

Letters from Friends: The Admissibility of *Amicus Curiae* Briefs in WTO Dispute Settlement

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Abstract: A popular—though heavily disputed—device to exert influence in WTO Dispute Settlement proceedings is the *amicus curiae* brief by which non-State actors try to communicate their views to a Panel or the Appellate Body. The underlying idea of *amicus curiae* briefs dates back to Roman times and was subsequently developed mainly in common law jurisdictions like the United States. Under WTO law, the possibility of submitting those briefs, however, is not mentioned in the Understanding on Rules and Procedures Governing the Settlement of Disputes. The aim of this article is thus to determine the admissibility of unsolicited *amicus curiae* briefs in WTO Dispute Settlement proceedings. Following an overview of the relevant case law, it will be shown that the Dispute Settlement Understanding provides for a legal basis of *amicus curiae* briefs in Panel proceedings. Subsequently, the article will try to establish the admissibility of, and a legal basis for, the submission of these briefs in Appellate Body proceedings. In the final part, the article will discuss some steps taken by both the Appellate Body and some WTO Members in order to clarify the issue of *amicus curiae* briefs as well as the likelihood of legislative changes in this field of law by the proposed reform of the DSU. In this respect, attention will also be directed to the European Union's attitude towards the submission of *amicus curiae* briefs in both Panel and Appellate Body proceedings.

A. Introduction

By virtue of the Dispute Settlement Understanding,¹ access to the WTO dispute settlement process is limited to states which are Members of the WTO.² Under the WTO Agreements this access is not available to individuals or international organisations, whether governmental or non-governmental.³ Environmental, labour and human rights groups, however, have a vital interest in the development of global trade, since trade law greatly affects these non-commercial issues.⁴ They therefore closely observe and seek to influence the dispute settlement process of the WTO. A popular—though heavily disputed—device to exert such influence is the *amicus curiae* brief by which non-State actors try to communicate their views to a Panel or the Appellate Body in WTO Dispute Settlement proceedings. The possibility of submitting those briefs, however, is not mentioned in the DSU.

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¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU).

² *United States – Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R para 101 (hereinafter *Shrimp/Turtle*).

³ *idem*.

⁴ cf E Hernández-López 'Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes' (2001) 35(3) *Journal of World Trade* 469, 471.

The basic concept of *amicus curiae* briefs is that a person or entity who is not a party to the dispute may submit an unsolicited report to the court in which it may articulate its own view on legal questions and inform the court about facts in order to facilitate the court's ability to decide the case.⁵ This concept is not familiar to all legal systems.⁶ The underlying idea of *amicus curiae* briefs dates back to Roman times and was subsequently developed mainly in common law jurisdictions like the United States.⁷

B. Admissibility of *amicus curiae* briefs

After an examination of the relevant WTO case law on *amicus curiae* briefs this part of the article will try to draw two conclusions from the case law: (i) *amicus curiae* briefs are admissible in Panel proceedings; and (ii) *amicus curiae* briefs are admissible in Appellate Body proceedings.

I. Admissibility of *amicus curiae* briefs in Panel proceedings

The history of *amicus curiae* briefs in WTO law started with the *Shrimp/Turtle* case,⁸ which involved an import ban on certain shrimp products by the United States. In the course of the proceedings, the Panel received two submissions from environmental organisations. Having noted that, pursuant to Article 13 DSU, "the initiative to seek information and to select the source of information rests with the Panel",⁹ the Panel concluded that accepting unsolicited submissions from NGOs was incompatible with the DSU and therefore rejected the briefs thus submitted.¹⁰ The Panel, however, allowed the parties to the dispute to put forward these documents as part of their own submissions.¹¹

On appeal, the Appellate Body rejected the Panel's reading of Article 13 DSU as "unnecessarily formal and technical in nature".¹² It recalled that Article 13 DSU enabled Panels to seek information and advice as they deem appropriate in a particular case.¹³ According to the Appellate Body, this authority to seek information does not include a prohibition to accept information which has been submitted without request of a Panel.¹⁴ On the contrary, Articles 12 and 13 DSU, read together, provided a Panel with "the discretionary authority either to accept and consider or to reject information and advice

⁵ D Shelton 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 American Journal of International Law 611.

⁶ Note by the Editors 'Issues of *Amicus Curiae* Submissions' (2000) 3 Journal of International Economic Law 701, 704.

⁷ P Ala'i 'Judicial Lobbying at the WTO: The Debate over the Use of *Amicus Curiae* Briefs and the US Experience' (2000) 24 Fordham International Law Journal 62, 84-5; G Marceau and M Stillwell 'Practical Suggestions for *Amicus Curiae* Briefs Before WTO Adjudicating Bodies' (2001) 4 Journal of International Economic Law 155.

⁸ *United States – Shrimp/Turtle* WT/DS58 (n 2).

⁹ *ibid*—Report of the Panel (15 May 1998) WT/DS58/R para 7.8.

¹⁰ *idem*.

¹¹ *idem*.

¹² *United States – Shrimp/Turtle (Appellate Body)* (n 2) para 107.

¹³ *ibid* para 103.

