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Original Paper

The Role of Non-governmental Organisations Acting as Amicus Curiae in WTO

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Abstract

WTO dispute settlement mechanism is a closed system, however, the non-governmental organisations acting as amicus curiae in WTO plays an alternative way in the external aspect. There are different opinions about the intervention of amicus curiae, we should take active measures to face amicus curiae.

Keywords

WTO, dispute settlement mechanism, amicus curiae, non-governmental organisations

1. Introduction

In the dispute settlement mechanism of World Trade Organization the dispute is generally submitted to the Panel which is constituted at the request of parties of the dispute, and the Appellate Body as well at a later stage if possible. In such mechanism the it is only the Panel and the Appellate Body to make decision about parties' dispute without intervention from other party; however, in recent years the friend of the courts, or amicus curiae is considered the possibility of being accepted by Dispute Settlement System as assistance of decision-making procedure.

In this essay I am making an attempt to illustrate the following points about amicus curiae and non-governmental organisations (NGOs): first of all, I will introduce basic information about amicus curiae, such as the concept and history of amicus curiae, and main debate about setting amicus curiae system in WTO dispute settlement mechanism. The second part, and the main part of this essay as well, is the discussion about non-governmental organisations' participation in WTO dispute settlement process, including the base for NGOs playing a role in world trade issues, main arguments about the existence of NGOs as the friend of the court in dispute settlements between Members, typical disputes related to the intervention of NGOs and the possibility of NGOs' regular participation in the WTO dispute settlement mechanism. My statement is that the mechanism of amicus curiae will be beneficial

to the WTO dispute settlement system and NGOs are the ideal body to act as a friend of the court to afford assistance to the dispute settlement between Members.

1.1 Concept of AC

Originally amicus curiae was defined as "a detached servant of the courts" whose function was that "acts for no-one, but simply seeks to give information to the courts". According to the context of WTO legal text, amicus curiae are as entities who are not a part or third party to a specific dispute (Note 1) but whose unsolicited submission may be considered by panels and the Appellate Body.

1.2 History of AC

Such mechanism can be date back to early Rome, due to the lack of information storage technology the judge was hardly to search relevant information of parties' dispute, thus the friend of the courts played an assistant role in decision-making procedure. In later years in England, the amicus curiae continued to act neutrally as an advisor to assist the court. The United States courts were not willing to accept amicus curiae's participation in litigation before the case of Green and Others V. Biddle in 1823; in this case Henry Clay provided his opinions about the dispute as amicus curiae, then it became the precedent of amicus curiae participation in United States legal system. Nowadays the controversy about the utilization of amicus curiae mechanism is mainly within the field of WTO dispute settlement procedure, and the typical entities of such intervention are non-governmental organisations (NGOs) as a result of their nature and characteristics the non-governmental organisations are appropriate to act as a role of assistant, and this will be discussed later in this article.

1.3 Main Debate about Introducing Amicus Curiae in WTO

1.3.1 General View of WTO Members on Amicus Curiae

The acceptance of amicus curiae has long been in controversy for decades since the dispute of US-Gasoline and EC-Hormones which amicus curiae brief was firstly involved; and the legal controversy of amicus curiae brief was increasingly promoted after the creation of Additional Procedure in the dispute of EC-Asbestos, and the majority of Members expressly stated their unpleasure about such change of due process, these dissenting voice were expressed in detail in the Minutes of Meeting held on 22 November 2000 which is about EC-Asbestos.

In general, the most of dissenting Members are on behalf of developing countries in the world, however, the opposite power is from developed countries, such as United States, the most active side of upholding the creation of amicus curiae in WTO dispute settlement structure. As for the reason of such situation, first of all is that the support of amicus curiae requires high qualification of experts or other supporting entities such as non-governmental organisations; however, the reality is that it is too difficult for developing countries to meet such high standards. Secondly, the developing countries hold the view that such involvement of another information provider with no specific interests on the dispute would result in the delay of process which is inconsistent with the effectiveness principle of dispute settlement. Thirdly, those developed countries headed by United States are keen on building amicus curiae system because such intervention of non-related party is likely to promote transparency and fairness of dispute

settlement procedure, the quality of amicus curiae is out of their consideration since they are usually with high standard expert and organisation support which is different from the developing country Members. Lastly, the developed countries suggest that amicus curiae in specialized area of knowledge will help to fill in the blanks of knowledge achieved by the Panel and the Appellate Body, the time wasted on collecting information of specific dispute by the panelists will be saved, this is a time-saving method which goes against the developing country Members' claim about the efficiency of amicus curiae brief.

