

# Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes

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The World Trade Organization (WTO) has sparked global attention for the forces which support and combat international trade. Although membership of the WTO is limited to political entities, non-State actors play a vital role in influencing the development of global trade. Non-State actors such as non-governmental organizations (NGOs) and private corporations closely observe and seek to influence international trade.<sup>1</sup> Because of the economic, social, political, and environmental effects of trade, there is a nexus between international trade and the concerns of non-State actors. As a way to remedy trade disputes and challenge national trade policies, the WTO dispute resolution mechanism plays a vital role in the WTO's objectives. Because of its vital role in the WTO, non-State actors closely observe disputes brought before the WTO dispute resolution mechanism. With this, this article asks: does the WTO dispute resolution mechanism provide non-State actors with the ability to participate in WTO trade disputes?<sup>2</sup>

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<sup>1</sup> For this article non-State actors refers to both NGOs and private corporations. Many of the issues presented in this article were predicted by Michael Young, see Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INTLLAW 389.

<sup>2</sup> The issue of whether NGOs and private parties should participate in the WTO has received much attention from legal scholars and practitioners. See Steve Charnovitz, *Participation of Non-governmental Parties in the World Trade Organization*, 17 U. Pa. J. Int'l Econ. L. 331 (arguing the broad base of WTO activities in investment, competition policy, environment, labour standards, and corrupt practice suggests WTO participation should be open to NGOs); Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, J. Int'l Econ. L. 433, 1998 (arguing that NGOs and private parties do indirectly and directly participate in WTO disputes); Philip M. Nichols, *Participation of Non-governmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Non-government Parties*, 17 U. Pa. J. Int'l Econ. L. 295 (arguing US trade policy does incorporate public participation through a variety of agencies and that trade policy should be determined by governments); G. Richard Shell, *Participation of Non-governmental Parties in the World Trade Organization: The Trade Stakeholders Model and Participation by Non-state Parties in the World Trade Organization*, 17 U. Pa. J. Int'l Econ. L. 359 (arguing NGOs and private business will benefit from an extension of standing in WTO disputes); Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims before the WTO Dispute Resolution System*, 65 Fordham L. Rev. 2275 (arguing private parties should participate in the WTO disputes in order to protect their interests); Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 Int'l. Comp. L. Qrtly. 647 (suggesting the WTO adopt a private party dispute-settlement mechanism which would: carefully define matters eligible for resolution, create a channel system by which complaints would be screened, and choose between arbitration, mediation, and conciliation mechanisms).

Recent trends in WTO dispute resolution show non-State actors play an increasingly significant role in the resolution of disputes between WTO Members.<sup>3</sup> First, the Appellate Body has interpreted the “Right to Seek Information” in Article XIII of the Dispute Settlement Understanding (DSU) as permitting non-State actors, particularly non-governmental organizations, to submit *amicus curiae* briefs in WTO disputes. Secondly, non-governmental legal counsel has played active roles in recent disputes. The Appellate Body has permitted private counsel to represent Member States in dispute proceedings. Thirdly, private counsel to business interests has played an indirect role in dispute settlement, by assisting in formulation of legal strategy in WTO disputes.

This article first examines the interest non-State actors, business and NGOs have in the WTO.<sup>4</sup> Secondly, this article analyses the functions of WTO Dispute Panels, the Appellate Body, and the Dispute Settlement Body (DSB), as decided in the DSU and in recent WTO disputes. Thirdly, this article analyses three trends which suggest non-State actors participate in WTO proceedings. These trends are: (a) the increasing role of private counsel representing Members in WTO dispute resolution; (b) the indirect role private counsel exerts in WTO dispute resolution; and (c) *amicus curiae* participation in WTO dispute proceedings. Fourthly, the article concludes these trends will continue to provide non-State actors a way to participate in WTO proceedings.

## I. BUSINESS AND NGO INTEREST IN WTO DISPUTES

The nexus between the objectives of non-State actors and international trade push NGOs and private business to influence the development of international trade. Because of the economic, social, political, and environmental effects of trade, there is a nexus between international trade and the concerns of civil society.<sup>5</sup>

The WTO Dispute Settlement Mechanism addresses challenges brought by Member States concerning the compliance of WTO treaty obligations by other Member States. The decisions made by Panels and the Appellate Body determine if a Member State’s trade policy is in compliance with WTO obligations. Member States commit to a series of obligations by signing and ratifying the WTO agreement. After treaty obligations are put into effect, the dispute mechanism serves as a

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<sup>3</sup> Kim van der Borghht suggests that along with issues of transparency and participation by developing countries, public participation in WTO disputes will be of extreme importance in the future. See Kim Van der Borghht, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 *Am. U. Int’l L. Rev.* 1223.

<sup>4</sup> For this article, non-State actors are the general and large category of persons and organizations, who are not affiliated with a government, interested in influencing international trade policy. Non-State actors include private parties, businesses, and NGOs. NGOs are organizations which are non-governmental and seek to influence national governments and international organizations. Typically, NGOs focus on issues such as labour, human rights, and environmental organizations. Private parties, private firms, and businesses are organizations which engage in the international movement of goods and services. These entities typically engage in these activities with profit-making objectives. Businesses does not necessarily have a nationality and thus do not represent the concerns of a single nation.

<sup>5</sup> For an exploration of the issues surrounding the concerns of civil society and the WTO, see Jan Aart Scholte, Robert O’Brien and Marc Williams, *The WTO and Civil Society*, 33 *J.W.T.* 1 (February 1999), 107.

permanent recourse to resolve discrepancies between Members. The dispute mechanism exists as a permanent interpreter and final word on dispute resolution for complaints and challenges concerning WTO obligations. By resolving disputes, the DSU is vital to the development of WTO trade law.

Members seeking to resolve a dispute concerning a WTO obligation must first have consultations with each other. This is done before any Panel is established. If the consultation does not resolve the dispute, a Member may ask the DSB to create a Panel. The Panel hears the dispute and decides if there is a breach of a WTO treaty benefit. The Panel decides whether a remedy is necessary to restore a treaty benefit. The Panel reports its findings to the DSB, which then adopts the report. This adoption is automatic. Appeals of a Panel's decisions are submitted to the sitting Appellate Body, which has jurisdiction over matters of law decided by Panels.

#### A. CURBING THE SOCIAL COSTS OF INTERNATIONAL TRADE

Because developments in international trade law greatly affect civil society, there is a nexus between the WTO and social issues. NGOs serve as a way to voice these social concerns involving international trade. Decisions of the WTO affect the general population of countries around the globe. International trade law determines how much, when, under what conditions, and often at what social costs goods and services cross international borders. These international transactions have legal implications in terms of what labour is used in production and what are the environmental effects of cross-border trade.

Environmental, labour and human rights groups have articulated desires to participate in trade law development.<sup>6</sup> Trade law greatly affects these non-commercial interests.<sup>7</sup> Labour groups point to the working conditions and the use of child or indentured labour in the production of goods for trade. Environmental groups seek to protect national environmental laws prohibiting importation of goods produced with

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<sup>6</sup> For examples of NGOs seeking involvement in the WTO process, see American Federation of Labor and Confederation of Industrial Organization, *Speeches, News Releases & Testimony* (13 April 2000) <[http://www.aflcio.org/cgi-bin/doc\\_display.pl?display=true&type=all](http://www.aflcio.org/cgi-bin/doc_display.pl?display=true&type=all)> (presenting the AFL-CIO's position on many trade issues, highlighting working conditions of workers in other countries and stressing human rights abuses by China); Amnesty International, *Amnesty International Annual Report 1998*, Introduction (6 April 2000) <<http://www.amnesty.org/ailib/aireport/ar98/intro3.htm>> (offering a description of how economic issues and multilateral organizations affect human rights violations and protection); Center for International Environmental Law, *Trade and Environment Program* (10 April 2000) <<http://www.ciel.org/tae.html>> (analysing the connection between trade and the environment, presenting arguments used by environmental groups used in lobbying for trade policy, and offering its *amicus curiae* brief in the *Shrimp/Turtle* case); World Wildlife Fund, *Supplementary Amicus curiae Brief on the Shrimp/Turtle Dispute* (10 April 2000) <<http://www.panda.org/resources/publications/sustainability/wto-acb/wto2.htm>> (presenting the *amicus curiae* brief submitted in the *Shrimp/Turtle* Dispute); *WTO Must Reform to Respect Environmental Treaties* (10 April 2000) <[http://www.panda.org/news/press/news\\_203.htm](http://www.panda.org/news/press/news_203.htm)> (demonstrating arguments for reform of the WTO made by environmental groups).

<sup>7</sup> For a concise description of how some NGOs view the WTO; see Znet, *A Q&A on the WTO, IMF, World Bank and Activism* (23 March 2000) <<http://www.zmag.org/zmag/articles/jan2000/jan2000albert.htm>> and Russell Mokhiber and Robert Weissman, *10 Reasons to Dismantle the WTO* (23 March 2000) <<http://www.zmag.org.crisescurevts/globalism/10%5FreasonsWTO%5F.htm>>.

environmentally unsound methods.<sup>8</sup> Also, environmental groups seek a reduction in the importation of materials hazardous to the environment.

### 1. *Trade and the Environment*

An important argument for the inclusion of environmental concerns in WTO disputes is that these concerns are global issues. NGOs provide a way for these global issues to be articulated before the WTO. As a global concern, environmental protection is related to world trade. Specifically, trade occurs between States; while environmental degradation occurs at a global level. This degradation often impacts upon more than one State, yet often one State is not solely accountable. Individual Members, though, are responsible for trade policy. There are four reasons why environmental degradation is related to trade between nations and thus global. They are: (1) externalities, which occur when one State is able to externalize outside its national borders the environmental costs of economic activity; (2) global environmental commons, which refers to physical areas which are environmentally affected by trade, yet they are outside of the jurisdiction of one State; (3) shared natural resources, which refers to resources such as water, stocks of fish, coal, oil, minerals that may be depleted or damaged by trade; and (4) altruistic or paternalistic concerns, which motivate one State to tailor its trade policy with the objective of improving the environment because it is beneficial to society.<sup>9</sup> In many instances environmental degradation can be remedied only with the actions of more than one State. Environmental issues often rise beyond the responsibility of one State. Environmental protection requires the co-operation of many States and, thus, environmental issues are global and beyond the concerns of one State. Consequently, environmental issues involving trade disputes may best be addressed by an international forum.

