

## CIVIL SOCIETY GROUPS AND ADMINISTRATIVE LAW: *AMICUS CURIAE* IN WTO

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Global administrative law (GAL) has been defined as comprising the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.<sup>1</sup> GAL stresses upon procedural participation of affected actors in the global administrative bodies and mechanisms for reviewing the actions of these bodies. Accountability of international organizations through the participation of global social movements may be an important mechanism for making GAL effective.<sup>2</sup> From this perspective, this essay reviews the debate on *amicus curiae* submissions by non-governmental organizations (NGO) before the World Trade Organization's (WTO) Dispute Settlement Body (DSB). The admissibility of such submissions could have interesting implications for developing countries like India, where social movements are taking an active part in trade policy debates.

*Amicus curiae* submissions enable entities that are not a party or third party to a dispute, to provide information on different aspects of the dispute to enable the court or tribunal to decide the matter appropriately. Many courts and tribunals from all over the world have relied on *amicus curiae* submissions from NGOs, industry associations, academics, etc., in settling the disputes before them. Many civil society organizations from across the world conduct research and advocacy on the impact of the WTO agreements on development, environment and human rights. The admissibility of *amicus curiae* submissions from these NGOs could give the panels a different perspective which may be missing from the submissions of the parties.<sup>3</sup>

Article 13 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) confers on the panels of the DSB the right to seek information and technical advice from any source which it deems appropriate. In terms of Article 12 (1) and (2), the panels may depart from the *Working Procedures* laid down in Appendix 3 to the DSU, and the panel procedures should provide sufficient flexibility to ensure high-quality panel reports without unduly delaying the panel process. Read with Article 13, this provision seems to accord substantial discretionary powers on the panels to accept information even from unsolicited sources. This has ruffled the feathers of some Members of the WTO and they have argued that unsolicited *amicus curiae* briefs should not be admissible in WTO dispute settlement proceedings.

The issue whether unsolicited *amicus curiae* submissions are admissible came up in the *US-Shrimp* case. The Panel held that such briefs cannot be accepted if the Panel *did not seek* this information in terms of Article 13 (1). Appealing against the ruling of the Panel, the US argued that nothing in the DSU restrained the Panel from considering unsolicited *amicus* briefs. In terms of Article 13 (2), the Panel *may* seek information from any source, and hence, when an

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<sup>1</sup> Benedict Kingsbury, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, vol.68, 2005, p.17.

<sup>2</sup> See B.S. Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law", *New York University Journal of International Law & Politics*, vol.37, no.4, 2005, p.808.

<sup>3</sup> See Steve Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization", *University of Pennsylvania Journal of International Economic Law*, vol.17, 1996, p.351.

unsolicited submission is made, the Panel can *seek* such information.<sup>4</sup> India, Pakistan and Thailand – the joint appellees in the case – and Malaysia, contended that the initiative to seek information rests with the Panel. The joint appellees also argued that in terms of paragraphs 4 and 6 of the Working Procedures of the Panel, only Member States that are parties to the dispute or third parties have a *locus standi* before the Panel. Since other Member States do not have a right to make submissions before the Panel, entities that are not Members of the WTO should not have a *locus standi*.

In their submissions the appellees relied upon a literal interpretation of the word *seek*. However, the Appellate Body (AB) read the provisions of Article 13 along with Article 12 and adopted a teleological interpretation in view of the functions of the Panel laid down in Article 11. In terms of Article 11, the Panel has to assist the DSB by conducting an objective assessment of the facts of the case and such other findings that will help the DSB to come to a conclusion. In view of the objects and purpose of the Panel's mandate under Article 11, the Appellate Body held that the Panel's authority to seek information under Article 13 did not amount to a prohibition on accepting unsolicited information. The discretion of the Panel whether to accept or reject an *amicus curiae* submission applies to both solicited and unsolicited briefs.<sup>5</sup>

