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## Articles

# Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations

Jared B. Cawley\*

### I. Introduction

The Friend of the Court Brief<sup>1</sup> or the Amicus Curiae Brief has become a staple in cases appearing before the United States Supreme Court.<sup>2</sup> In fact, during the 1998-99 term, “ninety-five percent of the cases argued before the Supreme Court had at least one amicus filing.”<sup>3</sup> It is no wonder that the Amicus Curiae Brief has found its way into use

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\* LL.M. in American Indian and Indigenous Peoples, University of Tulsa College of Law (2004); J.D., University of Tulsa College of Law (2003). The author wishes to dedicate this article to the following individuals: David & Nancy Cawley, Kimberly & Lydia Cawley, and Dr. Gordon T. Allred (who made writing “cool”).

1. The function of the amicus curiae at common law was a form of oral “shepardizing,” the bringing up of cases not known to the judge. In this role, the amicus submission originally was intended to provide a court with impartial legal information that was beyond its notice or expertise, which is where the name amicus curiae, or “friend of the court” is derived.

Note, *Friends of the Court? The Ethics of Amicus Brief Writing in First Amendment Litigation*, 26 FORDHAM URB. L.J. 1605, 1607 (1999).

2. *Id.* at 1611.

3. *Id.*

in international law, specifically into the dispute resolution process of the World Trade Organization (WTO). This acceptance by the Appellate Body in the WTO has led to controversy and outcry by key members of the WTO.<sup>4</sup>

The predecessor to the WTO, the General Agreement on Tariffs and Trade, did not allow non-member, and thus, non-governmental groups to supply unsolicited briefs to the dispute resolution process.<sup>5</sup> Similarly, there is no specific language under the WTO agreement that permits submission of unsolicited briefs by member or non-member organizations. Article 13 of Annex 2 of the WTO agreement, entitled "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU), speaks mainly to each arbitration panel's right to seek information and advice from anyone, if they so choose.<sup>6</sup> The article says nothing of the acceptance of information and advice from unsolicited sources.

This article will begin with the discussion of the history and role of the Amicus Curiae Brief in the U.S. Courts, followed by its use internationally. Next, it will look briefly at the role of the dispute resolution panels and Appellate Body of the WTO, and how disputes are originally brought before each body. Finally, it will look at the justification offered by the Appellate Body for acceptance of the Amicus Curiae brief from WTO Member/Governmental Organizations and Non-Member/Non-Governmental Organizations, specifically the *Shrimp Turtle Decision*<sup>7</sup> and *The British Steel Case*.<sup>8</sup>

## II. History of the Amicus Curiae Brief

Amicus curiae is defined as: "A person who is not a party to a lawsuit but who petitions the court to file a brief in the action because that person has a strong interest in the subject matter."<sup>9</sup> While scholars debate the location of the first use of the amicus curiae, it is generally accepted that the amicus curiae became common practice during the 17<sup>th</sup>

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4. Daniel Pruzin, *Key WTO Members Score Appellate Body for Its Decision to Accept Amicus Briefs*, INTERNATIONAL TRADE REPORTER, June 15, 2001, at 924.

5. Padideh Ala'i, *Judicial Lobbying at the WTO: The Debate Over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24 FORDHAM INT'L L.J. 62, 67 (2000).

6. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, [WTO Agreement], Annex 2, art. 13, Legal Instruments—Results of the Uruguay Round vol. 31, 33 I.L.M. 1125, 1234 (1994) [hereinafter DSU].

7. U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 1, 12 Oct. 1998 [hereinafter *Shrimp-Turtle*].

8. U.S. - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R 1, 10 May 2000 [hereinafter *British Steel*].

9. *Black's Law Dictionary New Pocket Edition* 32 (1996).

Century in England.<sup>10</sup> Along with the majority of English common law, which followed the first pilgrims across the Atlantic Ocean, the *amicus curiae* found a home in early U.S. courts as well.

*A. Use in U.S. Courts: From Neutral "Friend" to Political Advocate*

Originally, the *amicus curiae*, usually a non-party, was a stand-in for infants and aided the court by pointing out "manifest error . . . the death of a party to [a] proceeding, and . . . existing applicable statutes."<sup>11</sup> This role expanded over time to the point where judges and attorneys were appointing themselves as amici<sup>12</sup> in cases so that they could advise their friends or other third parties, who may have been parties or attorneys in the case.<sup>13</sup> Thus, the *amicus curiae* moved from being a "friend of the court" to an advocate of personal interests.<sup>14</sup>

Despite this move to advocacy, the *amicus curiae* was rarely used.<sup>15</sup> It was not until after 1820 that it finally found its way into the U.S. Supreme Court.<sup>16</sup> During the early days of the Supreme Court, the Court looked unfavorably on intervention by third-parties to suits in which they had only political and no direct interest.<sup>17</sup> However, the lower state courts often granted the privilege to file *amicus curiae* briefs to prevent the "injustice which would be caused by lack of representation" of third party interests in a suit.<sup>18</sup>

Eventually, the *amicus curiae* brief made a rather "dramatic and unusual"<sup>19</sup> entrance to the stage of the Supreme Court in *Green v. Biddle*.<sup>20</sup> In a move which would clearly not be granted today, the great orator Henry Clay, on behalf of the State of Kentucky (who was not a party to the suit), appeared as an *amicus curiae* before the Supreme

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10. Note, *supra* note 1, at 1607.

11. *Id.*

12. In *Ex parte Lloyd*, the reporter of the case, a practicing attorney, had further demonstrated his versatility by accepting retainers from both sides, and thus felt himself in a quandary. The Lord Chancellor, sitting in a bankruptcy case, felt he had no authority to advise an attorney as to which client to represent; but the Lord Chancellor was not to be out done in this game of shifting roles. He promptly appointed himself *amicus curiae* and in this second capacity did advise the attorney.

Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1963).

13. Note, *supra* note 1, at 1607.

14. *Id.* at 1608.

15. Krislov, *supra* note 12, at 699.

16. *Id.*

17. *Id.* at 697-98.

18. *Id.* at 699.

19. *Id.* at 700-01.

20. *Green v. Biddle*, 21 U.S. 1 (1823).

Court, and sought for and received a rehearing on *Green*.<sup>21</sup> The acceptance of Henry Clay as amicus is unusual, because an amicus curiae cannot act on behalf of a party.<sup>22</sup> Clearly Clay's request for a rehearing on *Green*, so that he could file an amicus brief on behalf of the State of Kentucky, was an action made on behalf of a party.<sup>23</sup>

More controversy<sup>24</sup> surrounding the use of the amicus curiae came to the forefront in *Florida v. Georgia*.<sup>25</sup> In a case between the two states of Florida and Georgia, the U.S. Attorney General sought permission from the Supreme Court to enter the fray as an amicus to the interests of the citizens of the U.S.<sup>26</sup> While it was generally permissible for the attorney general to speak on behalf of the citizens of the U.S., in this case it was slightly different because, for all intents and purposes, the U.S. had an arguably, quasi-interest in the outcome of this case.<sup>27</sup> In spite of the controversial nature of the decision to allow the government to intercede as amicus, this case marked the beginning of a pattern in which the U.S. government has participated as amicus in cases presented before the original jurisdiction of the U.S. Supreme Court.<sup>28</sup>

Eventually, the practice found its way into use by private interest groups.<sup>29</sup> The ever-expanding acceptance of the amicus curiae brief led to an overwhelming burden and time constraint placed upon the Supreme Court.<sup>30</sup> Under the guise of "judicial economy" the Supreme Court adopted a set of rules and customs necessary for filing a proper amicus curiae brief to the Court.<sup>31</sup> One such early rule only allowed non-parties to submit an amicus brief to the Court if both parties to the suit agreed to the submission.<sup>32</sup> However, the Supreme Court would still, rather

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21. Krislov, *supra* note 12, at 701.

22. *Id.*

23. *Id.*

24. While suits between states fall within the original jurisdiction of the Court, all jurisdictional grants involving the U.S. mentioned in the Constitution are included within the appellate jurisdiction of the Court. By allowing the U.S. to participate as amicus curiae, the Court was, in effect, evading the jurisdictional grants of article III which literally applied would have prevented the federal government's participation as an interested party in suits involving the Supreme Court's original jurisdiction.

*Id.*

25. *Florida v. Georgia*, 58 U.S. 478 (1854).

26. Krislov, *supra* note 12, at 701.

27. *Id.*

28. *Id.* at 702.

