

THE ROLE OF ENVIRONMENTALIST NGOs IN THE DEMOCRATISATION OF THE WTO DISPUTE SETTLEMENT PROCEDURE

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NGOs are constantly sounding the alarm against the irreversible effects of trade on the environment. On the contrary, economists argue that the development of international trade provides states with the necessary means to develop clean production techniques to safeguard the environment. ‘Trade versus Environment’ – this expression embodies the debate surrounding the WTO. NGOs have battled persistently to acquire a role in the WTO trade disputes relating to the environment. While the WTO dispute settlement mechanism was originally resilient to the intervention of non-parties to a dispute, it showed over the years a renewed interest in amicus curiae briefs submitted by NGOs. In this sense, the WTO dispute settlement mechanism followed, in the name of legitimacy, the general trend in public international law acknowledging the changing role of NGOs from ‘law-takers’ to ‘law-makers’. This article intends to investigate the progressive movement of openness of the WTO dispute settlement jurisprudence towards NGOs. In doing so, it explores the debate on the democratisation of the WTO adjudicative mechanism as well as the ensuing crisis of legitimacy looming over the WTO and NGOs alike. While this article presents the technical agent of democratisation construed in Article 13 of the DSU, it also engages in the analysis of the jurisprudence from the days of *US-Shrimp* until *EC-Asbestos*. This article finally highlights the different reform proposals discussed by the Doha negotiators in terms of the admissibility of the submissions by environmentalist NGOs into the dispute settlement procedure.

I INTRODUCTION: THE ‘TRADE VERSUS ENVIRONMENT’ SHOWDOWN

Non-Government Organisations (‘NGOs’) are non-state groupings formed to express the views and concerns of the civil society on different matters, among which is the protection of the environment. Although NGOs are constantly viewed as lobbying groups interfering in national and international politics, they have expanded progressively all over the world. This led to a

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non-disputed existence of NGOs in different forums of public international law, particularly in the context of the World Trade Organization ('WTO').

NGOs are frequently labelled as the 'voice of Nature' in the WTO as they have played a major role in highlighting the controversial showdown of 'trade versus environment'.¹ They are constantly sounding the alarm against the irreversible effects of trade on the environment. Their strategy calls for the introduction of trade restrictions to serve the protection of the environment.² On the contrary, economists argue that the development of international trade provides States with the necessary means to develop clean production techniques to safeguard the environment. They condemn the environmentalists' attitude of 'social correctness' as the rise of a 'new protectionism' era.³

This friction between environmentalist NGOs and trade experts transcended into an adjudicative confrontation as the former faced, time and again, obstacles in accessing the WTO dispute settlement system. Often, NGOs have attempted to intervene in environment-related trade disputes in the capacity of *amicus curiae*. As their participation in the procedure was not quite welcomed by the WTO adjudicative bodies, the debate became more heated. Accusations flew back and forth between the two camps. On the one hand, the WTO dispute settlement system was criticised for its lack of transparency; in fact, rulings of the WTO adjudicative bodies are usually regarded as reached 'behind closed doors' with sole consideration of states' interests.⁴ On the other hand, non-state actors, especially NGOs, were subject to scepticism from the general public that questioned the extent to which these organisations could be faithful representatives of the civil society on the international level.

Amidst this wave of criticism, the Appellate Body has gone a long distance to remodel, in the name of legitimacy, the WTO dispute settlement system. Its jurisprudential policy of openness towards the civil society was inspired mostly by the general imperative of pragmatism governing the multilateral trading system. Seeking to avoid the isolation of WTO law, the Appellate Body allowed the so-called 'friends of the court' to draw the WTO's adjudicative organs attention to the environmental issues at stake – issues which are not ordinarily included in these organs' mandate. As such, it could

1 On the role of environmentalist NGOs, see especially Kim Van der Borgh, 'The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate' (1999) 14(4) *American University International Law Review* 1223, 1227.

2 Kym Anderson, 'The Intrusion of Environmental and Labour Standards into Trade Policy' in Will Martin (ed), *The Uruguay Round and the Developing Countries* (1996) 435, 437.

3 Ibid 436.

4 Brigitte Stern, 'The Intervention of Private Entities and States as "Friends of the Court" in WTO Dispute Settlement Proceedings' in Patrick Macrory, Arthur Appleton and Michael Plummer (eds), *The World Trade Organization : Economic and Political Analysis Volume I* (2005) 1429.

be argued that the Appellate Body allowed the actions of environmentalist NGOs while eyeing the potential integration of the international law of the environment into the WTO legal system. It is possible that the Appellate Body was motivated by the trend of openness towards the civil society which occurred in public international law with the beginning of the millennium. Yet, despite the efforts of the Appellate Body, one can only speculate on the ability of the dispute settlement system to simulate truly such a movement of democratisation.

It is in this context that the present article discusses the potential role of NGOs in the WTO dispute settlement system. An interesting question arises, from a procedural point of view, as to whether the system would have an inbuilt predisposition to accommodate the participation of NGOs. In other words, it is interesting to examine whether the Dispute Settlement Understanding ('DSU') would encompass the necessary constitutional ingredients to substantiate the expansion of the current dispute resolution proceedings. Otherwise, there is only hope that the Doha Round negotiations will break new ground in the near future in terms of the democratisation of the WTO dispute settlement system. Before determining the scope of NGOs' participation in this system and prior to speculating on any future amendments of the *status quo*, it is important to analyse the role of NGOs in a general public international law panorama.

II THE PRACTICE OF AMICUS CURIAE IN PUBLIC INTERNATIONAL LAW

By definition, 'amicus curiae' is a Latin expression referring to the 'friends of the Court'.⁵ It allows a group of individuals, other than the litigants, to intervene in the judicial proceedings of a dispute by introducing factual and legal information, which could eventually influence the outcome in one way or the other.⁶ The practice of amicus curiae surfaced originally in national legal systems in both civil and common law traditions. It transcended thereafter to the realm of public international law.⁷ Nowadays, it is commonly agreed that this practice is in fact the preferred means for NGOs to participate in international adjudication.⁸

5 Katrin Arend, 'Article 13 DSU' in Rüdiger Wolfrum, Peter-Tobias Stoll and Karen Kaiser (eds), *WTO: Institutions and Dispute Settlement* (2006) 415, 420.