The AB ruling did not explain whether there is any legal basis on which the AB can consider *amicus curiae* submissions.<sup>6</sup> WTO Members criticized this action of the AB. In *US-Carbon Steel* the AB finally explained its legal authority to accept such submissions. The AB found that neither the DSU nor the *Working Procedures* explicitly prohibits the acceptance or consideration of such submissions. However, Article 17 (9) of the DSU read with Rule 16 (1) of the *Working Procedures* empowered the AB to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements, only for the purposes of the appeal under consideration. From this interpretation, the AB derived its legal authority to accept and consider *amicus curiae* submissions.<sup>7</sup> Thus, in *EC-Asbestos* the Appellate Body adopted additional procedures under Rule 16 (1) of the *Working Procedures*, which stated that all entities that wished to submit information to the Appellate Body should apply for leave to submit such information.<sup>8</sup>

Many Members of the WTO objected to this ruling of the AB. Most of the Members, including developing countries like India, Pakistan, Egypt and Uruguay argued that the AB was not the competent authority to decide on the admissibility of *amicus curiae* submissions since this issue was a substantive issue pertaining to the relationship between the WTO and NGOs. The Members pointed out that in terms of Article 5 (2) of the Agreement Establishing the World Trade Organization it is the responsibility of the General Council to make appropriate arrangements for consultation and co-operation with NGOs. They also argued that under Article 17 (9) of the DSU, the AB could only adopt rules on procedural matters, but the issue of admissibility of *amicus curiae* submissions was a substantive issue that altered the intergovernmental nature of the WTO

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<sup>4</sup> See Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Paragraph 9.

<sup>5</sup> Ibid, Paragraphs 106-10.

<sup>6</sup> Arthur E. Appleton, "Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body's Hat?", *Journal of International Economic Law*, vol.3, no.4, 2000, p.691.

<sup>7</sup> See Appellate Body Report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Paragraph 39, reprinted in Appleton, *supra* note 7, p.703.

<sup>8</sup> See Appellate Body Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, Paragraphs 51-2.

and affected the rights and obligations of the Members under WTO law. India pointed out that the possibility of allowing *amicus curiae* briefs in the dispute settlement system was actively considered in the Informal Group on Institutional Issues during the Uruguay Round of multilateral trade negotiations. This proposal was not accepted in the face of overwhelming opposition from many States.<sup>9</sup> The *travaux preparatoires* shows that the States that negotiated the WTO agreements including the DSU did not intend to make *amicus curiae* submissions acceptable.

Why do most developing countries oppose the admissibility of *amicus curiae* submissions? This seems to be very intriguing because such submissions can allow NGOs from these countries to provide information to the panels and thus supplement the arguments made by the State in its submission. Indeed, in *EC-Bed Linen* case the Panel received unsolicited *amicus curiae* submissions from the Foreign Trade Association in support of India's submissions.<sup>10</sup> For many developing countries and least developed countries (LDC), NGOs may serve to help them strengthen their submissions before the panels and make up for the lack of capacity in these countries. There are many NGOs working on trade and development issues in these countries that are engaged in research and advocacy both individually and collectively. Hence, they offer a valuable resource for these countries to tap into. In fact, the government of India has consulted these NGOs before finalizing their negotiating positions in the WTO Hong Kong Ministerial Conference.

The opposition of the developing countries to the admissibility of *amicus curiae* briefs is born out of the apprehension that the likely beneficiaries of such a decision would be individuals and NGOs from the developed countries which have better access to WTO work and documents. As submitted by India in the General Council, developing countries would be put at a greater disadvantage as their NGOs had much less resources and capacity to send unsolicited briefs. NGOs from the developed countries have a closer relationship with international organizations than those from the developing countries and many of them serve the cause of business interests in these countries.<sup>11</sup> Moreover, some NGOs from the developing countries are sponsored by institutions from the developed countries. There exists a certain degree of probability that these NGOs' objectives may be driven by interests in the developed countries that are in conflict with the national interests of the home country. Internal consultation with NGOs provides the government a mechanism of filtering the arguments of such NGOs<sup>12</sup> and making sure they do not weaken its case in the DSB.