¹⁴ *ibid* para 108.

submitted to it, *whether requested by a panel or not*" (emphasis original).¹⁵ As to the Panel's decision to allow the parties to include the *amicus curiae* briefs in their own submissions, the Appellate Body concluded that this decision was without legal error.¹⁶

In subsequent cases both Panels¹⁷ and the Appellate Body¹⁸ confirmed that *amicus curiae* briefs were admissible in Panel proceedings. These decisions, however, do not prove the admissibility of *amicus curiae* briefs¹⁹ as Appellate Body reports are neither binding interpretations of the WTO Agreements nor precedents that are binding in subsequent cases.²⁰ This conclusion is supported by Article IX:2 of the WTO Agreement according to which the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreements. Although a departure by the Appellate Body from its previous decisions seems unlikely,²¹ one needs to determine the legal basis in the WTO Agreements for accepting *amicus curiae* briefs in Panel proceedings, and—if such a basis exists—whether it complies with the other provisions of the WTO Agreements.

1. Legal basis

After the Appellate Body's decision in the *Shrimp/Turtle* case there were still uncertainties as to the legal basis for the admissibility of *amicus curiae* briefs in Panel proceedings. The suggestions that have insofar been made include Article 13.1 DSU and Articles 12 and 13 DSU, read together.

a) Article 13.1 DSU

In the part relevant to this question Article 13.1 DSU provides that a "panel shall have the right to seek information [...] from any individual or body which it deems appropriate" (emphasis added). The question is, thus, whether a right to seek information also includes a right to accept unsolicited submissions. Some commentators understood the decision in the *Shrimp/Turtle* case so as to refer solely to Article 13.1 DSU which was therefore considered the legal basis.²² A similar conclusion was drawn by the Compliance Panel in the *Australia – Salmon* case where it said that it considered the information submitted to it "pursuant to the authority granted to the Panel under Article 13.1 of the DSU."²³ Pursuant to Article 3.2 DSU, the WTO Agreements have to be interpreted in accordance with the customary rules of interpretation of public international law. Insofar, it is acknowledged that the principles of

¹⁵ *idem*.

¹⁶ *ibid* para 109.

¹⁷ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom—Report of the Panel* (23 December 1999) WT/DS138/R para 6.3 (hereinafter *Carbon Steel*).

¹⁸ *European Communities – Trade Description of Sardines—Report of the Appellate Body* (26 September 2002) WT/DS231/AB/R para 156 (hereinafter *Sardines*).

¹⁹ This conclusion, however, was apparently drawn by AE Appleton 'Shrimp/Turtle: Untangling the Nets' (1999) 2 *Journal of International Economic Law* 477, 481.

²⁰ M Matsushita et al *The World Trade Organization* (Oxford University Press Oxford 2002) p 25.

²¹ W Weiß and C Herrmann *Welthandelsrecht* (CH Beck München 2003) para 337.

²² Matsushita (n 20) p 37.

²³ *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada—Report of the Panel* (18 February 2000) WT/DS18/RW para 7.8.

interpretation of treaties set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties apply to the interpretation of WTO provisions.²⁴ Thus, by virtue of Article 31(1) VCLT, the ordinary meaning of Article 13.1 DSU has to be examined. In this context, some WTO Members had pointed out that “[t]he New Shorter Oxford English Dictionary gives the meaning of ‘seek’ as ‘ask for, demand, request’ a thing or a person.”²⁵ Thus Panels have the right to request information. The wording of Article 13.1 DSU can, however, not be read so as to allow a Panel to accept any information submitted by individuals or organisations. Therefore, Article 13.1 DSU cannot be considered a legal basis for accepting unsolicited *amicus curiae* briefs in Panel proceedings.

b) Articles 12 and 13 read together

In the *Shrimp/Turtle* case the Appellate Body stated that “[t]he thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel [...] ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.”²⁶ It was therefore suggested that the Appellate Body considered Articles 12 and 13, read together, as the legal basis for accepting *amicus curiae* briefs.²⁷ Pursuant to Article 12.2 DSU, Panel procedures should provide sufficient flexibility so as to ensure high-quality Panel reports. Furthermore, by virtue of Article 12.1 DSU Panels are authorised to depart from their Working Procedures. Hence, the DSU effectively authorises a Panel to adopt appropriate procedures in order to “make an objective assessment of the matter before it”.²⁸ It is therefore submitted that Articles 12 and 13, read together, establish the legal basis for the admissibility of *amicus curiae* briefs in Panel proceedings. This reading of Articles 12 and 13 together is also supported by Article 31(1) VCLT according to which the context of a legal provision has to be taken into account whilst interpreting this provision.

2. Compliance with other WTO provisions

Having found the legal basis for *amicus curiae* briefs in Panel proceedings, the compliance of these briefs with other WTO provisions needs to be established in the following. After the Appellate Body’s ruling in the *Shrimp/Turtle* case there were allegations that accepting *amicus curiae* briefs in Panel proceedings would violate Articles 19.2 and 10.2 DSU. These allegations will therefore need to be dealt with in turn.