Many observers note world trade is not the “source” or “root cause” of environmental degradation.<sup>10</sup> Thus, some free trade supporters contend the WTO should not be concerned with environmental issues. This notion however is false, for two reasons. First, trade between States does have negative environmental consequences, while not being the “root cause”.<sup>11</sup> In its 1999 *Trade and Environment Report*, the WTO wrote, “trade liberalization could potentially exacerbate the consequences of poor environmental policies”.<sup>12</sup> Second, individual States may have

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<sup>8</sup> The WTO has used both formal and informal mechanisms to incorporate environmental NGOs. See WTO, *Report of the WTO Informal Session with Non-Governmental Organizations (NGOs) on Trade and Environment*, PRESS/TE 016 (23 March 2000).

<sup>9</sup> See Robert Howse, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 Int'l Rev. L. & Econ. 61, 63–64.

<sup>10</sup> See Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report*, 12 Geo. Int'l Envtl. Rev. 523, 524 (citing WTO Secretariat Special Studies 4, *Trade and the Environment*, 1999, at 3, 14, 26–27).

<sup>11</sup> See *id.* (explaining this admission by the WTO in the 1999 report is “a clear admission that trade can have negative consequences”).

<sup>12</sup> See *id.* (citing the WTO Report, at 2, 26).

trade restrictions implemented with environmental objectives.<sup>13</sup> These restrictions are an instrument to protect the environment. These same instruments, though, pose barriers to cross-border trade and potentially violate WTO obligations.<sup>14</sup> WTO Panels will hear disputes involving these trade restrictions. This article argues: because environmental issues are global, the WTO should permit *amicus curiae* participation to articulate environmental concerns in disputes.

## 2. *Trade and Labour*

International trade has an impact on labour conditions, because labour costs are associated with the price of traded goods. NGOs express the concerns of labour rights and the conditions of workers. Many observers note countries which do not protect labour's basic rights have an unfair comparative advantage in the production of goods.<sup>15</sup> Accordingly with the movement of these goods, labour advocates worry about two things: labour in other countries work in negative conditions in order to keep costs of production low and workers in the importing country will lose employment because other economies are more competitive by not protecting the labour rights.

The United States has played a leading role in seeking to integrate WTO negotiations with labour standards.<sup>16</sup> Specifically, pro-labour proponents push for five international labour rights recognized by the International Labour Organization (ILO).<sup>17</sup> Pro-labour proponents argue these basic labour rights should be minimum standards for international trade between WTO Members. These are (1) the freedom of association; (2) the right to organize and bargain collectively; (3) the freedom from forced or compulsory labour; (4) a minimum age for the employment of children; and (5) measures that set forth minimum standards for work conditions.<sup>18</sup> At the Seattle

<sup>13</sup> See Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 Am. J. Int'l. 700, 703 (pointing to four kinds of trade restrictions: "regulations on imports exports adopted by all nations to safeguard their domestic resources and environment", enforcement of "environmental standards in international agreements", importing nations implementing restrictions because they question "the adequacy of environmental controls in other nations", and "controls on the export of hazardous products").

<sup>14</sup> See WTO Panel and Appellate Body Reports for the following disputes: *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*; *United States—Import Prohibition of Certain Shrimp and Shrimp Products*; and *United States—Standards for Reformulated and Conventional Gasoline*; Dispute Settlement List of Panel and Appellate Body reports (25 January 2001) <[www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm)>.

<sup>15</sup> See Owen Bieber, United Auto Workers, *Mastering the World Economy: Hearings before the Senate Committee on Finance*, 100th US Congress, 1st Session, 1987, 48–50 (arguing "There are many countries around the world that have built an advantage in international trade by preventing workers from exercising the right to organize and bargain with employers, by failing to adopt minimum standards for conditions of work, or by allowing forced or child labour").

<sup>16</sup> See Madeleine Albright, *World Trade Organization, Secretary Albright's Welcoming Remarks*, 30 November 1999, Ministerial Conference, Third Sess. WT/MIN(99)/11 and Charlene Barshefsky, *World Trade Organization Ambassador Charlene Barshefsky US Trade Representative Opening Remarks*, 30 November 1999, Ministerial Conference, Third Sess. WT/MIN(99)/10.

<sup>17</sup> See US International Trade Commission, *Trade Issues of the 1990s—Part II*, Int. Econ. Rev. 18, 19 December 1994 in Raj Bhala, *International Trade Law: Cases and Materials*, Charlottesville, Va: Michie, 1996, 1282.

<sup>18</sup> See *id.*

Ministerial in 1999, the United States attempted to initiate negotiation on introducing minimum labour standards into the WTO agreements.<sup>19</sup>

This issue though remains extremely controversial. Many developing countries find labour standards a way to mask protectionism by developed countries. The WTO explains:

“This proposal is among the most controversial currently before the WTO. Most developing countries and many developed nations believe the issue of core labor standards does not belong in the WTO. These member governments see the issue of trade and labor standards as a guise for protectionism in developed-country markets. Developing-country officials have said that efforts to bring labor standards into the WTO represent a smokescreen for undermining the comparative advantage of lower-wage developing countries.”<sup>20</sup>

In sum, the issue of labour conditions and trade are very much related. Members may bring a dispute to the WTO citing attempts to protect labour rights as a trade restriction. Similarly, Members may be unwilling to raise labour issues in a dispute, for fear that introduction of labour issues into WTO disputes will force the Appellate Body to rule on labour rights. With such a ruling, Members may use previous reports to justify labour rights protection or justify non-protection. Regardless, labour rights represent an economic issue, which provides a State with a comparative advantage in production. With their economic impact on prices, labour issues affect the movement of goods. Protecting labour rights provides higher wages and higher-priced goods. Not protecting labour rights results in lower wages and lower-priced goods. There is a comparative advantage in international trade to not protect labour rights. The WTO dispute mechanism should incorporate this issue into its decisions. This article argues: the WTO should permit the use of *amicus curiae* participation in order to have any articulation of labour concerns in WTO disputes.

## B. BUSINESS IMPLICATIONS OF SECURING WTO OBLIGATIONS AND REMEDYING NON-COMPLIANCE

Because WTO developments have important economic effects, there is a nexus between private business and the WTO. Private business firms have much interest in the development of international trade law. Private firms are responsible for the international movement of goods and services. Accordingly, the creation of barriers to international trade greatly affects their business interests. Businesses seek to preserve the free movement of goods. Also, businesses benefit from domestic protection from foreign competition. The resolution of a dispute brought before a Panel may eliminate barriers to trade for businesses or it may eliminate domestic protection from foreign competition. By potentially eliminating barriers to international trade, WTO dispute

<sup>19</sup> See Albright and Barshefsky, note 16, above.

<sup>20</sup> See World Trade Organization, *Trade and Labour Standards Subject of Intense Debate* (25 January 2001) <[http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/about\\_e/18lab\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm)> (summarizing many of the issues raised by Members at WTO 3rd Ministerial Session in Seattle in 1999).

decisions imply a direct economic advantage or disadvantage to businesses. For these reasons, private business is often the main protagonist of initiating a dispute and/or the main victim in a trade dispute's resolution.

Private business plays an important role as quasi-actors to a dispute. It can be said, businesses violate WTO obligations and States are held accountable. When a Member points to a treaty violation, most often a private party is responsible for actions resulting in the violation. In these situations a business acts as quasi-complainant. For instance, when there is a violation of a Trade-Related Aspects of Intellectual Property Rights (TRIPs) obligation, a business is having its property manufactured or copied illicitly. This business is interested in eliminating a violation of a WTO obligation. When there is a market access violation, there is an exporting firm interested in eliminating a tariff barrier.

Similarly, businesses play quasi-respondent roles in disputes. For example, if there is a complaint of government subsidies, a private party receives these subsidies. When there is a violation of TRIPs obligation, a business may be responsible for the actions which give rise to the violation. Also, should a WTO panel permit a Member to retaliate against another Member as a redress to dispute, a business will feel the effects of the retaliation.

Although they do not have a formal role, businesses play an important role in WTO dispute resolution. A dispute settlement mechanism which permits only Member State participation closes itself to participation from private parties. Businesses are left without an avenue to seek remedy for trade violations that occur. This situation parallels the issue presented to the International Court of Justice (ICJ) in the case of *Barcelona Traction*.<sup>21</sup> In that case, owners of a corporation needed a government to submit a claim before the ICJ in order to remedy an expropriation. This case illustrates that for the resolution of international economic disputes governments play a decisive and sometimes limiting role. If the dispute resolution mechanism requires State participation businesses may be left without a way to seek resolution or remedy a violation of treaty obligations.

In sum, private business and NGOs remain extremely attentive and seek to influence how WTO trade law develops. Because WTO dispute resolution plays an important role in determining where and how WTO treaty obligations are interpreted private business and NGOs seek to influence what disputes are taken to the DSB, participate as parties to the dispute, and observe how Panels and the Appellate Body interpret WTO obligations.

Private parties and NGOs should have active roles in the WTO. They present concerns which are different from the concerns of a Member State. Businesses and NGOs provide perspectives which are relevant to the development of trade law. Businesses offer economic and policy analysis of a trade dispute. NGOs demonstrate the social effects of trade. By limiting participation in WTO disputes to Member States there is no guarantee these voices will be incorporated into a dispute's resolution.

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<sup>21</sup> See *Case Concerning the Barcelona Traction, Light and Power Company Limited*, I.C.J., Jy. 24 1964 (5 May 2000) <<http://www.icj-cij.org/icjwww/idecisions/isummaries/ibtsummary640724.htm>>.

Panels may not listen to important points of view, because a State does not incorporate them. Member States may have mechanisms to incorporate non-State actors.<sup>22</sup> These mechanisms do not require Members to listen or incorporate non-State views.