29. Comment, *The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure*, 30 ST. MARY'S L.J. 1219, 1227 (1999).

30. *Id.*

31. *Id.*

32. *Id.* at 1227-28.

frequently, grant requests that may have not been approved by either party.<sup>33</sup>

Over the years, the filing of the amicus curiae has become less controversial, and more frequent. The purposes and reasons for such submissions vary, but not largely so. Often, non-parties (whether they are governmental, private-interest groups,<sup>34</sup> or private individuals) file briefs on behalf of constitutional, environmental, and civil rights issues. In fact, the amicus curiae was the backbone of several notable Supreme Court cases,<sup>35</sup> including “*Gideon v. Wainwright*,<sup>36</sup> *Escobedo v. Illinois*,<sup>37</sup> and *Miranda v. Arizona*.”<sup>38</sup> Another such notable case, *Mapp v. Ohio*,<sup>39</sup> was filed by the American Civil Liberties Union (ACLU) on behalf of a defendant who had been arrested for possession of illegal pornographic books.<sup>40</sup> The U.S. Supreme Court found that the parties to the suit failed miserably in effectively arguing the unlawful search and seizure issues, and relied heavily in drafting its decision on the amicus brief filed by the ACLU.<sup>41</sup>

While helpful to the defendant in *Mapp*, and in other notable cases, the amicus curiae has moved from “friend of the court” to “friend of the party” to “friend of the lobbyist.” Becoming directly involved in a suit as an additional party can be very expensive. However, when the interest is important to the organization, submitting an amicus brief is a common means of advancing an organization’s own policies in court.<sup>42</sup> Private groups such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP)<sup>43</sup> have thrived as additional advocates by filing amicus curiae,

33. *Id.* at 1228.

34. Even though such groups possess the same interest as that of a party with respect to the litigation’s out come [sic], the primary function of a group of this nature is to advise the court and educate it regarding policy implications and procedural problems from the point of view of the interest group, while, at the same time, helping the court arrive at a fair decision.

*Id.* at 1239.

35. Note, *supra* note 1, at 1608.

36. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

37. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

38. *Miranda v. Arizona*, 384 U.S. 436 (1966).

39. *Mapp v. Ohio*, 367 U.S. 643 (1961).

40. Comment, *supra* note 29, at 1228–29.

41. *Id.* at 1229.

42. *Id.* at 1239.

43. Moreover, the identification of the NAACP with such briefs is not merely a contemporary one, for that organization has, almost from its inception, participated as amicus curiae in litigation. An early case in point is *Guinn v. U.S.*, the famous Grandfather Clause case, where the NAACP justified its participation on the grounds that “the vital importance of these questions to every citizen of the U.S., whether white or colored, seems amply to warrant the submission of this brief.”

while other groups, such as the Product Liability Advisory Council, Inc. (PLAC), have been created merely for the purpose of filing such briefs.<sup>44</sup> Regardless of the initials or the policies of the organization, the amicus curiae brief has evolved into an effective lobbying tool for private-interest groups. Additionally, the trend has moved from filings by single groups to filings by numerous groups on both sides of the issue.

In order to preserve judicial economy, further limits have been placed on filing amicus curiae. Specifically, in order to file, a group or groups must limit "the amicus to the [efficient] presentation of [necessary] material [significantly] relevant"<sup>45</sup> to the issues presented by the parties to the suit. While other countries may have used amicus curiae since the early days of ancient Roman law,<sup>46</sup> the trend in its use in international courts has tended to limit its use to those rules and practices adopted by the U.S. Supreme Court.<sup>47</sup>

### B. *Use in International Courts*

The common law tradition of the amicus curiae has found general acceptance in a majority of countries other than the U.S. However, where the U.S. allows the open lobbying efforts now inherent in the use of the amicus brief, other countries and international courts have not been as open to this newfound use. There are exceptions. France, as well as other civil law countries, believes in the tradition of an open court system and welcomes intervention by third parties.<sup>48</sup>

The Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice (ICJ) had seemed to allow the intervention of third parties into a dispute.<sup>49</sup> The intervention enjoyed by nongovernmental groups before the PCIJ, however, was not to be had before the newly revised and revamped ICJ.<sup>50</sup> In a move fairly similar to that taken by the U.S. Supreme Court in the early half of the 1900s, the ICJ placed strict guidelines<sup>51</sup> on submissions of material to the

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Krislov, *supra* note 12, at 707.

44. Comment, *supra* note 29, at 1239.

45. Comments, *The Amicus Curiae*, 55 NW. U. L. REV. 469, 470 (1960).

46. Note, *supra* note 1, at 1607.

47. Ala'i, *supra* note 5, at 94.

48. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Proceedings*, 88 AM. J. INT'L L. 611, 616 (1994).

49. *Id.* at 620.

50. *Id.* at 623.

51. The Court has a legitimate institutional concern about opening the floodgates to participation by every individual and association interested in its proceedings. Of course, any court accepting amicus participation retains discretion to deny permission to any or all petitioners. In addition, the Court's Statute clearly limits participation to international organizations, eliminating

Court by nongovernmental organizations.<sup>52</sup> During an advisory proceeding in 1950, the International League of Human Rights (ILHR) sought permission to submit information to the ICJ.<sup>53</sup> In a move clearly designed to restrict the participation of the ILHR, the Court granted permission to the group, but limited its information to “legal questions.”<sup>54</sup> The group was also admonished “not to include any statement of facts that the Court had not been asked to appreciate.”<sup>55</sup> Unfortunately for the ILHR and for many other nongovernmental organizations,<sup>56</sup> the ILHR failed to follow the instructions given by the ICJ and was subsequently denied participation.<sup>57</sup> Because of the ILHR’s failure to follow instructions, other groups have been denied the opportunity to submit information to the ICJ.<sup>58</sup>

Dinah Shelton, Professor of Law at Santa Clara University School of Law believes that recent cases, such as that brought by Hungary against Slovakia, are prime examples of why there is a need to begin allowing a greater role from non-governmental organizations.<sup>59</sup> The case involves a large diversion of the flow of the Danube River, and also includes a heated controversy in environmental and treaty issues.<sup>60</sup> Professor Shelton argues that neither Hungary nor Slovakia has the monetary means of effectively researching and presenting the issues in this case, and that involvement by nongovernmental environmental organizations, which have better information and experts in this field, could provide the Court with valuable information in deciding the equitable outcome of this case.<sup>61</sup> However, as has been shown in cases like *Nicaragua v. United States*,<sup>62</sup> the ICJ has occasionally adopted

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the possibility of submissions from individuals or national groups.

*Id.* at 624.

52. *Id.* at 623.

53. *Id.*

54. *Id.* at 626.

55. *Id.*

56. In a letter dated March 28, 1994, the Registrar informed the [International Physicians for the Prevention of Nuclear War] that the Court had “considered your offer with all the care it deserves,” noting the physicians’ close working relationship with the WHO and their contribution to a relevant publication. However, having regard to the circumstances of the case and the scope of the WHO’s request, the Court had decided not to ask the organization to submit a written or oral statement.

*Id.* at 624.

57. *Id.* at 623-24.

58. *Id.* at 625.

59. *Id.* at 625.

60. *Id.*

61. Shelton, *supra* note 48, at 626.

62. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. U.S.*), 1984 I.C.J. 392 (Jurisdiction of the Court and Admissibility of the Application).



information by outside resources, but this practice will not be overly used in "contentious" cases, according to Professor Shelton.<sup>63</sup>

The role of the *amicus curiae* in England has stayed relatively true to its original common usage in the 17<sup>th</sup> century, with a few minor changes. Traditionally, the role is restricted to appointment by the Attorney General, to prevent injustice, and to provide representation to absent parties.<sup>64</sup> The former British Colony of Hong Kong has adopted a similar practice.<sup>65</sup>

In Europe, the European Court of Justice (ECJ)<sup>66</sup> frequently and generally accepts *amicus curiae* in its cases.<sup>67</sup> Additionally, under the European Union, Union member states "are allowed to intervene in cases before the Court."<sup>68</sup> However, the European Court of Human Rights (ECHR) initially did not allow submissions to the court by third parties.<sup>69</sup> Considering the fact that the court did not even allow a petitioner to appear before the Court prior to the 1970s, this restricted role for non-parties seems understandable.<sup>70</sup> It was not until the 1980s, following *Young, James and Webster v. United Kingdom*<sup>71</sup> that the court amended its rules<sup>72</sup> to allow for submissions by third parties.<sup>73</sup>

Having witnessed the swing from helpful "friend of the court" to the extremely burdensome and time-consuming "friend of the lobbyist," it is unsurprising that important international courts, such as the ICJ and the ECHR, have been reluctant to loosen the restrictive rules on the use of *amicus curiae* by non-parties. Viewing this tradition in these courts, it is

63. Shelton, *supra* note 48, at 628.

64. Johannes Chan, *Focus on the Ma Case: Amicus Curiae and Non-Party Intervention*, 27 HONG KONG L. J. 391, 394-95 (1997).

65. *Id.*

66. The purpose of the *amicus* intervention in the European Court of Justice is to enable a third party to protect an interest that may be affected by the result of the case. The interest is less than that normally required for intervention as a party, but it must be direct and specific or concrete. The requirement has been broadly construed, especially with regard to representative bodies. Thus, the Italian National Union of Consumers could intervene in competition cases because of the beneficial effects of competition on consumers.

Shelton, *supra* note 48, at 629.

67. *Id.*

68. *Id.*

69. *Id.* at 630.

70. *Id.*

71. *Young, James & Webster*, 76 Eur. Ct. H.R. (ser. A) (1981).