²⁴ *United States – Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body* (20 May 1996) WT/DS2/AB/R p 17.

²⁵ DSB Special Session—Negotiations on the Dispute Settlement Understanding: Proposals on DSU by Cuba et al (7 October 2002) TN/DS/W/18 p 4.

²⁶ *United States – Shrimp/Turtle (Appellate Body)* (n 2) para 106.

²⁷ R Howse ‘Membership and its Privileges: the WTO, Civil Society, and the *Amicus* Brief Controversy’ (2003) 9 *European Law Journal* 496, 498; see also GC Umbricht ‘An “*Amicus Curiae* Brief” on *Amicus Curiae* Briefs at the WTO’ (2001) 4 *Journal of International Economic Law* 773, 784.

²⁸ Article 11 DSU.

a) Violation of Article 19.2 DSU

First, it was said that accepting *amicus curiae* briefs from non-Members would effectively diminish the rights of Members under the covered agreements contrary to Article 19.2 DSU. This was so because non-Members were granted a right to make submissions that Members did not possess.²⁹ It needs to be recalled, however, that—as the Appellate Body had made clear on several occasions—the submission of *amicus curiae* briefs is not a legal right enjoyed by non-Members.³⁰ Rather, these briefs are devices within the authority and control of the Panel that can provide it with additional and relevant information, and thus can be used to assist the Panel to resolve the dispute before it.³¹ Furthermore, Members are not treated differently in comparison to non-Members as the former may also submit *amicus curiae* briefs.³² Thus, Members' rights are not diminished contrary to Article 19.2 DSU by allowing non-Members to submit *amicus curiae* briefs.

b) Violation of Article 10.2 DSU

Another—but related—question is whether allowing WTO Members to file *amicus curiae* briefs with a Panel violates Article 10.2 DSU as Members could circumvent the requirements to become a third party by submitting *amicus curiae* briefs instead.³³ Here, once again, it needs to be recalled that the submission of these briefs is not a right a Member enjoys.³⁴ Therefore, a Panel is under no legal duty to accept, let alone to consider, *amicus curiae* briefs submitted by Members. The right of a Member to participate as a third party in Panel proceedings is completely distinct and independent so that the submission of these briefs by Members cannot violate Article 10.2 DSU.

3. Result

It can thus be concluded that Articles 12 and 13 DSU, read together, provide a legal basis for the admissibility of *amicus curiae* briefs in Panel proceedings and that accepting these briefs does not violate any provision of the WTO Agreements.

²⁹ DSB Minutes of Meeting (14 December 1998) WT/DSB/M/50 p 5.

³⁰ *European Communities – Sardines (Appellate Body)* (n 18) para 166; as Ala'i (n 7) p 85 points out, this is in line with the approach taken by common law jurisdictions as the United States.

³¹ DP Steger 'Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience' in A von Bogdandy et al (eds) *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer The Hague 2002) 419, 422.

³² *European Communities – Sardines (Appellate Body)* (n 18) para 164.

³³ General Council Minutes of Meeting (22 November 2000) WT/GC/M/60 para 27.

³⁴ *European Communities – Sardines (Appellate Body)* (n 18) para 167.

II. Admissibility of *amicus curiae* briefs in Appellate Body proceedings

Whereas there appears to be emerging consensus on the admissibility of *amicus curiae* briefs in Panel proceedings,³⁵ the same issue with regard to Appellate Body proceedings is still highly controversial.

In the course of the proceedings of the *Carbon Steel* case,³⁶ the Appellate Body received two *amicus curiae* briefs. As Articles 12 and 13 DSU do not apply to Appellate Body proceedings, the question arose whether unsolicited *amicus curiae* briefs were admissible in these proceedings. In considering this matter, the Appellate Body acknowledged that “nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal.”³⁷ On the other hand, the Appellate Body found that “neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs.”³⁸ It further opined that it was clear from Article 17.9 DSU that the Appellate Body had broad authority to adopt procedural rules which do not conflict with provisions of the DSU or the covered agreements.³⁹ The Appellate Body therefore concluded that it had “the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which [it found] it pertinent and useful to do so.”⁴⁰ On the other hand, the Appellate Body stressed that only Members had a legal right to participate in WTO proceedings so that therefore it had no legal duty to accept or consider unsolicited *amicus curiae* briefs from individuals or organisations, which are not Members of the WTO.⁴¹

Another interesting question concerning the admissibility of *amicus curiae* briefs in Appellate Body proceedings arose in the *Sardines* case.⁴² In the course of the proceedings two briefs were submitted to the Appellate Body—one by a private individual, and the other by the Kingdom of Morocco, a WTO Member. Thus, the question was whether WTO Members were also entitled to file *amicus curiae* briefs with the Appellate Body. Recalling its reasoning in the *Carbon Steel* case, the Appellate Body first found that it had the authority to accept the brief filed by a private individual, and to consider it.⁴³ During the course of the proceedings, Peru—the Appellee in this case—argued that an acceptance of the *amicus curiae* brief submitted by Morocco would circumvent Articles 10.2 and 17.4—the rules in the DSU setting out the conditions under which WTO Members can participate as third parties in Dispute Settlement proceedings.⁴⁴ By taking a similar approach to the one used in the *Carbon Steel* case, the Appellate Body reasoned that “[j]ust because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not [...] lead inevitably to the conclusion that participation by a Member as

³⁵ *Ala'i* (n 7) p 83.