Because the WTO's focus is multilateral and thus global, the WTO should open itself to global points of view. Businesses and NGOs often have concerns which do not coincide with the needs of a Member State. These concerns though are part of the global focus of the WTO. They affect trade and are thus relevant to trade disputes. The WTO represents "world trade" as opposed to the trade concerns of individual States.<sup>23</sup> For this reason, there is a strong exclusionary element to the DSU by only permitting Member States to participate. Without non-State actor participation in disputes, the WTO mechanism is limited to trade issues between States. With non-State actor participation the WTO will be able to authentically address more issues, which are relevant to the movement of goods and services. With this, the WTO shifts from solely addressing intra-State issues and towards addressing the "global" issues of trade.

Without non-State actor participation in the WTO, there is no guarantee these concerns will be heard by Panels. The WTO is made up of 140 Members. This means WTO obligations, benefits, and disputes govern the trade relations of the majority of the planet.<sup>24</sup> Not all WTO Members, though, have provisions similar to the 1974 US Trade Act Section 301 and the EU's Council Regulation No. 3286/94, which permit

<sup>22</sup> See Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 Int'l Comp. L. Qrtly. 647, 653 (analysing the US Trade Act Section 301 and the European Union's Council Regulation No. 3286/94 which permit private actors to bring claims of trade treaty violations by other States).

<sup>23</sup> This notion of a cohesive or global nature of the WTO, as opposed to individual States action, is best expressed in the Preface of the *Marrakesh Agreement Establishing the World Trade Organization Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994. The Preface includes these statements: the WTO "will strengthen the world economy and lead to more trade, investment, employment and income growth throughout the world"; "Ministers affirm that the establishment of the World Trade Organization (WTO) ushers in a new era of global economic co-operation, reflecting the widespread desire to operate in a fairer and more open multilateral trading system for the benefit and welfare of their peoples"; "Ministers confirm their resolution to strive for greater global coherence of policies in the fields of trade, money and finance, including cooperation between the WTO, the IMF and the World Bank for that purpose"; and "This has marked a historic step towards a more balanced and integrated global trade partnership". See WTO, *Marrakesh Agreement Establishing the World Trade Organization Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994 (25 January 2001) <[www.sice.oas.org/trade/ur\\_round/UR01E.asp](http://www.sice.oas.org/trade/ur_round/UR01E.asp)>.

<sup>24</sup> A glance at the following WTO Membership list sparks three initial conclusions: (1) this encompasses the majority of the planet; (2) there is an enormous variation in forms of governments and their participatory nature; and (3) there is huge potential for social and business interests concerning world trade in these 140 economies. The list: Albania, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahrain, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, European Communities, Fiji, Finland, France, Gabon, The Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea Bissau, Guinea, Guyana, Haiti, Honduras, Hong Kong, Hungary, Indonesia, Ireland, Israel, Italy, Jamaica, Jordan, Japan, Kenya, Republic of Korea, Kuwait, The Kyrgyz Republic, Latvia, Lesotho, Liechtenstein, Luxembourg, Macau, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, The Netherlands, Netherlands Antilles, New Zealand, Nicaragua, Niger, Nigeria, Norway, Sultanate of Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent & the Grenadines, Senegal, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, United States, Uruguay, Venezuela, Zambia, and Zimbabwe. See WTO, *Members and Observers* (26 January 2001) <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.



private actors to bring claims of trade treaty violations by other States. In many Member States there may be no legal recourse for non-State actors to articulate their concerns about free trade. Similarly, the 140 Members represent different styles of government and democracy. Many States may have minimal participatory government. Citizens and business may have no legal method to dialogue about free trade with the State.

Non-State actor participation will offset the powerful influence of domestic interest groups, which push for WTO Membership and increased free trade. Member governments may commit to WTO obligations without the full support of civil society. Free trade appeals to many business and public interests. These interests push free trade agreements. With this lobbying, governments negotiate and join the WTO. Many Members may commit to the WTO because of the influence of certain political sectors of society.<sup>25</sup> These sectors have disproportionate domestic influence in governments and drive free trade negotiations. Other sectors of society, though, may oppose or wish to condition free trade. These sectors do not have a powerful enough voice to change the domestic position of a government. Regardless, citizens and businesses of many WTO Members may have different positions regarding international trade than their government. This article argues: the use of *amicus curiae* participation will provide these sectors with a way to voice their concerns to the WTO.

An important element of NGOs is they may represent domestic and global concerns. Not all NGOs share similar foci. Some NGOs such as the World Wildlife Fund and Greenpeace seek to protect the environment throughout the entire planet. They do not limit their objectives to one country or one region. They keep an eye on worldwide developments. Similarly, other NGOs may represent more local concerns. For instance an organization focused on one industry in one region which is affected by the international movement of goods. Examples could include workers in maquiladoras in Northern Mexico, textile workers in Malaysia, or weavers of carpet for export in India. These concerns, both local and global, are important to WTO disputes, because the decisions made by the WTO affect the interests of both kinds of groups.

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<sup>25</sup> The argument, here, is influenced by public choice theory. In some governments, influential sectors of society and public interests motivate free trade commitments. This leaves less powerful sectors of society in discord or without support for the State's trade policy. In analysing the never-ending *EC—Bananas* dispute, Raj Bhala offers this thematic syncretism between international trade and public choice theory: "Politicians are viewed as suppliers of a product, namely, policy initiatives. Voters are viewed as consumers of that product. Votes are the currency they use to 'pay' political officials for new policies. Accordingly, there is an upward-sloping supply curve for policy initiatives—more votes, more policies. There is a downward-sloping demand curve for these initiatives—the cheaper the cost, in terms of votes, the greater the demand. Where the two curves intersect an equilibrium is reached. However, voters do not all weigh in with equal force. Some voters—particularly well-organized, well-financed groups that work through sophisticated lobbyists—are more influential in pressing their case to political officials. These groups can provide a large number of votes in exchange for favourable policy initiatives. Thus, they have a particularly strong influence on policy." See Raj Bhala, *The Bananas War*, 31 *McGeorge L. Rev.* 839, 968. For more analysis of public choice theory applied to international law, see Enrico Colombatto and Jonathan R. Macey, *A Public Choice Model of International Economic Co-operation and the Decline of the Nation State*, 18 *Cardozo L. Rev.* 925, and John K. Setear, *Treaties, Customs, Rational Choice, and Public Choice*, 94 *Am. Soc'y Int'l L. Proc.* 187.

## II. THE DISPUTE SETTLEMENT UNDERSTANDING

In examining the role of non-State actors, it becomes important to analyse the following questions: who may bring a dispute before the DSB? What are the functions and powers of Panels and the Appellate Body? And, what impact do prior Panel decisions have on future Panel proceedings? An examination of these factors maps out what legal rights support, limit, regulate or nullify the participation of non-State actors in WTO disputes.

The DSU supplies Panels with broad discretion regarding what information they may look at. The DSU provides Panels with the role of fact finder and interpreter of law. Previous Panel decisions are not binding on future disputes but they do influence future interpretation. A party may appeal only an issue of law to the Appellate Body. There are no appeals beyond the Appellate Body.

### A. WHAT ARE THE FUNCTIONS OF A PANEL?

WTO Panels serve as both fact finders and interpreters of relevant WTO obligations. The DSU stems from rights conferred in Articles XXII and XXIII of the General Agreement on Tariffs and Trade (GATT) 1947. The dispute mechanism serves to “preserve the rights and obligations of Members” and “to clarify existing provisions” in accordance with customary rules of international law.<sup>26</sup> The dispute mechanism may not “add to or diminish rights and obligations” provided in the WTO agreements.<sup>27</sup> The specific functions of a Panel are provided for in Article XI, which states Panels “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 relevant covered agreements, and make such other findings ...”.<sup>28</sup> Panels shall also consult regularly with parties to the dispute and provide adequate time to develop a mutually satisfactory solution.

### B. WHAT MAY A PANEL LOOK AT?

Article XIII:1 “Right to Seek Information” of the DSU provides Panels with broad power to “seek information and technical advice from any individual or Body which it deems appropriate”.<sup>29</sup> This permits Panels to actively seek information. There are no effective limits to what information a Panel may seek. Panels may examine both “information” and “technical advice”.<sup>30</sup> Definitions for these terms are not provided in

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<sup>26</sup> See WTO, *Final Act Agreement Establishing the World Trade Organization*, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. III:1 (13 April 2000) <<http://www.wto.org/wto/legal/finalact.htm>>.

<sup>27</sup> See *ibid.*, at Art. III:2.

<sup>28</sup> See *ibid.*, at Art. XI.

<sup>29</sup> See *ibid.*, at Art. XIII:1.

<sup>30</sup> See *ibid.*, at Art. XIII:2.

the DSU. No conditions are placed concerning from whom information may be sought, what kind of information may be sought, or whether this power is limited to factual or legal information. Panels must inform Members before seeking any information or technical advice.

Paragraph 2 gives Panels the right to seek “information from any relevant source and may consult experts to obtain opinions on certain aspect of the matter”.<sup>31</sup> Panels may even seek outside advisory reports from an expert review group. This power is beneficial in cases where scientific, economic and technical issues affect how WTO obligations are interpreted. Annex 4 provides the procedures needed to establish an expert review group.<sup>32</sup>

### C. WHO MAY BRING A DISPUTE?

The DSU does not define what standing is necessary to bring a claim.<sup>33</sup> It is clear though that only a Member may bring a challenge before the DSB. WTO Members are governments. Currently, private parties may not bring disputes before the WTO’s DSB.<sup>34</sup> Members do not need an interest in a dispute in order to bring a dispute to the DSB. The issue of standing was tested by the European Union in the *European Communities—Regime for the Importation, Sale, and Distribution of Bananas* where the United States was a complainant State yet the United States produces a minimal amount of bananas. The European Union argued a claimant Member must have an actual trade interest in order to bring a dispute before a Panel.<sup>35</sup> The Appellate Body concluded the United States did have standing to

<sup>31</sup> See *id.*

<sup>32</sup> See *ibid.*, at Annex IV.

