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R;
33. General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60;