³⁶ *United States – Carbon Steel* (n 17).

³⁷ *ibid*—*Report of the Appellate Body* (12 May 2000) WT/DS138/AB/R para 39.

³⁸ *idem*.

³⁹ *idem*.

⁴⁰ *ibid* para 42; this conclusion is also supported by Article 3.2 DSU according to which the Dispute Settlement system also serves to clarify the law, cf Howse (n 27) p 501.

⁴¹ *ibid* paras 40-41.

⁴² *European Communities – Sardines (Appellate Body)* (n 18).

⁴³ *ibid* para 160.

⁴⁴ *ibid* para 65.

an *amicus curiae* is prohibited.”⁴⁵ The Appellate Body therefore concluded that, having the authority to receive an *amicus curiae* brief from a private individual, *a fortiori* it was entitled to accept such a brief from a WTO Member.⁴⁶ It emphasised, however, that participation as *amici* in WTO appellate proceedings was not a legal right so that the Appellate Body had no duty to accept any *amicus curiae* brief. Based on its legal authority to regulate its own procedures pursuant to Article 17.9 DSU, it might nevertheless choose to do so.⁴⁷ The Appellate Body further stressed that acceptance of *amicus curiae* briefs was purely discretionary so that it could reject a brief—e.g. on the ground of late submission—which would interfere with the “fair, prompt and effective resolution of trade disputes.”⁴⁸ In the case at hand the Appellate Body finally recalled that Article 17.6 DSU limited an appeal to issues of law so that the factual information provided in Morocco’s submission was not pertinent in this appeal.⁴⁹

Against the background of the case law, it needs to be determined, once again, whether there is a legal basis for accepting *amicus curiae* briefs in Appellate Body proceedings, and whether the acceptance of the briefs does not contravene any provisions of WTO law.

1. Legal basis

a) No need for an explicit provision

As has been seen, the Appellate Body acknowledged in the *Carbon Steel* case that there was no explicit provision in the DSU allowing it to accept and consider *amicus curiae* briefs.⁵⁰ Nevertheless, it found that, as long as there was no prohibition to that effect, it had the authority to accept and consider these briefs. The Appellate Body’s approach that permits conduct which is not explicitly forbidden was however tackled by both WTO Members and legal commentators.⁵¹ In contrast to the aforementioned approach, it was suggested to apply the principle of ‘*expressio unius est exclusio alterius*’, which states that when a text explicitly permits one form of conduct, it implicitly prohibits all similar forms not listed.⁵² Applying this principle, there is no legal basis for accepting *amicus curiae* briefs in Appellate Body proceedings. Furthermore, it was added that it was “highly doubtful that the drafters [of the WTO Agreements] envisioned any participation by actors who are not WTO member states.”⁵³ It needs however to be recalled that the provisions of the WTO Agreements are

⁴⁵ *ibid* para 165.

⁴⁶ *ibid* para 164.

⁴⁷ *ibid* para 166.

⁴⁸ *ibid* para 167 referring to *United States – Tax Treatment for “Foreign Sales Corporations” – Report of the Appellate Body* (24 February 2000) WT/DS108/AB/R para 166.

⁴⁹ *European Communities – Sardines (Appellate Body)* (n 18) para 169.

⁵⁰ *United States – Carbon Steel (Appellate Body)* (n 37) para 39.

⁵¹ J Robbins ‘False Friends: *Amicus Curiae* and Procedural Discretion in WTO Appeals Under the *Hot-Rolled Lead/Asbestos Doctrine*’ (2003) 44 *Harvard International Law Journal* 317.

⁵² *ibid* p 318.

⁵³ *ibid* p 321.

mostly not the result of refined drafting but reflect rather broad political compromises.⁵⁴ Moreover, applying the '*expressio unius*' principle might lead to rather questionable results.⁵⁵ For instance, the DSU does not explicitly state that the Appellate Body has to make an objective assessment of the matter—*i.e.* the facts and the law—before it. Article 11 DSU imposes this obligation only on Panels, which does not—of course—mean that the Appellate Body does not need—or even must not—make an objective assessment of the matter before it. The '*expressio unius*' approach has therefore to be rejected and one has to agree with the Appellate Body that the lack of a provision allowing the acceptance of *amicus curiae* briefs does not mean that such acceptance was prohibited, a view which is furthermore supported among WTO Members.⁵⁶

b) Article 13 DSU

As it is clear from its wording, Article 13 DSU only applies to Panel proceedings. Given this clear wording, an interpretation of Article 13 DSU so as to extend the term "panel" to include all WTO adjudicative bodies would be unsustainable under the Vienna Convention on the Law of Treaties.⁵⁷ Hence, Article 13 DSU cannot be considered a legal basis for accepting *amicus curiae* briefs in Appellate Body proceedings.