6 Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (2005) 303.

7 For more information in relation to the practice of amicus curiae in the United States, Australia and France, see generally Paul Collins, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation' (2004) 38(4) *Law and Society Review* 807, 807–832; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 365–402; Frédérique Ferrand, 'The French Approach to the Globalisation and Harmonisation of Civil Procedure' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (2012) 335, 349–351.

8 Anna-Karin Lindblom, above n 6.

At first glance, this practice seems to be in sharp contrast with the implicit trend in public international law that endorses the participation of private actors in judicial proceedings only when it occurs under the wing of States.⁹ Nevertheless, with the proliferation of international courts and tribunals since the 1990s,¹⁰ the general scene of public international law experienced a shift from traditional interstate disputes to a varied form of ‘pluralism in international justice’.¹¹ As such, the intervention of private actors gradually infiltrated the fora of international adjudication depending on the nature and specialisation of the different international judiciaries.¹² It is in this atmosphere of gradual openness towards private actors that the practice of *amicus curiae* became a current axis of legal research on the role of individuals in public international law.¹³

A quick overview of the general panorama of public international law reveals that the practice of *amicus curiae* surfaced initially in international courts designed to protect the rights of individuals against violations committed by States, such as the European Court of Human Rights and the various international criminal courts.¹⁴ Not only did private actors invade the international adjudication of the ‘individual-state’ type, they also succeeded

9 Marco Slotboom, *A Comparison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?* (2006) 227.

10 See generally, Cesare Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’ (1999) 31(4) *International Law and Politics* 709, 709; Gilbert Guillaume, ‘L’unité du Droit International est-elle Aujourd’hui en Danger?’ (2003) 55(1) *Revue Internationale de Droit Comparé* 23, 23–30.

11 Giorgio Sacerdoti, ‘The Role of Lawyers in the WTO Dispute Settlement System’ in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 126. See also, Holly Cullen and Karen Morrow, ‘International Civil Society in International Law: The Growth of NGO Participation’ (2001) 1(1) *Non-State Actors and International Law* 7, 7: ‘[T]he integration of NGOs into the implementation of international law ... indicates a socialisation of international law, and more importantly, the beginnings of pluralism in international law, where states are not the only actors which can influence the progressive development of international law’.

12 For a general presentation on the practice of *amicus curiae* in public international law, see especially Jona Razzaque, ‘Changing Role of Friends of the Court in the International Courts and Tribunals’ (2001) 1(3) *Non-State Actors and International Law* 169, 169–200.

13 See generally Héléne Ruiz Fabri and Jean-Marc Sorel (eds), *Le Tiers à l’Instance Devant les Juridictions Internationales* (2005); Emmanuelle Jouannet, ‘L’Impossible Protection des Droits du Tiers par la Cour Internationale de Justice dans les Affaires de Délimitation Maritime’ in Daniel-Heywood Anderson (et al), *La Mer et son Droit: Mélanges Offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (2003).

14 Hervé Ascensio, ‘L’*Amicus Curiae* devant les Juridictions Internationales’ (2001) *Revue Générale du Droit International Public* 897. On the conditions for the participation of NGOs as *amici curiae* in the proceedings of the Tribunal for the former Yugoslavia, see especially Patrizia De Cesari, ‘NGOs and the Activities of the *Ad Hoc* Criminal Tribunals for Former Yugoslavia and Rwanda’ in Tullio Treves (et al) (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 113, 118.

in conquering other growing sectors of international justice such as the direct investment arbitrations in application of the ICSID Convention.¹⁵

Nonetheless, this trend of admitting *amicus curiae* remains undisclosed in other international courts adjudicating intergovernmental disputes. Particularly, the International Court of Justice ('ICJ') and the WTO dispute settlement system adopted a reserved attitude vis-à-vis the *amicus* briefs. Both judicial institutions were inclined to limit their proceedings to the disputants and third parties respectively,¹⁶ given the explicit limitation imposed by their respective constitutional instruments.¹⁷ This strict observance by the ICJ and the WTO dispute settlement system of the exclusive intergovernmental character of the proceedings was criticised by the modern doctrine for being in disparity with the general framework of 'privatisation of the public international law'.¹⁸ Scholars argued that the rejection of the non-state actors' submissions is outdated.¹⁹ It is in this environment that the democratisation debate was transferred from the general context of public international law to the corridors of the WTO.²⁰

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- 15 Florian Grisel and Jorge Vinuales, 'L'*Amicus Curiae* dans l'Arbitrage d'Investissement' (2007) 22(2) *ICSID Review: Foreign Investment Law Journal* 380.
 - 16 On the position of the ICJ, see generally Eric de Brabandere, 'Non-State Actors in International Dispute Settlement: Pragmatism in International Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 342, 349–350; Anna-Karin Lindblom, above n 6, 301.
 - 17 *Statute of the International Court of Justice* art 34.1: 'Only States may be parties in cases before the Court'; *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*') art 3.2: 'The dispute settlement system of the WTO ... serves to preserve the rights and obligations of Members under the covered agreements'.
 - 18 On the movement of privatisation of the international law, see generally Habib Ghérari and Sandra Szurek (eds), *L'Emergence de la Société Civile Internationale, Vers la Privatisation du Droit International* (2003); Ralph Steinhardt 'The Privatisation of Public International Law' (1991–1992) 25 *George Washington Journal of International Law and Economics* 538ff., 544; Éric Canal-Forgues, *Le Règlement des Différends à l'OMC* (2004) 131.
 - 19 Philippe Sands, 'International Law, the Practitioner and Non-State Actors' in Chanaka Wickremasinghe (ed), *The International Lawyer as Practitioner* (2000) 117. See also Daniel Esty, 'We the People: Civil Society and the World Trade Organization' in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000) 87, 96–97: '[T]he proposition that states are the only legitimate actors within the international trading system is seriously dated'.
 - 20 On the general movement of 'democratisation of international law', see generally Rosalyn Higgins, 'The Reformation in International Law' in Richard Rawlings (ed), *Law, Society, and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995* (1997) 215.