1.3.2 Members' Debate about Amicus Curiae Brief on Minutes of Meeting, November 2000 (Note 2)

On 22 November 2000, the Minutes of Meeting was held, it is a meeting of communication from the Appellate Body to the Chairman of the Dispute Settlement Body on "European Communities - Measures affecting asbestos and asbestos-containing products" (EC-Asbestos). On this meeting, many arguments of the acceptance of amicus curiae in WTO Dispute Settlement System.

As it is illustrated above, the majority of developing country Members hold an opposite opinion against the introduction of amicus curiae. Hong Kong, China states that the amicus curiae brief procedure is time-consuming. By presenting an example that "if only 20 amicus curiae briefs were submitted this would represent more than 400 pages of legal arguments, which would require a response within a few days" (Note 2), it is significant that the addition of such procedure in decision-making process would delay the whole dispute settlement process. With regard to the qualification of non-Members of WTO, Mexico raised that it is unlikely to speak of "fairness" if the non-Members are allowed to submit briefs to the Panel or the Appellate Body since there is an unrelated body involved in the parties' dispute, the parties believe that this is a violation of fairness between them. There are many arguments of objecting to the acceptance of amicus curiae briefs to be concluded but in general on this meeting most Members on behalf of developing countries expressed their disagreement of the amicus curiae briefs.

However, the representative of the United States thinks that the Appellate Body takes an appropriate action of adopting additional procedure which creates the possibility for amicus curiae's intervention in EC-Asbestos case, which is an adverse attitude to the amicus curiae brief compared with the developing country Members. As far as United States concerned, "there was a value in establishing amicus procedures in the context of an individual case" (Note 2). It also indicated that Article 17.9 of DSU and Article 16(1) of WTO Working Procedure broadly authorises the Appellate Body to set additional procedure in violation of no specific articles and take amicus curiae submissions into account.

2. The Participation of NGOs in WTO Dispute Settlement System

2.1 The Role of NGOs in WTO

2.1.1 The Definition and Nature of NGOs According to Various Institutions

Non-governmental organisation, in accordance with United Nations Rule of Law known as "civil society organisation" as well, refers to a group which is non-profit-oriented and independent from

government, and of which organisation is on a local, national or international level in support of public good. In terms of the definition by World Bank which emphasizes the funding resources of NGOs, NGOs are “global charities that raise funding from a variety of sources, including the general public, to support projects in the developing world”, but they are not limited to charity entities, they are sometimes specialized in public health, agriculture, environment, education and community development as well (Note 3).

According to Salamon(1999), the concept of non-governmental organisations are included in the context of civil society which is a non-profit sector of nations; it defines such non-profit sector as various social institutions which operate out of the realm of market and the state or the nation. The civil society theory is the political base of the existence of non-governmental organisations; according to Salamon, the leading expert in the study of civil society theory, he refers the concept of civil society to a “global associational revolution” which occupies an unique position out of the realm of market and state: it plays a sole role which is called the search for a “middle way” by Salamon in connection with the citizens; the civil society is capable of offering assistance to individual entity for the purpose of public interests and their flexibility also contributes to such support; in another word, such contribution of the civil society attributes to its inherent advantage.

The form of such civil society performs in various ways, such as professional organisations, environmental groups and human rights organisations and other more; however, no matter how many those entities perform in different forms, their common features and nature are fixed as follows:

Firstly, they are organisations; to elaborate, it has “an institutional presence and structure”, for instance the organisations will hold regular meetings and own a complete institutional framework for daily business; secondly, they are private organisations which means that they are not institutionally-controlled by the state; thirdly, they runs for non-profit-oriented aims; Fourthly, they are self-governing and run the organisations independently; Lastly, the members of such non-profit sectors perform voluntarily with no legal obligations born on them.

In general, there are various versions of the definition about NGOs, however, their common features are stated in Salamon (1999) listed above, any organisations which would be regarded as non-governmental will have those features included.