c) Article 17.9 DSU

In both the *Carbon Steel* case⁵⁸ and the *Sardines* case⁵⁹ the Appellate Body based its authority to accept and consider *amicus curiae* briefs on Article 17.9 DSU. This provision entitles the Appellate Body to draw up its own working procedures but, at the same time, requires it to consult with the Chairman of the Dispute Settlement Body and the Director-General. Given this broad power granted to the Appellate Body, one might conclude that—parallel to the reasoning advanced earlier with regard to Panel proceedings—Article 17.9 DSU can be seen as a legal basis for accepting *amicus curiae* briefs in Appellate Body proceedings.⁶⁰ It needs to be borne in mind, though, that Article 17.9 requires the Appellate Body to consult with the other relevant WTO organs while drawing up the working procedures and to communicate these procedures to the WTO Members. So far, there is however nothing to suggest that the Appellate Body took any of the aforementioned steps in any of the cases examined.⁶¹ It is therefore submitted that—although Article 17.9 DSU may be used as a legal basis in future cases, provided the necessary steps will be taken by the Appellate Body—at the moment

⁵⁴ D McRae 'What is the Future of WTO Dispute Settlements?' (2004) 7 *Journal of International Economic Law* 3, 9.

⁵⁵ Howse (n 27) p 499; for the following see also PC Mavroidis '*Amicus Curiae* Briefs before the WTO: Much Ado About Nothing' in A von Bogdandy (n 31) 317, 327.

⁵⁶ DSB Special Session—Jordan's Contribution Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding (28 January 2003) TN/DS/W/43 para 34.

⁵⁷ Mavroidis (n 55) p 321.

⁵⁸ *United States – Carbon Steel (Appellate Body)* (n 37) para 39.

⁵⁹ *European Communities – Sardines (Appellate Body)* (n 18) para 166.

⁶⁰ Matsushita (n 20) p 37.

⁶¹ AE Appleton '*Amicus Curiae* Submissions in the *Carbon Steel* Case: Another Rabbit from the Appellate Body's Hat?' (2000) 3 *Journal of International Economic Law* 691, 696.

Article 17.9 DSU on its own cannot be considered the legal basis for accepting *amicus curiae* briefs.

d) Rule 16(1) of the Working Procedures

In the *Carbon Steel* case the Appellate Body also referred to Rule 16(1) of the Working Procedures.⁶² According to this Rule the Appellate Body may adopt an appropriate procedure for the purposes of that appeal only where a procedural question arises that is not covered by these Rules. Bearing in mind the Appellate Body's broad power to draw up its own working procedure one may conclude that Article 17.9 DSU, read together with Rule 16(1) of the Working Procedures, can be considered the legal basis for accepting *amicus curiae* briefs in a certain appeal. The drawback of this solution is, however, that Rule 16(1) is confined to *ad hoc* solutions so that there is no permanent legal basis at the moment.

2. Compliance with other WTO provisions

Accepting Article 17.9 DSU and Rule 16(1) of the Working Procedures as the legal basis for *amicus curiae* briefs in Appellate Body proceedings however means that—as is laid down in Rule 16(1)—the acceptance of these briefs must not be inconsistent with other WTO provisions. As was shown earlier, the acceptance of *amicus curiae* briefs neither diminishes the rights of WTO Members, nor creates any rights for non-Members and therefore is not inconsistent with Article 19.2 DSU. Another point being raised in this context is the fact that, by virtue of Article 17.4 DSU, WTO Members are allowed to submit legal arguments in the appellate proceedings only if they were third parties in the Panel proceedings. It was therefore suggested that *amici* who did not submit a brief to the Panel, may not be permitted to submit a brief to any subsequent Appellate Body proceedings,⁶³ as this might be contrary to Article 17.4 DSU. This contention can nevertheless not be sustained, as a Member's right to participate as a third party is independent and distinct from submitting *amicus curiae* briefs to the Appellate Body so that such a submission cannot violate Article 17.4 DSU. Thus, the acceptance of *amicus curiae* briefs in Appellate Body proceedings is not inconsistent with any WTO provision.

3. Result

It has therefore been shown that Article 17.9 DSU, read together with Rule 16(1) of the Working Procedures, provides a legal basis for the admissibility of *amicus curiae* briefs in Appellate Body proceedings and that accepting these briefs does not violate any provision of WTO law. It nevertheless needs to be pointed out that briefs submitted to the Appellate Body must not contain factual information as Article 17.6 DSU limits the Appellate Body's terms of reference to points of law only.⁶⁴

⁶² *United States – Carbon Steel (Appellate Body)* (n 37) para 39 footnote 33; Working Procedures for Appellate Review (28 February 1997) WT/AB/WP/3 Rule 16(1).

⁶³ Umbricht (n 27) p 788.

⁶⁴ Marceau and Stillwell (n 7) p 169.