72. The President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State that is not a Party to the proceedings to submit written comments within a time limit and on issues that he shall specify. He may also extend such an invitation or grant just leave to any person concerned other than the applicant.

*Id.* at 631.

73. Shelton, *supra* note 48, at 631.

also unsurprising that many nations other than the U.S. do not desire to have the amicus brief wander into the halls of the WTO dispute resolution process. But to more fully understand how the amicus curiae could possibly aid panel and Appellate Body decisions under the WTO, we must first understand the basics of this process.

### III. World Trade Organization Dispute Resolution Process

#### A. *Brief History of the Development of the WTO*

In an effort to develop and promote international trade through regulation, the International Trade Organization (ITO) was proposed following World War II.<sup>74</sup> However, due to fears in the U.S. Senate that this agreement would undermine the sovereignty of the U.S., the ITO agreement never came into fruition.<sup>75</sup> A similar organization, with a similar intent, was found in the General Agreement on Tariffs and Trade (GATT).<sup>76</sup> The general purpose of GATT was to prevent discrimination in trading between competing, member countries.<sup>77</sup> Dispute Resolution Panels were created in 1955 under the GATT system to handle disputes between the contracting member governments; however, the decisions by these panels were non-binding.<sup>78</sup> During the history of the GATT, claims from non-governmental, and thus non-member organizations were not a problem.<sup>79</sup> Only one non-governmental organization (NGO) ever participated in the dispute resolution process, the International Chamber of Commerce (ICC).<sup>80</sup> The belief of the governing members of the GATT, that member “states will comply only when it is in their self interest to do so,”<sup>81</sup> was a reflection of the non-binding decision making of the GATT dispute resolution process, which ultimately led to the rule oriented WTO.<sup>82</sup>

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74. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 538 (Aspen Law & Business, 3d ed. 1999).

75. Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?*, 12 *TRANSNAT'L LAW* 427, 429-30 (1999).

76. CARTER & TRIMBLE, *supra* note 74, at 538.

77. *Id.*

78. Laidhold, *supra* note 75, at 430.

79. Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 *FORDHAM INT'L L.J.* 173, 174 (2000).

80. *Id.*

81. Laidhold, *supra* note 75, at 430-31.

82. *Id.*

## B. *The World Trade Organization*

During the Uruguay Round of trade negotiations under the GATT system, several new agreements, as well as several uncovered areas of trade, were enveloped into the trade institution of the WTO.<sup>83</sup> Under the GATT system, NGOs were required to bring their disputes to their governmental agencies, which would then contact the offending foreign government to enter into consultations and negotiations in order to settle the dispute.<sup>84</sup> This negotiation process was completely closed off to NGOs, despite the fact that they may have been the party most affected by the outcome.<sup>85</sup> After NGOs loudly complained about this problem to the U.S. government, the U.S. Trade Representative was directed to ensure that a system was implemented under the WTO that would allow for the concerns of the NGOs to be heard.<sup>86</sup> The result was the formation of the DSU,<sup>87</sup> which outlined the rules and procedures for the settlement of disputes under the WTO. The dispute resolution process maintained some of the principles of the GATT; however, a few notable changes were created to take care of the problems of the GATT.<sup>88</sup> Specifically, under the DSU, while the consultation phase and the Dispute Resolution Panels were maintained, the Appellate Body and an alternative arbitration system were instituted.<sup>89</sup>

### 1. Consultation Phase

Under the Consultation Phase of the DSU, which is similar to the same process under GATT, parties are encouraged to meet and negotiate prior to an appearance before a dispute panel.<sup>90</sup> With the hope that the consultations will bring a quick end to the dispute, parties are “strongly encouraged” to “accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Contracting Party” within sixty days.<sup>91</sup> If the parties are unable to settle the dispute within the sixty-day period, they are then permitted to summon a panel.<sup>92</sup>

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83. CARTER & TRIMBLE, *supra* note 74, at 539.

84. Azar M. Khansari, Note, *Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 20 HASTINGS INT'L & COMP. L. REV. 183, 185 (1996).

85. Charnovitz, *supra* note 79, at 177.

86. *Id.* at 178.

87. DSU, *supra* note 6, at 1226.

88. Khansari, *supra* note 84, at 188.

89. *Id.* at 191.

90. *Id.*

91. *Id.* at 191-92.

92. *Id.*

## 2. The Dispute Resolution Panels

Under the GATT system of dispute resolution, a panel could only be summoned by the agreement of all contracting member states.<sup>93</sup> So, if one of the parties to the dispute wanted to stall the process, it could simply refuse to allow the dispute to move before a panel.<sup>94</sup> Under the new DSU, however, a principle known as “automaticity” allows the parties to automatically appear before a panel, even though the consultation phase is still encouraged.<sup>95</sup>

Panels are composed of at least three members who are chosen from the delegations of WTO member governments.<sup>96</sup> Under Article 8 of the DSU, members are to be “well-qualified governmental and/or non-governmental individuals,”<sup>97</sup> who are instructed to “give their own expert opinion; they are not allowed to accept instruction from their governments.”<sup>98</sup> The countries of the complaining parties are a further barrier under Article 8 to a seat on the panel, since panelists are required to be from a country that is not a party to the complaint “unless the parties to the dispute agree otherwise.”<sup>99</sup> Therefore it would seem possible, that if each party agrees, each party may have a representative from their government on the panel. Also, if party members agree to the names submitted by each country within ten days, the number of panelists may be composed of five individuals instead of three.<sup>100</sup>

Under paragraph six of Article 8, the complaining parties are provided with the names of the panelists by the office of the Secretariat, and must accept those chosen unless either party can show “compelling reasons” for their removal.<sup>101</sup> If after twenty days the parties cannot agree, the Director-General, along with the Chairman of the Dispute Settlement Body (DSB) and a chairman of a relevant council or committee to the dispute, will appoint the members to the panel.<sup>102</sup> The purpose of these panels is to determine the facts relevant to the rules adopted by the WTO.<sup>103</sup> This role is accomplished in a manner much

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93. CARTER & TRIMBLE, *supra* note 74, at 433.

94. *Id.*

95. “Automaticity” refers to the ability of the complaining party to have its dispute moved automatically before a panel, whose decision would become automatically binding on both parties, and who will then have the automatic right to retaliate against the offending party should that party decide not to comply with the panel’s decision. *Id.*

96. Khansari, *supra* note 84, at 192.

97. DSU, *supra* note 6, at 1231.

98. CARTER & TRIMBLE, *supra* note 74, at 435.

99. DSU, *supra* note 6, at 1231.

100. *Id.*

101. *Id.*

102. *Id.* at 1231-32.

103. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L.

like the U.S. district courts are handled, by applying the law to relevant facts, interpreting the law where there is a dispute as to the meaning or application of the law, or choosing the appropriate rule where two rules of law appear to conflict.<sup>104</sup>

Article 13 grants each panel the right to ask for information from each party, or anyone, including experts, that it feels is necessary to aid in the understanding of the issues in the case.<sup>105</sup> Once all of the information and briefs are submitted from the parties and from those who were requested to supply information, the panel meets confidentially and drafts a report to which each panelist contributes anonymously.<sup>106</sup> Following the submission of the report to each party, a time period is set by the panel that allows each party to review and comment in writing on the panel's initial ruling.<sup>107</sup> Further hearings will take place if it is determined by the panel, from the comments submitted by the parties, that more information needs to be presented.<sup>108</sup> If neither party responds with any comments, the initial report shall be considered the final report.<sup>109</sup> This final report will then be submitted to the entire membership of the WTO.<sup>110</sup> The losing party has sixty days under Article 16 to submit an appeal.<sup>111</sup> Also, upon consensus, members of the WTO can choose not to adopt the ruling by the panel.<sup>112</sup>

### 3. The Appellate Body

Like the Dispute Resolution Panels, the Appellate Body consists of members who are chosen by the DSB.<sup>113</sup> Unlike the Dispute Resolution Panels, however, the Appellate Body consists of seven members who are "private citizens, not affiliated with any government."<sup>114</sup> These private citizens are legal scholars who have "demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."<sup>115</sup> Also, unlike the members of the Dispute Resolution Panel, who are chosen on a case-by-case basis, the seven members of the Appellate Body serve four-year terms, with the possibility of being

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L.J. 333, 336 (1999).

104. *Id.* at 337.

105. DSU, *supra* note 6, at 1234.

106. *Id.* at 1235.