2.1.2 The Current Status and Function of NGOs in Participating International Issues

Recent decades witnessed the development of NGOs from small-scale origins to large and complex and worldwide influential organisations (Lewis & Kanji, 2009). Lewis and Kanji (2009) indicates that the NGOs have gone through four generations during the process of development. The first generation is within the scope of individuals and family, this is the stage in which NGOs act as relievers to undertake measures for immediate needs. The second generation focuses on achieving initiatives through learning experience from other agencies. The third generation, it is said that “focus on sustainability... and a stranger interest in influencing the wider institutional and policy context through advocacy”. The forth generation, and the stage which NGOs stay currently as well, sees more active performance of NGOs

on a global and international level rather than a local and national level. With regard to such development of NGOs during decades, it has been proved that NGOs are acting as more influential on international issues than they are used to be, therefore their voice tend to be heard by more decision-making entities, such as WTO Dispute Settlement Body, and it will be discussed in detail in the later part of this essay.

With regard to the influence of NGOs on an international stage Hobe (1997) indicates that NGOs are playing an increasingly important role on an international level. For instance, NGOs such as Greenpeace and Amnesty International perform actively in the process of international decision-making and they are keen on supervising the enforcement of international law of State in terms of environmental protection rules, international human rights rules and humanitarian law. In addition, due to increasing challenges in terms of population overload, environmental pollution and other global issues, states have admitted their incapacity of disposing of such troubles effectively; thus, the entities with non-state legal personality are offering a hand to states regarding to the disposal of such international issues, acting as a supporting role on international stage.

2.2 NGOs' Involvement in WTO

2.2.1 The Practice of NGOs Participation in WTO Dispute Settlement System

The intervention of amicus curiae is the action taken by organisations or individuals other than DSB and patries of the dispute submit amicus curiae briefs. Due the lack of clear expression of rights and obligations of amicus curiae submitting such briefs, the Panel and Appellate Body recognise their rights on considering amicus curiae briefs in dispute-settling practice; but their attitudes towards amicus curiae briefs are changing through the process of settling such disputes relating to the submission of such unsolicited submissions.

2.2.1.1 US - Gasoline and EC - Hormones

In the practice of WTO panels in the case US - Gasoline of which the submission of non-governmental organisations are firstly considered by the Panel. This dispute attracted great attention from many aspects of society and the non-governmental organisations as well; the non-solicited brief submitted by environmental protection NGOs was not accepted by the panels unfortunately. In the report of the Panel, the Panel thought that such briefs should be submitted to the governments of the dispute parties rather than DSB in supporting their governments. Such position of the Panel was shown the same in the case of EC - Hormones.

In the case of EC - Hormones the Panel was still reluctant to accept submissions from non-governmental organisations; the reason for such attitude as far as I am concerned, is that the dispute arisen in the early time and the dispute settlement system only allowed the participation of governments strictly; besides the the scale of NGOs was not so great at that time, they were too weak to let their voice to be heard by the world; thus, the Panel was not likely to accept briefs from NGOs.

2.2.1.2 US - Shrimp

In the United States - Import Prohibition of Certain Shrimp and Shrimp Products case, the Panel

changed its attitude towards the unsolicited submission from NGOs: it said that it could not accept the unsolicited information from NGOs unless such information were included within the briefs of one of the parties. In this particular case the non-governmental organisations, the Centre for Marine Conservation (CMC) and the Centre for International Environmental Law (CIEL) were accepted to submit briefs about this case; however, the process of acceptance is circuitous because the submission was refused by the Panel but the Panel decision was denied but the Appellate Body and the submission was thought acceptable.

Initially the Panel received the two amicus curiae briefs from CMC and CIEL; on 1 August 1997 Malaysia, Pakistan and Thailand sent requests to the Panel at the second substantive meeting about this case not to take the submissions into consideration (Note 4).

The United States emphasised the right of collecting information from any relevant source in the light of Article 13 of the DSU, throwing light upon that the two briefs from CMC and CIEL are appropriate to be accepted by the Panel. However, the rest of the meeting participants were in the contrary position to argue against the statement of the United States. As it was stated on the meeting, Malaysia and the other complainants did not admit the acceptance of amicus curiae briefs from non-governmental organisations (Note 5). It was challenged that because the submitted briefs referred not only to "technical advice" but also "legal and political arguments", the submissions fell outside the scope of Article 13 of DS; in another word, no reference was found to accept unsolicited submissions from NGOs under Article 13 of DSU.