<sup>33</sup> For an explanation of “standing” in WTO disputes, see Debra P. Steger and Peter Van Den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, 92 *Am. Soc’y Int’l L. Proc.* 79, 80.

<sup>34</sup> An interesting discussion of the role of private party participation in WTO disputes is in Petro C. Mavroidis *et al.*, *Is the WTO Dispute Settlement Mechanism Responsive to the Needs of Traders? Would a System of Direct Action by Private Parties Yield Better Results?* 32 *J.W.T.* 2 (April 1998), 147, 165. The United States has been the main promoter of opening the dispute settlement mechanism to private parties. See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *Minn. J. Global Trade* 1, 42–50. Both President William J. Clinton and Ambassador USTR Charlene Barshefsky have proposed extending WTO dispute standing to private parties. See WTO, *Statement by Ambassador Charlene Barshefsky*, Ministerial Conference Second Session, Geneva, 18 and 20 May 1998, WT/MIN(98)/ST/57 (23 March 2000) <<http://www.wto.org/wto/ddf/ep/public.html>>. *Statement by H.E. William Clinton*, 50th Anniversary, Geneva, 18 May 1998, WT/FIFTY/H/ST/8 (23 March 2000) <<http://www.wto.org/wto/ddf/ep/public.html>>. See also, USTR, Press Release, 10 March 2000 (11 April 2000) <<http://www.ustr.gov>> (announcing USTR seeks ways to increase public input in trade policy); Press Release, 11 January 2000 (11 March 2000) <<http://www.ustr.gov>> (Ambassador USTR Charlene Barshefsky and Secretary of Commerce William Daley announce procedures to seek advice from NGOs after a suit filed by NGOs against the USTR and Dept. of Commerce); US Paper for the Dispute Settlement Review, 31 October 1998 (15 February 2000) <<http://www.ustr.gov>> (proposing *amicus curiae* briefs should be permitted in WTO disputes); *The Report on WTO Implementation from the President’s Advisory Committee for Trade Policy and Negotiations: Cementing and Improving Existing Agreements*, 11 March 1996 (23 February 2000) <<http://www.ustr.gov/reports/wto/contents.html>> (proposing increased transparency in WTO disputes and increasing consultations between USTR and private parties when litigating disputes).

<sup>35</sup> See WTO Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R adopted 25 September (13 April 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, at para. 17.

bring the dispute. It explained that no provision of the DSU “contained any explicit requirement that a Member must have a ‘legal interest’ as a prerequisite for requesting a Panel”.<sup>36</sup> The Appellate Body placed great emphasis on Article XXIII:1 which states “[i]f any Member should consider” any WTO benefit is being nullified or impaired it has the right to request a Panel. The Appellate Body went on to agree with the Panel’s reasoning that with “... the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules ...”.<sup>37</sup> Accordingly, standing is quite broad. The emphasis is on whether a Member considers a benefit is being denied, not whether the Member is specifically denied a benefit or will be denied a benefit.

An interesting element of the dispute mechanism is that a Member may raise a dispute if a WTO benefit is being denied. This notion of legal interest or damages is similar to ideas of “State Responsibility” presented by the International Law Commission (ILC) Reports on State Responsibility.<sup>38</sup> For instance, the Draft Articles adopted on First Reading by the Commission (1996) defines responsibility of a state for its internationally wrongful acts as “Every internationally wrongful act of a State entails the international responsibility of that State”.<sup>39</sup> In defining the “elements of an internationally wrongful act of a State”, the ILC notes “There is an internationally wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State”.<sup>40</sup> The ILC stresses a wrongful act occurs when a State breaches its international obligations. This is similar to the WTO standing standard set in the *European Communities—Regime for the Importation, Sale and Distribution of Bananas* dispute of “[i]f any Member should consider” any WTO benefit is being nullified or impaired it has the right to request a Panel.

#### D. WHAT ARE THE EFFECTS OF PRIOR PANELS?

Originally in GATT disputes, previous Panels’ reports were not used in interpreting current disputes. Effectively there was no *stare decisis*. Recently in the *US—Foreign Sales Corporations* dispute, the Appellate Body quoted the *Japan—Alcoholic Beverages* report, “adopted panel reports are not binding, except with respect to resolving the particular dispute between the parties of that dispute”.<sup>41</sup> The Appellate

<sup>36</sup> See *ibid.*, at para. 7.49.

<sup>37</sup> See *ibid.*, at para. 136.

<sup>38</sup> See Lauterpacht Research Centre for International Law, *State Responsibility Project* (25 January 2001) <<http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm>> (presenting the ILC State Responsibility Reports).

<sup>39</sup> See ILC, *Draft Articles Adopted on First Reading by the Commission*, 1996, Art. I. (25 January 2001) <[www.law.cam.ac.uk/rcil/ILCSR/Arts.htm](http://www.law.cam.ac.uk/rcil/ILCSR/Arts.htm)>.

<sup>40</sup> See *ibid.*, at Art. 3.

<sup>41</sup> See WTO Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporation”*, adopted 24 February 2000 (15 November 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, at para. 108.

Body reasoned adopted reports do “not affect the rights and obligations of contracting parties under the General Agreement”.<sup>42</sup>

Panel Reports and Appellate Body reports, though, are given much weight in interpreting WTO obligations. Raj Bhala has suggested there is *de facto stare decisis* in WTO disputes.<sup>43</sup> Previous decisions influence current and future decisions, but there is no predictable binding force of previous decisions. Thus, the decisions made by a Panel will technically affect only the parties to the dispute. But Panel reports will serve as interpretations for future disputes. Members have grown to expect previous rulings to affect future interpretations. In presenting their arguments to a Panel or the Appellate Body Members refer to previous dispute decisions in the WTO.

In sum, Panels have a broad authority to seek and examine facts in a dispute. Only WTO Members may bring a dispute before the DSB. Previous Panel and Appellate Body decisions do shape the development of WTO trade law. Within this dispute mechanism, non-State actors find a way to articulate their interest in international trade law.

### III. RECENT TRENDS DEMONSTRATING PRIVATE PARTY PARTICIPATION IN WTO DISPUTES

Since its implementation in 1995, trends in the WTO dispute mechanism indicate an increased participation by non-State actors. The WTO was conceived as an organization of Member States with the greater part of the participants being diplomats. The nexus between business interests, environmental protection, and labour with trade policy have caused an opening in the WTO dispute mechanism. Three recent developments in WTO disputes point to this trend: the use of private counsel by Member States in dispute proceedings, private counsel’s indirect role in formulating and assisting in legal strategy, and *amicus curiae* briefs submissions in disputes.

#### A. PRIVATE COUNSEL AS REPRESENTING GOVERNMENTS

Private counsel to government delegations in disputes has become more commonplace.<sup>44</sup> Initially, it was not clear what roles private counsel may have in disputes. The WTO is an organization made of Member States. Diplomatic and official representatives of Member governments negotiated agreements and represented their respective governments in GATT disputes and Uruguay Round negotiations. The WTO is a multilateral organization where Member States voice their concerns through government officials.

<sup>42</sup> See *ibid.*, at para. 112.

<sup>43</sup> See Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, Am. U. Int’l L. Rev. 845, *The Precedent Setters: De Facto Stare Decisis In WTO Adjudication (Part Two of a Trilogy)*, 9 J. Transnat’l L. & Pol’y 1.

<sup>44</sup> See Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 Mich. J. Int’l L. 1195, 1203–1207 and Steger and Van Den Bossche, *WTO Dispute Settlement: Emerging Practice and Procedure*, 92 Am. Soc’y Int’l. Proc. 79, 80.

The DSU however added an adversarial element to the WTO institutional structure. Members have the power to challenge other Members in a forum specifically designed for WTO agreements and with specific jurisdiction over WTO issues. If compliance by a responding party was not made, a complaining party may implement trade sanctions. Given this adversarial aspect, the DSU created a quasi-judicial system where counsel specializing in trade law would be needed. Member States would need to provide their own attorneys versed in WTO trade law and WTO dispute procedures. The DSU does not address what role outside counsel will have.

When the DSB began functioning in 1995 many questions arose regarding the role of outside counsel. Observers asked: could Member States use outside counsel in formulating dispute settlement strategy? Could outside counsel be a part of a Member State's delegation in a dispute proceedings? Could outside counsel participate in oral hearings of a dispute?

The *European Communities—Regime for the Importation, Sale and Distribution of Bananas* case addressed some of these issues. Here, the Appellate Body permitted private lawyers for Saint Lucia, a third party in the dispute, to participate in oral hearings.<sup>45</sup> Initially, the Panel in this dispute rejected Saint Lucia's request for representation by private counsel before the Panel.<sup>46</sup> The Panel's reasoning emphasized its working procedures, which limited members of a government party to a dispute to be present at Panels. Also, the Panel explained concerns about confidentiality arose, because lawyers were not members of the government. Next, the Panel reasoned permitting private lawyers to participate in disputes would lessen the inter-governmental nature of the WTO.

Saint Lucia appealed the Panel's rejection to participate. Saint Lucia argued it had the sovereign right to decide the make up of its delegation and the WTO agreement, nothing in the DSU or the Appellate Body's Working Procedure prohibited this. The Appellate Body reasoned that nothing in the WTO agreement, the DSU, or the Appellate Body's Working Procedure specified who can represent a Member in an oral hearing before the Appellate Body.<sup>47</sup>

The Appellate Body's reasoning rested on two policy arguments. First, the use of private counsel was a government's own choice and it "may well be a matter of particular significance—especially for developing country Members—to enable them to participate fully in dispute proceedings".<sup>48</sup> This is particularly important because many developing Member States may not have the institutional resources to have full-time government lawyers versed in WTO trade law, and, with a limited number of disputes, may not have the need for such lawyers. Second, the Appellate Body explained that because issues

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<sup>45</sup> See WTO Appellate Body Report, note 35, above, at para. 12.

<sup>46</sup> See WTO Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT.DS27/R/USA (13 April 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, at para. 7.11.