107. *Id.*

108. *Id.*

109. *Id.*

110. CARTER & TRIMBLE, *supra* note 74, at 436.

111. DSU, *supra* note 6, at 1235.

112. CARTER & TRIMBLE, *supra* note 74, at 436.

113. DSU, *supra* note 6, at 1236.

114. CARTER & TRIMBLE, *supra* note 74, at 436.

115. DSU, *supra* note 6, at 1236.

reappointed to their position only once.<sup>116</sup> This manner of selecting the members of the Appellate Body provides “consistency and coherence” to the dispute resolution process in much the same way as the appointment of the U.S. Supreme Court justices does in America.<sup>117</sup>

Once an appeal is submitted to the Appellate Body, the case is generally required to last no more than sixty days, and the appeal is limited to the facts and issues of law outlined in the panel report.<sup>118</sup> Unlike its counterparts in the U.S. legal system, the Appellate Body is not allowed to remand cases back to the panels.<sup>119</sup> In addition, should a panel decide that no applicable WTO rule of law exists to determine the outcome of a case, the Appellate Body could agree with the panel, and provide no remedy to the complaining party.<sup>120</sup> The remaining Appellate Body procedures are similar to the procedures of the dispute resolution panels.<sup>121</sup> The Appellate Body can also seek information from outside sources under Article 13, the proceedings remain confidential, and the findings of the Appellate Body members are done unanimously.<sup>122</sup>

#### 4. Other Arbitration Proceedings

The DSU also allows the dispute to be held before other means of settlement, such as “mediation, conciliation or ‘good offices.’”<sup>123</sup> This means of dispute settlement is purely voluntary however, and should either party change its mind, the complaining party may still take its case before a Dispute Settlement Panel.<sup>124</sup>

#### 5. Remedy

As has been previously mentioned, countries that lost under the old GATT system were required to pay the winning side only if they felt it was in their best interest to do so, since the GATT panels’ decisions were non-binding.<sup>125</sup> Under the WTO, however, panel and Appellate Body decisions are automatically binding and the winning party can retaliate if the losing party decides not to comply.<sup>126</sup>

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116. *Id.*

117. Paul B. Stephan, *Sheriff or Prisoner? The U.S. and the World Trade Organization*, 1 CHI. J. INT’L L. 49, 52 (2000).

118. DSU, *supra* note 6, at 1236.

119. Trachtman, *supra* note 103, at 337.

120. *Id.* at 338.

121. See DSU, *supra* note 6, at 1236-37.

122. DSU, *supra* note 6, at 1236.

123. CARTER & TRIMBLE, *supra* note 74, at 435.

124. *Id.*

125. See Laidhold, *supra* note 75, at 430-31.

126. DSU, *supra* note 6, at 1239.

If the losing party fails to establish its own timeline, or if the parties have failed to agree to a reasonable amount of time, the DSB is given the task of assigning a reasonable amount of time in which the losing party is given a chance to comply with the final ruling.<sup>127</sup> If the losing party still has not complied with the final ruling, it will be given an additional twenty days in which to negotiate a compensation deal with the winning party.<sup>128</sup> Should this negotiation round fail to achieve results, the winning party can take retaliatory measures against the losing party.<sup>129</sup>

Typically, the retaliation will consist of trade restrictions on goods of a similar nature as those involved in the complaint.<sup>130</sup> However, under the same article, if it is “not practicable” to retaliate using trade restrictions on goods of a similar nature, the winning party can employ “cross retaliation”—meaning, specifically, that trade restrictions can be imposed on non-related goods.<sup>131</sup> Despite this new form of enforcement, some scholars believe that whether or not losing parties comply will depend on the “goodwill” of the parties.<sup>132</sup> It is argued, rather persuasively, that those countries that can afford to disobey the orders of the WTO will continue to do so at the expense of the economically challenged countries or those countries that are simply not large enough to fight back.<sup>133</sup>

#### IV. Acceptance of the Amicus Curiae Brief by the WTO

With the rapid growth and experience of NGOs on the international stage, it was inevitable that the influence of NGOs would creep on to the stage of the WTO dispute resolution process.<sup>134</sup> Lobbying in areas of international human rights, environmental protection, etc., NGOs such as Green Peace and Amnesty International are having a major influence on the outcome of cases in international courts, as well as in international policy.<sup>135</sup> Their influence on the WTO, however, has been slow due to the belief of WTO members that its dispute resolution process should be limited to governmental representatives from signature member parties.<sup>136</sup>

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127. *Id.* at 1238.

128. CARTER & TRIMBLE, *supra* note 74, at 437.

129. DSU, *supra* note 6, at 1239.

130. *Id.*

131. *Id.*

132. Khansari, *supra* note 79, at 196.

133. *Id.*

134. *See generally*, Karsten Nowrot, *Symposium: The Rule of Law in the Era of Globalization: Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 579 (1999).

135. *Id.* at 579-580.

136. Daniel Pruzin, *WTO Members Make Unfriendly Noises on Friend of the Court*

Submissions of amici curiae by outside groups did not begin just with NGOs, but with non-member countries and law firms as well.<sup>137</sup> As interest in international law began to rise among NGOs the first amicus curiae was submitted in a dispute<sup>138</sup> between the United States and Brazil.<sup>139</sup> The brief was dismissed and returned to the submitting party with instructions to submit its brief to its representative government.<sup>140</sup> This summary dismissal did not deter the NGOs, and as the submissions of amici curiae began to grow, so did the outcry by WTO member governments.<sup>141</sup> Part of the outcry stems from the belief of WTO members, that if NGOs are permitted to submit amici to the dispute resolution process, NGOs and thus, non-members, would be afforded greater access than members would be given.<sup>142</sup> Specifically, WTO members can only be heard in a dispute if they are a primary or third party.<sup>143</sup> For example, countries like India believe that it would be somewhat humiliating to classify WTO members as something less than a member just to partake in the privilege of submitting amici to a dispute.<sup>144</sup> More moderate members, such as Canada, view the idea of opening the formerly closed off system of the WTO as beneficial; however, Canada believes that the decision to allow interference in the dispute settlement system by non-governmental members should be made by the WTO members themselves, and not by the panels or Appellate Body.<sup>145</sup> The European Union echoed the sentiments of Canada and asked only that the Appellate Body provide guidance concerning when submission of amici by NGOs would be considered by the court to be “pertinent.”<sup>146</sup> Only New Zealand and Switzerland have joined the United States in defending the Appellate Body’s decision to allow submissions of amici by outside parties.<sup>147</sup> The U.S. believed that acceptance of amici from NGOs was unavoidable when considering the

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*Dispute Briefs*, INTERNATIONAL TRADE REPORTER, Aug. 17, 2000, at 1283 [hereinafter *Dispute Briefs*].

137. *Id.*

138. The dispute concerned the strict standards placed on gasoline emissions of foreign countries doing business in the U.S. The WTO eventually ruled that the standards were too restrictive and discriminated against foreign supplies in favor of domestic supplies. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Daniel Pruzin, *WTO Appellate Body Under Fire for Move to Accept Amicus Curiae Briefs From NGOs*, INTERNATIONAL TRADE REPORTER, Nov. 30, 2000, at 1805 [hereinafter *Briefs from NGOs*].

143. *Id.*

144. *Id.*

145. *Id.* at 1806.

146. Pruzin, *supra* note 4, at 924.

147. *Briefs from NGOs*, *supra* note 142, at 1805.



growing number of amici being filed in cases before the dispute resolution system of the WTO.<sup>148</sup> In an effort to facilitate this procedure, the U.S. believes that the submission of amicus curiae briefs by NGO's should be formalized to allow for a more uniform and judicial means of submission.<sup>149</sup>

Whatever that formalization of process may be, it is currently clear that no specific language in the DSU allows for the submission of amici from NGOs.<sup>150</sup> So, how then does the Appellate Body justify its acceptance of such briefs? This article will examine this issue by considering two recent and controversial cases, namely *The Shrimp-Turtle Decision*<sup>151</sup> and *The British Steele Case*.<sup>152</sup> In the *Shrimp-Turtle Decision*, the U.S., a WTO member, actually submitted the briefs for the NGOs.<sup>153</sup> However, more controversy was created in the *British Steele Case* when the Appellate Body, though declaring submission of amici by NGOs to be improper, insisted that it had the authority to "accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so."<sup>154</sup>

A. *Submission and Controversy by Non-Member, Non-Governmental Organizations: The Shrimp-Turtle Decision*

*United States - Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)* originated in a claim brought by the WTO member countries of India, Pakistan, Malaysia, and Thailand.<sup>155</sup> In accordance with the Endangered Species Act of 1973, the U.S. required all shrimping vessels be fitted with Turtle Excluder Devices (TEDs) in order to protect the endangered sea turtles that were being inadvertently trapped and killed.<sup>156</sup> The sea turtles were becoming entangled in the fishing nets and would drown when they were unable to surface for air.<sup>157</sup> Under the cover of multilateral trading rules the U.S. refused to import shrimp from countries that failed to use TEDs to protect the

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148. *Id.*

149. Rossella Brevetti, *WTO Urged to Formalize Process for NGO's Participation in Disputes*, INTERNATIONAL TRADE REPORTER, Nov. 16, 2000, at 1734.

150. See footnote 6.

151. *Shrimp Turtle*, *supra* note 7, at 1.

152. *British Steele*, *supra* note 8, at 1.

153. Pruzin, *supra* note 4, at 924.

154. *Id.*

155. *Shrimp Turtle*, *supra* note 7, at 1.