The situation changed in the later appeal proceeding. According to the report of the Appellate Body, the United States firstly argued the inappropriateness that the Panel considered not to take the non-requested submissions by NGOs. The other participating Members were still object to the claim by the United States. The Appellate Body reversed the decision made by the Panel, pointing out the non-acceptance of NGOs submissions was incorrect.

There are several questions arising out of the arguments about amicus curiae briefs in this case: firstly it is the meaning of "seek" in the context of Article 13 of DSU. The Article is stated as:

> *"each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate".*

Mavroidis (2002) illustrates the Panel's understanding about the word "seek" reflects an initiative attitude to collect information from other sources; thus, the initiative action taken by the NGOs that submitting amicus curiae briefs will be disregarded by the Panel. In the literal interpretation of "seek", the Appellate Body refers the understanding by the Panel to unnecessarily formal and technical.

Although the Appellate Body does not wholly reverse the decision made by the Panel, but it is showed that the attitude of the Dispute Settlement Body towards the amicus curiae brief submitted by the NGOs has changed, the NGOs see the light of occupying a place in dispute settlement system since then.

2.2.1.3 British - Steel

This is a case in which the Appellate Body took a further step on the consideration of amicus curiae issues. Compared with the case US - Shrimp, the main difference between these two typical cases was that the NGOs amicus curiae briefs were submitted directly to the Appellate Body but not at the Panel procedure.

In this case, the Appellate Body accepted two non-requested submissions from NGOs which fell to be considered by the Panel, illustrating the approach of the Appellate Body about the issue of such unsolicited briefs from NGOs. As for the source of the authority of accepting the NGOs submissions, the Appellate Body explained that their actions were taken under Article 17.9 of the DSU, violating no specific rules in DSU or any other relevant agreements. Also, it is stated by the Appellate Body that it owned a wide discretion to create particular procedures which is considered to be appropriate to settle procedural issue related to the case under Article 16(1) of the Working Procedures of WTO. In accordance with all the clarification made by the Appellate Body, it can be concluded that the limitation set on the NGOs' involvement of WTO Dispute Settlement System is gradually reducing, even though the majority of WTO Members still object to the consideration of unsolicited NGOs submissions neither at the Panel procedure nor the Appellate Body procedure, making such Appellate Body decision "fallen on deaf ears", it is still proved to be a great test on the intervention of NGOs in dispute resolution.

2.2.2 Arguments for and against NGOs' Participation in WTO

It has long been arguable that whether the NGOs can play an individual role in international decision-making process. In the Chapter X of Charter of United Nations, Article 71 states that "the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned", which indicates that the NGOs can be involved in the process of international issue settlement, this is an unprecedented article that clarifies the relationship between non-governmental organisations and inter-governmental international organisations. Although this article limits the scope of NGOs' right of participation to economic and social aspects of international issues, it shows an approbatory attitude of world to the NGOs in terms of involvement to international decision-making process.

Although the international society tends to accept the increasing involvement of NGOs performing during decision-making proceedings about international issues, it has never been propitious for such participation of NGOs. The question about the access to WTO decision-making system for NGOs is arguable through decades and the main dissenting arguments are as follows:

A. In terms of the nature of WTO it is an exclusive forum for governments rather than other entities (Note 6).

The nature of WTO is indicated on the official website of WTO and it shows that the WTO is a place for governments and states to negotiate trade agreements and settle trade dispute, the other forms of entity are not referred on the website. Citing such statement, the dissenters argue that NGOs are excluded from the WTO and much less the decision-making system. What is more, in the Guidelines for Arrangements on Relations with Non-Governmental Organizations adopted by the General Council on 18 July 1996, the Article VI states that "members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations", which also points out the WTO is built among governments and states, no reference to non-governmental organisations.

B. The majority influential NGOs are not found independently, they are under the control of special-interest groups (or narrow-interest groups), and mainly is financial control, which limits the liberty of NGOs activities to a large extent.