C. The way ahead: Keeping the status quo or taking legislative steps ?

As has been seen, the case law of the Appellate Body has led to a developing practice according to which both Panels and the Appellate Body have the discretionary authority to accept and consider unsolicited *amicus curiae* briefs submitted by non-State actors and WTO Members alike. The aforementioned practice can furthermore be reconciled with the provisions of the WTO Agreements. It is thus true that the legal framework for accepting *amicus curiae* briefs in WTO Dispute Settlement proceedings exists, but—at the same time—it is inevitable to clarify this issue.⁶⁵

I. A first step: the 'Additional Procedure' in the *Asbestos* case

A first step into the direction of clarification was made by the Appellate Body in the *Asbestos* case⁶⁶ by adopting the 'Additional Procedure'.⁶⁷ In October 2000, the Appellate Body communicated to the parties of the dispute that it was mindful that, in the Panel proceedings, the Panel had received five written submissions from NGOs, two of which the Panel had decided to take into account. Recognising the possibility that it might also receive submissions from persons other than the parties and the third parties, the Appellate Body took the view that the fair and orderly conduct of the appeal could be facilitated by the adoption of appropriate procedures, for the purposes of the appeal only, pursuant to Rule 16(1) of the Working Procedures, to deal with any possible submissions received from such persons. After having received the parties' and third parties' comments on its proposal, and after consultations among all seven Members of the Appellate Body, the Appellate Body adopted an additional procedure, for the purposes of the appeal only, to deal with written submissions received from persons other than the parties and third parties to the dispute. The 'Additional Procedure' set out several formal and substantial criteria for both the application of leave to file a brief with the Appellate Body and the submission of those briefs themselves.⁶⁸ The Appellate Body's Communication was greeted with strong disapproval by some WTO Members alleging that it had the practical effect of altering the agreements and that—although the Appellate Body was entitled to adopt its own working procedures—its decision to seek information from non-State actors went beyond its mandate.⁶⁹ Especially Eastern European countries⁷⁰ pointed out that the issue of *amicus curiae* briefs should be decided exclusively by WTO Members.⁷¹ Likewise, the European Union⁷² stressed that

⁶⁵ GA Zonnekeyn 'The Appellate Body's Communication on *Amicus Curiae* Briefs in the *Asbestos* Case' (2001) 35(3) *Journal of World Trade* 553, 563.

⁶⁶ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products—Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R (hereinafter *Asbestos*).

⁶⁷ Communication of the Appellate Body in *European Communities – Asbestos* (n 66) (8 November 2000) WT/DS135/9.

⁶⁸ Communication of the Appellate Body (n 67) paras 3, 7.

⁶⁹ General Council Minute of Meeting (n 33) paras 9, 12.

⁷⁰ Hungary, Bulgaria, the Czech Republic, Latvia, Romania, Slovakia and Slovenia; apart from Bulgaria and Romania, these countries became Member States of the European Union on 1 May 2004.

⁷¹ General Council Minute of Meeting (n 33) para 82.

⁷² Even though only the European Communities is a WTO Member, the terms European Union and European Communities will be used interchangeably.

Members had to legislate on that issue and emphasised the need for rule making in order to achieve clarity.⁷³ In this context, attention shall therefore be directed to the legislative proposals that were subsequently advanced by the European Union.⁷⁴

II. Clarification through the amendment of the DSU

Notwithstanding the nearly unanimous disapproval of the 'Additional Procedure' among WTO Members, it was only one year after the Appellate Body's decision in the *Asbestos* case that the European Union's legislative proposal concerning *amicus curiae* briefs was advanced. In order to better understand the timing of the proposal it is necessary to know about the European Union's attitude towards *amicus curiae* briefs. In the *Shrimp/Turtle* case the EU as a third participant took a sceptical view with regard to a right of NGOs to file submissions directly with a Panel but acknowledged the fact that Members were free to include *amicus curiae* briefs into their own submissions.⁷⁵ As an Appellee in the *Carbon Steel* case the European Union found that two briefs which were submitted to the Appellate Body were inadmissible in appellate review proceedings.⁷⁶ The EU took a different view, however, when it published its legislative proposals. For the first time it acknowledged that the DSU as interpreted by the Appellate Body allowed the submission of *amicus curiae* briefs on a case by case basis.⁷⁷ This position was later confirmed in the *Sardines* case where the EU stated that the briefs filed with the Appellate Body were pertinent so that the Appellate Body had the discretion to accept them.⁷⁸ But despite the existence of a legal basis for the submission of *amicus curiae* briefs in both Panel and Appellate Body proceedings, the European Union took the view that it was necessary to define better the framework and the conditions for allowing such briefs in potentially all cases. To this end, the EU's contribution contained a new Article 13bis which lays down the prerequisites for the submission of unsolicited *amicus curiae* briefs to Panels and the Appellate Body alike.⁷⁹ As Professor Howse has noted, the proposal closely corresponds to the 'Additional Procedure' of the Appellate Body.⁸⁰ For instance, the proposal retained the procedural two-stage approach, *i.e.* an application for leave and an effective submission.⁸¹ In order to prevent unreasonable delays in the proceedings the proposal provides for strict time limits for the application for leave and the submission itself. Furthermore, the parties and third parties to the dispute are given ten days time to comment on, and respond to, such submissions. These two points also reflect due process considerations which, according to some authors, generally have a strong influence on the issue of *amicus curiae* briefs as a whole.⁸²

⁷³ General Council Minute of Meeting (n 33) paras 95, 96.