156. U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/RW, 3, 15 June 2001.

157. *Environment: WTO Appeals Body Faults Implementation of Shrimp-Turtle Law*, INTERNATIONAL TRADE REPORTER, Oct. 14, 1998, at 1698 [hereinafter *Environment*].

endangered sea turtles.<sup>158</sup> The U.S. granted automatic immunity to the import ban to countries that did not have the specific species of turtles in their waters where shrimping was taking place, to countries that employed non-hazardous means of shrimp gathering which did not harm the sea turtles, and to any country which had no sea turtles whatsoever in their coastal waters.<sup>159</sup> Other nations could apply for an exemption to the import ban by producing evidence of regulatory programs which implemented safety measures in shrimping which were comparable to those outlined and used by the U.S.<sup>160</sup>

Upset with the U.S. for unilaterally mandating its own laws on other WTO members, the countries of India, Pakistan, Malaysia, and Thailand filed a grievance with the Dispute Resolution Body on the grounds that the U.S. policy banning importation of shrimp from countries not implementing the TEDs was discriminatory.<sup>161</sup> Brought before a Dispute Resolution Panel, the case centered on the import ban, specifically Section 609, which the four Asian countries claimed was a direct violation of Article 11 of the GATT.<sup>162</sup> This article restricts the measures member countries can take with regard to unilaterally banning trade with other WTO member countries.<sup>163</sup> The Panel agreed, holding that section 609 provided “unjustifiable discrimination” against the four Asian countries.<sup>164</sup> The section was unjustifiable because it allowed shrimp imports automatically from some countries, while forcing others to apply for exemption.<sup>165</sup> In its defense, the U.S. argued that the ban on some countries was justifiable and necessary.<sup>166</sup> The ban was justifiable, argued the U.S., because the sea turtles were an endangered species worldwide, and were in danger of becoming extinct unless the use of TEDs was implemented in every country where shrimping endangered the sea turtles.<sup>167</sup> Therefore, in order to prevent the extinction of the sea turtles, a distinction was made, and those countries that implemented protection measures were rewarded, while those that did not were prohibited from importing their shrimp.<sup>168</sup> While lauding the environmental efforts of the U.S., the panel ultimately rejected the argument, and held that the use of the import ban by the U.S. was a

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158. *Id.*

159. *Shrimp-Turtle, supra* note 7, at 2.

160. *Id.*

161. Laidhold, *supra* note 75, at 439.

162. *Id.*

163. *Id.*

164. *Shrimp-Turtle, supra* note 7, at 4.

165. *See id.* at 2.

166. *Shrimp-Turtle, supra* note 7, at 5.

167. *Id.*

168. *Id.*

“threat to the multilateral trading system.”<sup>169</sup>

The U.S. created further controversy by submitting three amicus curiae briefs prepared by non-governmental organizations.<sup>170</sup> As previously mentioned, Article 13 of the DSU does not specifically permit the submission of amici from non-member, non-governmental groups.<sup>171</sup> In support of the submissions of the amici, the U.S. argued that while Article 13 permitted a panel or appellate body to accept submissions by any source it so chose, it does not specifically deny the submission of those amici merely because they were unsolicited.<sup>172</sup> The U.S. argued that denying the submission of the briefs by NGOs would limit the options for information that the DSU grants to the panels and Appellate Body.<sup>173</sup> The four Asian countries, however, protested the use of the amici as being strictly prohibited by Article 13.<sup>174</sup> The control of outside information, they argued, was specifically granted to panel and Appellate Body members, and that only these members have discretion in seeking information applicable to each case.<sup>175</sup> Unfortunately for the U.S., the panel agreed with the four Asian countries and ignored the submissions of the NGOs in making their final decision.<sup>176</sup>

In accordance with Article 16 of the DSU, the United States appealed the panel decision to the Appellate Body of the WTO.<sup>177</sup> In its brief, the U.S. claimed that the Dispute Panel erred in determining that section 609 was unjustified and discriminatory.<sup>178</sup> Similarly, the U.S. claimed that the panel erred in denying the submission of the amici by the NGOs.<sup>179</sup> Unsurprisingly, the four Asian countries asked that the ruling of the Dispute Panels be upheld, and that the U.S. not be permitted to unilaterally impose trade sanctions against other WTO member countries when it has specifically agreed under the WTO to maintain a multilateral process in trade negotiations and solutions.<sup>180</sup> With regard to the submission of amici from NGOs, India, Pakistan, Malaysia, and Thailand continued to assert that the submissions were not allowed.<sup>181</sup> Specifically, the four Asian countries pointed out the fact that when seeking additional information, the panels and Appellate Body were

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169. *Id.*

170. Environment, *supra* note 157, at 1698.

171. See DSU, *supra* note 6, at 1234.

172. *Shrimp-Turtle*, *supra* note 7, at 4.

173. *Id.*

174. *Id.* at 9.

175. *Id.*

176. *Id.* at 4.

177. *Id.*

178. *Shrimp-Turtle*, *supra* note 7, at 4.

179. *Id.*

180. *Id.* at 11.

181. *Id.* at 9.

required under the DSU to notify the contending members that such information was being sought.<sup>182</sup> In addition, they also argued that since WTO members who are not part of the original dispute are denied the chance to participate by submitting amici, it would be unreasonable for the panels or the Appellate Body to accept amici from non-member, non-governmental groups.<sup>183</sup> One very rational argument advanced by the four Asian countries was that if amici from NGOs were allowed, the possibility of an onslaught of amici in a given case could, in fact, cause undue burden on opposing parties, as well as the panels and Appellate Body.<sup>184</sup> The opposing party may feel that it has to respond to each amicus submission on the off chance that one of the panelists or members of the Appellate Body would give credence to the argument contained therein.<sup>185</sup>

Several other countries, as third party participants, also weighed in on the issue of whether or not unsolicited amici could be submitted by NGOs.<sup>186</sup> Australia, disagreeing with the United States' argument on both issues maintained that the DSU does not afford NGOs an opportunity to provide unsolicited information, and that if the Panel had wanted the information provided by the amici, it could have requested it.<sup>187</sup> The European Community also voiced its disfavor in allowing NGOs to submit unsolicited amici, especially when each NGO has the right to publish its views in journals and other periodicals, which could then be viewed by the general public, as well as both parties to the dispute, the panelists, and members of the Appellate Body.<sup>188</sup> Sensing that an opportunity to be heard may be lost, many environmental groups backed the original NGO amici submissions, which also weighed in on the appeal.<sup>189</sup>

In its decision in October of 1998, the Appellate Body first addressed the issue of whether or not non-member, non-governmental groups could submit amici to either the Dispute Resolution Panels or the Appellate Body.<sup>190</sup> The Appellate Body began its analysis by putting forth the question to the United States, as to what extent it adopted the information contained in the amici submitted by the NGOs.<sup>191</sup> The U.S. responded by stating that its views pertaining to the case were contained

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182. *Id.* at 10.

183. *Id.*

184. *Shrimp-Turtle*, *supra* note 7, at 10.

185. *Id.*

186. *See id.* at 15-21.

187. *Shrimp-Turtle*, *supra* note 7, at 15.

188. *Id.* at 18.

189. *Id.* at 21.

190. *Id.*

191. *Id.* at 23.

in the briefs submitted by the U.S. to the Panel and Appellate Body, and that while it considered the views expressed by the NGOs to be separate from its own, the expert opinions and information should not be overlooked by the Panel or the Appellate Body.<sup>192</sup> In considering this response from the U.S., and a dissimilar response from the four Asian countries, the Appellate Body decided that the issue of the admissibility of the amici by the NGOs was a separate legal issue, which it felt that the Panel did not specifically address in its report.<sup>193</sup> In a holding which created outcry and controversy, the Appellate Body found that the attaching of amici to the material submitted by either the appellant or the appellee, regardless of where that material may have originated, "renders that material at least prima facie an integral part of that participant's submission."<sup>194</sup> Much to the chagrin of the four Asian countries and the third parties to the dispute, the Appellate court accepted the submission of the attached amici by the United States.<sup>195</sup> However, due to the admission by the U.S. that it only adopted those views that were consistent with its own argument, the Appellate Body focused primarily on those arguments advanced by the original brief submitted by the U.S.<sup>196</sup>

So, how did the Appellate Body arrive at this conclusion you may ask? First, the Appellate Body retraced the steps already set forth in this article and arrived at Article 13 of the DSU.<sup>197</sup> At the explanation of the Appellate Body, Article 13 grants each panel the right to seek any additional information and/or expert advice from any source that it feels is applicable to the case.<sup>198</sup> Therefore, according to the Appellate Body, Article 13 grants each panel the authority to seek information, as well as the authority to seek no information at all.<sup>199</sup> This authority, should also be viewed in light of Article 12 of the DSU, which authorizes the panel to "depart from, or to add to," or in other words, create their own "Working Procedures," which may aid in providing reports that are efficient and high quality.<sup>200</sup> This authority, granted to the panels by the DSB, does not seek to limit the information available to the panels in deciding a dispute; on the contrary, it grants the panel the authority to accept or reject any information that is submitted, even without being

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192. *Id.*

193. *Shrimp-Turtle*, *supra* note 7, at 24.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 28.

198. *Id.*

199. *Shrimp-Turtle*, *supra* note 7, at 28.