As it is indicated at the beginning of this essay, the NGOs are not found for political purposes but its operation requires a large amount funds; the most of these funds are not from public donation, but from governments or states which is proved by some researches (Note 7). In the Study of Financing of Non-governmental Organisations (NGO) from the EU Budget by Policy Department on Budgetary Affairs of European Parliamen in 2010, different resources of funding for NGOs are analyzed in detail, in general there are two categories: project funding and programme funding. The former one refers to short-term support to the most of NGOs, the later one aims at distributing funds to a smaller number of NGOs but with a larger amount of funds in a long term. The figure below shows the amount of funds and time length of financial support from governments to different NGOs:

	EAC	ECHO	ENV	WB	DMFA	AECID
Project Funding	Culture Programme: budget of around €4million for 2010-2013	Grant Facility: up to 2007 the GF has supported 50 projects of 36 organisations for around €5.4m Framework Partnership Agreements: Varies between €100,000 and €18 million in 2009, to over 200 NGOs.	LIFE+: total budget of €2.143 billion for 2007-2013 (The figure refers to LIFE + as a whole, whereas the operating grants only accounts for a small share of the budget (approx. 3 %)	Many funding streams available to CSOs, from small grants of around $7000 (Civil Society Fund) to large awards averaging $1 million	SALIN: €28 million a year to 20 non-Dutch NGOs MDG3: €70 million over 4 years to 45 organisations	Project Based Cooperation: maximum support of €950,000 over two years
Programme Funding	Europe For Citizens: total budget (for the whole programme) of €215 million for 2007-2013. Funding for civil society organisations amounts to € 17 million, and operating grants to €14 million (2008-09).				MFS 2007-10: €2.1 billion over 4 years to 74 organisations	Framework Agreement Cooperation (Convenio de Cooperación): NGO funding is limited to €5 million per year (with the exception of humanitarian aid)

Figure 1. Selection of NGO Funding Mechanisms (Note 7)

Reading this table it can be concluded that no matter what forms the financial support is provided, the amount of such funding is considerably large, and it can be inferred that those NGOs would be relatively influenced by the fund-offering governments, therefore it is difficult to speak of the NGOs' independence on decision-making process.

C. The governments are reluctant to receive influence from NGOs on their power of making decision both on national level and international level.

According to the Article VI of the 1996 Guidelines for Arrangements on Relations with Non-Governmental Organization, it clearly indicates that "as a result of extensive discussions, there is currently a broadly held view that it would *not* be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making". With regard to this statement, it is expressly said that NGOs should not be directly involved in the working proceedings or meetings of WTO, this official article is cited by the dissenting voice to resist the intervention of NGOs on WTO decision-making procedures.

However, although these dissenting voice exist I still in favour of the participation of NGOs in international and WTO dispute settlement procedure because the merits of such involvement overweight the demerits as discussed above:

A. In terms of policy according to Umbricht (2001), the arguments in favor of the participation of NGOs are at a level of WTO quasi-jurisdiction (Note 8).

First of all, Umbricht (2001) believes that all information available to decision-making proceedings would contribute to the outcome. The more information the Panel and the Appellate Body collect, the higher probability for them to settle the dispute throughly because all the points neglected by the Panel or the Appellate Body may be completed by such inform provided; thus it is reasonable and beneficial for the Dispute Settlement Body to accept information from various methods. Besides, it is also said that complex cases require a large amount of information to assist the Dispute Settlement Body to clarify the context of the case. It unlikely for the Panel or the Appellate Body to be specialized in every field related to the dispute they are dealing with, thus the professional submission from specialized experts in particular area would contribute considerably to the dispute settlement process.

B. Apart from the policy arguments cited by Umbricht (2001), another aspect of the favoring statement is in the context of the legislation, it is also called “delegated power of the Appellate Body”. According to Article 17.9 of DSU, the Appellate Body is given broad authority to develop particular procedures without any violation of any rule under DSU. In addition, Article 16 (1) of the Working Procedure for Appellate Review indicates that the Appellate Body is entitled to create appropriate procedure as well in purpose of resolving procedural problem. These two articles are interpreted broadly referring to the power of Appellate Body.

C. Regarding with Scholte (1998), the advantages of NGOs involvement in WTO decision-making process are as follows in connection with the theory of civil society: firstly, NGOs are in a great position to provide WTO decision-making body with information of both data and analysis which may be out of the scope of the knowledge and implementation of WTO expert. Secondly, the different submissions offered by NGOs may lead to debate for WTO bodies to review themselves which could contribute to the clarification and explanation of the status of NGOs. Thirdly, the system of NGOs’ intervention builds a bridge between those organisations which set up in the interests of the public and WTO hearing body.