<sup>47</sup> See *ibid.*, at para. 12.

<sup>48</sup> See *id.*

brought before the Appellate Body are only of legal interpretation in Panel reports, Members should be represented by qualified counsel in Appellate Body proceedings.<sup>49</sup>

These developments demonstrate that the WTO dispute mechanism is becoming more open. It is not limited to government participation only. The role of private counsel is important for developing countries who often have limited institutional resources. Without the use of private counsel, smaller governments may not be able to voice their concerns as complainants or third party States to a dispute. Also, without private lawyers developing countries may not be able to adequately represent themselves in WTO challenges. With private counsel, Members are better able to secure their WTO obligations and provide WTO benefits. The use of private lawyers and specifically eliminating restrictions of government only participation signifies a trend towards permitting non-State or private participation in WTO disputes. Consequently, the WTO becomes less inter-governmental and more open to a global trade focus.

#### B. PRIVATE COUNSEL ASSISTING GOVERNMENTS

Legal counsel representing private firms have played an important role in assisting government delegations in recent WTO disputes. Private firms with specific interest in a particular dispute often hire legal counsel to help formulate strategy and research factual and legal issues of a dispute. For example, a private firm may feel the economic effects of a particular subsidy or tariff measure in a WTO Member State. Also, a private firm may stand to lose economically if a subsidy or tariff measure is lifted. While legal counsel to the Member State represents the Member State in the dispute, legal counsel to the private firm represents the firm's interest before the government. Government lawyers decide accordingly whether these lawyers' input will be incorporated. Private lawyers secure that the interests of a private firm are heard.

Because there is a nexus between international trade and business, private parties have sought legal participation in WTO disputes. Jeffrey L. Dunoff presents a detailed and sophisticated analysis of the role counsels to private parties play in WTO disputes. As part of his argument that non-State actors do indirectly participate in the WTO disputes, Jeffrey Dunoff examines how both Fuji and Kodak played active, decisive and vital roles in the dispute *Japan—Measures Affecting Consumer Photographic Film and Paper*.<sup>50</sup> Commonly referred to in international trade circles as the “Kodak-Fuji” dispute.<sup>51</sup> Both companies spent much time, money and energy to express their interest to the United States public, WTO Member governments, WTO officials, and the dispute Panel. Although neither Fuji nor Kodak were complaining or responding

<sup>49</sup> See *id.*

<sup>50</sup> See Dunoff, *The Misguided Debate over NGO Participation at the WTO*, Int'l Econ. L. Vol. 1, No. 3 at 441 (referring to the dispute reported in Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March 1998 (13 April 2000) <<http://www.wto.org/wto/dispute/distab.htm>>.

<sup>51</sup> Examples include John Linarelli, *The Role Of Dispute Settlement In World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 Law & Pol'y Int'l Bus. 263, and Sara Dillon, *Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies*, 8 Minn. J. Global Trade 197.

parties in the WTO dispute, both firms used a plethora of methods (direct and indirect) to influence the settlement of the dispute.<sup>52</sup> The nexus between the WTO and international business pushed both companies to have these active positions.

Dunoff argues that in this dispute Kodak and Fuji were the real parties in interest.<sup>53</sup> Both Kodak and Fuji stood to gain or lose economically from the ultimate resolution of the WTO dispute. This economic stake made them the parties in interest, although not formally parties in the dispute. Kodak served as quasi-claimant and Fuji as quasi-respondent or quasi-third party. The essence of Kodak's complaint and the United States' complaint before the WTO was Kodak had a distorted and particularly small share of the Japanese market, the Japanese government's competition policy led to the denial of the United States' WTO benefit of an open market. Kodak filed a Section 301 petition before the United States using lawyers, economists and bilingual researchers at the law firm of Dewey Ballantine.<sup>54</sup> Kodak's lawyers and executives often met with United States Trade Representative (USTR) officials before and during the dispute.<sup>55</sup>

Because Fuji could possibly lose a great deal of its market share if the United States continued with Section 301 proceedings or if Japan lost a WTO dispute, Fuji actively participated by presenting its position and offer factual information to both the United States and Japanese governments.<sup>56</sup> Fuji feared: (1) a decrease in its Japanese market share if the United States won the challenge; and (2) United States sanctions if Japan did not remedy an eventual loss in a WTO dispute. The law firm of Willkie, Farr and Gallagher represented Fuji.<sup>57</sup> Fuji provided USTR officials with factual details needed for both the Section 301 and WTO proceedings. Dunoff explains that because the Japanese government refused to negotiate the Section 301 proceeding, Fuji took an active role and openly discussed factual matters with the USTR.<sup>58</sup>

Both companies played important roles when the case moved to the WTO. Fuji and Kodak representatives advised respective governments in choosing Panellists and preparing factual claims and legal arguments, oral presentations, and written responses to Panel questions.<sup>59</sup> Fuji and Kodak supplemented this support at the Panel proceedings by using legal representation to establish support from the European Union.<sup>60</sup> Also, both companies used public relations efforts to garner support and

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<sup>52</sup> See note 50, above, at 441–448.

<sup>53</sup> See *ibid.*, at 442.

<sup>54</sup> The Dewey Ballantine team of attorneys included: former USTR officials who had served as Deputy Special Representative for Trade Negotiations and General Counsel, Director for Japanese Affairs and Special Counsel to the Deputy USTR, Associate Counsel, Assistant US Trade Representative for China and Japan, former International Trade Counsel to the Ways and Means Committee, and former Chief of the Trade Policy Unit at the US Embassy in Japan. See *ibid.*, at 443.

<sup>55</sup> See *ibid.*, at 442.

<sup>56</sup> See *ibid.*, at 445–447.

<sup>57</sup> See *ibid.*, at note 49.

<sup>58</sup> See *ibid.*, at 444.

<sup>59</sup> See *ibid.*, at 447.

<sup>60</sup> See *id.*



present their side of the dispute.<sup>61</sup> Kodak and Fuji took out ads in major newspapers and lobbied Members of Congress.<sup>62</sup>

The nexus between the economic concerns of businesses and the WTO pushed these private firms to participate in these disputes. Although there is no formal participation mechanism in the DSU, private parties do have an interest in dispute resolution. By providing relevant points of view of businesses, private legal counsel adds an element of private party participation in WTO disputes.

### C. *AMICUS CURIAE* BRIEFS IN WTO PROCEEDINGS

NGOs have used *amicus curiae* briefs in various international courts as a legal vehicle to express legal, social, and public concerns not articulated by parties to the dispute. *Amicus curiae* briefs play a useful role because legal decisions in international disputes affect interests beyond the parties to the dispute.<sup>63</sup> Parties to an international dispute may be inhibited or unwilling to voice many of the concerns non-State actors may have. Litigation strategy, geopolitical interests, concerns of *res judicata*, or domestic foreign policy preclude States, as either a respondent or claimant to a dispute, from expressing the concerns of non-State actors. For instance, a government will often overlook labour rights, environmental or economic issues of a dispute by focusing its litigation strategy on the legal obligations of the State.

From this situation, non-State actors have found *amicus curiae* briefs an important method to articulate legal issues and policy justifications which otherwise courts may not hear. Similarly, international courts benefit from the information and reasoning provided by NGOs in *amicus curiae* briefs. This article suggests *amicus curiae* briefs may provide non-State actors with a way to participate in WTO disputes. Similarly, WTO dispute Panels will benefit from the non-State perspective and information non-State actors can provide in *amicus curiae* briefs submitted before WTO disputes.

*Amicus curiae* participation often provides information, which is vital to the resolution of a dispute. *Amicus curiae* briefs include detailed examination of the facts and legal issues of a case from a perspective different from that of a party to the case. Such briefs submitted by NGOs may provide social and policy analysis of legal issues. Often they offer analysis, which parties and arbiters may not be able to receive elsewhere. This is particularly relevant when the impact of legal decisions have technological and social effects. In these cases, the wider impact of a decision beyond the two parties in a

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<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> The simplest and most agreed upon definition of *amicus curiae* brief is a brief submitted to a court by someone not a party to the dispute. Dinah Shelton offers this description from Justice Arthur Goldberg in *United States v. Barnett*: A traditional function of *amicus curiae* is to assert 'an interest of its own separate and distinct from that of [parties]', whether that interest be private or public. It is 'customary for those whose rights [depend] on the outcome of cases ... to file briefs *amicus curiae*, in order to protect their own interests'. See Dinah Shelton, *The Participation of Non-governmental Organizations in International Judicial Proceedings*, 88 *American J. Int'l L.* 611, 617.

case makes *amicus curiae* briefs extremely useful. They provide a court with additional and relevant information.

*Amicus curiae* participation provides information which States as parties in an international dispute cannot, or often are resistant to bring, before a tribunal. States are often unwilling to present sensitive issues of environmental, social, and labour concerns before a court. These issues may not be in the State's interest in resolving the dispute. Often presenting one of these issues before an international tribunal may contradict foreign policy objectives. The reasoning behind these issues may contradict the State's legal theory. These issues may complicate the litigation strategy of a State.<sup>64</sup> Similarly, a State may be unwilling to bring a dispute before a tribunal, because the expected economic return of a dispute may be wealth reducing.<sup>65</sup> Accordingly, a State's discretion to raise or not raise a dispute is welfare enhancing.<sup>66</sup> Specifically, Levy and Srinivasan have demonstrated that in certain cases a government's decision to not bring a dispute is motivated by trade negotiation positions with other States or by the negative economic effects resulting from the dispute.<sup>67</sup> In many cases they suggest a State may decide to not raise a dispute because of its costs to the economy.<sup>68</sup> This model points to State's having valid reasons for not including social issues in a dispute or to not raise a dispute at all. With this discretion many issues fail to be considered by Panels, because they have no voice. This article argues: *amicus curiae* serve as an instrument to voice issues, business and social, not raised by States in disputes.