III THE DEMOCRATISATION DEBATE IN THE WTO: A CRISIS OF LEGITIMACY... BUT WHO'S LEGITIMACY?

NGOs have always accused the WTO of suffering a 'democratic deficit'.²¹ For a better understanding of this criticism, one should consider carefully the concept of democratisation. By definition, democracy 'suggests ... that everyone affected by a decision has a right to participate in the decision-making process'.²² The addition of the suffix 'isation' attributes a dynamic perspective to the notion of democracy.²³ Whereas democracy is a state of affairs, democratisation is an ongoing process. As such, the request of NGOs can be described as an invitation to the WTO to become a more democratic organisation.

For several NGOs, the dream of democratising the WTO goes beyond the perimeter of the dispute settlement system.²⁴ More specifically, the WTO should pass through certain milestones before it can be branded as a democratic organisation. NGOs have routinely looked for better access to information, increased participation in the decision-making process and a more effective role in legal advocacy.²⁵ These milestones have delineated in practice the concept of democratisation. Hence, this concept became customarily associated with two synonymous attributes – transparency and participation. This second attribute constitutes the object of scrutiny in this article.

Following the Uruguay Round, the civil society was constantly vociferous in its request for the WTO to open its dispute settlement system to amici submissions. It actively sought the establishment of a 'participatory democracy' within the WTO dispute settlement procedure. This rising voice of civil society ignited the first spark of an overriding debate on the democratisation of the system fuelled equally by the views of enthusiasts and critics of the controversial intervention of NGOs. Interestingly, both sides present their main arguments on grounds of legitimacy.

21 Sylvia Ostry, 'The WTO and International Governance' in Klaus-Günter Deutsch and Bernhard Speyer (eds), *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* (2001) 285, 291.

22 See Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (2008) at <<http://0-www.oxfordreference.com.alpha2.latrobe.edu.au/views/ENTRY.html?entry=t287.e600&srn=2&ssid=305627910#FIRSTHIT>>.

23 Pim den Boer, 'The Historiography of German *Begriffsgeschichte* and the Dutch Project of Conceptual History' in Iain Hampsher-Monk, Karin Tilmans and Frank van Vree (eds), *History of Concepts: Comparative Perspectives* (1998) 13, 15: 'The suffix "isation" ... gives many words a new, dynamic dimension'

24 See generally Fiona McGillivray, 'Democratising the World Trade Organization' (2000) *Essay in Public Policy No 105*, Stanford University.

25 Sylvia Ostry, above n 21, 291.

On the one hand, the partisans of this participation note essentially that NGOs are in the heart of all international fora and existed even prior to the emergence of the WTO. It is obvious that public international law already acknowledges this participation as an important factor shaping national policies and international treaties. If NGOs are currently in the spotlight, it is due to their increasing interest in the law-making process within international organisations and their desire to have a formal input in the proceedings of international adjudication.²⁶ As such, it is unlikely that the WTO dispute settlement system could have remained insensible to the changing role of NGOs from ‘law-takers’ to ‘law-makers’.²⁷

More importantly, the system could not have ignored the fact that the WTO is not only a trade negotiation forum, but also a key structure of global governance.²⁸ For that reason, it should act in accordance with its responsibilities towards the community of worldly citizens it represents and open its dispute settlement process to the general public.²⁹ Specifically, environmentalists argue that the WTO should rise up to the challenge of finding common ground between trade and the environment and refrain from being unfriendly to NGOs.³⁰ Eventually, the Appellate Body has responded to this general call for openness and admitted in the *US-Shrimp Case* that the WTO is not a ‘self-contained legal regime’ operating in isolation from non-trade institutions.³¹

On the other hand, the critics present a robust case against the intervention of NGOs in the WTO adjudicative process. Their argument is based on questioning the motives of these contributors of civil society: are they

26 Philippe Sands, above n 19, 103.

27 On the changing role of non-state actors, see generally Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (2010).

28 Daniel Esty, above n 19, 88–89.

29 Daniel Esty, above n 19, 90.

30 Daniel Esty, above n 19, 93.

31 For more information on the circumstances of the *US-Shrimp* dispute, see below Part IV. See also Jonathan Skinner, ‘A Green Road to Development: Environmental Regulations and Developing Countries in the WTO’ (2010) 20(1) *Duke Environmental Law & Policy Forum* 245, 252; Peter Yu, ‘The Objectives and Principles of TRIPS Agreement’ in Carlos María Correa (ed), *Research Handbook on the Protection of Intellectual Property under WTO Law: Intellectual Property in the WTO Volume I* (2010) 146, 188; Peter Mavroidis, ‘Remedies in the WTO Legal System: Between a Rock and a Hard Place’ (2000) 11(4) *European Journal of International Law* 763, 765; Frederick Abbott, ‘Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance’ in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000) 15, 33. On the linkage between the WTO law and the public international law, see generally Thomas Cottier and Krista Schefer, ‘Good Faith and the Protection of Legitimate Expectations in the WTO’ in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000) 47, 47, 67–68.

mobilised by purely altruistic motives or do they mask various lobbying forces of the international relations world? When considering the conclusions of *amici curiae*, the observant can probably detect certain slogans strategically formulated into a ‘*trompe l’oeil* format’³² to represent a mixed *bouquet* of underlying political opinions.³³ In reality, even when adopting the highest level of objectivity and professionalism, civil actors would not be able to isolate themselves completely from considerations relating to their geographical origin and natural socio-cultural environment.