D. In general, due to the closed system of WTO dispute resolution the process of the dispute settlement is lack of transparency to some extent. The allowance of the participation of NGOs who are on behalf no political or economic interests creates a great opportunity for WTO to prompt its working transparency and further gain its reliability in settling disputes.

With regard to these arguments, the advantages of the involvement of NGOs overweight the disadvantages because they contribute to the efficiency and transparency which should be the first aim the WTO Members pursue. Under the circumstances of Members tending to settle their disputes in the system of WTO, what they are expecting from the Dispute Settlement Body is settling the dispute

quickly since such international issues are always complex and arguable on one hand, and on another hand there is rarely relative unfairness between Members, the contribution made by the intervention of NGOs meets the Members' requirement for WTO dispute resolution. Therefore, the participation of NGOs in WTO dispute settlement process should be encouraged in terms of these reasons and above.

2.2.3 Legal Basis and Non-legal Basis for NGOs Involving in WTO

Although the WTO has excluded NGOs as the body of WTO, the WTO does not ignore the communication with NGOs. As it is stated in the Agreement Establishing the World Trade Organization, "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO" (Note 9), which indicates that the possibility of the involvement of NGOs is recognised officially; however, the wording of such possibility is "may" which shows that WTO is in an initiative position to accept NGOs submission and the scope of NGOs' activities of assisting WTO are limited, and NGOs are left outside the WTO process therefore to some extent.

However, due to the increasing influence of NGOs on international issues, the WTO tends to gradually offer more opportunities for NGOs intervention in those issues than in the past. For instance, in the 1996 *Guidelines for Arrangements on Relations with Non-Governmental Organizations* the WTO suggests the Members the role of NGOs that "can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency" and "a valuable resource, can contribute to the accuracy and richness of the public debate". What is more, the Guideline emphasised the interaction with NGOs should be in terms of the following aspects:

- the organization on an ad hoc basis of symposia on specific WTO-related issues
- informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations
- the continuation of past practice of responding to requests for general information and briefings about the WTO
- if chairpersons of WTO councils and committees participate in discussions or meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise

In addition, in the report by the Consultative Board to the Director-General Supachai Panitchpakdi, *the Futrue of the WTO: Addressing Institutional Challenges in the New Millennium*, it concludes that the WTO Secretariat and the Director-General develop regular relationship with non-governmental representatives, the figure provided by the WTO indicates that the number of participants from NGOs is increasing gradually during 7 years by 2005 (Note 10). Such information provided by the WTO does not reflect the recognition of the NGOs' participation rights on a written-law level, however, it provides a guideline for the WTO when considering accepting NGOs as part of the Dispute Settlement System.

The discussion above presents the legitimacy on a theoretical level; however, the real dispute-settling participation of NGOs is reflected through a practical way. In the following part, some milestone disputes which show different attitudes of the Panel and the Appellate Body towards the intervention of

NGOs playing a role of amicus curiae (Note 11) in dispute-settling process in the structure of WTO.

3. The Improvement of the Participation of NGOs in Dispute Settlement Process of WTO

As I have stated at the beginning of this essay, I am in favour of introducing the mechanism of NGOs acting as amicus curiae in WTO Dispute Settlement System; however the current situation of the intervention of NGOs is not ideal - they have little influence on settling disputes; thus improvement measures shall be tested for NGOs in an effort to speak more loudly on a WTO stage.

In this part of this essay, I will test the possible improvement measures of NGOs participation (Note 12) with three approaches: the first one is to seek possibility for the Dispute Settlement Body to hear more from the NGOs within the scope of current WTO legal text; the second approach is references to the experience of involving amicus curiae in national legal systems such as US, which is outside the jurisdiction of WTO legal system; and the third one other elements when determining the involvement of NGOs,such as the specific criteria of introducing amicus curiae briefs in terms of substantive and procedural issues within the scope of WTO Dispute Settlement System.

3.1 Guidelines Implied in the DSU (Note 13)

In accordance with the analysis made by Marceau and Stilwell (2001), the Panel can find the following articles in the DSU as guidelines to introduce amicus curiae briefs from NGOs:

A. Article 13 of DSU indicates the general right of panel to seek information and technical advice from many aspects; it authorises the panel the initiative to take consideration of NGOs submission which it deems appropriate about the specific dispute; and it states in Article 11 of the DSU that the panel should provide objective assessment about the issue before it.