*Amicus curiae* participation is limited in many respects, mostly procedural.<sup>69</sup> Because of the benefits *amicus curiae* briefs provide, both national and international courts accept the increased work of accepting *amicus curiae* briefs.<sup>70</sup>

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<sup>64</sup> Of particular litigation significance is the *res judicata* implications of presenting certain legal issues. Parties may be unwilling to present an issue if there is a fear that it cannot be resolved in their favour. In such a situation, the party may be precluded from raising the issue again in another dispute. Accordingly, *amicus curiae* participation provides a significant input to the resolution of a case. An *amicus curiae* does not fear the issue cannot be raised again or that this particular proceeding is the "one shot" to present this legal point of view. This evasion of *res judicata* implications has proved vital in developing new arguments. See *id.*

<sup>65</sup> See Philip I. Levy and T.N. Srinivasan, *Regionalism and (Dis)advantage of Dipute-Settlement Access*, *American Economic Review*, Vol. 86, No. 2, 93–98.

<sup>66</sup> See *id.*

<sup>67</sup> See *ibid.*, at 95, 97 (explaining deciding to raise a dispute may adversely affect the "state of economic relations" and "... altering the structure of the dispute-settlement procedure is not necessarily beneficial, and that it is likely to alter the type of agreements that governments are willing to sign"); see also Bernard M. Hoekman and Petros Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance*, *The World Economy*, April 2000, 530.

<sup>68</sup> See Levy and Srinivasan, note 65, above, and Hoekman and Mavroidis, note 67, above.

<sup>69</sup> *Amicus curiae* cannot direct or manage what issues a tribunal does or does not hear. The parties to the dispute still have paramount power in this respect, by choosing what issues will be brought before a court. Also, *amicus curiae* are not served with many of the notices and discovery aspects of a trial. Similarly, *amicus curiae* cannot offer evidence or examine the evidence of the parties. See Shelton, note 63, above.

<sup>70</sup> In United States courts *amicus curiae* must request leave of the court to file a brief. The International Court of Justice permits submissions from non-governmental organizations in advisory proceedings. The European Court of Justice permits for *amicus curiae* intervention. The European Court of Justice is chartered to accept complaints by both Member States and individuals. The European Court of Human Rights requires *amicus curiae* to demonstrate a legal interest and proper administration of justice. These two standards have served to limit the number of *amicus curiae* filing. The Inter-American Court of Human Rights accepts *amicus curiae* briefs. This is done without any expressed authorization for the convention of the rules of the court. See Shelton, note 63, above, at 619.

### 1. *Permitting Amicus curiae Participation in WTO Disputes*

In the *US—Shrimp/Turtle* case, the Appellate Body permitted the use of *amicus curiae* briefs. The DSU does not mention *amicus curiae* participation. There is no explicit denial of the right to file *amicus curiae* briefs, nor is there an explicit affirmation providing the right to file such briefs. The DSU is unclear and there was much room for interpretation by Panels and the Appellate Body.

This uncertainty was fuelled by two important factors. First, NGOs have a strong desire to express their trade concerns. Many NGOs feel their interests are not voiced by Member States. *Amicus curiae* brief submissions are a way for non-State actor to express their legal concerns to a dispute body. Thus, there is strong pro-*amicus curiae* interest. Secondly, the DSU does not provide for clear and definite *stare decisis*. Previous Panel and Appellate Body reports do not bind any future parties nor do they define specific rights for future disputes. Previous reports serve as guidance. A Panel has the discretion to not apply previous decisions and reasoning. Accordingly despite the decisions in the *US—Shrimp/Turtle* case, the right to file *amicus curiae* briefs is not cemented in current legal interpretation of the DSU.

On 11 August 1998 the Appellate Body in the *Shrimp/Turtle* case permitted the submission of three *amicus curiae* briefs by NGOs.<sup>71</sup> The three briefs were filed by: (1) the Earth Island Institute, the Human Society of the United States and the Sierra Club; (2) the Center for International Environmental Law (CIEL), the Centre for Marine Conservation (CMC), the Environmental Foundation Ltd., the Mangrove Action Project, the Philippine Ecological Network, Red Nacional de Acción Ecología, and Sobrevivencia; and (3) the World Wildlife Foundation (WWF) and the Foundation for International Environmental Law and Development.<sup>72</sup> The United States as Appellant attached the *amicus curiae* submission as three Exhibits on 23 July 1998.<sup>73</sup> The United States submitted the briefs as “reflecting their respective independent views with respect to turtle excluder devices (TEDs) and other issues”.<sup>74</sup> The United States sighted the NGOs’ expertise in conservation of sea turtle and encouraging the use of TEDs. TEDs are a small apparatus attached to shrimp nets which avoid catching sea turtles when shrimp fishing. The US Environmental Protection Agency regulation required a certification that TEDs were used when exporting shrimp or shrimp product to the United States.

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<sup>71</sup> See WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 (13 April 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, at para. 86.

<sup>72</sup> See *ibid.*, at para. 82.

<sup>73</sup> See *id.*

<sup>74</sup> See *ibid.*, at para. 82, footnote 66.

## 2. *Procedural Decisions Permitting Amicus curiae Submissions*

The Appellate Body explicitly overturned the Panel's decision that "accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU".<sup>75</sup> The CMC and CIEL had submitted an *amicus curiae* brief to the Panel on 28 July 1997 and the WWF had submitted a brief to the Panel on 16 September 1997.<sup>76</sup> The Panel reasoned that pursuant to Article 13 "the initiative to seek information and to select the source of the information rest with the Panel".<sup>77</sup>

The legal right to make submissions, however, is limited to Member States. In explaining its decision, the Appellate Body affirmed that the WTO dispute settlement process was limited to Members of the WTO. Access to the process does not currently exist to "individuals or international organizations, whether governmental or non-governmental".<sup>78</sup> "Legal rights" to make submissions are limited to Members who are parties to a dispute or have expressed an interest in being third parties to the dispute.<sup>79</sup>

The Appellate Body's reasoning on "what a Panel is *authorized* to do under the DSU" differs from the Panel's decision.<sup>80</sup> A Panel is authorized with broad discretionary power to seek information. This is contrary to the Panel's prohibition of *amicus curiae* submissions. The Appellate Body gave four points concerning a Panel's power to seek information, effectively providing a Panel the right to accept *amicus curiae* briefs (non-requested information). These points derive from both statutory analysis of the DSU and previous Appellate Body decisions.

First, a Panel has the broad discretionary power to seek information. The Appellate Body used the language in Article XIII and reasoning from the *EC—Measures Affecting Meat and Meat Products (Hormones)* and *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*. The Appellate Body notes the DSU "enable[s] Panels to seek information and advice as they deem appropriate in a particular case".<sup>81</sup> A Panel has the discretion to decide if it should or should not seek information.<sup>82</sup>

Secondly, a Panel's discretionary power to seek advice is comprehensive in nature.<sup>83</sup> A Panel's authority includes whether the Panel decides not to seek information and technical advice, accept or reject any information or advice which it sought and received, or to make some other disposition thereof.<sup>84</sup> A Panel has the

<sup>75</sup> See *ibid.*, at para. 114, overturning the Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (13 April 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, para. 7.8.

<sup>76</sup> See the Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, note 75, above, at para. 3.129.

<sup>77</sup> See *ibid.*, at para. 7.8.

<sup>78</sup> See WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, note 71, above, at para. 105.

<sup>79</sup> See *id.*

<sup>80</sup> Emphasis added. See *ibid.*, at para. 105.

<sup>81</sup> See *ibid.*, at para. 147.

<sup>82</sup> See *ibid.*, at paras 84–86.

<sup>83</sup> See *ibid.*, at para. 108.

<sup>84</sup> See *id.*

authority to determine “the need for information and advice”, the “acceptability and relevancy of information”, and what “weight to ascribe to that information or advice” or to “conclude no weight at all should be given to what has been received”.<sup>85</sup>

Thirdly, the DSU authorizes Panels to depart from or add to the Working Procedures, and in effect develop their own Working Procedures.<sup>86</sup> The Appellate Body noted Article XII:1 of the DSU granted Panels this power. Also, Article XII:2 ensures that Panels have “sufficient flexibility” to “ensure high-quality” reports.<sup>87</sup>

Fourthly, the Appellate Body stated that “seek” as used in Article XI of the DSU was interpreted too narrowly by the Panel.<sup>88</sup> A Panel may “grant permission to file a Statement of brief, subject to such conditions as it deems appropriate”.<sup>89</sup> Also, a Panel’s discretion should include consultation with parties to the dispute.<sup>90</sup> Effectively, this eliminates the distinction between “requested” and “non-requested” information.<sup>91</sup>

Since the *US—Shrimp/Turtle* dispute, the Appellate Body has confirmed its authority to accept *amicus curiae* to submissions. In the *British Steel* case, the Appellate Body noted “we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent to and useful to do so”.<sup>92</sup> The Appellate Body explained it has “no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO”.<sup>93</sup> Furthermore it noted “Individuals and organizations, which are not Members of the WTO, have no legal right to make submission to or to be heard by the Appellate Body”.<sup>94</sup>

Ultimately in this dispute, the Appellate Body did not consider briefs submitted by the American Iron and Steel Institute and the Specialty Steel Industry of North America.<sup>95</sup> In favour of the submissions, the United States argued *US—Shrimp/Turtle* explains the DSU provides panels “ample and extensive authority to undertake and control the process”.<sup>96</sup> As respondent, the European Community argued Article XIII of the DSU did not apply to the Appellate Body and this provision was limited to factual information and not legal arguments.<sup>97</sup> The Appellate Body concluded it may consider *amicus curiae* submission on appeal and it has the “legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal”.<sup>98</sup>

<sup>85</sup> See *ibid.*, at para. 108.

<sup>86</sup> See *ibid.*, at para. 109.

<sup>87</sup> See *id.*

<sup>88</sup> See *ibid.*, at para. 111.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See Appellate Body, *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 (15 November 2000) <<http://www.wto.org/wto/dispute/distab.htm>>, para. 42.

<sup>93</sup> See *ibid.* at para. 41.

<sup>94</sup> See *id.*

<sup>95</sup> See *ibid.*, at paras 41 and 36.