200. *Id.* at 29.

requested.<sup>201</sup> Even so, the Appellate Body urged that the panelists did not reject the NGO amici outright in this case, they merely suggested that if the parties wished the amici to be included, that each party include them in their own briefs to the panel.<sup>202</sup> Therefore, the Appellate Body found that the panel erred in concluding that the DSU does not provide for the acceptance of amicus curiae from NGOs, and that the panel was acting within its authority when it accepted the briefs of the appellants that contained the NGO amicus curiae submissions.<sup>203</sup> Unfortunately for the U.S., the Appellate Body rejected its argument that the panel erred in holding that the trade restrictions pursuant to section 609 were unjustifiably discriminating.<sup>204</sup> As with the panel report, the Appellate Body lauded efforts made by the United States to protect the environment, specifically the endangered sea turtles.<sup>205</sup> However, it concluded that the United States cannot unilaterally impose trade restrictions on non-complying WTO member countries and suggested that multilateral discussions be entered into to address the protection of the sea turtles.<sup>206</sup>

As one commentator has pointed out, along with a few hints from the Appellate Body, the outcome of this case may have been decided differently had the United States sought multilateral support for its sea turtle protection measures.<sup>207</sup> According to the Appellate Body, environmental issues are exactly the kind of issue that merits multilateral, as opposed to unilateral, measures.<sup>208</sup> The crux of this dictum is that, for the first time, it appeared that the WTO was willing to entertain issues regarding environmental matters, and while upset with the overall decision, the U.S. was pleased that the environment may soon become a matter of interest to the WTO.<sup>209</sup> Clearly, while environmental groups took this decision a lot harder than the United States government, the door was opened for the environmental NGOs to further their cause in the WTO through lobbying with the aid of the amicus curiae.<sup>210</sup>

This decision also upset many WTO member countries that were opposed to allowing non-member groups access to the exclusive trade

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201. *Id.*

202. *Id.* at 30.

203. *Id.*

204. *Id.* at 53.

205. *Shrimp-Turtle*, *supra* note 7, at 55.

206. *Id.*

207. Ryan L. Winter, Note, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?* 11 COLO. J. INT'L ENVTL. L. & POL'Y 223, 242 (2000).

208. *Id.*

209. Environment, *supra* note 157, at 1698.

210. *Id.*

organization.<sup>211</sup> Arguing that the decision had given NGOs greater rights than WTO members, countries such as Pakistan lobbied for an amendment to the DSU that would overturn the Appellate Body decision in *Shrimp-Turtle*.<sup>212</sup> Other countries insisted that the business of the WTO dealt with matters relating specifically between governments, and the voice granted to NGOs, although limited, would undermine the "objective and legal examination of the issues."<sup>213</sup> Still others are concerned in the lobbying shift from traditional NGOs to law firms and corporations who are financially and academically superior to their counterparts in third world countries.<sup>214</sup> As these fears and objections began to simmer following the *Shrimp-Turtle* decision, the Appellate Body added more fuel to the fire through its holding in the *British Steel* decision.<sup>215</sup>

*B. Submission and Controversy by Non-Member, Non-Governmental Organizations: The British Steel Case*

The fears by developing nations that the NGO lobbyist was becoming more corporate was soon realized in May of 2000, when the Appellate Body accepted amicus curiae briefs from the industrial American Iron and Steel Institute (AISI) on behalf of the United States in *The British Steel Case*.<sup>216</sup> Originally, the AISI filed the amicus in the panel proceedings, but was rejected by the panel for being untimely.<sup>217</sup> Not to be shutout, the AISI, along with the Specialty Steel Industry of North America (SSINA), resubmitted its amicus brief when the U.S. appealed to the Appellate Body.<sup>218</sup> The major difference between this case and *Shrimp-Turtle* was the fact that the AISI and the SSINA submitted their amici directly to the Appellate Body instead of including it with the U.S. brief.<sup>219</sup>

The dispute began when the United States Department of Commerce applied countervailing duties on imports of leaded bars acquired by United Engineering Steels Limited (UES), a British joint venture, to British Steel Engineering Steels (BSES).<sup>220</sup> BSES was

211. Charnovitz, *supra* note 79, at 185.

212. *Id.*

213. *Id.*

214. Andrea Kupfer Schneider, *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made?: Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 WIDENER L. SYMP. J. 87, 100 (2001).

215. Dispute Briefs, *supra* note 136, at 1283.

216. Ala'i, *supra* note 5, at 77.

217. *Id.*

218. Dispute Briefs, *supra* note 136, at 1283.

219. *Id.*

220. *British Steel*, *supra* note 8, at 1.

created through the privatization of the UES joint venture by the British government.<sup>221</sup> As was mentioned above, the Dispute Resolution Panel rejected the amici submitted on behalf of the United States by ASIS and SSINA.<sup>222</sup> Following the notice given to the DSB by the United States of its intent to appeal the panel decision, the NGOs resubmitted their amici directly to the Appellate Body.<sup>223</sup> Over the objection of the European Communities (EC) as well as other third parties to the dispute, the Appellate Body accepted the amici briefs.<sup>224</sup> Similar to its argument made in *Shrimp-Turtle*, the EC claimed that Article 13 of the DSU did not allow for the submission of unsolicited amicus curiae to the Dispute Resolution Panel and Appellate Body Proceedings.<sup>225</sup> Even if the Appellate Body did find that Article 13 allowed the submission of amici to Appellate Body Proceedings, the EC argued that Article 13 specifically limited that information to factual or technical advice, not interpretations of law.<sup>226</sup> The EC further argued that Article 17.4 and 17.10 confine any arguments made before the Appellate Body to those made by members to the dispute and third parties, which arguments must be kept confidential.<sup>227</sup>

In February 2000, the Appellate Body submitted the arguments to the United States, in addition to Brazil and Mexico, who were third parties, for comment on the arguments advanced by the EC.<sup>228</sup> Both Mexico and Brazil agreed that the Appellate Body should distinguish the amicus submissions between those containing issues of fact, and those containing issues of law.<sup>229</sup> Specifically, Brazil argued that the parties alone were qualified to make legal arguments regarding the issues of law implemented under the rules of the WTO.<sup>230</sup>

In its reply, the U.S. asked the court to remember its ruling in the *Shrimp-Turtle* decision regarding a panel's authority to hear or deny unsolicited amicus submissions.<sup>231</sup> Specifically, the Appellate Body determined that the "Working Procedures" outlined in the DSU granted the panel the authority to control the means of submission of outside information.<sup>232</sup> In contrast to the argument advanced by the EC, the U.S.

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221. *Id.*

222. *See Ala'i, supra* note 5, at 77.

223. *See Dispute Briefs, supra* note 136, at 1283.

224. *Ala'i, supra* note 5, at 78.

225. *Id.* at 78.

226. *Id.*

227. *Id.*

228. *British Steel, supra* note 8, at 10.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*



argument claimed that the Appellate Body, under its own "Working Procedures," which are outlined under Article 17 of the DSU, had the same authority to "create an appropriate procedure when a question arises that is not covered by the Working Procedures."<sup>233</sup> In a futile attempt, the U.S. further argued that the acceptance of unsolicited briefs by the Appellate Body would in no way "compromise" the confidentiality granted to the Appellate Body proceedings.<sup>234</sup>

Accepting the argument put forth by the United States, the Appellate Body held, once again, that it had the authority to accept the submitted amicus curiae briefs.<sup>235</sup> The Appellate Body, in outlining its holding, began with the acceptance of the fact that nothing in the DSU or the "Working Procedures" specifically allowed it to accept the amici submitted by the NGOs.<sup>236</sup> However, nothing in the DSU or the "Working Procedures" specifically denied the Appellate Body's authority to accept the amici either.<sup>237</sup> Bolstering its argument with quotes from its holding in *Shrimp-Turtle*, the Appellate Body reiterated that only signature members of the WTO, who are parties or third parties to the dispute, have a legal right to be heard and to participate in proceedings before a panel or the Appellate Body.<sup>238</sup> NGOs are not signatory members, therefore, they have no legal right to be heard, and neither a panel nor the Appellate Body is legally obliged to accept or consider amici submitted by the NGOs.<sup>239</sup> That being said, however, a panel or the Appellate Body does have the legal authority to consider the amici whether or not the NGOs have a legal right to submit them.<sup>240</sup> Since the Appellate Body had the legal right to consider the amici, and the legal right not to consider them, the Appellate Body found the amicus curiae briefs submitted in this case to be non-pertinent in making its final decision, and did not use them.<sup>241</sup>

Unfortunately, the argument made by the Appellate Body in its justification of its acceptance of amici from NGOs has fallen on deaf ears, and WTO member governments continue to oppose their submission and consideration.<sup>242</sup> But why are the WTO member governments who oppose the submission of the amici so determined to keep NGOs out of the dispute settlement process? To answer that

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233. *Id.*

234. *British Steel*, *supra* note 8, at 10.

235. *Id.* at 11.

236. *Id.* at 10.

237. *Id.*

238. *Id.* at 11.