B. With regard to Article 12.2 of the DSU, the panel shall strike a balance between high-quality reports and the due process. This implies that under the circumstances of no unduly delaying the panel process, the panel can consider NGOs submissions to get the dispute better settled.

C. It requests under Article 12.6 that each party to the dispute to make written submission to the Secretariat for immediate transmission to the panel and other parties; and Article 10.2 requires the third party to provide corresponding submissions which shall be transmitted to the parties; this requirement is also stated in Appendix 3, paragraph 4 of the DSU. Such requirements do not apply to the amicus curiae procedure expressly but they should: it would make it possible that the existence of amicus curiae brief is informed to the parties and the parties would have the chance to dispose it.

D. According to Article 3.2 of the DSU it rules that the dispute settlement body shall not “add to or diminish the rights and obligations” of the Members. Under this article it sets a limit on panel’s power to introduce amicus curiae briefs - the panel should ensure that the introduction of amicus curiae briefs shall not have any negative influence on the Members’ rights, such as their rights to challenge the briefs submitted by amicus curiae.

Following these articles as guidelines the panel can introduce more amicus curiae briefs from NGOs to get them more actively involved in WTO dispute settlement.

3.2 Experience from National Legal System

As it addresses at the beginning of this essay, the amicus curiae originates from Roman time, and it continues to develop in English legal system until eighteenth century; when it comes into the United States, the amicus curiae proliferates since then. Thus the amicus curiae has long been practiced on a national level, which would contribute considerably to the build of such mechanism in WTO Dispute Settlement System, here I only refer to some practice made by the US court as examples.

The United States Supreme Court always opens the door to amicus curiae of which modern rules and norms state clearly**.** For instance, the Supreme Court Rule 37 indicates that:

> *"an amicus curiae brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule".*

This requires a participation permission from litigation parties with consent; if the parties simultaneously or respectively reject to grant such permit, the amicus would turn to the court for permission which is called "leave to file", and the Court is glad to grant such petitions for the amicus. According to Kearney and Merrill (2000), not only the governmental representatives but also non-governmental bodies may produce amicus curiae briefs once they obtain the permission from all the parties to the litigation. Such procedure applies to private representatives providing amicus curiae briefs, it is not suitable for NGOs participation within the jurisdiction of WTO because as it is said early, the majority of WTO Members would go against the participation of NGOs in their disputes; parties' consent is an obstacle on the NGOs' way to the involvement of the specific dispute. However, in United States the Court allows federal and state representatives to file amicus curiae briefs without the permission by parties' consent, which differs from the private amicus curiae mechanism and under some circumstances, it is terribly rare that the Court would be in an initiative position to invite the amicus curiae intervention and such involvement is always accepted by the Court. If such mechanism applies to the WTO Dispute Settlement System, it is unlikely for the panel to take an initiative action to request amicus curiae briefs from NGOs currently, however, it can be excepted that the barriers for NGOs intervention would be reduced by setting imitative regulations compared with the United States amicus curiae mechanism.

3.3 Other Considerations

Regarding to the substantive criteria of the NGO participation, the most important one is that there should be motivation for the NGOs to act as amicus curiae to present its opinions about the dispute; such motivation shall be in the interest of the public because the NGO is on behalf of the public interests itself, only if they are with no commercial-interest orientation can they be regarded as neutral and are allowed to give suggestions about the specific case.

Apart from the substantive standards, according to Marceau and Stilwell (2001) the considerations of procedural issues contributes to the establishment of NGOs participation mechanism as well, and one

such considerations is submitting amicus curiae briefs without delay. It enables the panel to evaluate and determine the amucis curiae briefs provided by NGOs timely. In US - Shrimp case the NGOs submissions were rejected by the Panel based on the grounds that the briefs were submitted unduly at a later stage, thus the time limit shall be an important element when determining the acceptance of amucis curiae briefs.