<sup>96</sup> See *ibid.*, at para. 38.

<sup>97</sup> See *ibid.*, at para. 36.

<sup>98</sup> See *ibid.*, at para. 39.

Reported in March of 2001, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* provided more controversy to the *amicus curiae* submission debate. In this dispute the Appellate Body permitted the submission of *amicus curiae*.<sup>99</sup> Previously, the Panel had received five submissions from NGOs and it took two of the submissions into account.<sup>100</sup> Next, the Appellate Body went further than previous disputes and made an open call for submissions from interested parties. It drafted a set of rules for the submissions, which were to be used solely in the *European Communities Asbestos* dispute.<sup>101</sup> The rules provided precise regulation of the application for leave to file a brief and for the actual written brief.<sup>102</sup> These procedural rules were titled the Additional Procedure.<sup>103</sup> The Appellate Body used this regulation as a strict measure to decide which submissions it would accept and deny.

The Appellate Body received 17 applications and it accepted none of them.<sup>104</sup> The Appellate Body noted six of the 17 applications came in after the deadline set in the Additional Procedure.<sup>105</sup> Next the Appellate Body reported of the 11 remaining applications, it denied the “leave to file a written brief” for all of them.<sup>106</sup> It explained “Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.”<sup>107</sup>

This recent development in WTO disputes suggests there is a great deal of interest for NGOs to participate in WTO disputes. Specifically, *European Communities—Measures Affecting Asbestos* demonstrates the Appellate Body, dispute Panels, and NGOs are articulating a pro-*amicus curiae* stance.

This dispute illuminates four important points. First, the Appellate Body did not find it lacked the authority to receive submissions from *amicus curiae*. This effectively suggests, like with previous disputes, the Appellate Body does have the right to accept submissions from *amicus curiae*. This demonstrates non-state actors do have a role in WTO disputes. This role, however, is not guaranteed by WTO treaty. This role has been created by the Appellate Body in disputes such as *US—Shrimp/Turtle*, *British steel case*, and *European Communities—Measures Affecting Asbestos*.

<sup>99</sup> See *Briefs in a twist*, Economist, 9 December 2000.

<sup>100</sup> See WTO, Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para. 50.

<sup>101</sup> See WTO, Appellate Body, *Communication from the Appellate Body*, WT/DS135/9, 8 November 2000.

<sup>102</sup> The Appellate Body explained these rules were enacted in the “interests of fairness and orderly procedure” with authority from Rule 16(1) of the Working Procedures for Appellate Review. The standard created by the Appellate Body was “any person, whether natural or legal, other than a party or a third party to this dispute” may file a written brief. For the application for leave, applicants needed to: limit the application to 3 typed pages, describe the applicant and its general objectives, identify specific issues of law, explain why it is desirable to grant the leave, and disclose any relationship with the parties. The Appellate Body notes it would “review and consider each applicant for leave to file.” The actual brief was limited to 20 typed pages and the requirement to make a “precise statement, strictly limited to legal arguments.” See *ibid.*

<sup>103</sup> See *ibid.*

<sup>104</sup> See *Briefs in a twist*.

<sup>105</sup> See WTO, *European Communities—Measures Affecting Asbestos*, at para. 55.

<sup>106</sup> See *ibid.*, at para. 56.

<sup>107</sup> See *ibid.*, at para. 56.

Second, dispute panels have proceeded to accept non-state actor submissions. The Panel in *European Communities—Measures Affecting Asbestos* received five submissions and it took two into account.<sup>108</sup> With this, NGOs have been afforded the right to participate at both the Panel and Appellate level.

Third when it finds it necessary, the Appellate Body will use its authority vested in the *Appellate Body Working Procedures* to draft and enact specific procedures to accept non-state actor submissions. It is important to note the Appellate Body has only done this on one occasion. Likewise, it firmly and repeatedly noted the procedure was limited to the dispute at hand.<sup>109</sup> The Additional Procedure does not extend to other disputes. Regardless, the Appellate Body has taken steps beyond recognizing it may accept *amicus curiae* submissions, and it has taken affirmative procedural measures to guarantee the participation of these non-state actor submissions.

Fourth, there is much enthusiasm amongst NGOs to submit their legal perspectives in WTO disputes. Initially, 13 NGOs submitted their interest to participate in the Appellate Body proceedings; these submissions were not in accordance with the Additional Procedure.<sup>110</sup> An additional six NGOs submissions were received, but they failed to meet the Additional Procedure deadline.<sup>111</sup> The Appellate Body noted it reviewed a total of 11 submissions.<sup>112</sup> In sum, a total of more than 25 NGOs attempted to participate in the dispute. This set of NGOs illustrates a diverse set of actors. They represent a variety of interests, including environmental and business. These submissions came from a variety of nations including: United States, Swaziland, South Africa, United Kingdom, Portugal, Sri Lanka, Korea, Senegal, Canada, El Salvador, Colombia, Japan, India, Belgium, Argentina, Australia, Switzerland, France and the Netherlands.

<sup>108</sup> See *ibid.*, at para. 50.

<sup>109</sup> WTO, Appellate Body, *Communication from the Appellate Body*.

<sup>110</sup> These NGOs include: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianto Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métallos (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan). See WTO, *European Communities—Measures Affecting Asbestos*, at para. 53.

<sup>111</sup> These NGOs include: Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States). See *ibid.*, at para. 55.

<sup>112</sup> These submissions include: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland). See *ibid.*, at para. 55.

With such avid support from the Appellate Body and mass interest from a variety of NGOs, the *European Communities—Measures Affecting Asbestos* dispute suggests there is an interest amongst WTO observers and the WTO to mold a space for non-state actor participation in WTO disputes. The nexus between the concerns of non-state actors and international trade has moved these 25 NGOs to more actively participate in future WTO disputes. By enacting the Additional Procedure, the Appellate Body has recognized this nexus and slowly is incorporating non-state actors into the dispute process.

### 3. *Reasons Against Amicus curiae Participation*

Member States heavily protested the Appellate Body's interpretation of the DSU permitting *amicus curiae* briefs, NGOs submission of the briefs, and the United States' incorporation of the sections of the *amicus curiae* brief into its own submission. The Panel in the *US—Shrimp/Turtle* case reasoned it had not requested the information in the briefs under Article XIII, thus it would not take the information into consideration.<sup>113</sup> Once the Panel denied the submission, it stated that any party/Member was free to "put forward" the documents as part of their submission.<sup>114</sup> The United States then incorporated the "statement of facts" section of the *amicus curiae* brief from CMC and CIEL as an exhibit.<sup>115</sup> India argued the submission was improper because it was done during the second substantive meeting of the Panel which was intended for rebuttals.<sup>116</sup> Malaysia and Thailand claimed that the Panel should not accept the *amicus curiae* brief, because there is no mention of such a power in Article XIII of the DSU.<sup>117</sup>

At a meeting of the DSB, held after the publication of the Appellate Body's report in the *US—Shrimp/Turtle* case, many Member States objected to the ruling on a Panel's power to accept *amicus curiae* briefs.<sup>118</sup> Thailand and Pakistan asserted that Members should decide NGOs' involvement in the dispute settlement process.<sup>119</sup> They argued that the Appellate Body has only a judicial function and is not a creator nor negotiator of new WTO rights. *Amicus curiae* submissions, they argued, violated Article XIX:2 of the DSU, which prohibit Panels from creating or diminishing rights in the WTO agreement.<sup>120</sup> The WTO agreement did not include the right to file *amicus curiae* briefs. By deciding to permit *amicus curiae* briefs, the Appellate Body proceeded to diminish the rights of Members.<sup>121</sup> Malaysia explained that there should not have been

<sup>113</sup> See WTO Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, note 71, above, at para. 155.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *ibid.*, at paras 157, 158.

<sup>118</sup> WTO, Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/50, 14 December 1998 (23 March 2000) <<http://www.wto.org/wto/ddf/ep/public.html>>.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*



an *amicus curiae* submitted before the Appellate Body, if there was no *amicus curiae* before the Panel.<sup>122</sup> Malaysia argued the Appellate Body decided over issues of fact by receiving the *amicus curiae* briefs. Japan argued that *amicus curiae* briefs would add to the workload of Panels and parties.<sup>123</sup> In sum, there are strong legal arguments against permitting *amicus curiae* submission. The strongest revolves around the creation of a new right. It remains unclear whether permitting *amicus curiae* submissions creates a new right for non-State actors and nullifies the right of Members to solely participate in disputes.

#### 4. *Contents and Utility of Amicus curiae Briefs in the Shrimp/Turtle Dispute*

The nexus between international trade and environmental protection pushed CIEL and WWF to submit *amicus curiae* briefs. The two *amicus curiae* briefs submitted in the *Shrimp/Turtle* case presented a legal voice representing international environmental concerns. The briefs provided important information concerning technical issues, global concerns not necessarily tied to one State, and the concerns of civil society. The two briefs made arguments supporting regulation of the international environment. The legal arguments in the briefs contained three objectives: (1) support of regulation of the international environment; (2) permitting *amicus curiae* submission in WTO disputes; and (3) offering scientific evidence and environmental perspectives to the Appellate Body. The briefs offered legal arguments interpreting Article XX, customary international law, multilateral obligations, and international treaty obligations. Also, the briefs pushed for *amicus curiae* submissions as a way for civil society to voice its concerns before the WTO dispute mechanism. The submissions also provided scientific and environmental justifications for using TEDs.

An analysis of the *amicus curiae* brief filed by CIEL and the WWF illuminates how an *amicus curiae* brief can articulate the nexus between trade and the concerns of non-State actors. The briefs provide information and evidence relevant to the dispute. Particularly, they provide an international environmental focus, scientific justification, and analysis of Article XX. The briefs present legal arguments crafted to support the important concerns, which are not necessarily tied to one State. These concerns are observant of international trade.