239. *Id.*

240. *British Steel*, *supra* note 8, at 11.

241. *Id.*

242. *Dispute Briefs*, *supra* note 136, at 1283.

question, a brief overview of non-governmental organization activity would be pertinent.

#### V. Non-Governmental Organizations: An Overview

The fear of NGOs may very well stem from the decline in global influence of the nation-state.<sup>243</sup> On a global scale, NGOs frequently pressure large corporations into complying with the NGOs' private/global agenda.<sup>244</sup> In one example, Greenpeace International pressured Shell Oil Company not to scuttle an aging oilrig into the North Atlantic Ocean by waging a campaign in Germany that resulted in a loss for Shell of over thirty percent in gas revenue, due to the decline in purchases.<sup>245</sup> NGOs often achieve success by persuading the consumer to boycott products that are produced or marketed in opposition to the economic and environmental goals of the NGOs.<sup>246</sup> The dolphin will ever be grateful for the intervention of NGOs in persuading the consumers of tuna fish to boycott those companies who did not take protective measures to ensure that no dolphins were being trapped and killed in their tuna nets.<sup>247</sup> While few and far between, the victories won by the NGOs have given them a powerful lobbying tool with corporations and governments alike.<sup>248</sup>

But are these not the types of behaviors that we would like to see enforced with corporations and governments? Are the NGOs not merely looking out for the welfare of the planet and its citizens? Certainly groups such as women, children, and the elderly are better protected through the efforts of human rights and environmental groups, right? So what have we to fear from the NGOs?

The fear of corporations is obvious: loss of profits.<sup>249</sup> But, instead of waging war on the NGOs, corporations are responding proactively by forming their own industry watchdog groups to police themselves.<sup>250</sup> While the efforts of the non-governmental groups may appear laudable, what the governments fear is this persuasive power that is yielded by the NGOs beyond governmental territorial boundaries.<sup>251</sup> While no

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243. Peter J. Spiro, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: Contribution: New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996).

244. *Id.*

245. *Id.*

246. *Id.* at 959-960.

247. *Id.*

248. *Id.*

249. Spiro, *supra* note 243, at 961.

250. *Id.* at 961-62.

251. *Id.*

officially sanctioned laws are declared, if corporations and industries are following these NGO persuasions worldwide, for fear of boycotting, the policies advanced by the NGOs might as well be the law for all intents and purposes.<sup>252</sup> Additionally, governments fear NGOs for the same reason NGOs fear the WTO: lack of transparency.<sup>253</sup> Like their rivals in the WTO, the leadership positions in NGOs are typically filled by appointment, and not by election; therefore, they have no constituents to whom they are accountable.<sup>254</sup> While NGOs cry for more access to what they see as an authoritative, closed-off WTO, the non-governmental organizations need only be as open as they so choose.<sup>255</sup> Again, the example involving Shell Oil is illustrative.<sup>256</sup> While attempting to pressure Shell Oil into not scuttling an outdated oilrig to the bottom of the North Atlantic Ocean, Greenpeace received incorrect information regarding the potential damage the scuttling would have on the North Atlantic.<sup>257</sup> Even after independent verification, and an acknowledgement on behalf of Greenpeace that its information was incorrect, it continued to pressure Shell into disposing of the rig using other means, which was very costly to the company.<sup>258</sup> In fact, to prevent further loss of revenue, due to the boycotting against its interests in Germany, Shell has gone so far as to ask Greenpeace for advice on how it can scuttle other outdated rigs.<sup>259</sup> With this kind of pressure, it is doubtful if any corporation would dare scuttle their outdated rigs for fear of retribution from Greenpeace or other NGOs.<sup>260</sup>

Whether one despises or hails non-governmental organizations, these groups have been around since the nineteenth century and it does not appear that they will become less influential anytime soon.<sup>261</sup> Recognizing this fact, the United Nations, almost since its inception, has provided for ways of accepting and dealing with information submitted by non-governmental organizations.<sup>262</sup> The non-governmental organizations are generally defined by the United Nations to be any international organizations that have not been created by governmental or inter-governmental organizations.<sup>263</sup> Whatever their definition may

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252. *Id.* at 962.

253. William M. Reichert, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 MINN. J. GLOBAL TRADE 219, 225 (1996).

254. Spiro, *supra* note 243, at 963.

255. *Id.*

256. *Id.* at 964.

257. *Id.*

258. *Id.*

259. *Id.* at 965.

260. Spiro, *supra* note 243, at 965.

261. Reichert, *supra* note 253, at 227.

262. *Id.* at 228-29.

263. *Id.* at 227.

be, however, NGOs are not allowed to directly address the General Assembly, which is the main governmental representative body of the United Nations.<sup>264</sup> Indeed, the role of the NGO in the United Nations, while receiving greater recognition than that received from the WTO, is still relegated to that of a provider of information rather than a direct member of the organization.<sup>265</sup> A non-governmental organization may only submit information to the Economic and Social committee of the United Nations, which was set up specifically for this purpose.<sup>266</sup> The original hope of the United Nations was that NGOs would bring the voice of the world community and would act as a link to the public at large.<sup>267</sup> However, due to the large number of non-governmental organizations in existence, this information typically tends to clog up the system and make it difficult for any of their concerns to be heard.<sup>268</sup>

Ironically, despite the usual fears expressed by governmental members of the WTO, many governmental organizations rely on NGOs to act where they normally cannot.<sup>269</sup> For example, the International Atomic Energy Agency often uses NGOs to monitor the nuclear activity of countries like Iraq.<sup>270</sup> The assistance of NGOs is beneficial because they are not required to obtain permission to enter the country and because they do not need to make sure that their speech is politically correct, as they are not acting in the role of a governmental agency, even though they may be acting on behalf of them.<sup>271</sup>

Up until the Uruguay Round negotiations began in 1986, the only non-governmental organization to submit information to the WTO predecessor, the GATT, was the International Chamber of Commerce.<sup>272</sup> The GATT signatory governments made no protests, and no other NGOs sought to be included.<sup>273</sup> As the trade negotiations began to intensify during the Uruguay Round, which ultimately led to the creation of the WTO, many NGOs became interested in the trade process, and became outraged when their concerns were not addressed by the governmental organizations who were negotiating the rules for the new World Trade Organization.<sup>274</sup>

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264. *Id.* at 230.

265. *Id.*

266. Arrangements for Consultation with Non-Governmental Organizations, U.N. ECOSOC Res. 1296(XLIV), 44<sup>th</sup> Sess., U.N. Doc. E/4548 (1968), *as quoted in* Reichert, *supra* note 253, at 229.

267. *Id.* at 231.

268. *Id.* at 230.

269. *Id.* at 232.

270. *Id.*

271. *Id.*

272. Chamovitz, *supra* note 79, at 174.

273. *Id.* at 175.

274. *Id.*

Eventually, due to pressure from the NGOs, and some governments, including the United States, the WTO began discussions on ways to be more open to non-governmental organizations.<sup>275</sup> The new provisions instructed the WTO Secretariat to be more actively engaged in its contacts with NGOs.<sup>276</sup> While NGOs were still not allowed to participate directly in the workings of the organization, WTO committee chairpersons could individually meet with NGOs to discuss any issues that the NGOs wished to have addressed.<sup>277</sup> Progress on the openness of the WTO committees continued to expand the role in the decision making process to the NGOs.<sup>278</sup> In 1997, the WTO, along with the United Nations, sponsored a symposium to discuss the importance of the role of NGOs in the international trade arena.<sup>279</sup> And while progress continues to be made, it is apparent, from the disturbance made by protestors at the WTO conference held in Seattle in 1999, that the WTO has a long way to go to please these outside interests.<sup>280</sup> Most notably, the judicial and dispute resolution process of the WTO is still relatively closed to NGO participation, although, as has been explained above, this process is beginning to be enlarged.<sup>281</sup>

Following the *British Steel* case, the Appellate Body inadvertently opened the door for more judicial lobbying from NGOs.<sup>282</sup> In *E.C.-Asbestos*, the Appellate Body turned once again to its "Working Procedures" to develop a procedure for NGOs to submit amicus curiae to the Appellate Body.<sup>283</sup> The new procedure required for anyone wishing to submit information to first apply for and receive leave from the Appellate Body.<sup>284</sup> The Appellate Body attempted to make clear that these new procedures applied only to *E.C.-Asbestos*, and would not apply to any future proceeding.<sup>285</sup> Up to seventeen NGOs and one individual applied for leave from the Appellate Body in order to submit amici in *E.C.-Asbestos*, and in a shocking move, the Appellate Body rejected every submission with no explanation.<sup>286</sup> Despite the rejection by the Appellate Body, the new "Working Procedures" surprised and outraged many governments, who responded with a political attack on

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275. *Id.* at 178.

276. *Id.* at 178-79.

277. *Id.* at 179.

278. Charnovitz, *supra* note 79, at 181.

279. *Id.*

280. *Id.* at 173.

281. *Id.* at 185.

282. Ala'i, *supra* note 5, at 80.

283. *Id.*

284. *Id.* at 81.