Not surprisingly, it could be considered, in the same line of thought, that communications from NGOs in the context of a given trade dispute most likely emanate from groups with no real interest in a WTO case other than to encourage a ruling against a certain disputant. NGOs could have ‘an interest of a general nature in the result of a given case in the light of the interest they pursue’.³⁴ In this manner, NGOs would not be considered as ‘friends of the court’, but rather as ‘enemy of a certain disputant’.³⁵ In all cases, the scepticism surrounding the growing role of non-state actors in the international arena is not exclusive to the WTO. On the opposite, it can be detected also in the jurisprudence of the ICJ.³⁶

Other arguments could come into play in tipping the scales of the democratisation debate in one direction or the other. In support of the transparency of the WTO dispute settlement system, proponents of the intervention of NGOs hint to the fact that the principal actors in the area of international trade are fairly operators of the civil society. Building on the panel’s findings in *US – Section*

32 The French expression ‘*trompe l’oeil*’ could be translated as ‘more than meets the eye’, thus is referring to a deceptive format in the context above. For further information, see generally Elizabeth Knowles, *Oxford Dictionary of Phrase and Fable* (2006): ‘*trompe l’oeil* [is a] visual illusion in art, especially as used to trick the eye into perceiving a painted detail as a three-dimensional object. The term is French, and means literally ‘deceive the eye’.’

33 The French term ‘*bouquet*’ is used as a synonym for ‘assortment’ or ‘bundle’.

34 Giorgio Sacerdoti, above n 11, 125.

35 Mario Prost, *D’abord les Moyens, les Besoins Viendront Après: Commerce et Environnement dans la “Jurisprudence” du GATT et de l’OMC* (2005) 117.

36 ‘Separate Opinion of Judge Guillaume’, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 287, 287–288. When commenting on the influence exercised by NGOs within the Assembly of the World Health Organization and the General Assembly of the United Nations to initiate a request for an advisory opinion on the ‘Legality of the Threat or Use of Nuclear Weapons’ in 1996, Judge Gilbert Guillaume ‘wondered whether ... the requests for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible’ hoping that ‘Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media’. Following these remarks by the judge, commentators had little doubt that the proceedings were instigated behind the scenes by the political lobbying of the ‘World Court Project’, a grouping of NGOs opposed to the use or threat of nuclear weapons. See especially Philippe Sands, above n 19, 103.

301 Trade Act,³⁷ they maintain that non-state actors should be admitted *a fortiori* as participants in the WTO dispute settlement mechanism despite the latter's intergovernmental nature.³⁸ Moreover, the possibility of providing assistance on scientific questions could constitute another argument in favour of the intervention of non-state actors. From a technical point of view, it is plausible that WTO panels would not have the required knowledge on certain scientific complex issues. After all, jurists alone cannot respond accurately to the needs of society in the correlatively challenging areas of health protection and environment.³⁹

In contrast, to those against the democratisation of the WTO dispute settlement system, the idea of granting a 'right' of participation in the procedure to non-state actors would force the Dispute Settlement Body into facing an overwhelming number of superfluous communications. Thus, there would be a real jeopardy of overloading the system and paralysing its ability to effectively adjudicate intergovernmental trade disputes. Moreover, in a related note, it could be argued that the face-off between the environmentalist NGOs and the WTO dispute settlement system is a battle fought against the wrong opponent. If the dispute settlement system is able to affect how governments shape their national policies on issues of the environment,⁴⁰ its role remains limited as it is not intended to take part in the WTO rule-making process.⁴¹ Rather, the battle should be fought by NGOs against the trade law negotiators drafting WTO Agreements.

Having clarified the terms of the debate, it is important to demonstrate how the WTO adjudicative bodies deal with the submissions of *amici curiae*. Thus, the principal question to be addressed is whether NGOs as 'friends of the Court' can access the WTO dispute settlement system, and if so, under what conditions. With the debate on the democratisation of the WTO adjudicative branch leading to mixed results, it is interesting to determine whether the relationship between the dispute settlement system and NGOs is that of a tempestuous love affair or that of a potentially forced cohabitation.

37 Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, paras 7.72, 7.73.

38 Serge Guinchard, *Droit Processuel: Droit Commun du Procès* (2001) 634.

39 Quite to the point, a famous scientist, Paul Johnston, claimed in 2002 that '[w]ithout being properly informed you can't understand ecosystems as a whole'. See Philippe Bovet and François Ploye, 'The Polluter Pays but Who Profits? Clean Futures Market', *Le Monde Diplomatique* (online), July 2002 <<http://mondediplo.com/2002/07/18weather>>.

40 Alan Deardorff, 'The Economics of Government Market Intervention, and Its International Dimension' in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000) 71, 72.

41 Edward Krauland, 'The Challenge of Enhancing Global Security through Multilateral Legal Architecture' in Marco Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H Jackson* (2000) 101, 107.

IV THE TECHNICAL AGENT OF DEMOCRATISATION: ARTICLE 13 OF THE DSU

The first question to be tackled relates to the technical vehicle that would allow the WTO dispute settlement system to accommodate the *amici curiae*. In that perspective, it is noteworthy that the grand design of the DSU encompasses a subtle reminder of the intergovernmental feature of the organisation and its dispute settlement system respectively. Dominique Carreau, a name well-known to specialists of public international law in France, argues that as the Marrakesh Agreements were signed by states,⁴² they created an international organisation of an intergovernmental type. As a consequence, given that the DSU exists within this intergovernmental framework, it is normal that its rules and procedures would be solely addressed to Members of the organisation. Carreau reaches this conclusion in light of the general philosophy of the preservation of ‘the rights and obligations of Members under the covered agreements’ as defined in Article 3.2 of the DSU. Therefore, according to this author, the WTO dispute settlement system is definitely an intergovernmental mechanism.⁴³

In a similar approach, the jurisprudence of the Appellate Body includes a clear indication to the intergovernmental nature of the system:

It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO.... Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before a panel” may become third parties in the proceedings before that panel. Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel.⁴⁴

This first glimpse at the DSU leads to the assumption that, given the intergovernmental nature of the WTO, it is natural for the dispute settlement system to be unwelcoming – cautious the least – towards admitting the interference of private actors in a procedure strictly intended for sovereign States. The intergovernmental framework of the dispute settlement system is, thus, a sign of its predisposition to exclude private actors, whether individuals or NGOs.