This shows that concerns over the character of the *amici* is at the heart of the opposition of the developing countries like India to the admissibility of *amicus curiae* submissions. Hence, there is a necessity for developing guidelines to determine which NGOs can submit *amicus curiae*

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<sup>9</sup> See WTO, *Minutes of Meeting Held in Centre William Rappard on 22 November 2000*, WT/GC/M/60.

<sup>10</sup> Gabrielle Marceau and Matthew Stilwell, "Practical Suggestions for *Amicus Curiae* Briefs before WTO Adjudicating Bodies", *Journal of International Economic Law*, vol.4, no.1, 2001, p.161.

<sup>11</sup> See B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making", *European Journal of International Law*, vol.15, no.1, 2004, p.26. For a discussion on how northern NGOs tried to pressurize the WTO DSB to interpret the GATT rules to accommodate their environment concerns, see B.S. Chimni, "WTO and Environment: Shrimp-Turtle and EC-Hormones Cases", *Economic and Political Weekly*, May 13, 2000, p.1752.

<sup>12</sup> See Philip M. Nichols, "Participation of Nongovernmental Parties in the World Trade Organization", *University of Pennsylvania Journal of International Economic Law*, vol.17, 1996, pp.320-1.

briefs.<sup>13</sup> Relevant factors for determining the character of the *amici* would include its mandate or terms of reference, the interests that it represents and is accountable to, and its area of expertise.<sup>14</sup> To address the concerns of countries like India, it should be ensured that the *amici* has a public interest orientation and no direct financial interest in the outcome of the case. Indeed, these factors are included in the proposals of the European Communities (EC) for DSU reforms. Thus, the EC has proposed that a new Article 13 *bis* be introduced in the DSU stating that any person wishing to make an *amicus curiae* submission must apply for leave to file such a submission. The application should include a description of the applicant, its membership and legal status, its general objectives, the nature of its activities and the sources of its financing. It should also demonstrate that the applicant has a direct interest in the issues raised in the dispute and provide a declaration of the nature of its relationship with any party or third party to the dispute.<sup>15</sup>

The EC proposal largely reproduces the ad hoc procedures adopted by the AB in *EC-Asbestos* case.<sup>16</sup> While theoretically the reforms proposed by the EC could help to ensure that NGOs submitting *amicus curiae* briefs do not have a conflict of interest, Marceau and Stilwell points out that so far NGOs participating as *amici* have often represented particular commercial interests. In this scenario, the balance of the WTO dispute settlement may shift towards the developed countries, their NGOs and corporations.<sup>17</sup> Objecting to the EC proposals, countries like India have stated that NGOs would seek to represent and advance their own sectoral interests.<sup>18</sup> Zimmerman's survey of the countries that have used the dispute settlement system during the first decade of the WTO shows that the US and EC have made far greater use of the dispute settlement system than even advanced developing countries like India and Brazil.<sup>19</sup> In this context, allowing unsolicited *amicus curiae* briefs could lead to further burdening the developing countries with the requirement to respond to the submissions made by northern NGOs in a time-bound manner. This could add to the capacity constraints of the developing countries.

Participation of NGOs in WTO dispute settlement proceedings should not be equated with participation of social movements. As pointed out by Rajagopal, while NGOs are an important actor in social movements, they themselves do not lead or constitute social movements. NGOs are institutionalized forms of a few social movements.<sup>20</sup> In fact, a large number of social movements do not have institutional forms of representation apart from the State. For instance, trade unions in India do not represent a large number of workers who are employed in the unorganized sectors. While it is true that the decisions of the WTO DSB could ultimately affect individuals and hence it would be fair to allow the voices of individuals to be heard by the panels and AB, this could lead to more undemocratic outcomes through a democratic process. This is because the

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<sup>13</sup> B.S. Chimni, "The World Trade Organization, Democracy and Development: A View from the South", *Journal of World Trade*, vol.40, no.1, 2006, p.23.