285. *Id.*

286. *Id.* at 82.

the Appellate Body.<sup>287</sup> Likewise, NGOs did not sit idly following the summary dismissal of their amici.<sup>288</sup> Several large environmental NGOs, including Greenpeace, expressed their overwhelming disappointment in the Appellate Body, not only for the rejection of their amici, but also for doing so without explanation.<sup>289</sup> It has been argued that the Appellate Body rejected the submission of the briefs following pressure from governmental groups, for acting inappropriately in the role of legislator, by adopting and implementing the procedure for submission of the amici.<sup>290</sup> The goal of the Appellate Body, to manage the submission of amici by NGOs, was admirable. However, it failed to follow its role as the judicial arm of the WTO as opposed to its legislative arm.<sup>291</sup> Whatever the reason may have been for the rejection of the amici, the Appellate Body, in its E.C.-Asbestos decision in March of 2001, merely explained that it dismissed the submissions for their failure to comply with the guidelines it set forth.<sup>292</sup>

Whatever the reasons for rejection or acceptance, it is apparent from the material above that NGOs will continue to demand a voice on the stage of the world trade process. But do they deserve that voice? It is clear that the NGOs desire to be a voice for the people, but do the people need the unelected NGOs to speak out for them?<sup>293</sup> It is this question that is promulgated by the governmental members of the WTO, specifically that the decisions made by the WTO member governments do not directly affect the people.<sup>294</sup> The WTO, they argue, is about trade issues between governments, who are either elected representatives of the people, or are representative due to their status as the people's sovereign.<sup>295</sup> The NGOs they claim, would only serve to muddy the waters of an already politically difficult world trade process.<sup>296</sup>

Now that we have heard some of the arguments advanced by the WTO member governments regarding why NGOs should be excluded from the WTO process, it is only fair that the NGO argument, regarding why they should be included in the WTO process, should also be heard. To begin, governmental agencies do not have a monopoly on ideas, and allowing NGOs a voice in the WTO process would allow for the

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287. Charnovitz, *supra* note 79, at 188.

288. *Id.* at 189.

289. *Id.*

290. Ala'i, *supra* note 5, at 94.

291. *Id.*

292. *Id.*

293. See Charnovitz, *supra* note 79 at 198-202 (arguing the "Statists'" view that the people do not need NGOs to speak out for them).

294. *Id.* at 201.

295. *Id.*

296. *Id.* at 202.

submission of more information at the cost of the NGOs rather than the prospective governments.<sup>297</sup> NGOs could also aid in enforcement of WTO trade regulations through the boycotting measures discussed above.<sup>298</sup> If Government A is failing to comply with WTO regulations at the detriment of Government B, then the NGOs could assist by advancing boycotting measures to the public to enforce Government A's compliance.<sup>299</sup> However, it is this kind of non-boundary intervention that the governments oppose and fear.<sup>300</sup> As a sovereign, Government A could react to any implementations made against it by the sovereign of Government B; however, it cannot take measures against an international non-governmental group which has no boundaries to contain it.<sup>301</sup> Most recently, in early 2001, several WTO member governments lashed out at NGOs and the Appellate Body, and argued that the participation of NGOs in the dispute resolution process was leading to a breach in the DSU rule requiring confidentiality in dispute settlement proceedings.<sup>302</sup> Specifically, Thailand charged that paragraphs in the brief it submitted to the Appellate Body appeared in a brief submitted by a non-governmental organization, which due to the dispute settlement policy was forwarded to both Thailand and its opponent, Poland, which gave an advantage to Poland.<sup>303</sup> Mexico and the Philippines joined Thailand in its complaint.<sup>304</sup> Only the United States argued that there was no link between the loss of confidentiality and the amicus submissions of NGOs.<sup>305</sup>

Whatever the fears of the WTO member governments, it is obvious from the examples stated above that NGOs are a great asset on behalf of environmental and human rights interests around the world. From the viewpoint of the endangered sea turtle and the dolphin, NGOs are a much-needed commodity in the arena of international trade.<sup>306</sup> Among other causes, NGOs fight for the health of world citizens through their campaign for the removal of asbestos from building materials used around the globe.<sup>307</sup>

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297. *Id.* at 208.

298. *Id.* at 210.

299. Charnovitz, *supra* note 79, at 210.

300. *Id.*

301. *Id.* at 210-11.

302. Daniel Pruzin, *Dispute Settlement: WTO Members Charge Link Between Amicus Briefs, Confidentiality Breach*, INTERNATIONAL TRADE REPORTER, Apr. 12, 2001, at 567.

303. *Id.*

304. *Id.*

305. *Id.*

306. See generally, *Shrimp Turtle*, *supra* note 7, at 15; Spiro, *supra* note 243, at 960.

307. Daniel Pruzin, *Environment: Environmental Groups Hail Asbestos Ruling by WTO, Criticize Rejection of Amicus Briefs*, INTERNATIONAL TRADE REPORTER, Mar. 22, 2001, at 469.

## VI. Recommendations

It is apparent from the evidence outlined above that the battle between the WTO member governments and NGOs are not going away anytime soon. So, what alternatives exist to facilitate a more compatible relationship between the two necessary opponents? Ideally, the two sides would simply agree to agree. Other International Courts have recognized the right of individuals and non-governmental organizations to file briefs in their own behalf or on behalf of others.<sup>308</sup> Specifically, the African Court of Human and People's Rights instituted protocols defining how individuals and NGOs may submit cases or briefs directly to the court.<sup>309</sup> As outlined above, the WTO dispute resolution process, other than the recent holdings of the Appellate Body, has no such protocols in place.<sup>310</sup> Rather than complain and scream at the Appellate Body for accepting amicus filings by NGOs, the WTO governmental members should work together with the NGOs, the dispute resolution panels, and the Appellate Body to create acceptable, workable guidelines that would protect the interests on all sides. Recognizing its leadership position in the arena of international trade, U.S. House of Representatives members Rangel and Levin proposed legislation calling for an expanded effort to convince the WTO to open its doors to non-governmental organizations.<sup>311</sup> The legislation advances a greater transparency in the WTO by allowing NGOs to participate in trade negotiations, and advocating new procedures that would allow and direct the submission of amicus filings to the dispute resolution panels and the Appellate Body.<sup>312</sup>

Alternatively, while direct participation in the WTO would be preferable to the NGOs, their lobbying power with the governments and corporations of the world still allows them to have a powerful influence in the international trade arena. While they may not have a direct voice in the negotiation of trade policy, NGOs can continue to advance their own policies prior to and during negotiations directly to the governments involved. The governments are not legally required to listen. However, it has been shown in this article that it is in the best interests of those

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308. Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and People's Rights: Lessons Learned from the European and Inter-American Courts of Human Rights*, 8 MSU-DCL J. INT'L L. 377 (1999).

309. *Id.*

310. See DSU, *supra* note 6, at 1234.

311. *Summary of Rangel/Levin TPA Bill Issued by Reps. Rangel and Levin, Oct. 3, 2001: The Comprehensive Trade Negotiating Authority Act of 2001*, INTERNATIONAL TRADE REPORTER, Oct. 11, 2001, at 1617.

312. *Id.*



involved to give ear to what NGOs have to say.

Many observers of the WTO strongly agree that a greater voice needs to be given to NGOs in the realm of international trade.<sup>313</sup> Arguing that the increased transparency in the WTO would lead to an improvement in public confidence in the WTO, the observers suggest that the WTO Secretariat create a “toolkit” for the NGOs to aid them in properly submitting amicus curiae to the dispute resolution panels and the Appellate Body.<sup>314</sup>

## VII. Conclusion

It has been apparent from the cases discussed in this article that the Appellate Body has decided that it, along with the dispute resolution panels, has the authority under the “Working Procedures” of the DSU to request and accept amicus curiae briefs from non-governmental organizations. While the DSU does not specifically allow for the acceptance of unsolicited amici curiae, it does not specifically prevent them either.<sup>315</sup> In light of this view, and in light of the fact that the NGOs are not going away anytime soon, it would behoove the governmental members of the WTO to quickly address and draft procedures and policies for the submission of amici by non-governmental organizations. Through this process the fears of the member governments can be addressed and legislated. Should an NGO be found in violation of policies regarding confidentiality, the WTO could be given the authority to ban further participation in WTO proceedings by that NGO. Similarly, it is possible to ensure that no greater burden would be placed on the dispute resolution panels, the Appellate Body, or the parties to the dispute themselves despite the growing number of NGO amicus filings. For instance, a provision can be included that allows everyone involved to disregard arguments made by non-governmental organizations whose briefs are not applicable to a given grievance.

Whatever the solution may eventually provide, it is doubtful that the debate on the role of non-governmental organizations in the WTO will end in the near future.<sup>316</sup> Governments will continue to fear attacks on their sovereignty from NGOs, and NGOs will continue to shout, fight and boycott for the advancement of their own international policies.

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313. Charnovitz, *supra* note 79, at 214-15.

314. *Id.* at 215.

315. *See generally*, *British Steel*, *supra* note 8, at 10.

316. Charnovitz, *supra* note 79, at 215.