42 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

43 Dominique Carreau and Patrick Juillard, *Droit International Economique* (2005) 67. See also Thomas Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (2006) 60.

44 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB-1998-4, para 101.

Yet article 13.1 of the DSU consecrates the panels' right to seek information from any individual or body of its choosing.⁴⁵ Considered in their literal wording, Articles 3.2 and 13.1 of the DSU seem to pinpoint a possible inconsistency between the intergovernmental nature of the dispute settlement system and the right for its adjudicative bodies to seek information from certain bodies, including NGOs.

With the prospect of clashing visions vis-à-vis these different provisions of the DSU, the WTO adjudicative bodies were bound to present the international community with a harmonious interpretation that would bridge the gaps between the relevant articles.

V THE EVOLUTION OF THE WTO JURISPRUDENCE: FROM PRUDENCE TO RELATIVE OPENNESS TOWARDS AMICUS CURIAE

A *The Original Reluctance towards Amicus Curiae briefs*

In 1995, shortly after the establishment of the WTO, the panel adjudicating the *US-Gasoline* dispute received for the first time a non-solicited amicus brief.⁴⁶ Yet, the panel report was silent on this issue.⁴⁷ As the first WTO panels attempted to avoid this thorny question, it was only a matter of time before it was on the table again. In *US-Shrimp*, the panel received yet again submissions from NGOs regarding the substance of the dispute.⁴⁸ These submissions formed the embryo of an unwarranted difficulty for the panel for two reasons. First, the circumstances of the dispute reveal that the panel did not seek the information submitted. Second, whereas the findings of these submissions could include scientific data potentially useful for the settlement of the dispute, their substance could however exercise a non negligible ideological pressure on the panellists.⁴⁹

In *US-Shrimp*, the panel had to address two key questions as to the issue of amicus curiae: would the panel have the right to accept submissions from NGOs, which are not parties to the dispute? And if so, would the panel have the obligation of taking into consideration these submissions in its report?

45 Article 13.1 of the DSU provides that 'each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.'

46 Guohua Yang, Bryan Mercurio and Yongjie Li, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (2005) 174.

47 James Durling and David Hardin, 'Amicus Curiae Participation in WTO Dispute Settlement: Reflections on the Past Decade' in Rufus Yerxa and Bruce Wilson (eds) *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 222.

48 Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 98–1710, para 7.7.

49 Mario Prost, above n 35, 113.

Regarding the first question, the panel strictly refused to take into account any submissions from non-governmental sources on the ground that this approach would be ‘incompatible with the provisions of the DSU’.⁵⁰ In a faithful reading of Article 13 of the DSU, the report stated that the initiative to seek information is firmly reserved to the panel, thus leaving no room for NGOs submissions.⁵¹

This interpretation of the DSU caused a wave of shock among scholars known for their sympathy with environmental causes. In the view of environmentalists such as Mario Prost, the panel report closed the door to NGOs, curtailed the possibility to sensitise the WTO adjudicative bodies to environmental values and even risked burying in the ashes any hope of ‘greening the WTO’.⁵²

B *The US-Shrimp Dispute: The First Signs of Openness towards the International Civil Society*

Nevertheless, rather than considering the status of environmental interests as hopeless, it is best to assess the situation with the benefit of jurisprudential hindsight. In the same matter, *US-Shrimp*, the Appellate Body found that the panel’s interpretation does not correspond to the letter of Article 13 of the DSU. According to the Appellate Body, this article only gives panels the right to seek information without necessarily prohibiting them from ‘accepting information which has been submitted without having been requested by a panel’.⁵³ Thus, the Appellate Body overturned the findings of the panel under the pretext that its ‘reading of the word “seek” is unnecessarily formal and technical in nature’.⁵⁴ As a result, the Appellate Body expanded the margin of discretion of panels in accepting and subsequently taking into consideration any information, regardless of whether the panel requested it or not.

This strong message regarding the absence of any prohibition to accept non-requested amicus curiae submissions was coupled with yet another practical rule. Addressing the second question, the Appellate Body negates any obligation upon the panels to consider the amicus briefs. On the opposite, it asserts that panels are free to make a discretionary judgement on the importance of the information submitted during the process of dispute settlement:

The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape

50 Panel Report, *US – Shrimp*, above n 43, para 7.8.

51 Ibid.

52 Mario Prost, above n 35,113.

53 Appellate Body Report, *US – Shrimp*, above n 44, para 108.

54 Appellate Body Report, *US – Shrimp*, above n 44, para 107.

the process of fact-finding and legal interpretation makes clear that a panel will *not* be divulged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.⁵⁵

A close reading of the report reveals that the Appellate Body did not overturn the panel's finding that 'if any party in the present dispute wanted to put forward these documents, or part of them, as part of their own submissions to the Panel, they were free to do so'.⁵⁶ On analysis, this solution seems appropriate and enticing for the reason that it reconnects with the fundamental intergovernmental characteristic of the WTO dispute settlement system. Otherwise, if the Appellate Body would have accepted that panels are obliged to take into consideration the amicus curiae briefs, it would have 'inappropriately elevat[ed] the status of private actors ... to that of a government'.⁵⁷ Thus, it would have potentially questioned – even challenged – the fundamental intergovernmental feature of the dispute settlement system. A jurisprudential pathway of this kind would involve a high level of risk with the possibility of the WTO temple collapsing on the heads of its membership.⁵⁸ It is likely that the price of such a jurisprudential adventure would cost the organisation and its dispute settlement system the confidence of its Members. As it is diligently acknowledged, it is utmost important for the WTO Members to 'feel that they have a certain control over "their" dispute'.⁵⁹

Yet, by allowing the amicus briefs into the dispute settlement proceedings through the door of submissions by the disputants, the Appellate Body succeeded in preserving the integrity of the system, while establishing the widely sought after 'balance between community interest and "party-control"'.⁶⁰ The balancing effect of this solution lies in the Appellate Body's finesse in depriving the 'friends of the court' from a proper 'right' of participation in the procedure, but – critically – ensuring that they would not be automatically excluded from the WTO dispute settlement proceedings as long as they are integral to any part of the submissions of any of the disputants.