⁷⁴ DSB Special Session—Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding (13 March 2002) TN/DS/W/1 pp 7, 11 *et seq.*

⁷⁵ *United States – Shrimp/Turtle (Appellate Body)* (n 2) paras 65, 66.

⁷⁶ *United States – Carbon Steel (Appellate Body)* (n 37) para 36.

⁷⁷ DSB Special Session—Contribution of the EC (n 74) p 7.

⁷⁸ *European Communities – Sardines (Appellate Body)* (n 18) para 155.

⁷⁹ DSB Special Session—Contribution of the EC (n 74) pp 11, 12.

⁸⁰ Howse (n 27) p 506.

⁸¹ cf Article 13bis.2 and 13bis.5, respectively.

⁸² cf Mavroidis (n 55) p 317 *et passim*; see also Howse (n 27) p 503.

The proposal advanced by the European Union establishes a clear framework for allowing *amicus curiae* briefs in both Panel and Appellate Body proceedings. Despite the existence of a legal basis for the submission of such briefs it is therefore submitted that WTO Members should amend the DSU pursuant to Article X:8 of the WTO Agreement in order to end the long-standing controversy about the admissibility of *amicus curiae* briefs in WTO Dispute Settlement proceedings. An incorporation of this issue into the DSU could furthermore stop, or at least reduce, the activism of the Appellate Body and thus reduce the risk of Members becoming mere observers rather than the main actors in the setting of fundamental rules regarding dispute settlement in the WTO.⁸³

D. Conclusion

Although the involvement of non-State actors in WTO proceedings is not completely unheard of,⁸⁴ the issue of *amicus curiae* briefs is still vehemently discussed both within and outside the WTO and its Members and is far from being resolved. The case law of the Appellate Body has led to a developing practice which is rather unlikely to change in the near future.⁸⁵ Thus, as the law stands both Panels and the Appellate Body have the discretionary authority to accept and consider unsolicited *amicus curiae* briefs submitted by non-State actors and WTO Members alike. The authority of Panels to accept and consider *amicus curiae* briefs can be deduced from Articles 12 and 13 DSU, read together. The Appellate Body's authority, insofar, is more limited, since it can be exerted only on a case-by-case basis pursuant to Article 17.9 DSU and Rule 16(1) of the Working Procedures, read together. It is therefore true that the legal framework for accepting *amicus curiae* briefs in WTO Dispute Settlement proceedings exists, but it is nevertheless suggested that it is desirable to clarify this issue.⁸⁶ To this end, the General Council could adopt an interpretation of Articles 12, 13 and 17.9 DSU under Article IX:2 of the WTO Agreement. The most straightforward approach, however, would be for Members to amend the DSU pursuant to Article X:8 of the WTO Agreement. But notwithstanding the carefully drafted proposals that have been advanced in this context it is nevertheless unlikely that they will receive the necessary consensus among WTO Members to amend the DSU.⁸⁷ This is mainly due to the fact that especially developing countries are generally opposed to the admission of *amicus curiae* briefs as they fear a flood of advocacy from well-funded NGOs and multinational corporations.⁸⁸ Given the growing influence of developing countries—which became not only clear after the breakdown of the Ministerial Conference in Cancún—⁸⁹even

⁸³ For the latter see also General Council Minute of Meeting (n 33) para 83.

⁸⁴ cf Article 6.12 Anti-Dumping Agreement.

⁸⁵ DSB Special Session—The European Communities' Replies to India's Questions (30 May 2002) TN/DS/W/7 p 6.

⁸⁶ See also EU Petersmann 'WTO Negotiators Meet Academics—The Negotiations on Improvements of the WTO Dispute Settlement System' (2003) 6 Journal of International Economic Law 237, 240.

⁸⁷ Whereas for an interpretation pursuant to Article IX:2 of the WTO Agreement a three-fourths majority of the Members is needed, a decision to amend the DSU pursuant to Article X:8 of the WTO Agreement has to be made by consensus.

⁸⁸ DSB Special Session—Proposals by Cuba et al (n 25) p 4; in contrast to those fears, recent experience has shown that on various issues NGOs in developed countries have frequently taken positions radically different from those adopted by their governments, cf DSB Special Session—EC's Replies (n 85) p 7; see also Howse (n 27) p 509 who cautions against regarding developing countries as the true enemies of *amicus* practice.

⁸⁹ Fifth WTO Ministerial Conference, Cancún, Mexico, 10–14 September 2003.