<sup>14</sup> Marceau and Stilwell, *supra* note 9, p.180.

<sup>15</sup> See WTO, *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Communication from the European Communities, TN/DS/W/1, Article 13 *bis* (3).

<sup>16</sup> See WTO, *Negotiations on the Dispute Settlement Understanding*, Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/DS/W/18.

<sup>17</sup> Marceau and Stilwell, *supra* note 9, p.180.

<sup>18</sup> *Supra* note 14.

<sup>19</sup> Thomas A. Zimmerman, "WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation", *Aussenwirtschaft: The Swiss Review of International Economic Relations*, vol.60, no.1, p.33.

<sup>20</sup> Balakrishnan Rajagopal, "International Law and Social Movements: Challenges of Theorizing Resistance", *Columbia Journal of Transnational Law*, vol.41, no.2, 2003, p.409.

substantially large number of interest groups that are unorganized and unrepresented could remain unheard by the panels or the AB.

It should be noted that since the decision to adopt a panel or AB report is taken by reverse consensus, there is practically very little possibility of a report being not adopted since the victorious Member's affirmative vote alone can ensure its adoption. Since the powers of other Members to oppose the adoption is reduced drastically to only a theoretical possibility, it would be undemocratic to allow the panels or the AB to be influenced by unsolicited *amicus curiae* submissions from particular groups without there being any possibility of ascertaining that views of all interest groups, organized and unorganized, are accommodated in the process. Interest groups that do not have a second voice in the WTO apart from the State are put at a serious disadvantage because the adoption of panel or AB reports at the DSB is a certainty.

Administrative law serves to ensure that representative democracy is supplemented by creating avenues for citizens' involvement in governance. While the decisions of the WTO ultimately affect the people, their interests are collectively represented at the WTO by their States. According to Charnovitz, just like citizens enhance their democratic participation at the national level through active engagement with the administration (which is facilitated by administrative law), they should be involved in international governance in bodies like the WTO.<sup>21</sup> However, Nichols points out that even in liberal democracies certain policy-making institutions like cabinet meetings are insulated from public participation. Hence, the point where the transition from participatory to representative governance occurs is critical.<sup>22</sup>

Institutional support for deliberative democracy is provided by separation of powers between the executive, legislature and judiciary wherein each serves to check and balance the powers of the other. If the traditional understanding of administrative law as a mechanism for enhancing deliberative democracy in administrative decision-making is extended to global institutions like the WTO, one has to base this on the existence of a separation of powers in the WTO. However, there seems to be no clear separation of powers in the WTO. The panels and the AB are like quasi-judicial bodies whose decisions have to be adopted by the Members at the DSB. Thus, the decision to adopt a panel or AB report is a *political* decision by the executive authorities of a Member State. If that decision has to be influenced by citizens' groups, that can be best achieved at the domestic level where separation of powers and attendant administrative legal mechanisms empower all citizens to question the executive authority.

GAL sees national administrative authorities as a part of the global administrative space<sup>23</sup> where they co-exist with international organizations like the WTO. GAL can be effective in increasing the representation of citizens' interests in the WTO by focusing upon means to enhance the active deliberation of citizens with their governments on WTO matters. At the domestic level, citizens whose interests are not accommodated in the final decision or in the consultation process may still have recourse to mechanisms like judicial review. It is because these mechanisms are absent at the global level, NGOs and other interest groups should not be given opportunity to make submissions before the panels or AB unless it is specifically sought for.

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<sup>21</sup> Steve Charnovitz, "Opening the WTO to Non-Governmental Interests", *Fordham International Law Journal*, vol.24, nos.1 & 2, 2000, p.206.

<sup>22</sup> Philip M. Nichols, "Realism, Liberalism, Values, and the World Trade Organization", *University of Pennsylvania Journal of International Economic Law*, vol.17, 1996, p.861.

<sup>23</sup> Kingsbury, Krisch and Stewart, *supra* note 1, p.21.