55 Appellate Body Report, *US – Shrimp*, above n 44, para 108.

56 Panel Report, *US – Shrimp*, above n 48, para 7.8. This finding was confirmed by the Appellate Body in its report in paragraph 109.

57 James Durling and David Hardin, above n 47, 221.

58 On the Members' fear that NGOs would revoke the inter-governmental nature of the WTO and jeopardise its dispute settlement system, see generally Jeffrey Dunoff, 'The Misguided Debate over NGO Participation at the WTO' (1998) 1(3) *Journal of International Economic Law* 433, 433–456.

59 Peter Clark and Peter Morrison, 'Key Procedural Issues: Transparency – Comments' (1998) 32 *The International Lawyer* 860.

60 *Ibid.* See also James Durling and David Hardin, above n 47; Nathalie Bernasconi-Osterwalder (et al), *Environment and Trade: A Guide to WTO Jurisprudence* (2006) 325.

In general, the scholarly reaction vis-à-vis the report of the Appellate Body in *US-Shrimp* is mixed. Nevertheless, one aspect is common, with many authors struggling to justify the findings of the Appellate Body from a legal perspective. Certain scholars, such as Georg Umbricht, concur with this interpretation: however, the author argues that the Appellate Body opted for ‘a broad reading of Article 13 DSU allowing panels to consider amicus curiae briefs’.⁶¹ French scholars such as H  l  ne Ruiz Fabri regard this ruling as a neutralisation of the amicus curiae problem.⁶² Others have a difficulty in justifying the legal analysis of the Appellate Body. If Article 13 of the DSU does not enclose a strict prohibition of submissions by amicus curiae, the general text of the DSU is equally devoid of any clear provision confirming this practice as part of the WTO dispute settlement proceedings. Literature reviews strived to find a logical foundation for the power of inquiry vested in panels. Robert Howse, for example, stresses that ‘the Appellate Body did *not* base the authority to accept amicus curiae briefs on the right to ‘seek’ information from any individual or body in Article 13’;⁶³ rather, it based its decision on this article in conjunction with Article 12.1 of the DSU in terms of which panels can ‘adopt their own working procedures applicable to each specific dispute’.⁶⁴ A final category of researchers considered that the Appellate Body, in accepting the submissions of amicus curiae without any clear provisions in the DSU, admitted to the existence of an ‘inherent jurisdiction’ of panels and consolidated their implied power as a ‘general principle of law’ recognised in various Common Law systems.⁶⁵

C *The Inclusiveness of the Appellate Body in the Movement of Democratisation*

In *US-Shrimp*, the Appellate Body itself received a number of unsolicited *amicus* briefs, one being submitted directly by a non-governmental entity and three others being attached to the submissions of a disputant. As a consequence, the Appellate Body had to decide on its own authority to accept amicus briefs.

61 Georg Umbricht, ‘An “Amicus Curiae Brief” on Amicus Curiae Briefs at the WTO’ (2001) 4 *Journal of International Economic Law* 775.

62 H  l  ne Ruiz Fabri, ‘Chronique du R  glement des Diff  rends – 1996–98’ (1999) *Journal du Droit International* 497.

63 Robert Howse, ‘Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy’ (2003) 9(4) *European Law Journal* 498.

64 Ibid. See also Guohua Yang, Bryan Mercurio and Yonghie Li, above n 46, 145; James Durling and David Hardin, above n 47. For more information on the ruling of the Appellate Body, see Appellate Body Report, *US – Shrimp*, above n 44, para 105.

65 Chester Brown, *A Common Law of International Adjudication* (2007) 76; Andrew Mitchell and David Heaton, ‘The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function’ (2009–2010) *Michigan Journal of International Law* 583.

In its final report, the Appellate Body ruled only on the latter, withholding its ruling on the former, thus leaving pending the question of the admissibility of a non-requested amicus brief during appeal.⁶⁶ Even more surprisingly, the Appellate Body struggled to find a proper legal foundation for its decision. If the panel's right to accept and consider amicus brief can be based on a combination of Articles 12.1 and 13 of the DSU, it is not clear which articles could justify the Appellate Body's authority in that respect.⁶⁷ In that context, it is no surprise that amici submissions during the appellate phase have drawn much more controversy than they have initially for panels.⁶⁸

Following *US-Shrimp*, the reports of the Appellate Body matured progressively into a body of case law leading to a jurisprudential policy of openness towards the international civil society. In *US – Lead and Bismuth II*, having received a number of amici briefs, the Appellate Body defined for the first time the legal basis justifying its ability to receive such submissions. It brilliantly highlighted the silence of the DSU on this matter and sought as such guidance from the spirit of Article 17.9 of the DSU:

In considering this matter, we first note 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 in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. However, Article 17.9 of the DSU ... makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU.... Therefore, we are of the opinion that ... we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.⁶⁹

It is important to note that Article 17.9 of the DSU does not address the issue of amicus curiae briefs directly. Yet, it allows the Appellate Body to draw up working procedures in consultation with the Chairman of the DSB and the Director-General, and to communicate these procedures to the Members. Hence, one can only agree with the opinion according to which the Appellate

66 Brigitte Stern, above n 4, 1434. It is noteworthy that, following the *US-Shrimp* dispute, the panel adjudicating the *Australia-Salmon* dispute was inclined to accept unmistakably amicus briefs that were not attached to the litigants' submissions. On this issue, see especially Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, 00-0542, para 7.9. See also James Durling and David Hardin, above n 47, 223.

67 Nathalie Bernasconi-Osterwalder (et al), above n 60, 320.

68 See especially Padideh Ala'i, 'Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience' (2000–2001) 24(62) *Fordham International Law Journal* 83–84.