WTO Members recently concluded that “[i]t was not realistic to expect consensus to be reached on [the issue] of *amicus curiae* briefs”.⁹⁰ Realistically, one therefore seems to have no choice but to agree with Umbricht that in the near future the final word on *amicus curiae* briefs will remain to be spoken by the Appellate Body—*nolens volens*.⁹¹

Bibliography

- Ala’i, Padideh** ‘Judicial Lobbying at the WTO: The Debate over the Use of *Amicus Curiae* Briefs and the US Experience’ (2000) 24 *Fordham International Law Journal* 62
- Appleton, Arthur E** ‘*Amicus Curiae* Submissions in the *Carbon Steel* Case: Another Rabbit from the Appellate Body’s Hat?’ (2000) 3 *Journal of International Economic Law* 691
‘*Shrimp/Turtle*: Untangling the Nets’ (1999) 2 *Journal of International Economic Law* 477
- Hernández-López, E** ‘Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes’ (2001) 35(3) *Journal of World Trade* 469
- Howse, Robert** ‘Membership and its Privileges: the WTO, Civil Society, and the *Amicus* Brief Controversy’ (2003) 9 *European Law Journal* 496
- Marceau, Gabrielle and Matthew** ‘Practical Suggestions for *Amicus Curiae* Briefs Before **Stillwell**, WTO Adjudicating Bodies’ (2001) 4 *Journal of International Economic Law* 155
- Matsushita, Mitsuo, Schoenbaum, TJ and Mavroidis, Petros C** *The World Trade Organization: Law, Practice and Policy* Oxford University Press Oxford 2002
- Mavroidis, Petros C** ‘*Amicus Curiae* Briefs before the WTO: Much Ado About Nothing’ in Armin von Bogdandy, Petros C Mavroidis and Yves Mény (eds) *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* 317 Kluwer Law International The Hague 2002
- McRae, Donald** ‘What is the Future of WTO Dispute Settlements?’ (2004) 7 *Journal of International Economic Law* 3

⁹⁰ DSB Special Session—Minutes of Meeting (13 November 2003) TN/DS/M/11 para 28.

⁹¹ Umbricht (n 27) p 793.

- Petersmann, Ernst-Ulrich** 'WTO Negotiators Meet Academics—The Negotiations on Improvements of the WTO Dispute Settlement System' (2003) 6 *Journal of International Economic Law* 237
- Robbins, Josh** 'False Friends: *Amicus Curiae* and Procedural Discretion in WTO Appeals Under the *Hot-Rolled Lead / Asbestos* Doctrine' (2003) 44 *Harvard International Law Journal* 317
- Shelton, Dinah** 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611
- Steger, Debra P** '*Amicus Curiae*: Participant or Friend ? The WTO and NAFTA Experience' in Armin von Bogdandy, Petros C Mavroidis and Yves Mény (eds) *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* 419
Kluwer Law International The Hague 2002
- Umbricht, Georg C** 'An "Amicus Curiae Brief" on Amicus Curiae Briefs at the WTO' (2001) 4 *Journal of International Economic Law* 773
- Weiß, Wolfgang and Herrmann, Christoph** *Welthandelsrecht*
CH Beck München 2003
- Zonnekeyn, Geert A** 'The Appellate Body's Communication on *Amicus Curiae* Briefs in the *Asbestos* Case: *An Echternach Procession ?*' (2001) 35(3) *Journal of World Trade* 553

Table of Cases

Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada—Report of the Panel (18 February 2000) WT/DS18/RW

European Communities – Measures Affecting Asbestos and Asbestos-Containing Products— Report of the Appellate Body (12 March 2001) WT/DS135/ AB/R

European Communities – Measures Affecting Meat and Meat Products (Hormones)—Report of the Appellate Body (13 February 1998) WT/DS26/ AB/R, WT/DS48/ AB/R

European Communities – Trade Description of Sardines—Report of the Appellate Body (26 September 2002) WT/DS231/ AB/R

United States – Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Panel (15 May 1998) WT/DS58/R

United States – Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body (12 October 1998) WT/DS58/AB/R

United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom—Report of the Panel (23 December 1999) WT/DS138/R

United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom—Report of the Appellate Body (12 May 2000) WT/DS138/AB/R

United States – Standards for Reformulated and Conventional Gasoline—Report of the Appellate Body (20 May 1996) WT/DS2/AB/R

United States – Tax Treatment for “Foreign Sales Corporations”—Report of the Appellate Body (24 February 2000) WT/DS108/AB/R

Table of Documents

Communication of the Appellate Body in European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (8 November 2000) WT/DS135/9

Dispute Settlement Body Minutes of Meeting (14 December 1998) WT/DSB/M/50

Dispute Settlement Body Special Session—Contribution of the European Communities and its Members States to the Improvement of the WTO Dispute Settlement Understanding (13 March 2002) TN/DS/W/1

Dispute Settlement Body Special Session—India’s Questions to the European Communities and its Members States on their Proposal Relating to Improvements of the DSU (7 May 2002) TN/DS/W/5

Dispute Settlement Body Special Session—Jordan’s Contribution Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding (28 January 2003) TN/DS/W/43

Dispute Settlement Body Special Session—Minutes of Meeting (13 November 2003) TN/DS/M/11

Dispute Settlement Body Special Session—Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe (7 October 2002) TN/DS/W/18

Dispute Settlement Body Special Session—The European Communities’ Replies to India’s Questions (30 May 2002) TN/DS/W/7

General Council Minute of Meeting (22 November 2000) WT/GC/M/60

Working Procedures for Appellate Review (28 February 1997) WT/AB/WP/3