In this instance environmental concerns were intimately tied to the dispute. The United States' measure in dispute had an environmental objective. This was protecting endangered sea turtles.<sup>124</sup> Here the 11 NGOs sought to keep the United States' measure intact, yet their concerns were more environmental and not domestic as compared to the United States' interest. More importantly, the perspective of these

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

<sup>124</sup> The United States prohibited imports of shrimp and shrimp products by methods not using TEDs. The United States sought to keep the measure. Interests not related to the US government, outside the United States, and perhaps not in dialogue with the United States sought to influence the dispute.

interests were important to a dispute. Their concerns were global, thus an international dispute settlement fora should hear them. Also, their objective—conditioning trade to protect the environment—was of extreme importance for a Panel settling a dispute about international trade.

Both briefs had the basic goals of providing information which was relevant to the dispute and providing legal interpretation supporting the goals of international environmental law. The CIEL brief had two main purposes: to provide scientific information and to provide “legal arguments supporting interpretation of WTO rules in light of international environmental law principles for sustainable development”.<sup>125</sup> The WWF brief had the aim “to ensure that the WTO Dispute Settlement System has before it both the scientific and other technical facts relevant to the conservation of sea turtles; and the relevant international, regional and national law and policy governing the conservation of sea turtles”.

##### 5. *NGOs Explain the Viability and Legal Utility of Amicus curiae Submissions*

CIEL’s *amicus curiae* brief offered legal interpretations of the DSU supporting submission of such briefs. By doing this CIEL suggested to the WTO a way to hear the voices of NGOs. The WTO could examine legal arguments and evidence from sources other than States. Similarly, this offered NGOs a new method of legal dialogue with the WTO. In its *Motion to Submit the Amicus curiae Brief to the Panel*, CIEL provided the Panel with reasons why the brief should be accepted.<sup>126</sup> First, the brief offered technical, scientific and legal information critical to the Panel’s deliberations. Next, CIEL pointed to the growing use of *amicus curiae* briefs in public international law and multilateral organizations.<sup>127</sup> Accepting *amicus curiae* briefs would improve public participation in the WTO and improve the WTO dispute settlement process.<sup>128</sup>

In its brief CIEL argued that the scientific and technical complexity of the dispute justified giving the United States deference to its factual and scientific determinations used in adopting the measures to protect sea turtles. WTO Panels are not versed in the expertise necessary to analyse the complex scientific data used in adopting the United States’ measure.<sup>129</sup> This argument was made in order to stress the complexity of the

<sup>125</sup> See CIEL, *An introduction: The Shrimp/Turtle Dispute and CIEL’s Amicus curiae Brief*, (13 April 2000) <<http://www.igc.org/ciel/shptur.html>>.

<sup>126</sup> See CIEL, *Motion to Submit Amicus curiae Brief to the Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 17 September 1997 (13 April 2000) <<http://www.igc.apc.org/ciel/second.html>>.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> In its brief submitted to the Appellate Body, the WWF argued the Panel misunderstood the roles of *amicus curiae* briefs. The WWF stressed *amicus curiae* could provide factual and legal information not offered by any of the parties, information from an expert source, and information “as to the broader implication of decisions beyond the immediate interests of the parties in the dispute, particularly where, as in the present case, a decision may have a significant impact on matters of public interest.” At the international level, there is increasing recognition of the value of allowing tribunals to take account of the information made available by non-parties to proceedings. To date this trend is particularly evident in human rights tribunals and in international criminal tribunals. See WWF, at <<http://panda.org/resources/sustainability/wto-acb/wto2.htm>> (22 March 2001).

issue at hand. CIEL's objective was to avoid a trade tribunal from making a haphazard and quick decision concerning scientific issues. Also, this argument provided a justification for CIEL's participation as an *amicus curiae*.

#### 6. NGOs Express "International Environmental Interests"

Next, CIEL provided legal interpretations of GATT Article XX and international law principles supporting sustainable development. The WWF claimed the Panel's interpretation of the Preamble of the WTO Agreement failed to understand sustainable development. These interpretations stressed multilateral obligations of the United States, other than the WTO; a broad interpretation of the "General Exception" of Article XX of the GATT; and interpretations of why the United States measure meets Article XX's standards.

Article XX(g), "General Exceptions", excludes certain domestic measures from GATT obligations. Exclusions are permitted in "conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" so long as the measures are "not applied in a manner" which is "arbitrary", do not give rise to "unjustifiable discrimination between countries where the same conditions prevail", or a "disguised restriction on international trade".<sup>130</sup> CIEL stressed that Article XX should be read within the spirit of sustainable development. And, sustainable development has international legal support.<sup>131</sup> These arguments voice the concerns of international environmental protection. The concerns are not necessarily tied to one State or WTO Member. Here, CIEL demonstrated how the legal issues before the dispute should be interpreted within the context of international legal environmental protection. This interest was not necessarily tied to the interest of one Member State. Similarly, without *amicus curiae* submissions there was no avenue to guarantee the expression of this international concern. The international nature of this concern differs from the United States as respondent or the claimant's domestic interests.

CIEL provided an interpretation of Article XX, then it showed the United States measure met the standards of this WTO provision. CIEL argued the measure was neither arbitrary nor constituted a disguised restriction on international trade.<sup>132</sup> They argued the measure met the Article XX(g) standard of "exhaustible natural resource", "relating to" conservation, and "in conjunction with restrictions on domestic production or consumption".

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<sup>130</sup> See *id.*

<sup>131</sup> See CIEL, *Motion to Submit Amicus curiae Brief to the Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, note 117, above.

<sup>132</sup> See *id.*

#### IV. CONCLUSION

The nexus between social concerns, business interests and international trade has moved the WTO dispute mechanism to gradually open up to the participation of non-State actors. This movement has occurred in the short period of five years. The WTO should prepare for the call for increased participation in WTO disputes from businesses and NGOs from around the world. The WTO is focused on “world trade”, accordingly it should not limit its objective to the concerns articulated by Member delegations and single States. The decisions made by the DSB, WTO dispute Panels, and the Appellate Body will affect millions of people and business interests around the world.

A dispute mechanism which recognizes and incorporates these private concerns promises to provide a more holistic and “real world” resolution to trade disputes. Without such recognition, Panels may easily overlook how legal decisions regarding WTO obligations affect civil society. Environmental, labour and business analysis may fail to appear in the briefs of Member States. International trade affects a variety of non-State actors, accordingly these voices should be articulated before the WTO disputes.

##### A. PRIVATE COUNSEL REPRESENTING MEMBER STATES

For private counsel representing Member States, the WTO should provide rules regarding potential conflict of interests between counsel and Member States. With private counsel specialized in representing Member States, these attorneys should work within a system which guarantees confidentiality between attorneys and foreign government officials. Similarly, private counsel should operate with rules which secure fair and equitable representation of client-States, when private counsel has more than one client-State. Currently, government attorneys representing a Member State work with a representative of the government. When private counsel represents a government, though, their commitment or allegiance to the government may be more dubious.

The use of private counsel representing Member States increases the level of participation of developing nations in the WTO dispute mechanism. Smaller nations with limited budgets or limited need for trade lawyers will benefit from private attorneys specialized in trade law. Without such specialized counsel, many WTO Members may be unable to assert their WTO rights to challenge other Members and defend against challenges from other Members. Currently, many developing nations have limited human capital and financial resources focused on the WTO. The availability of specialized private counsel will provide all WTO Members with a method to secure their DSU and WTO agreement rights.

##### B. PRIVATE COUNSEL ASSISTING GOVERNMENTS

The settlement of trade disputes will benefit from the indirect participation of private counsel. Businesses will use these attorneys in order to ensure their interests

are voiced before Member delegations participating in WTO disputes. This participation will improve dispute resolution by adding vital facts and legal analysis. Private firms will be able to analyse how trade dispute resolution affects business interests. In this respect, trade resolution benefits from the articulation of the concerns of civil society. WTO Member delegations should provide mechanisms to foster co-operation with the legal counsel of private firms. Without such co-operation there is no guarantee the concerns of businesses and NGOs will be incorporated into WTO dispute resolution.

### C. *AMICUS CURIAE* PARTICIPATION

WTO dispute resolution will greatly benefit from the increased use of *amicus curiae* participation. Its greatest benefit will be the incorporation of non-State actors into the WTO dispute mechanism. Currently, the WTO has no legal instrument to hear the concerns of non-State actors in resolving trade disputes. Similarly, there is no guarantee Member States will incorporate the views of non-State actors. Some Members such as the United States and the European Union do have legal instruments to incorporate private party participation.<sup>133</sup> There is no guarantee though that these non-State concerns will be examined by WTO Panels. The increased use of *amicus curiae* participation promises to incorporate the concerns of civil society in dispute resolution.

The *US—Shrimp/Turtle* case illustrates the significance of *amicus curiae* participation. Specifically, the *amicus curiae* in this dispute provided important legal analysis and research which was not limited to the perspective of one State. The NGOs/*amicus curiae* provided legal analysis from the perspective of international environmental protection, multilateral obligations, and global concerns. These views are important because they stress the “global” nature of the WTO. Without *amicus curiae* participation there is no guarantee Members will submit these issues to a Panel or that a Panel will take these issues into account.

Because WTO dispute resolution will affect millions of people and businesses around the world, WTO panels should proceed to appreciate the legal perspectives of these non-State actors. Without such incorporation, the WTO dispute mechanism is limited to the participation of Members, i.e., States.

Institutional issues regarding *amicus curiae* participation need to be resolved. Given the WTO’s limited resources, it would be contradictory to accept all *amicus curiae* briefs. This may produce too much work for the DSB and Dispute Panels. Accordingly, the DSB could develop a way to choose or limit which *amicus curiae* may submit briefs. The DSB could also provide Panels with the discretionary authority to ask for *amicus curiae* briefs. Additionally, because *amicus curiae* briefs provide additional legal analysis, they often serve as a way to reduce workloads of tribunals.

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<sup>133</sup> See note 22, above.

In sum, the WTO dispute mechanism has demonstrated a gradual opening up to the participation of non-State actors. The WTO should proceed to implement measures to secure and best benefit from this participation. The nexus between the concerns of non-State actors and international trade will undoubtedly move NGOs and businesses to more actively participate in future WTO disputes.