69 Appellate Body Report, *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, 00-1896, para 39.

Body omitted to link its findings to any specific textual provision, despite the clear explanation in the report circulated that the Appellate Body has ‘the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal’.⁷⁰

Interestingly, it seems that this vague reference to Article 17.9 of the DSU allowed the Appellate Body to have an ‘unlimited freedom of action’⁷¹ in relation to the amici submissions, as long as it ‘believe[s] [it] is pertinent and useful in an appeal’.⁷² The current analysis of the jurisprudence of the Appellate Body will end on an explanatory note clarifying the extent of this ‘unlimited freedom of action’. The margin of manoeuvre of the Appellate Body could be considered as quite large. Not only is the Appellate Body in a position to allow NGO submissions, even more, as per the findings in the *EC-Sardines* dispute,⁷³ it can admit amici submissions originating from a WTO Member,⁷⁴ without any distinction as to the author of the brief.⁷⁵

D *The Double-Edged Sword of the Appellate Body’s Jurisprudential Policy of Openness*

Technically speaking, one of the risks of the approach adopted by the Appellate Body on the question of the admissibility of *amicus curiae* briefs lies in its liberty in interpreting the provisions of the DSU. Its method of interpretation takes centre stage given its variation whether it is related to the panels or the Appellate Body’s ability to receive amici submissions. If nowadays WTO panels allow the intervention of certain ‘friends of the court’ in the dispute settlement procedure, it is due to the fact that their attitude of tolerance is backed by the findings of the Appellate Body and its broad interpretation of Article 13 of the DSU. Whereas this interpretation is inspired by the spirit of the DSU, the Appellate Body’s reading of the DSU when determining the extent of its ability to be a recipient of such submission can be rather labelled as evolutionary.⁷⁶

This evolutionary interpretation was not well received by WTO Members. The jurisprudential policy of the Appellate Body introducing subtly a

70 Ibid 42. See Andrew Mitchell and David Heaton, above n 65, 585.

71 Brigitte Stern, above n 4, 1437.

72 Appellate Body Report, *US –Lead and Bismuth II*, above n 69.

73 Appellate body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 02-5137, para 153.

74 The brief was submitted by Morocco, which preferred an intervention as an *amicus* rather than a third party to the dispute.

75 Appellate Body Report, *EC-Sardines*, above n 73, paras 162, 166.

76 Brigitte Stern, above n 4, 1457.

culture of openness into the dispute settlement proceedings was indeed very alarming. At one point in 2000, the WTO General Council was forced to hold a special session during which Members considered the systemic issue of *amicus curiae*. While acknowledging that they had no intention to weaken the dispute settlement institutions, several Members asserted that the purpose of the meeting was to reaffirm the mandate of each constituent element of the multilateral trading system. In that respect, it was revealed that the quasi-totality of Members expressed genuine concern vis-à-vis the development of the Appellate Body's jurisprudence on *amicus curiae* since the *US-Shrimp Case*.

Even more, as the issue was discussed during the Uruguay Round and subsequently excluded by negotiators from the draft of the DSU, many representatives conveyed that there was a general atmosphere of hostility in the WTO in relation to *amicus curiae* briefs. The Appellate Body was especially frowned upon for exceeding its authority. Practically, the course of action undertaken by the Appellate Body was viewed as a *de facto* alteration of the Members' rights. As such, several representatives confirmed that it would be preferable for the Appellate Body to refer the matter of *amicus curiae* to the General Council – as the WTO legislature in charge of the interpretation of agreements, rather than setting a precedent in the direction of the admissibility of *amicus* submissions.

As a guise of conclusion for this meeting, the Chair of the General Council firmly advised that in the absence of clear provisions on the matter, the Appellate Body should exercise self-restraint and extreme caution when dealing with *amicus* briefs in the future 'until Members had considered what rules were needed'.⁷⁷

E *The Strategically Nuanced Solution in EC-Asbestos: A Jurisprudential Policy of 'Conditional and Controlled' Openness*

As explained, several diplomats and even certain doctrinal opinions expressed their hostility in regards to the Appellate Body's ruling. On the one side, diplomats lashed with hard criticism accusing the Appellate Body of 'crossing its limits' and reminding that it 'was not a *supra* body within the organisation'.⁷⁸ On the other side, authors argued that the latter 'reach[ed] a point of no return' by not only admitting NGOs submissions, but by deliberately

⁷⁷ WTO General Council, Minutes of WTO General Council Meeting, WT/GC/M/60 (22 November 2000) 28–29.

⁷⁸ *Ibid* 4.

inviting them to submit briefs.⁷⁹ However, when evaluating the criticism of WTO Members to the Appellate Body's findings, one can note that its overall jurisprudence fared well in calming their fears. Often, the Appellate Body exercised self-restraint in admitting and considering amicus submissions. As Durling and Hardin explain, the worst scenario of having the sovereignty of WTO Members hijacked by amicus curiae simply did not occur.⁸⁰ Rather, the Appellate Body attempted to find ways to confine any potential intervention by private actors into a strict framework of rules.

In *EC-Asbestos*, the Appellate Body established a set of special procedures and substantial rules to regulate the admittance of amicus submissions.⁸¹ Among the requirements specified by the Appellate Body,⁸² NGOs needed to apply in writing for a leave to file an amicus brief while specifying explicitly their interest in the matter at hand. Other than regulating the procedural aspect of the authorisation to submit amicus briefs, the Appellate Body also clarified the rules applying for the written briefs themselves. Particularly, NGOs were asked to date and sign a filed brief of no longer than 20 pages and to limit their submissions to legal arguments in support of one of the disputants' position.⁸³ With these procedures and rules in the play, none of the NGO submissions were accepted eventually by the Appellate Body, thus transforming its *EC-Asbestos* ruling into a strategically nuanced solution – though it did not quite force the WTO Members' hand into accepting the intervention of private actors, it did not completely deprive NGOs from their rightful voice in environmental disputes.