4. Conclusion

With all the analysis above in this essay, it can be concluded that NGOs are intending to get a foothold as amicus curiae in WTO decision-making procedure. Although the mainstream of the attitudes towards the participation of NGOs in WTO Dispute Settlement System is negative, it is clear that the WTO Dispute Settlement Body is not that reluctant to accept unsolicited submissions from NGOs. Such change can attribute to two reasons: firstly, NGOs become more specialised and obtain larger scale than them in the past days, as an individual entity compared with the governmental entity, they are eager to get involved in international issues; secondly, due to the increasing amount and complexity of disputes between Members, the Dispute Settlement Body is unlikely to settle every dispute perfectly; the assistance from NGOs would contribute to provide professional guidance to the comprehension of the specific case which would assist the panel to gain efficiency during the dispute settlement proceedings.

During the process of accepting NGOs submission as amicus curiae brief, the controversy about this issue never stops. Dissenters criticise the amicus curiae mechanism for the NGO's unsolicited intervention breaks the governmental relationship between Members because the NGO owns no governmental nature itself; and the dissenters also argue that the majority of powerful NGOs in the world are controlled by specific interest groups which may lead to the loss of neutrality and fairness of NGOs submissions; simultaneously, the nations are reluctant to gain NGOs' power on both national and international level; nevertheless, it is my view that the advantages overweight the disadvantages; thus the Dispute Settlement Body shall take consideration of the access of NGOs into WTO Dispute Settlement System.

It is not appropriate to argue that NGOs involvement in decision-making process is violating WTO rules because legal grounds that support its intervention can be found in the context of WTO rules and agreements. These grounds on one hand provide opportunities for NGOs getting connected with the General Council in manner of appropriate consultation and cooperation, and authorise the panel wide discretion to take initiative action to obtain amicus curiae briefs from NGOs. The panel and the appellate body have made effort to get NGOs involved in the dispute settlement proceedings in some cases like US - Shrimp and British - Steel; although the limitations set on NGOs qualifications to jump into the dispute settlement process are still significant, it can be seen that Dispute Settlement System now is opening its door to accept NGOs submissions as amicus curiae briefs gradually.

It is honest to say that the supportive grounds for the intervention of NGOs are few; a number of efforts shall be made to improve such situation to fill the gap between NGOs and WTO Dispute Settlement

System. One approach is to search general guidance for the panel to make decision about NGOs from existing WTO legal contexts; the second approach is tracking back to the origin of amicus curiae, the national legal system such United States for instance, to get practical experience for modifying and creating new regulations and rules for the participation of NGOs.

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Notes

Note 1. https://www.wto.org/English/Tratop_E/Dispu_E/disp_settlement_cbt_e/c9s3p1_e.htm

Note 2. General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60

Note 3. http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20716737~pagePK:220503~piPK:264336~theSitePK:228717,00.html

Note 4. The Panel Report, United States - Import Prohibition of Shrimp and Shrimp Products, WT/DS58/R,15May1998, para.3.129.

Note 5. The Panel Report, United States - Import Prohibition of Shrimp and Shrimp Products, WT/DS58/R,15May1998, para.3.131.

Note 6. See https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

Note 7. See *Financing of Non-governmental Organisations (NGO) from the EU Budge*t, available at http://www.europarl.europa.eu/document/activities/cont/201011/20101116ATT95570/20101116ATT95570EN.pdf

Note 8. In the original context of Umbricht (2001) these arguments refer to the advocacy of amicus curiae briefs, however the NGOs submission fails within the scope of amicus curiae briefs, therefore these are arguments supporting the involvement of NGOs as well

Note 9. Marrakesh Agreement Article V:2

Note 10. According to the report *the Futrue of the WTO: Addressing Institutional Challenges in the New Millennium by WTO, para 184, there were* 1578 participants representing 795 NGOs attending the Cancun Ministerial, while there were only 235 participants representing 108 NGOs on Singapore Meeting 7 years earlier.

Note 11. The form of NGOs participation in Dispute Settlement System is various: such as attending proceedings, submitting amicus curiae briefs and providing information as experts and legal counsel, in this essay it focuses on the role of NGOs playing as amicus curiae in the assistance of dispute settlement.

Note 12. The rationality of NGOs involvement has been illustrated in the former part of this essay thus in this part I am making an attempt to list the improvement approaches in terms of the procedure issues.

Note 13. This is different from the former part “Legal basis and non-legal basis for NGOs involving in WTO” because the “legal basis” part illustrates the lawful grounds which state expressly in WTO legal text; in this part it provides only the implications for the Dispute Settlement Body the underlying possibility to consider NGOs submission as amicus curiae.