VI CONCLUSION: THE WAY FORWARD WITH THE DOHA ROUND

This contribution is certainly short of presenting an exhaustive answer to the 'trade versus environment' dilemma. In fact, the author only hopes to contribute in the most humble way to the demystification of the terms of said debate. The author commends the Appellate Body for managing to its best the *status quo*. It has succeeded over the years to balance the intergovernmental nature of the dispute settlement system with the urging desire of the civil society to have its voice heard via amicus briefs. It is no secret that this balance was achieved at the high price of giving NGOs an apparent indeterminate weight in the

79 Brigitte Stern, above n 4, 1437.

80 James Durling and David Hardin, above n 47.

81 See especially Communication from the Appellate Body, WT/DS135/9 (8 November 2001).

82 On the suggestions made by the doctrine on this issue, see especially Gabrielle Marceau and Matthew Stilwell, 'Practical Suggestions for *Amicus Curiae* Briefs before WTO Adjudicating Bodies' (2001) 4(1) *Journal of International Economic Law* 155, 155–187.

83 Communication from the Appellate Body, above n 81.

outcome of disputes.⁸⁴ Reading between the lines, one can say that in the present state of affairs, the WTO adjudicative organs are more likely to accept amicus briefs when submitted as part of the disputants' submissions rather than independent 'stand-alone' submissions.⁸⁵ For the time being, it seems that the admissibility of the amicus briefs is yet to 'become a formal procedural element in the DSU'.⁸⁶ It remains, until further notice, a technicality governed by a practical solution dictated by the jurisprudence of the Appellate Body.⁸⁷

The future could be different with the review process of the Dispute Settlement Understanding as foreseen by the Uruguay Round negotiators in 1994.⁸⁸ Despite the initiation of this process four years following the establishment of the WTO, the negotiations failed to produce any positive results.⁸⁹ During the Doha Ministerial Conference, the issue of reforming the Dispute Settlement Understanding resurfaced. Among the issues on the table of the Doha Round negotiations figures the admissibility of amicus curiae briefs. Since 2001, WTO Members have not been able to agree on the way forward. On the one side, the United States and the European Union called for an increased transparency of the system to be achieved through the formalisation of the admissibility of amicus submissions.⁹⁰ On the other side, developing countries expressed their reservation on this approach.⁹¹ With this

84 James Durling and David Hardin, above n 47, 225.

85 Ibid.

86 Kim Van der Borgh, above n 1.

87 Certain scholars maintain that there is a 'practical' review of the DSU undertaken by the Appellate Body in parallel with the Members' diplomatic negotiations. These practical reform solutions include, other than the admissibility of the amicus curiae briefs, the practice of completing the analysis and the relaxation of the requirements of third-party participation. For more information, see especially Thomas Zimmermann, above n 43, 233.

88 See especially *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, (adopted on 14 April 1994) (Uruguay Round Ministerial Decision).

89 For a historical account on the negotiations pertaining to the DSU, see David Evans and Celso de Tarso Pereira, 'DSU Review: A View from the Inside' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (2005) 251, 251; William Davey, 'Reforming WTO Dispute Settlement' in Mitsuo Matsushita and Dukgeun Ahn (eds), *WTO and East Asia* (2004) 91, 92ff; Ignacio Garcia Bercero and Paolo Garzotti, 'DSU Reform: What are the Underlying Issues?' in Dencho Georgiev and Kim van der Borgh (eds), *Reform and Development of the WTO Dispute Settlement System* (2006) 123, 123ff.

90 The European proposal includes steps similar to the procedure set up by the Appellate Body in *EC-Asbestos*. For more information, see *Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, WTO Doc TN/DS/W/1 (13 March 2002) (Dispute Settlement Body Special Session) 7. See also *Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency – Revised Legal Drafting*, WTO Doc TN/DS/W/86 (21 April 2006) (Dispute Settlement Body Special Session) 3–4.

91 On the views of the African Group, see *Negotiations on the Dispute Settlement Understanding – Proposal by the African Group*, WTO Doc TN/DS/W/15 (25 September 2002) (Dispute Settlement Body Special Session) 5. See also *Negotiations on the Dispute Settlement Understanding –*

overwhelming resistance from developing countries and the unsteady pace of the DSU negotiations over the years,⁹² WTO Members are not likely to reach any time soon a consensus on the issue.

A lot of work could be done to democratise the WTO dispute settlement system. As demonstrated, there is no shortage of ideas for reform. However, these ideas remain trapped in an inter-governmental model designed to serve states. Authors have traditionally argued that negotiators could introduce evolutionary – rather than revolutionary – steps of reform, and thus maintain a courteous regard to the general principle of ‘do[ing] no harm’ to the WTO dispute settlement system.⁹³ Such steps would be majorly procedural and occasionally substantive when judged appropriate at the table of negotiations. The idea is to preserve the identity and the integrity of the World Trade Organisation. After all, the WTO is not an international organisation dealing primarily with matters pertaining to the protection of the environment. In all cases, the WTO should not be seen as the sole flag bearer of good governance. Global governance is a responsibility shared with other international organisations.⁹⁴

As truthful as they are, these facts should not negate the obligation of the WTO to pave the path towards a better future. The author of this article opines that it would be more courageous to join the international community in its plea to the WTO negotiators to overcome the inter-governmental design conundrum. The way forward for these negotiators is to replace the unbankable promises into well researched answers on the subject of the admissibility of *amici curiae*. Moving away from a quick-fix jurisprudential solution, one can moot for a more permanent suggestion – that of meeting halfway the civil society and daring for once to change the rules of the game at the WTO.

Proposals on DSU by Cuba, Honduras, India, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe, WTO Doc TN/DS/W/18 (7 October 2002) (Dispute Settlement Body Special Session) 2–4.

92 For more information, see Nathalie Bernasconi-Osterwalder (et al), above n 60, 318.

93 See Peter Sutherland, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) 49.

94 Giovanni Finizio, Lucio Levi and Nicola Vallinoto, ‘The Democratization of International Organizations’, (Report, International Democracy Watch, 2011).